

REINVENTING REGULATION/REINVENTING ACCOUNTABILITY: JUDICIAL REVIEW IN NEW GOVERNANCE REGIMES

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This Essay considers the doctrinal and institutional challenges courts and designers of New Governance systems face when considering the availability and scope of judicial review. Part II briefly summarizes New Governance principles, while Part III explains the challenges they pose for American standing law. The Essay then considers solutions. Part IV considers aspects of other nations' administrative standing law, considering whether those nations' legal innovations overcome these hurdles while remaining true to courts' proper role in reviewing agency action. Other nations have taken significant steps to resolve these issues; however, it remains unclear whether those resolutions transfer to the different institutional and legal structure in the United States. Part V considers whether the problem of standing can be resolved in a principled way by reconceptualizing the injury plaintiffs allege when they challenge New Governance regulation. Finally, Part VI considers the proper scope of judicial review of New Governance regulation.

Cet article traite des défis doctrinaux et institutionnels qui se présentent aux tribunaux et aux concepteurs de systèmes de Nouvelle Gouvernance lorsqu'ils envisagent la disponibilité et la portée de la révision judiciaire. La partie II résume brièvement les principes de Nouvelle Gouvernance alors que la partie III explique les défis qu'ils présentent pour la législation américaine en vigueur. L'article considère ensuite des solutions. La partie IV traite d'aspects de la législation administrative en vigueur d'autres nations, en examinant si les innovations juridiques de ces nations surmontent ces obstacles tout en demeurant fidèles au rôle approprié des tribunaux lorsqu'ils révisent les actions d'agences. D'autres nations ont adopté des mesures importantes pour solutionner ces questions; toutefois, il n'est pas encore clair si ces solutions peuvent s'appliquer à la structure institutionnelle et juridique différente des États-Unis. La partie V considère si le problème de la qualité pour agir peut être résolu de façon qui respecte les principes en conceptualisant différemment le préjudice allégué par le demandeur qui conteste la réglementation de la Nouvelle Gouvernance. Finalement, la partie VI considère la portée appropriée de la révision judiciaire de la réglementation de Nouvelle Gouvernance.

I. INTRODUCTION

The approach to public administration known as “New Governance” has become a popular subject of academic study. While specific New Governance ideas are often

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not particularly novel, it is only relatively recently that scholars have found methodological commonalities across different regulatory areas, and endowed them with the term “New Governance.”¹ Over the course of the last decade, this regulatory approach has become grist for a lively scholarly discussion that both examines this phenomenon more abstractly² and applies it to particular regulatory contexts, both domestic³ and international.⁴

Unsurprisingly, up to now scholars have focused largely on discovering and examining these commonalities before considering how the phenomenon of New Governance fits with traditional public law features such as judicial review. The lack of attention to judicial review is especially understandable since the characteristics of New Governance regulation make it, at first glance, a poor fit with traditional judicial review of administrative action.⁵ Nevertheless, despite its relatively lower priority as an object of study, it remains critical for New Governance scholars to consider how judicial review fits into the picture. Accountability remains a fundamental requirement of public law, regardless of the modality of the regulation. While New Governance promises to provide accountability through new approaches to regulation, an external – that is, judicial – role remains indispensable to that accountability, and hence, to the system’s overall legitimacy. The absence of such an external check will inevitably raise the concerns – including those about capture, misfeasance and neglect of diffuse interests – that led to the expansion of the judicial role in the American federal administrative system in the 1960s and 1970s.⁶

The importance of such external accountability need not distort the fundamental thrust of New Governance regulation. While judicial review may be crucial, it need not be the tail that wags the regulatory dog. The flex point between the basic principles of New Governance and judicial review may rest in legal doctrine governing the access to and scope of that review. In other words, if anything needs to “give” in this system, it is not necessarily New Governance itself, nor the availability of judicial review, but rather, the doctrinal rules that govern such review. Making those rules conform to the structure of New Governance regulation in a way that preserves a meaningful yet appropriately limited role for courts may well constitute an important challenge to the construction of a full theory of New Governance regulation.

After Part II of this essay briefly summarizes New Governance principles, Part III lays out the challenges those principles pose for traditional American standing law. This part of the essay focuses on the doctrinal requirements of injury, causation and redressability and the problems they present for challenges to agency action taken under New Governance principles.

The essay then considers possible fixes. Part IV expands the essay’s geographic focus by considering aspects of other nations’ laws governing standing to challenge

¹ See e.g. Karkkainen, *infra* note 7 at 472 (discussing use of the term “New Governance”).

² See e.g. Lobel, *infra* note 27.

³ See e.g. Susan Sturm, “Second Generation Employment Discrimination: A Structural Approach” (2001) 101 Colum L Rev 458 (American employment discrimination law).

⁴ See e.g. David Markell, “The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency and Accountability” (2010) 45 Wake Forest L Rev 435 (examining the New Governance-influenced procedures for citizen participation in the North American Commission for Environmental Cooperation).

⁵ See *infra* Part II.

⁶ See e.g. Richard Stewart, “The Reformation of American Administrative Law” (1975) 88 Harv L Rev 1667.

administrative action. In particular, it considers whether innovations in those nations' standing law help overcome these hurdles while remaining true to courts' proper role in the administrative system. While other nations have taken some significant steps to overcome or resolve these issues, it remains unclear whether those resolutions easily transfer to the different institutional and legal structure in the United States. Part V considers whether the standing problem can be resolved in a principled way by reconceptualizing the injury plaintiffs allege when they challenge New Governance regulation. It suggests such a reconceptualization is both doctrinally plausible and justified by a proper understanding of New Governance regulation.

Part VI widens the essay's scope by considering the proper scope of judicial review of New Governance regulation. In particular, it focuses on the problem presented by judicial review of ongoing agency management of public-private collaborations. Such management constitutes much of what is novel about New Governance; however, judicial review of such ongoing activity raises concerns about judicial competence and overstepping.

