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STANDING TO CHALLENGE GOVERNMENTAL ACTION

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§ 1. THE NATURE OF THE PROBLEM

The five major questions about judicial review of administrative action are whether, when, for whom, how, and how much judicial review should be provided. The question of who may challenge administrative action—the third of the five major questions—is customarily discussed by courts in terms of “standing” to challenge. The problem of standing merges with and often seems to overlap the problems of whether and when administrative action may be reviewed. For instance, when the party who challenges administrative action has better standing than any other party, a holding that the challenging party lacks standing is the equivalent of a holding of unreviewability; this was true, for instance, in the important case of *Perkins v. Lukens Steel Co.*¹ The overlap of the problem of standing with the problem of when administrative action may be challenged—the problems of ripeness and of exhaustion of administrative remedies—is even more common. The same case often involves a single problem which is made up of elements of “standing and ripeness”—elements involving both the qualification of the plaintiff and the timing of the challenge. For instance, when the Attorney General added to his subversive list the name of the Joint Anti-Fascist Refugee Committee, the question whether the Committee could challenge the Attorney General’s action before the subversive list was used in any adjudication involved a problem of both the timing of the challenge and the standing of the Committee.² In *Eccles v. Peoples Bank*³ the Court refused to review the validity of a condition under which the bank became a member of the Fed-

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This article is the product of an effort to broaden and to deepen Chapter 16 of Davis, *Administrative Law* (1951). A companion article on the closely related subject of Ripeness of Governmental Action for Judicial Review will soon be published in the *Harvard Law Review*.

1. 310 U. S. 113 (1940).

2. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1951).

3. 333 U. S. 426 (1948).

eral Reserve System, largely because the Court thought the question whether the Board would ever invoke the condition was too speculative; the case can be explained in terms of lack of ripeness or in terms of lack of standing of the bank until the bank is more immediately affected.

One who is seriously harmed by reviewable administrative action which is illegal or even unconstitutional is often denied judicial review on account of lack of standing. The law of standing is fundamentally artificial to the extent that one who is in fact harmed by administrative action is held to lack standing to challenge the legality of the action. The artificiality—frequently running counter to natural instincts of judges—results in a complexity that is so great that the Supreme Court often violates the principles that the Court has laid down for its own guidance.⁴ The Supreme Court has recently referred to the law of standing as a “complicated specialty of federal jurisdiction.”⁵ The federal law of standing is undeniably “complicated.” But since all courts must determine what parties should be allowed to challenge governmental action, the law of standing is no more a specialty of federal jurisdiction than it is a specialty of state law.

Only in one sense is the law of standing a specialty of federal jurisdiction. Speaking very broadly, the state courts that have constructed their own doctrine independently of the federal doctrine have usually tended toward the simpler, less artificial, and more satisfactory idea that anyone who is in fact substantially injured by administrative action has standing to challenge it. The federal law of standing is a “specialty of federal jurisdiction” only to the extent that it involves artificialities that the state courts have refused to adopt.

Because the law of standing to challenge administrative action is only a part of a broader body of law involving standing to challenge governmental action, we include in our discussion some of the germinal cases on standing to challenge the constitutionality of legislative action.

§ 2. “ADVERSELY AFFECTED IN FACT” AS A GUIDE

A court which holds that one who is in fact adversely affected by governmental action lacks standing to challenge that action is in effect saying something like this: “We don’t deny that you are hurt by the governmental action you challenge. We don’t deny that the

4. See the summary in section 18, below.

5. *United States ex rel. Chapman v. FPC*, 345 U. S. 153, 156 (1953).

action may be illegal. We don't deny that we are assigned the job of providing relief against illegal governmental action of the type here involved. But even though you are hurt, you are not deserving of relief."

Our central question is: What circumstances, if any, can justify such a holding by a court?

The circumstances that will justify such a holding have to relate to the standing of the plaintiff, and not to the question of reviewability or unreviewability. In other words, to focus upon the law of standing, we must assume that a legislative or judicial determination has previously been made that the particular type of governmental action should be subject to review. Our question is: When, if ever, should a plaintiff who is in fact hurt by reviewable governmental action be denied review for lack of standing?

The reasons in favor of permitting a challenge of governmental action by one who is in fact adversely affected by that action are very powerful. The strongest reason is the principle of elementary justice that one who is in fact hurt by illegal action should have a remedy. The second reason is that the artificiality and complexity of the law of standing would disappear if the courts would follow the simple idea that one who is in fact hurt may challenge; the large amount of litigation over the unnecessary complexities of the law of standing is wasteful. The third reason, applicable in the federal system, lies in the intent behind the Administrative Procedure Act.