Part VI notes the skepticism with which American courts have considered the prospect of judicial supervision of agencies' ongoing management activities. However, it suggests that some form of ongoing judicial supervision is probably necessary to any realistic scheme of judicial review of New Governance regulation. This Part of the essay analogizes to an area where American courts have previously exerted this type of power – structural reform litigation, and, in particular, judicial oversight over school desegregation. It notes the challenges the desegregation mandate imposed on courts, and concedes the (at best) partial success of that effort. However, it also suggests that shouldering these burdens may become necessary in the administrative law context. Part VI ends by suggesting the mechanics of how an appropriate system of judicial review might be constructed.

II. THE BASICS: NEW GOVERNANCE AND THE CHALLENGES IT POSES

“New Governance” is a catch-all label that includes within it a variety of regulatory approaches. However, for purposes of this very general examination, certain common characteristics of New Governance models can be identified. This list is incomplete and not authoritative; indeed, New Governance scholars disagree about what New Governance actually includes.⁷ However, the identification here of some generally-accepted characteristics illustrates how, even at this general level of explanation, New Governance presents significant problems for the prospect of judicial review.

For our purposes, a key feature of New Governance is its use of soft, non-mandatory regulatory tools.⁸ Regardless of “how soft” those tools are – that is, regardless of the precise degree to which non-binding norms mix with authoritative and mandatory legal rules – the fact remains that, compared with traditional regulation, New Governance features some significant degree of “regulation without rules.” In place of rules, New Governance contemplates participant-generated and

⁷ See generally Bradley Karkkainen, “New Governance in Legal Thought and in the World: Some Splitting as an Antidote to Overzealous Lumping” (2004) 89 Minn L Rev 471 (noting the variations among New Governance scholars with regard to the scope of the field).

⁸ See Lobel, *infra* note 27 at 388-395; see also Abbott & Sindal, *infra* note 13 at 508-509 (describing the presence of “soft law” as one of the “four central elements of New Governance”).

enforced norms, with government performing an ongoing role of coordinating and incentivizing the work of other actors.⁹

Second, New Governance is marked by its broad, problem-based focus.¹⁰ Rather than slicing a particular problem into its component parts and allocating regulation of each to a particular agency, New Governance envisions a more holistic approach to problem-solving, one that emphasizes the interrelated nature of the regulatory problem at hand. Coordinated delivery of social services for the poor, and coordinated land-use, transportation and environmental planning present two examples of holistic consideration of regulatory problems that traditionally are split into smaller parts for regulation by agencies operating under different mandates and often not communicating with each other.

Finally, New Governance is characterized by devolution and subsidiarity.¹¹ New Governance scholars generally favour decentralized decision-making involving groups whose local focus would often make them invisible to a more centralized, hierarchical, bureaucracy. Such decision-making is justified on the related grounds that problems are best dealt with by those in closest contact to the actual problem, and optimal solutions are often those that are closely tailored to the specifics of a given situation.¹²

These characteristics of New Governance, as laudable as they might be, nevertheless present significant challenges for a system of judicial review that was developed under a very different set of assumptions about how regulation is performed. First, the “soft” nature of New Governance raises serious questions about causation under conventional standing doctrine. As will be examined in more detail in Part III, if government is not unambiguously acting to the detriment of a particular interest, but rather is simply coordinating or incentivizing third-party action, it becomes unclear whether one can confidently say that a given government action has “caused” anyone any harm.

Other facets of New Governance raise analogous concerns. The multi-pronged, holistic nature of New Governance regulation suggests that no one government institution is ultimately responsible for the harms caused. While theoretically such multi-pronged approaches to problems can be led by one government actor, the dispersal of expertise and interests presumably means that in most cases regulation marked by this feature will take the form of multiple government actors coordinating their actions.¹³ This diffusion of authority may lead to a diffusion of responsibility, and a concomitant reluctance on the part of reviewing courts to conclude that judicial correction of one agency’s misconduct will in fact redress the plaintiff’s injury.¹⁴ This

⁹ As suggested above, such action may co-exist with more traditional regulation.

¹⁰ See e.g. Lobel, *infra* note 27 at 385-388.

¹¹ See e.g. Lobel, *infra* note 27 at 381-385; see also Abbott and Snidal, *infra* note 13 at 508-509 (describing the incorporation of “a decentralized range of actors and institutions” as one of the “four central elements of New Governance”).

¹² See e.g. Abbott and Snidal, *infra* note 13 at 525-527.

¹³ See e.g. Kenneth Abbott and Duncan Snidal, “Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit” 42 *Vand J Transnat’l L* (2009) 501 at 528-529 (noting the phenomenon of diffused expertise in the transnational regulatory context).

¹⁴ See e.g. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, at 568-571 (1992) (plurality portion of opinion) [*Defenders of Wildlife*] (concluding that the failure to sue the agency actually threatening an endangered species renders speculative the question whether relief against the agency responsible for administering the *Endangered Species Act* would redress any injury caused by a species extinction). Of course, this same dynamic impacts causation analysis as well. This is unsurprising, given that

horizontal diffuseness of responsibility is matched by a vertical diffuseness, to the extent New Governance features devolution of decision-making power, whether to more local levels of government or private actors. This vertical diffusion of responsibility raises the same concern about redressability.

Moreover, the nature of New Governance regulation as primarily concerned with coordination and management of others' actions raises questions about the appropriate scope of judicial review. If the federal government's role in New Governance is that of "an orchestrator rather than a top-down commander,"¹⁵ and "less one of direct action than one of providing financial support, strategic direction, and leadership"¹⁶ for other actors, then presumably judicial review of government action necessitates review of how the government performs those tasks. As will be noted later,¹⁷ American courts have expressed concern about such programmatic judicial review.¹⁸ To the extent this reticence derives ultimately from the common-law limits on judicial review of administrative action, this problem may be one not purely confined to the United States.¹⁹

Thus, New Governance poses challenges both for the availability and scope of judicial review in the administrative system. The next Part considers the availability problem, as seen through the lens of American standing law. After canvassing other nations' legal systems for possible fixes to the problems thus presented, the essay then moves on to consider how judicial review – both its availability and its scope – can come to accommodate New Governance regulation while staying within the bounds of the traditional judicial role.