The APA provides in section 10: "Except so far as (1) statutes preclude review or (2) agency action is by law committed to agency discretion—(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Although the legislative history is not entirely free from conflicting views, the part of the legislative history that is both clear and authoritative is the statement made by the committees of both the Senate and the House, identical in both reports: "This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute."⁶

When both committee reports are so clear in translating the statutory words "adversely affected" to mean "adversely affected in fact," the reasons in favor of following that interpretation are rather powerful, except to the extent that other legislative history

6. Sen. Doc. No. 248, 79th Cong., 2d Sess. 212, 276 (1946).

is inconsistent. In general, the rest of the legislative history clutters up the question more than it detracts from the committees' statements. A detracting factor was Senator McCarran's quotation of the Attorney General, who said: "This reflects existing law."⁷ The committee themselves were stumbling when they said: "The phrase 'legal wrong' means such a wrong as is specified in subsection (e) of this section. It means that something more than mere adverse personal effect must be an illegal effect. The law so made relevant is not just constitutional law but any and all applicable law."⁸ This statement confuses legal wrong with mere illegality and confuses what must be shown to obtain review with what must be shown to win on review. Similarly, Congressman Walter said on the House floor: "Legal wrong means action or inaction in violation of the law or the facts. The categories of questions of legal wrong are set forth later as subsection (e) of section 10."⁹ The categories of subsection (e) include action which is arbitrary, unconstitutional, in excess of statutory jurisdiction, without observance of procedure required by law, or unsupported by substantial evidence. The statement of Congressman Walter seems to say that anyone would have standing to prove illegality, whether or not he shows adverse effect in fact. But since the constitutional concept of "case" or "controversy" as interpreted by the Supreme Court requires adverse effect, Congressman Walter's interpretation probably should be modified to conform to constitutional requirements.

The solid part of the legislative history is thus the statement of the Senate and House committees that one who is "adversely affected in fact" may challenge administrative action.

The conclusion thus seems to be abundantly supported that one who is in fact adversely affected may obtain judicial review, in absence of adequate affirmative reasons for denying standing. The rest of our inquiry into the law of standing to challenge will therefore be devoted to examination of possible affirmative reasons for denying standing to one who is in fact adversely affected.¹⁰

7. *Id.* at 310. The Attorney General cited six cases to implement this statement.

8. *Ibid.*

9. *Id.* at 369. See also the statement of Senator Austin (*id.* at 308-09): "For a long time we have known just what the meaning of 'legal injury' is. It seems to me that by the use of the word 'wrong' a much broader category of individuals is admitted to review." Thereupon the Senator quoted from Bouvier's Law Dictionary, which in turn rested in part upon Blackstone, and from Words and Phrases.

10. An example of denial of standing to one who is in fact adversely affected is the denial of standing of a minority stockholder to object to action which adversely affects his corporation. *Pittsburgh & W. Va. Ry. v. United States*, 281 U. S. 479 (1930). The standing of a holder of a majority of the

§ 3. STATUTORY PROVISIONS AFFECTING STANDING

In addition to the APA, just discussed, other statutes may affect the solution of problems of standing. Although a case or controversy which is otherwise lacking cannot be created by statute, a statute may create new interests or rights,¹¹ thereby giving standing to one otherwise barred by lack of case or controversy. And a statute conferring standing may affect the determination of whether or not a right or a case or controversy exists.

The effect of such a statutory provision may be illustrated by comparing *Oklahoma v. Civil Service Commission*¹² with *Massachusetts v. Mellon*.¹³ In the *Oklahoma* case, the Civil Service Commission entered an order finding a violation of the Hatch Act by a member of the state highway commission; this finding foreshadowed a further order reducing federal highway grants to Oklahoma, unless the State removed the offending commissioner from office. Oklahoma instituted proceedings for review pursuant to a provision allowing review by "any party aggrieved." Under *Massachusetts v. Mellon*, the Court might have said that Oklahoma was not compelled to take any federal funds, that acceptance of funds rested on consent, and that Oklahoma had no standing to question the validity of federal grants. Instead, the Court held that the federal statute created a "legal right" in Oklahoma, and that "By providing for judicial review of the orders of the Civil Service Commission, Congress made Oklahoma's right to receive funds a matter of judicial cognizance. Oklahoma's right became legally enforceable."¹⁴ The Court distinguished *Massachusetts v. Mellon*, the *Lukens Steel* case,¹⁵ and

stock is likewise denied. *Schenley Distillers Corp. v. United States*, 326 U. S. 432 (1946). The justification is that the management of the corporation has been entrusted with the protection of the corporation's interest. When the stockholder has some interest of his own in which the corporation does not entirely share, the stockholder has standing to protect that interest. In *American Power & Light Co. v. SEC*, 325 U. S. 385 (1945), a divided Court upheld the standing of a stockholder to challenge SEC action requiring the corporation to make a transfer from surplus to capital. Because of reduction in the amount available for dividends, the Court considered that the stockholder had "a substantial financial or economic interest distinct from that of the corporation which is directly and adversely affected." 325 U. S. at page 388. Three dissenting justices took a view to which few businessmen would subscribe—that "the stockholders' interest . . . is indistinct from that of the corporation prior to an actual declaration." 325 U. S. at page 395.

11. A spectacular example of statutory creation of a new right in one who would otherwise be an officious intermeddler is an informer statute. In *United States ex rel. Marcus v. Hess*, 317 U. S. 537 (1943), the Court applied an informer statute of 1863 which permitted the informer to sue a person who defrauds the government for double the amount of damage to the government, the informer retaining half the amount recovered as his own.

12. 330 U. S. 127 (1947).

13. 262 U. S. 447 (1923).

14. 330 U. S. at page 137.

15. *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940).

the *Alabama Power* case¹⁶ by emphasizing "the authority for statutory review and . . . the existence of the legally enforceable right to receive allocated grants without unlawful deductions."¹⁷

The statutes governing leading federal agencies differ substantially. The narrowest provision, one giving rise to virtually no litigation, is that of the Federal Trade Commission Act: "Any person . . . required by an order of the Commission to cease and desist . . . may obtain a review. . . ."¹⁸ The Civil Aeronautics Act provides that ". . . any order . . . shall be subject to review . . . upon petition . . . by any person disclosing a substantial interest in such order,"¹⁹ and that a suit may be brought by the Board or its agent or "any party in interest" to enjoin violations of the Act or of the regulations.²⁰ The Urgent Deficiencies Act,²¹ which governs most proceedings for review of ICC orders, has no provision concerning standing to obtain review, but the Interstate Commerce Act provides that "Any construction, operation, or abandonment contrary to the provisions . . . may be enjoined . . . at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest."²²

Several important statutes provide for review at the instance of one who is "aggrieved," but even the statutes employing this concept differ in detail. The narrowest is the Federal Power Act: "Any party to a proceeding . . . aggrieved by an order issued by the Commission in such proceeding may obtain a review. . . ."²³ The National Labor Relations Act provides: "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review. . . ."²⁴ The Securities Act pro-

16. *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938).

17. 330 U. S. at page 139. Two justices did not participate and two justices dissented without opinion. Mr. Justice Frankfurter, concurring, said that the state could question only the correctness of the procedure and the determinations of the Commission, not the validity of the Act.

For another good illustration of the effect of a statute providing for review by a "person aggrieved," compare *Atlanta v. Ickes*, 308 U. S. 517 (1939) with *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir. 1943), dismissed as moot, 320 U. S. 707 (1943). These cases are discussed below at pages 406-408.

18. 38 Stat. 719 (1914), 15 U. S. C. A. § 45(c).

19. 52 Stat. 1024 (1938), 49 U. S. C. A. § 646(a).

20. 52 Stat. 1025 (1938), 49 U. S. C. A. § 647(a).

21. 38 Stat. 208 (1913), 28 U. S. C. A. § 41(28).

22. 24 Stat. 379 (1887), 49 U. S. C. A. § 1(20). The Food, Drug and Cosmetic Act provides: "In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may . . . file a petition. . . ." 52 Stat. 1055 (1938), 21 U. S. C. A. § 371(f) (1).

23. 49 Stat. 860 (1935), 16 U. S. C. A. § 825I(b).