III. NEW GOVERNANCE AND AMERICAN STANDING LAW

New Governance regulation fits uncomfortably with American legal doctrine governing the availability of judicial review of agency action. The biggest problems flow from the doctrine's insistence that the defendant agency have caused the plaintiff's injury, and, relatedly, that judicial relief would redress the plaintiff's injury. In the usual situation where the agency is directly regulating private parties, causation is normally established quite easily. Indeed, causation presents no special problem even in some third-party harm situations. For example, courts generally have no problem finding causation when a plaintiff alleges that an agency's failure to regulate emissions pursuant to law allows a third party to continue to pollute, thus causing harm to the plaintiff.

However, causation becomes more problematic when regulation assumes certain New Governance forms. To illustrate this, consider a case from over thirty years ago, well before the rise of a discourse on New Governance. In *Simon v. Eastern Kentucky Welfare Rights Organization*,²⁰ the plaintiff welfare-rights organization, acting on behalf

causation and redressability can be considered mirror images of each other. See e.g. Charles Kelso, "Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results" (1996) 28 U Tol L Rev 93 at 135 n. 280.

¹⁵ Abbott and Snidal, *supra* note 13 at 521.

¹⁶ Paul Osterman *et al*, *Working in America: A Blueprint for the New Labor Market* (Boston: M.I.T. Press, 2001) at 151.

¹⁷ See below Part VI.

¹⁸ See e.g. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) [*National Wildlife Federation*] (noting that requests for such programmatic corrections are generally not properly addressed to courts).

¹⁹ See text accompanying *infra* note 47.

²⁰ 426 U.S. 26 (1976) [*Eastern Kentucky*].

of its members, sued the Internal Revenue Service [IRS], alleging that it had misinterpreted a provision of the *Internal Revenue Code* and thereby made it easier for hospitals to deny indigents free health care while still enjoying charity status (with the attendant tax deductibility of contributions).

The Supreme Court held that the organization could not show that the IRS caused its members' injury. It concluded that it was simply too speculative whether the agency's regulation prompted the hospitals' denial of free services and therefore caused the plaintiffs' harm. For the same reason, it concluded that it was similarly speculative whether a court order enjoining the regulation would redress that lack of medical care.²¹ Instead, the Court suggested that it was equally plausible that a court order requiring the IRS to tighten the rules for charity status would prompt the hospitals to choose to forego that status and continue denying free care.²²

Somewhat more distantly, but in substance essentially indistinguishable, is the situation where government is alleged to violate law when funding activity by third parties. For example, in *Lujan v. Defenders of Wildlife*²³ the plaintiffs argued that the U.S. Government violated the *Endangered Species Act* when it funded development projects abroad without engaging in internal consultations about the projects' impact on endangered species. In rejecting the plaintiffs' standing, a plurality concluded that their injury was not redressable, because (among other reasons) U.S. Government funding for the project made up only a small percentage of the project's cost. According to the plurality,²⁴ it was therefore unclear whether the project would be stopped or altered even if the Court ruled for the plaintiffs on the consultation issue.²⁵

While it is hazardous to extrapolate, these examples nevertheless bode poorly for American courts' willingness to hear challenges to much New Governance regulation.²⁶ If it is true that such regulation can be described as non-coercive and

²¹ See Kelso, *supra* note 14.

²² 426 U.S. at 42-44. The Court endorsed *Eastern Kentucky's* analysis in a later, analogous, case. See *Allen v. Wright*, 468 U.S. 737 (1984).

²³ 504 U.S. 555 (1992).

²⁴ The members of the *Lujan* majority that refused to join Justice Scalia's redressability analysis – Justice Kennedy, joined by Justice Souter – did not reach the redressability issue. See *Defenders of Wildlife*, *supra* note 14 at 579, 580 (opinion of Kennedy, J.).

²⁵ *Ibid* at 571 (opinion of Scalia, J.). A majority found that the plaintiffs had not established injury; for that reason the Court denied the plaintiffs' standing. See *ibid* at 562-567.

²⁶ A recent case, *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010), hints at a more generous approach to standing. The facts of *Monsanto* are complex, but the key point is that the Court held that a party had standing to challenge an injunction prohibiting an agency from taking a deregulatory act, even though a reversal of the injunction would require the agency to consider whether to promulgate a more limited deregulatory order after conducting an environmental assessment that might or might not support partial deregulation. See *ibid* at 2753-2754. The Court observed that the agency had made it clear that it favoured such a partial deregulation in response to the court's ruling on the merits against its full deregulation decision. For that reason, the Court stated that "there is more than a strong likelihood that [the agency] would partially deregulate [the product] were it not for the District Court's injunction. The District Court's elimination of that likelihood is plainly sufficient to establish a constitutionally cognizable injury." *Ibid* at 2754.

Monsanto suggests that an injury may be considered redressable even when the court's order (here, reversing the lower court's injunction) simply throws the matter into the hands of a third party (here, the agency), which might or might not take the action desired by the plaintiff. As such, one might view the Court's decision as a partial repudiation of its analysis in cases such as *Eastern Kentucky*. See text accompanying *supra* note 22. But because the Court expressed such confidence that the agency would in fact take the desired action, its analysis is probably best understood as simply an application of the rule requiring only that it be "likely" that the plaintiff's injury would be redressable by a court. See e.g. *Sprint Communications v. APCC Services, Inc.*, 554 U.S. 269 (2008) at 269. By contrast, in the context of New Governance regulation, redressability would likely be far more speculative, given the

informal,²⁷ and as relying on third-party action,²⁸ then presumably it is beyond the reach of a plaintiff's lawsuit, as the defendant-agency can claim that the nature of the regulation renders causation and redressability too speculative.²⁹ The next Part considers how other nations' laws have approached this issue.