24. 49 Stat. 453 (1935), 29 U. S. C. A. § 160(f).

vides that "any person aggrieved by an order of the Commission may obtain a review. . . ." ²⁵ The Public Utility Holding Company Act and the Securities Exchange Act differ only slightly. ²⁶

A provision of the Communications Act is the most complex: "An appeal may be taken . . . (1) By an applicant . . . whose application is refused . . . (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application." ²⁷

The most common provision in state statutes seems to be that "any party aggrieved" may obtain judicial review. The Model State Administrative Procedure Act provides: "Any person aggrieved by a final decision in a contested case . . . is entitled to judicial review thereof under this act . . ." ²⁸ Another section permits challenge of a rule "when it appears that the rule, or its threatened application, interferes with or impairs, the legal rights or privileges of the petitioner." ²⁹

When the statutory provisions are brought into this juxtaposition, not much rhyme or reason behind the variations is discernible. The cases indicate no appreciable difference between one who has an "interest," one who is "adversely affected," and one who is "aggrieved." True, each concept becomes a receptacle for ideas about standing, but what is read into any one concept could just as readily be read into either of the others. For instance, the cases reveal no reason for believing that the Communications Act, conferring standing upon "any . . . person aggrieved or whose interests are adversely affected," differs in substance from the Securities Act, which is limited to "any person aggrieved." ³⁰ Similarly, the provision of the Securities Act apparently has precisely the same meaning as the words "any person or party aggrieved" in the Public Utility Holding Company Act. The legislative language seems

25. 48 Stat. 80 (1933), 15 U. S. C. A. § 77i(a).

26. Compare: "Any person or party aggrieved by an order . . . may obtain review . . .", 49 Stat. 834 (1935), 15 U. S. C. A. § 79x(a) (Holding Company Act) with "Any person aggrieved by an order . . . in a proceeding . . . to which such person is a party may obtain review . . .", 48 Stat. 901 (1934), 15 U. S. C. A. § 78y(a) (Securities Exchange Act).

27. 48 Stat. 926 (1934), 47 U. S. C. A. § 402(b).

28. Section 12(1) of the Model Act, Nat. Conf. of Comm'rs on Unif. State Laws (1944).

29. Section 6(1).

30. This observation has as its authority the scores of cases cited in this chapter. A specific judicial observation to the same effect is found in *Associated Industries v. Ickes*, 134 F. 2d 694, 705 (2d Cir. 1943), dismissed as moot, 320 U. S. 707 (1943). Yet the Food, Drug and Cosmetic Act in a single section permits "any interested person" to be heard at the administrative proceeding, and allows "any person who will be adversely affected" to get judicial review. 52 Stat. 1055 (1938), 21 U. S. C. A. § 371f.

to have been largely fortuitous. Yet the restrictions in the Federal Power Act and in the Securities Exchange Act seem to have been deliberately designed to limit review to parties to the administrative proceeding, and that fact is of significance in interpreting provisions imposing no such explicit limitations.

§ 4. IS A "LEGAL RIGHT" NECESSARY TO A "CASE"
OR "CONTROVERSY"?

The worst trouble spot in the law of standing is the confusion about the question whether an adverse effect in fact is enough to confer standing, or whether a deprivation of a legal right is required. A portion of the same question is the question whether the plaintiff must assert deprivation of a legal right in order to satisfy the constitutional requirement of case or controversy.

A part of the confusion stems from lack of definition or clarification of terms. We shall use the term "interest" to signify a want or desire; thus, everyone has an interest in food, clothing and shelter, and a businessman has an interest in maximizing his profits, including an interest in freedom from the kind of competition that may reduce his profits. We shall use the term "right" or "legal right" to mean a legally-protected interest; thus, the businessman has no right or legal right to freedom from lawful competition even though the effect is a reduction of his profits.

A plaintiff who seeks to challenge governmental action always has standing if a legal right of the plaintiff is at stake. When a legal right of the plaintiff is not at stake, a plaintiff sometimes has standing and sometimes lacks standing. Circular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether the plaintiff has a legal right, but the question whether the plaintiff has a legal right is the final conclusion, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right.

One type of judicial exposition appears in *Tennessee Electric Power Co. v. TVA*.³¹ Eighteen competing corporations sued to enjoin operations of the TVA, asserting unconstitutionality. The Supreme Court held the plaintiffs to be without standing to raise the constitutional issues, because "the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue."³² The catch lies in the two words "otherwise lawful." The plaintiffs

31. 306 U. S. 118 (1937).

32. 306 U. S. at page 140.

were asserting that the competition was unlawful, and the Court was denying them an opportunity to show the unlawfulness. The question was not whether the plaintiffs had standing to challenge lawful competition but whether they had standing to challenge competition the lawfulness of which was at issue. The Court laid down the palpably false proposition that one threatened with direct injury by governmental action may not challenge that action "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."³³ If this proposition were the law, then no one could challenge a statute outlawing the Baptist Church, or prohibiting Republican speeches, or denying criminal defendants a jury trial, or authorizing unlawful searches, or compelling witnesses to testify against themselves.

The Court should have said that the plaintiffs were asserting "a legal right,—one arising out of the Constitution." The plaintiffs' theory was that under the Tenth Amendment Congress was exceeding its powers in establishing the TVA and in authorizing the TVA to compete with the private companies. Since the plaintiffs were in fact adversely affected by the TVA competition, the legal right involved is a constitutional right, and the source of the constitutional right is the Tenth Amendment.

No legal right in addition to a constitutional right is normally required for a challenge of the constitutionality of governmental action. For instance, if a statute infringes *X*'s freedom of speech, *X* may challenge, even though *X* has no legal right based upon "property . . . contract . . . [freedom from] tortious invasion . . . or . . . a statute which confers a privilege." *X*'s legal right stems from the Constitution itself, just as the legal right of the eighteen power companies stemmed from the Constitution itself. If Congress by direct command or through delegation to an administrative agency (instead of indirectly through government competition) regulates the business of *Y*, then *Y* may challenge the constitutionality of the regulation under the Tenth Amendment, even though no legal right of *Y* is involved except the constitutional right conferred by the Tenth Amendment.³⁴

33. 306 U. S. at pages 137-138.

34. In *Alabama Power Co. v. Ickes*, 302 U. S. 464, 479-480 (1938), the Court, in holding that a public utility adversely affected by competition of municipal corporations to which the federal government made loans and grants lacked standing to challenge the loans and grants, declared: "Where, although there is damage, there is no violation of a right no action can be maintained. . . . The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the

In *Perkins v. Lukens Steel Co.*³⁵ the Court also talked the language of lack of legal right. The Public Contracts Act requires those who sell goods to the government to comply with certain requirements concerning labor. The companies contended that a wage determination made in an administrative proceeding in which the companies had participated involved erroneous statutory interpretation. The asserted consequence was that the companies, in order to supply goods to the government, had to comply with wage schedules founded upon an error of law. The Supreme Court said: "We are of opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction . . . was based. . . . Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of law."³⁶ The Court also asserted that "the Government enjoys the unrestricted power . . . to fix the terms and conditions upon which it will make needed purchases,"³⁷ that the statute was not enacted for the protection of sellers, and that the statute "does not represent an exercise by Congress of regulatory power over private business or employment."³⁸

The Supreme Court later acknowledged that the government does not enjoy "unrestricted power" in its contractual relations;³⁹ the government is still the government even when it acts in its proprietary capacity, and discrimination against a racial or religious group is therefore unconstitutional. Unconstitutionality of such a discrimination could be asserted by one who has been in fact hurt by such discrimination; no legal right in addition to the constitutional right to be free from such discrimination is necessary. If violation of the Constitution may be asserted by one who is injured by the violation, the question arises why violation of a statute

moneys, therefore, presents a clear case of *damnum absque injuria*. . . . If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results."

But in *Frost v. Corporation Comm.*, 278 U. S. 515 (1929), the Court held that one having a franchise may secure an injunction against the illegal grant of a franchise to another.

See also the many cases discussed in the section on Competition, *infra*.

35. 310 U. S. 113 (1940).

36. 310 U. S. at page 125.

37. 310 U. S. at page 127.

38. 310 U. S. at page 128.

39. See *United Public Workers v. Mitchell*, 330 U. S. 75, 100 (1947): "Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' None would deny such limitations on congressional power . . ."

may not be asserted by one who is injured by the violation. The best reason, in the context of the *Lukens* case, probably is that the statutory provisions violated were not enacted for the protection of those who were asserting the violation. That is why the companies in the *Lukens* case lacked a "legal right" on which standing could be based.

What the Court did not inquire into in the *Lukens* opinion is why the companies which are adversely affected by the asserted misinterpretation of the statute should not be enlisted as natural law enforcers, whether or not a legal right of the companies is violated. The opinion was written in terms of what "the Government" may do in making contracts; a more refined view would be that government officers were making contracts on behalf of the government, that Congress is also a participant in the exercise of the government's proprietary functions, and that the most practicable way to keep the government's contracting officers within their statutory powers is by letting complainants like those in the *Lukens* case obtain judicial review of the officers' action.

Although the *Lukens* case was unanimous, it has been legislatively reversed,⁴⁰ and it is difficult or impossible to reconcile with other Supreme Court decisions.