IV. NEW GOVERNANCE REGULATION AND STANDING REQUIREMENTS OUTSIDE THE UNITED STATES

The world's legal systems are, of course, far too diverse to permit in this short space a comprehensive canvassing of other nations' standing law. Instead, this essay will discuss particular aspects of that law to note both challenges and possibilities for accommodating judicial review of New Governance regulation.

As a very general matter, most nations' judicial systems recognize the need for a plaintiff to show an interest in the subject-matter of the lawsuit. Common law nations derived this requirement from English law,³⁰ while civil law nations generally recognize such a requirement as well.³¹ However, in some cases national legislatures have abolished the injury requirement in particular types of lawsuits. Most notably, a number of common law and civil law nations have authorized environmental groups to sue on environmental matters without having to demonstrate the existence of a concrete interest, either of its own or one of its members.³² In other cases, legislatures or courts have authorized other organizations, such as unions or the Red Cross, to sue on matters relevant to the organization's interest without it having to satisfy that nation's law's conventional standing requirements.³³

In one sense these broad grants of standing go beyond resolving the more discrete problem presented by standing to challenge New Governance action. This latter issue presents the problem of conceptualizing injury and causation in the context of a prospective plaintiff who otherwise plainly has an interest in the challenged regulatory activity. For example, New Governance regulation of land use

fluid, multi-party nature of the regulatory process. Thus, *Monsanto*, while promising, does not represent the deeper reconceptualization of standing law that may be required to secure judicial review of New Governance regulation. See below Part IV.

²⁷ See Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought" (2004) 89 *Minn L Rev* 342 at 388-389.

²⁸ See Lester Salamon, "The New Governance and the Tools of Public Action: An Introduction" (2001) 28 *Fordham Urb LJ* 1611 at 1613.

²⁹ *Cf. Eastern Kentucky*, *supra* note 20 at 46 (Stewart, J. concurring) ("I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.").

³⁰ See e.g. Jon Owens, "Comparative Law and Standing to Sue: A Petition For Redress For the Environment" (2001) 7 *Envtd Law* 321 at 348.

³¹ See generally van Dijk, *infra* note 33 (discussing French and German law); Parker, *infra* note 33 at 277-278 (discussing requirement under Italian law).

³² See generally Owens, *supra* note 30. Compare *Sierra Club v. Morton*, 405 U.S. 727 (1972) (refusing to allow a well-known environmental advocacy group to challenge an agency action adversely affecting the environment without showing injury either to the organization itself or to one of its members).

³³ See P. van Dijk, *Judicial Review of Governmental Action and the Requirement of an Interest to Sue* (Alphen ann den Ryn, Netherlands and Rockville Maryland: Sitoff and Nordoff, 1980) (French court allowing a union to sue); Douglas Parker, "Standing to Litigate 'Abstract Social Interests' in the United States and Italy: Reexamining 'Injury in Fact'" (1995) 33 *Colum J Transnat'l L* 259 at 284-287 (Italian legislature giving unions the right to sue to challenge anti-union contact by employers, without any requirement that the union's own interest is at stake and without the union suing as a representative of its members); *ibid* at 287-290 (Italian statute authorizing the Red Cross to sue to vindicate humanitarian interests).

clearly impacts residents of the area, even if the “soft” nature of the regulation renders problematic standard applications of the injury and causation requirements. By contrast, the environmental, union and Red Cross legislation discussed above has simply wiped away those requirements.³⁴

However, at another level one can discern useful parallels between legislation granting broad standing rights and judicial attempts to reconceptualize injury and causation. Both moves can be justified by concern that the diffuse nature of the issue makes it hard for a would-be plaintiff to satisfy conventional rules. In both cases then, the absence of these innovations raises the risk that no person would ever have standing to sue.³⁵ Thus, the aggressive step of abolishing standing requirements and the more limited reconceptualization of injury and causation both respond to a desire to ensure the availability of judicial review when either the nature of the issue or the nature of the regulatory style would frustrate it under more conventional standing rules.

Other nations’ actions also raise the separate, but related, question of institutional authority over standing requirements. Italy, for example, has granted organizational standing, without the need for the organization to satisfy normal standing requirements, by statutorily authorizing particular organizations to sue to vindicate particular causes.³⁶ Indeed, Italy has gone even farther, and empowered the Ministry of the Environment to certify environmental organizations as authorized to enjoy this special juridical status.³⁷ Other nations that have wiped away standing limits for certain organizations have done so by courts construing generally-phrased statutory language.³⁸

By contrast, in the United States standing remains very much a matter of judicial construction of constitutional law. This difference matters because the constitutional nature of American standing law places primary responsibility for innovations with the Supreme Court, rather than Congress. Moreover, the ostensibly unchanging nature of the case-or-controversy requirement suggests that a more likely and doctrinally justifiable innovation may involve reconceptualizing the inputs into the standing inquiry – here, injury and causation – rather than explicitly abandoning those requirements, as European³⁹ and other⁴⁰ legislatures have done.

Such a reconceptualization of injury and causation may change standing law sufficiently to accommodate judicial review of New Governance regulation. Nevertheless, systems where legislatures enjoy significant influence over standing may still be better-suited to respond to the challenge New Governance poses to judicial review. The softness of New Governance regulation means that stretching concepts of injury and causation will entail difficult line-drawing problems. The Supreme Court

³⁴ See e.g. Parker, *ibid* at 288 (noting that the Italian Red Cross statute goes beyond any concern with concrete injury). Compare *Eastern Kentucky*, *supra* note 20 (Stewart, J. concurring) (observing that under the Court’s refusal to grant standing to a private party beneficiary of an agency’s assessment of another party’s tax liability, nobody would be able to contest the tax liability of a third party). The facts of *Eastern Kentucky* are provided above, at text accompanying *supra* notes 20-22.