Perhaps the most prominent Supreme Court case recognizing standing in absence of violation of a "legal right" of the plaintiff is *FCC v. Sanders Brothers*.⁴¹ The question was the standing of an existing broadcasting station, which would be economically injured by competition, to challenge the Commission's grant of a construction permit for a new station. The Court first held that "resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the [Commission] must weigh and as to which it must make findings in passing on an application for a broadcasting license."⁴² The Court emphasized that "the Act recognizes that the field of broadcasting is one of free competition," and that "Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads . . ."⁴³ The Court also declared that "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the

40. 66 Stat. 308 (1952), 41 U. S. C. A. § 43a (1953 Supp.). The sponsor of the amendment referred to the *Lukens* case and said: "It is our purpose, by this amendment, to overturn that decision." Senator Fulbright, 98 Cong. Rec. 6641 (1952).

41. 309 U. S. 470 (1940).

42. 309 U. S. at page 473.

43. 309 U. S. at page 474.

granting of a license,"⁴⁴ and that "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public."⁴⁵ At that point the Court might have been expected to refer to the *Tennessee Electric* case⁴⁶ which had been decided only three years earlier, and to say that standing cannot be based upon an interest in freedom from competition but that a "legal right" is necessary. Instead, however, the Court said exactly the opposite: "Congress . . . may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal. We hold, therefore, that the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect of the order of the Commission."⁴⁷

The only difference between the *Tennessee Electric* case and the *Sanders* case that affects the problem of standing is that in the *Tennessee Electric* case no statutory provision affected the problem of standing but that in the *Sanders* case the statute provided for judicial review by an applicant or by "any other person aggrieved or whose interests are adversely affected . . ." If the key to the two holdings on standing lies in this statutory provision, then whenever the APA is applicable, a "legal right" is unnecessary to confer standing, since the APA provides for review at the instance of "any person . . . adversely affected or aggrieved . . . within the meaning of any relevant statute . . ."⁴⁸

The *Sanders* doctrine as further developed in the *Scripps-Howard* and *KOA* cases⁴⁹ is of primary importance to the law of standing, for the Supreme Court in the three cases has enunciated the principle that one whose only interest in attacking the administrative action is to avoid a new or increased competition has standing to make the attack, even though it is specifically recognized that the attacker has no "legal right" at stake.

The *Sanders* doctrine already has had considerable impact upon the law of standing, and it is likely to continue to be of central im-

44. 309 U. S. at page 475.

45. *Ibid.*

46. *Tennessee Electric Power Co. v. TVA*, 306 U. S. 118 (1937), discussed above at pages 360-361.

47. 309 U. S. at page 477.

48. Section 10(a).

49. *Scripps-Howard Radio v. FCC*, 316 U. S. 4 (1942); *FCC v. NBC (KOA)*, 319 U. S. 239 (1943).

portance. The practical effect of the doctrine is essentially sound; one who is in fact adversely affected should have standing to challenge the legality of administrative action, for reasons stated above in section 2.

The doctrine nevertheless is deserving of adverse criticism from the standpoint of its unnecessary undermining of the accustomed meaning of words. The notion that the complaining station has no "legal right" but that its financial or economic "interest" in avoiding new competition is entitled to legal protection is the sheerest logomachy, for the only practical issue is whether or not the right or interest should be entitled to legal protection. To provide legal protection to what the Court solemnly asserts is not a "right" is merely twisting the usual meaning of words, impairing an established means of communication, and causing needless confusion and complexity. If the Court gives legal protection to the interest, then denying that the holder of the interest has a "right" is contradictory, if the usual meaning of these terms is followed. The most amusing consequence of this web of unreality lies in the proposition for which the *Sanders* case now stands—that the complaining station has a remedy without a right!

The cure for this excessive conceptual refinement lies in the plain and practical simplicity of acknowledging that if the "interest" is legally protected, then it deserves to be called a "right." Despite the statutory provision that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license," the Court could easily say that the licensee still may be "aggrieved" or "adversely affected" within the meaning of the review provision and therefore may represent its own interest in securing judicial review, just as a carrier with an economic interest may get judicial review of ICC action and may assert its own interest. To say that a station "aggrieved" or "adversely affected" has a "right" to prevent illegal action would be consistent with the provision limiting rights created by licenses. This simple solution would satisfy the case or controversy doctrine requirement; it would escape needless confusion about the distinction between rights and interests; it would end the artificiality of pretending that a private party upholding one side of an adversary proceeding may not represent his own interest.

The substance of the *Sanders* doctrine, as distinguished from the artificial language technique, is likely to endure, and is likely gradually to prevail in fields other than regulation of broadcasting. We shall explore the doctrine further in the ensuing two sections.