³⁵ See *Regina v. Sec’y of State for Foreign & Commw. Affairs* ex parte *The World Dev. Movement Ltd.*, 1 W.L.R. 386, 393 (Q.B. 1995) (British court recognizing standing for a public interest organization, in part due to the fact that if standing were denied then nobody would have standing to challenge the legality of the government action).

³⁶ See *supra* note 33 (Italy). Compare *Sierra Club*, *supra* note 36.

³⁷ See Parker, *supra* note 33 at 288-294.

³⁸ See Owens, *supra* note 30 at 345-348 (Great Britain).

³⁹ See e.g. Parker, *supra* note 33 at 288-294 (Italy).

⁴⁰ See e.g. Owens, *supra* note 32 at 369 (Peru).

has already confronted this problem when dealing with its broadest application of these concepts – its acceptance as sufficient (even if only at the pleading stage) of the creative and attenuated causal chain in *United States v. Students Challenging Regulatory and Administrative Procedures* [*SCRAP*].⁴¹ As the Court has grown more conservative, its embarrassment at its acceptance of the plausibility of the standing claim in *SCRAP* has increased. However, its inability to draw principled limits has led it to reject injury and causation claims with only the barest of reasoning. For example, in *Lujan v. Defenders of Wildlife*,⁴² the Court rejected a claim that zookeepers and others with a professional interest in an animal species were injured by action threatening the species' continued existence with little more than the exclamation that such a claim was "beyond all reason."⁴³

By contrast, legislatures enjoy much more legitimacy in drawing lines that, if drawn by a court, would appear to be unprincipled.⁴⁴ Legislation is nothing if not line-drawing; its legitimacy flows from legislators' popular mandate, rather than principled interpretation of a legal text. Thus, nations where legislatures control standing may be better suited to draw potentially fine-grained distinctions about which parties may seek judicial review of New Governance regulation that theoretically impacts many groups of people, or interests that are in some sense diffused.⁴⁵

Of course, practice is messier than theory. In the American context the stark dichotomy between legislation and constitution is belied by the status of the *APA* as a foundational statute that has accommodated significant shifts in regulatory theory and understandings of judicial review. The picture gets even murkier in light of the *APA*'s status as a codification of longstanding common law rules of judicial review of agency action.⁴⁶ Given the quasi-constitutional status of much of that common law, the *APA* arguably takes on a dual status – a "mere" statute that serves only as the default that Congress can override at will, but also a codification of quasi-constitutional limits on judicial review.⁴⁷ In turn, this dual nature suggests that the extent of congressional power to use its control over administrative law to influence the availability of judicial review remains an unresolved question in the American system. To the extent courts in other systems face their own limitations beyond the power of the national parliament to influence, this difficulty may be more than a purely American one.

⁴¹ 412 U.S. 669 (1973) (accepting, for purposes of surviving a motion to dismiss, plaintiffs' claims that changes in railroad rates harmed their interest as hikers because the rates would cause some recycling activity to become uneconomical, thus leading to more trash deposited on hiking trails).

⁴² *Defenders of Wildlife*, *supra* note 14 at 555.

⁴³ *Ibid* at 566.

⁴⁴ See e.g. William D. Araiza, "The Section 5 Power and the Rational Basis Standard of Equal Protection" (2005) 79 Tul L Rev 519 at 546-551.

⁴⁵ See text accompanying *supra* note 37.

⁴⁶ See e.g. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) [*Southern Utah*] (describing some of the *APA*'s limitations on judicial review as based on the common-law principles of mandamus); see also *Webster v. Doe*, 486 U.S. 592, 606, 608-609 (1988) (Scalia, J., dissenting) (describing the "committed to agency discretion by law" provision for precluding judicial review of agency action as resting on common-law limits on judicial review).

⁴⁷ See e.g. *Webster*, *ibid* at 609 (Scalia, J., dissenting) (describing political questions as one of the doctrinal areas that developed as part of the common law of judicial review of agency action).

V. GOVERNMENT ACCOUNTABILITY AND THE JUDICIAL ROLE

One might consider restrictions in American standing law to reflect merely technical flaws that are relatively easily corrected through a broader understanding of causation. But the issue raises more fundamental concerns.

At one level, the problem can be understood to implicate not causation but the nature of the injury itself. In *Simon*, for example, one might just as easily have understood the plaintiffs' injury not as loss of free medical care, but, as Justice Brennan saw it in his separate opinion, as the decreased opportunity to receive such care.⁴⁸ Reconceptualizing the injury in this way might remedy the problem caused by the Court's skepticism about the causal link between the harm and the challenged government action.

One might object that this "resolution" is simply a play on words: if one doesn't know in a given case whether government *really* caused a particular injury, presumably one can know with more confidence that the government action at least made the injury more likely. Under this understanding, this answer to the problem reflects not so much a reconceptualization of injury as a simple weakening of the causation requirement. One might argue that it may be a good idea to weaken the causation requirement in this way, but still insist that the move described above simply accomplishes that straightforward fix, rather than reflecting any deeper rethinking about what injury should mean.

However, in another sense this resolution does go beyond wordplay to reflect a deeper reconceptualization of injury. In *Simon*, Justice Brennan begins his critique of the Court's standing analysis by citing the plaintiff's *legal* claim – that "the IRS is offering the economic inducement of tax-exempt status to such hospitals under terms illegal under the Internal Revenue Code."⁴⁹ Why worry about the legal claim when the issue is standing? After all, we all understand that one may suffer injury separate from the invasion of one's legal rights – indeed, this is assumed when a plaintiff is held not to have standing because he is asserting the legal interests of a third party.⁵⁰ Justice Brennan seems to take this unusual analytic route because he wanted to tie the plaintiffs' injury to the legal claim they are asserting:

Respondents' claim is not, and by its very nature could not be, that they have been and will be illegally denied the provision of indigent medical services by the hospitals. Rather, if respondents have a claim cognizable under the law, it is that the Internal Revenue Code requires the Government to offer economic inducements to the relevant hospitals only under conditions which are likely to benefit respondents. The relevant injury in light of this claim is, then, injury to this beneficial interest – as respondents alleged,

⁴⁸ See *Eastern Kentucky*, *supra* note 20 at 46, 56 (Brennan, J., concurring in the judgment) ("The relevant injury ... is ... as respondents alleged ... injury to their 'opportunity and ability' to receive medical services").

⁴⁹ *Ibid* at 55 (Brennan, J., concurring in the judgment).

⁵⁰ See e.g. in *Warth v. Seldin*, 422 U.S. 490 (1975), the Court assumed that the taxpayers of a city had Article III standing to sue a neighbouring town over its exclusionary zoning. But even though the taxpayers were assumed to have Article III injury, they were not allowed to sue because they were asserting a third party's legal rights. In the administrative law context one could also cite the (rare) cases where a plaintiff suffers Article III injury but is nevertheless held to be outside of the zone of interests protected by the statute. See e.g. *Air Courier Conference of America v. American Postal Workers Union AFL-CIO*, 498 U.S. 517 (1991).

injury to their “opportunity and ability” to receive medical services.⁵¹

Justice Brennan’s phrase, “the relevant injury in light of this claim,” has to be understood as tying the injury to the benefits they enjoy under the statute. The statute creates the interest Justice Brennan believes the plaintiffs to have relied on for their standing. This is not just loosening causation. It is reimagining the nature of the injury.

New Governance regulation should be understood as creating rights analogous to the right perceived by Justice Brennan in *Eastern Kentucky*. Under New Governance principles government aims, at least in part, to create conditions under which other actors modify their conduct in desired ways. So understood, it makes sense to think about injury not as the deprivation of a particular concrete good (such as medical care or a clean environment), but instead as the deprivation of the optimal conditions under which other parties might provide the good.

One finds a parallel to this sort of incentivizing conduct in, of all places, constitutional litigation. In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,⁵² the Supreme Court concluded that a white-owned contracting firm had standing to challenge a city’s racial set-aside for contracting business, despite the plaintiff lacking any evidence that the set-aside had ever caused it to lose a contract. Instead of denying standing, the Court reconceptualized the injury, by describing it as the inability to compete on a level playing field.⁵³ In this sense, then, the Court’s understanding of Equal Protection reflects a concern that is at least passingly analogous to some New Governance regulation. In both New Governance and Equal Protection, the point is not to mandate certain outcomes (equal distribution of contracts to all races on a proportionate basis, or provision of a certain amount of healthcare).⁵⁴ Rather, the point is to insist on a process – equal consideration of all contractors, regardless of race, and the incentivizing of private hospitals to provide medical care. That process may or may not have a particular substantive good in mind,⁵⁵ but in both cases the right in question is understood as a right to that process, not a right to that substantive good.

In such a case, where the government undertakes only to provide a decision-making process it makes sense to understand the injury in analogous terms. In *Eastern Kentucky* Justice Brennan understood the interest, derived from the statute, as the “opportunity” to receive medical care based on an appropriate incentivizing of private conduct. In *Florida Contractors*, the interest, derived from the Constitution, was the “opportunity” to compete for contracts on an equal basis. So too, in a New Governance context one might understand the interest, derived from the

⁵¹ *Eastern Kentucky*, *supra* note 20 at 56 (Brennan, J., concurring in the judgment).

⁵² 508 U.S. 656 (1993) [*Florida Contractors*].

⁵³ *Ibid* at 666 (“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The “injury in fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”).

⁵⁴ See *ibid.* (equal protection).

⁵⁵ Equal protection may not have equal outcomes as its goal, though presumably there remains the aspiration that, with equal treatment, outcomes will eventually equalize.

government's regulatory approach, as the opportunity to benefit from appropriate government leadership and coordination of third parties' actions.

Still, one might argue that equal protection is a special case – that, essentially, denial of equal treatment is itself understood to be a cognizable harm, even without an explicitly concrete loss.⁵⁶ Under this argument, any other similar opportunity loss, such as the reduced likelihood of enjoying a particular good because of sub-optimal government incentivizing of private conduct, is simply different, and inadequate for standing purposes. Indeed, American courts' insistence that injury be not just particularized, but *concrete*, seems to fly in the face of a claim that an individual has an interest in, say, the appropriate incentivizing of private conduct or an appropriate level of public-private consultation or partnership with regard to a given goal, completely separate from the interest in the concrete benefit itself.

However, such a reconceptualization seems to align better with the nature of New Governance regulation. As explained in Part III, in New Governance regulation the government should be understood not as ultimately responsible for the provision of a particular service, but rather as a coordinator and facilitator of private conduct so that the good in question is provided via private choice. The nature of this role suggests that the private party's interest protected in the regulatory program is best understood in terms of opportunities to enjoy the substantive good, rather than in terms of the good itself. In addition to having the practical benefit of resolving the causation problem, this understanding of the plaintiff's interest aligns New Governance style with the interests private parties have in making sure that government follows the law when it regulates. This harmonization therefore allows courts to answer questions about the availability of judicial review with an eye toward what government is really charged with doing when it regulates according to New Governance principles.

Doctrinally, this move may not be as difficult or unprincipled as it might seem at first glance. American courts recognize that statutes may create rights, the deprivation of which constitutes an Article III injury.⁵⁷ They also recognize that the *APA* requires that a plaintiff be “arguably within the zone of interests” sought to be protected by the statute alleged to be violated.⁵⁸ While the “zone of interests” test is an additional, prudential standing requirement imposed over and above the Article III injury test, in a case where the injury is alleged to be the deprivation of a statutorily-bestowed interest, there appears to be no reason why possessing that statutorily-based interest should not satisfy Article III requirements. Indeed, basing the standing inquiry on the existence of a statutorily-granted interest hearkens back to traditional American standing law, which required such an interest (rather than simple concrete injury) as an indispensable element.⁵⁹ In the case of New Governance, that statutorily-provided interest is best understood as an interest in proper government management of the collaborate relationships that constitute this style of regulation.