§ 5. STANDING TO ASSERT PUBLIC RIGHTS; THE DOCTRINE OF
"PRIVATE ATTORNEY GENERALS"

A vital feature of the *Sanders* case,⁵⁰ just discussed, is that "one likely to be financially injured," even though lacking legal right, may challenge not only those features of the administrative action which may cause injury to the complainant but may, in the words of the Court, "raise . . . any relevant question of law in respect of the order of the Commission."⁵¹ The *Sanders* opinion, as further developed in subsequent cases, means that the person with standing (1) represents the public interest and (2) does not represent his own private interest, and that (3) the interests asserted on the appeal may be different from those which confer standing to appeal.

In *Scripps-Howard Radio v. FCC*⁵² the Court explained the *Sanders* doctrine: "The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402(b)(2) Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected' by Commission action. . . . But these private litigants have standing only as representatives of the public interest. . . . That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights. . . . [T]he rights to be vindicated are those of the public and not of the private litigants."⁵³

The meaning of the Court seems to be unmistakable that the complainant has standing to assert rights other than his own.

In *FCC v. NBC (KOA)*⁵⁴ the Court held four to two that KOA, whose broadcast would be interfered with by grant to WHDH of approval for an increase in power and for operation unlimited in time, could intervene in the proceeding on the WHDH application and had standing to get review. The majority pointed out merely that *Sanders* had held that despite lack of property right, "economic injury gave the existing station standing to present questions of public interest and convenience by appeal from the order of the Commission."⁵⁵ Mr. Justice Frankfurter said in dissent: "Since the Commission in exercising its licensing function must be governed by the public interest and not the private interest of existing licensees, an appellant . . . appears only to vindicate the public

50. *FCC v. Sanders Brothers Radio Station*, 309 U. S. 470 (1940).

51. 309 U. S. at page 477.

52. 316 U. S. 4 (1942).

53. 316 U. S. at pages 14-15.

54. 319 U. S. 239 (1943).

55. 319 U. S. at page 247.

interest and not his own. . . . That the Commission's order may impair the value of an existing station's license is in itself no ground for invalidating the order; it merely may create standing to attack the validity of the order on other grounds. Whatever doubts may have existed as to whether the ingredients of 'case' or 'controversy,' as defined, for example, in *Muskrat v. United States* . . . are present in this situation were dispelled by our ruling in the *Sanders* case that the legality of a Commission order can be challenged by one 'aggrieved' or 'whose interests are adversely affected' thereby, even though the source of his grievance is not what is claimed to make the order unlawful. But from this it must not be concluded that anyone who claims to be 'aggrieved' or who is in any way adversely affected by Commission action has a right to appeal. . . . In order to establish its right to appeal . . . KOA had to make a showing that its interests were substantially impaired by a grant of the WHDH application."⁵⁶

No good reason is apparent why the *Sanders* doctrine, as further developed by the later cases, should not be of general applicability whenever either the APA or another statute containing an "adversely affected" provision is applicable. Perhaps the most comprehensive and penetrating opinion written by any court on the problem of standing is that of Judge Frank in the *Associated Industries* case.⁵⁷ An association of consumers of coal sought to challenge orders directing an increase in minimum prices of coal. The statute provided that "any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party" could

56. 319 U. S. at pages 259-260.

Mr. Justice Douglas dissented in both the *Scripps-Howard* case and the *KOA* case. In the former he apparently took the rather extreme position that a station's interest in avoiding a substantial reduction in number of listeners is insufficient to establish a case or controversy. But in the second case he only reiterated "doubts" and "concern" about whether the *Sanders* and *Scripps-Howard* doctrine satisfied the *Muskrat* requirements of case or controversy, and emphasized that if something short of a substantive right suffices for standing, "then I think we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate. Otherwise we will not only permit the administrative process to be clogged by judicial review; we will run afoul of the constitutional requirement of case or controversy." 319 U. S. at page 265. The *Sanders* and *Scripps-Howard* cases, said Mr. Justice Douglas, do not dispense with the requirement that KOA must show that it has sustained or is about to sustain some direct and substantial injury. "They merely hold that an appellant has his case decided in light of the standards of the public interest, not by the criteria which give him a standing to appeal." 319 U. S. at page 266.