⁵⁶ See e.g. *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that white plaintiffs are injured by being intentionally placed in a majority-minority district, because being subject to the race-conscious action itself constitutes the injury).

⁵⁷ See e.g. *Havens Realty v. Coleman*, 455 U.S. 363 (1982).

⁵⁸ *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970).

⁵⁹ See e.g. *Edward Hines Yellow Pine Trustees v. United States*, 263 U.S. 143 (1923); *Alabama Power v. Ickes*, 302 U.S. 464 (1938).

Thus, the doctrinal pieces exist to accomplish this change. To be sure, they may require some shuffling, but no more than courts have accomplished in the past when accommodating judicial review to new theories of regulation.⁶⁰

VI. BEYOND STANDING: THE SCOPE OF JUDICIAL REVIEW OF NEW GOVERNANCE REGULATION

Structuring judicial review with “an eye toward what government is really charged with doing” raises concerns beyond the availability of judicial review. In particular, it also raises issues about the scope of such review. Most importantly for present purposes, New Governance envisions a role for government as ongoing manager of a continuing process of collaboration and problem-solving among various parties. Thus, judicial review of government’s role in that process will entail ongoing review, with appropriately tailored remedies.

This form of judicial review poses challenges for American courts. The Supreme Court is skeptical about judicial supervision of ongoing agency policy management. In *Lujan v. National Wildlife Federation*⁶¹ the Court refused to consider as ripe for adjudication challenges to aspects of the Interior Department’s general land management program, since actions taken under that program did not yet have “an actual or immediately threatened effect.”⁶² It noted that such programmatic review clashed with “the traditional... and normal mode of operation of the courts.”⁶³ Even more to the point, in *Norton v. Southern Utah Wilderness Alliance*⁶⁴ the Court worried that judicial supervision of an agency’s ongoing management responsibilities would stretch courts’ competence and unduly interfere with agencies’ discretion.⁶⁵

It is an important question whether these hurdles flow from legislative or constitutional limits on federal courts. In *National Wildlife Federation* the Court characterized the limitation in that case as statutory, suggesting that Congress could cure the ripeness problem the Court identified by providing for judicial review “at a higher level of generality” than the level at which an agency action would normally be considered ripe.⁶⁶ Similarly, in *Southern Utah* the Court described the hurdle as statutory, concluding that “[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with [statutory directives to engage in ongoing management action] is not contemplated by the *APA*.”⁶⁷

⁶⁰ See text accompanying *infra* notes 74-81. As a final comparative glance, it bears noting that one scholar concludes that at least the Italian system has largely adopted this approach. See Parker, *supra* note 33 at 279-280 (concluding that Italian standing law tends to focus more on the meaning of the legal right asserted by the plaintiff and less on an American-style preliminary inquiry into the plaintiff’s injury).

⁶¹ *National Wildlife Federation*, *supra* note 18.

⁶² *Ibid* at 894. Other nations’ administrative law systems impose at least roughly analogous limits. See e.g. van Dijk, *supra* note 33 at 134-135 (describing roughly analogous requirements in French administrative law).

⁶³ *National Wildlife Federation*, *supra* note 18 at 894.

⁶⁴ *Southern Utah*, *supra* note 46 at 2373.

⁶⁵ *Ibid* at 2381.

⁶⁶ See *National Wildlife Federation*, *supra* note 18 at 894.

⁶⁷ *Southern Utah*, *supra* note 46 at 2381. See also *National Wildlife Federation* *supra* note 18 at 890 n. 2 (refusing to consider as “final agency action” under the *APA* an agency’s general program that does not take the form of “some specific order or regulation, applying some particular measure across the board”).

However, at other times the Court appears to consider these hurdles to reflect fundamental separation of powers principles – in particular, the principle that challenges to large-scale, programmatic actions are most appropriately directed to Congress or the agency itself (including, presumably, to the presidential administration to which the agency is accountable).⁶⁸ Such suggestions of a constitutional foundation for the limitation on judicial review echo the Court's citation of similar separation of powers reasons for refusing to hear generalized grievances.⁶⁹

Still, if there is to be judicial review of New Governance some allowance must be made for broad, programmatic attacks. To the extent New Governance regulation consists of government engaging in an ongoing planning and management process, judicial review of that regulation necessarily implies review of such ongoing, programmatic activities. Slicing and dicing those activities in order to isolate a particular government action suitable for traditional judicial review and correction fundamentally misapprehends the thrust of New Governance. To analogize very roughly, such traditional judicial review would amount to reviewing why the tire of a car was not properly rotating and attempting to correct it by mandating that it rotate correctly, instead of asking whether the entire car was operating correctly and mandating an appropriate remedy. Simply put, if government regulation becomes more programmatic in nature, then judicial review must follow, if it is to remain relevant.

Such holistic judicial review finds a distant echo in courts' management of structural reform litigation – most notably, school desegregation litigation. Such management responsibilities arose in response to the Supreme Court's rejection of immediate desegregation and its insistence on the complete removal of the vestiges of the previously segregated system. This combination created a landscape where fulfillment of the desegregation mandate was expected to come about through an ongoing process managed by courts.

Scholars who have studied courts' role in this process offer a decidedly mixed verdict on its success.⁷⁰ In addition to concerns about their competence to manage such large-scale change, the alleged intrusiveness of long-term judicial control over schools has led a more conservative Supreme Court to impose severe limits on the tools courts can wield to ensure fulfillment of the desegregation mandate. Somewhat analogous concerns apply also to the prospect of judicial supervision of agency management under New Governance. Concededly, such supervision does not explicitly aim at remaking an institution. However, it does involve reviewing how a

⁶⁸ See e.g. *Southern Utah* *supra* note 46 at 891 (“respondents cannot seek *wholesale* improvement of [the agency’s land program] by court decree, rather than in the offices of the [agency] or the halls of Congress, where programmatic improvements are normally made.”) [emphasis in original]. To the extent the action is taken by an “independent” agency, the Court in a recent case appeared to substitute Congress for the President as the party ultimately responsible for correcting such programmatic failures. See *Federal Communications Commission v. Fox Television Stations*, 129 S.Ct. 1800, 1816 & n. 4 (2009).

⁶⁹ See *Defenders of Wildlife*, *supra* note 14 at 573-578. This is not to say that the standing issue in *Defenders of Wildlife* is exactly analogous to the ripeness-based concern in *National Wildlife Federation*. However, in both cases, the Court expressed concern about judicial review of general government policies, without an effect that is either immediate, see *National Wildlife*, *supra* note 18 at 894, or particularized, see *Defenders of Wildlife*, *supra* note 14. As a further ambiguity, in at least one case the Court has backed off its statement in *Defenders of Wildlife* that the generalized grievance bar is necessarily of constitutional stature. See *Federal Election Comm’n v. Akins*, 524 U.S. 11 (1998).

⁷⁰ The classic statement of this pessimistic appraisal is Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

complex institution interacts on an ongoing basis with other institutions, in a way that runs the risk of intruding on the entity primarily tasked with those responsibilities.⁷¹ If courts could only partially succeed (at best) at the desegregation task before their supervisory role was sharply cut back, one might wonder if the same fate would likely attend supervision of ongoing agency management of a complex, interactive regulatory process.

At the very least, judicial review of New Governance regulation suggests a new role for courts. Justice Scalia implied as much in *Southern Utah*, when he tied restrictions on judicial review of ongoing agency action not just to the *APA* but to the tradition of the mandamus remedy on which the relevant part of the *APA* rested.⁷² Indeed, if Justice Scalia has his history right, then the issues raised by this new type of judicial review transcend American law and affect, at the very least, other nations whose administrative law traditions relate back to English common law.⁷³

The parallel between this new type of judicial review and the troubled history of courts' management of school desegregation gives pause to any confident call for reworking judicial review to account for the characteristics of New Governance regulation. Still, judicial review of agency action in the United States has undergone major changes in the past, even within the last sixty years during which the *APA* has purportedly set forth the basic ground rules. For example, courts have expanded the concept of standing,⁷⁴ embraced judicial review earlier in the administrative process,⁷⁵ and greatly expanded the judicial role in reviewing agency action for reasonableness.⁷⁶ All of these developments are relevant to the type of judicial review necessary to ensure effective supervision over New Governance regulation. At the same time, in embracing these earlier innovations courts remained mindful of their limited role and the need to respect agency discretion.⁷⁷ These past examples of doctrinal evolution suggest that one should not too quickly discount the courts' ability to develop new practices of judicial review that both respond to new regulatory realities and respect their limited roles.

⁷¹ Speaking for a unanimous court in *Southern Utah*, *supra* note 46, Justice Scalia expressed those concerns in this way:

The principal purpose of the *APA* limitations we have discussed [on judicial review of ongoing agency management of a regulatory issue] – and of the traditional limitations upon mandamus from which they were derived – is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day management.

⁷² *Ibid* at 2381.

⁷³ *Cf. supra* note 47.

⁷⁴ *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970); *SCRAP*, *supra* note 41.

⁷⁵ *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

⁷⁶ See e.g. *Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (sketching out the development of “hard look” review of agency action under the “arbitrary and capricious” standard).

⁷⁷ See e.g. *Toilet Goods v. Gardner*, 387 U.S. 158 (1967) (companion case to *Abbott Laboratories*, finding an agency action unripe even under the more generous *Abbott Laboratories* test); *Motor Veh. Mfrs Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43-44 (1983) (recognizing the limited role of judicial review even under the “hard look” gloss on the “arbitrary and capricious” standard).

Congress can assist the courts in this effort. In 1946 Congress enacted the skeletal framework we know as the *APA*, and the courts construed it over time. Similarly, Congress enacted a “mood” when it enacted the substantial evidence test,⁷⁸ and courts applied it using their unique expertise.⁷⁹ In facing this new challenge, a combination of more careful statutory specification of the availability and substance of judicial review and continued evolution of the gloss courts place on the *APA*⁸⁰ provide at least some hope that New Governance can generate a new understanding of appropriate judicial review. Such innovations would follow in the footsteps of the statutory innovation and judicial gloss that altered judicial review of agency action during the New Deal, the consumer and environmental movements of the 1960s and 1970s, and the deregulatory/cost-efficiency thrusts of the 1980s and 1990s.⁸¹

VII. CONCLUSION

The reconceptualization of judicial review offered above takes us into deep waters. It suggests that what is needed is more than just a tinkering with any one legal system’s standing doctrine or system of remedies. Instead, it suggests the need for a more general rethinking of judicial review – or, more accurately, a re-application of fundamental principles of judicial review to the new challenges posed by New Governance regulation. Such a re-application requires that we revisit the fundamental purposes and limitations of judicial review in the administrative system. It is only with those first principles re-established that we can confidently think about how the reinvention of public administration requires the reinvention of judicial review.

⁷⁸ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

⁷⁹ See e.g. *ibid* at 494-496 (discussing how a reviewing judge should review an ALJ’s credibility-based fact-findings when those findings were reversed by the agency head on appeal); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977) (same).

⁸⁰ See generally William D. Araiza, “In Praise of a Skeletal APA: *Norton v. Southern Utah Wilderness Alliance*, Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA” (2004) 56 Admin L Rev 979 (noting how courts have been able to place glosses on the general language of the *APA* to reflect evolving theories of regulation and judicial review).

⁸¹ For classic examples of how judicial review has moved in relation to changes in theories of regulation, compare *Scenic Hudson Preservation Conf. v. Federal Power Comm’n*, 354 F.2d 608 (2nd Cir. 1965) (applying arbitrary and capricious review with an eye to ensuring that under-represented environmental interests were considered by the agency) with *American Dental Ass’n v. Martin*, 984 F.2d 823 (7th Cir. 1993) (Posner, J.) (applying cost-benefit analysis to agency action under the arbitrary and capricious standard).