57. *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir. 1943), dismissed as moot 320 U. S. 707 (1943). This decision may well be an instance of the rare phenomenon of a lower court's decision superseding a recent Supreme Court decision. This may be true even in spite of the language of Judge Frank distinguishing *Atlanta v. Ickes*, 308 U. S. 517 (1939).

seek review, and the association was a party to the administrative proceeding. In *Atlanta v. Ickes*,⁵⁸ the Supreme Court had previously held that a consumer had no standing to challenge an order fixing a minimum price for coal, but that was an equity proceeding not brought under the "person aggrieved" provision. The court in the *Associated Industries* case made an elaborate analysis of the *Sanders, Scripps-Howard*, and *KOA* cases and held that the association had standing to challenge the order.

The essence of Judge Frank's analysis is especially important because it seems both unanswerable and of broad applicability: "While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals."⁵⁹

The basic idea of the private Attorney General who can sue to vindicate the public interest is a very old one. One manifestation of it is in the informer statutes. A sample is a 1905 opinion of the Supreme Court which carried out an Ohio informer statute which had been in effect since 1831. The Court explained: "Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government. The right to recover the penalty or forfeiture granted by statute is

58. 308 U. S. 517 (1939).

59. 134 F. 2d at page 704.

frequently given to the first common informer who brings the action, although he has no interest in the matter except as such informer."⁶⁰

More recently the Supreme Court carried out an informer statute according to its terms in *United States ex rel. Marcus v. Hess*.⁶¹ The statute provided that "any" person may sue certain defrauders of the government for double damages and keep half. The Court held the statute constitutional and held: "'Suits may be brought and carried on by any person,' says the Act, and there are no words of exception or qualification such as we are asked to find."⁶²

§ 6. STANDING TO INITIATE A REVIEW PROCEEDING ON THE BASIS OF ASSERTION OF THE RIGHTS OF ANOTHER

In what circumstances, if at all, does one private party have standing to assert the rights of another private party?

In order to answer this question, we shall have to make the important distinction between standing to initiate a review proceeding and standing to assert illegality in a proceeding already properly commenced. This section deals with the first kind of standing, and the succeeding section with the second.

From the doctrine that one who is adversely affected may enforce the rights of the public, it is only a short step to the proposition that one who is adversely affected may enforce the rights of another person. In the broadcasting field, for instance, the public rights seem to include all or most of the private rights, and in the *Sanders* opinion the Court said that the complaining broadcasting station could "raise . . . any relevant question of law in respect of the order of the Commission."⁶³

Our problem is not that of authorized representation; the law is quite clear that Associated Industries may assert the rights of its members, consumers of coal,⁶⁴ and that the National Coal Association may represent producers of coal, and such organizations as the United Mine Workers and the Railway Labor Executives Association may assert the rights of their members.⁶⁵

60. *Marvin v. Trout*, 199 U. S. 212 (1905).

61. 317 U. S. 537 (1943).

62. 317 U. S. at page 546.

63. *FCC v. Sanders Brothers Radio Station*, 309 U. S. 470, 477 (1940).

64. *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir. 1943), dismissed as moot 320 U. S. 707 (1943).

65. *National Coal Ass'n v. FPC*, 191 F. 2d 462 (D.C. Cir. 1951), in which the coal association, United Mine Workers, and Railway Labor Executives Association were allowed to challenge the grant of a certificate of convenience and necessity to construct natural gas pipelines.

In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1951) Mr. Justice Jackson was the only justice to discuss the standing of the organization to assert the rights of its members; he upheld the standing on that basis.

The cases go both ways on the question whether one person who is not the authorized representative of another may assert the rights of the other. An outstanding example of a denial of standing is *Tileston v. Ullman*,⁶⁶ holding that a physician could not challenge the constitutionality of a statute prohibiting the use of drugs or instruments to prevent conception. The physician asserted that the statute would prevent his giving professional advice concerning the use of contraceptives to three patients whose condition of health was such that their lives would be endangered by child-bearing. The Court said that the physician was asserting his patients' rights and not his own: "His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf." That the holding was well supported by previous authority is shown by the Court's citation of cases holding that one who is not a female or delegated to champion any grievance of females may not assert the constitutional rights of females with respect to a statute prohibiting serving them liquor behind a screen,⁶⁷ that one doing a large business may not assert unconstitutionality with respect to those doing a small business,⁶⁸ that witnesses subpoenaed in a grand jury investigation inquiring into corrupt practices in primary elections had no standing to challenge constitutionality of congressional power to regulate primaries,⁶⁹ that one having no maritime lien may not challenge the validity of a statute which might adversely affect such a lien,⁷⁰ and that subcontractors may not assert rights of their contractors.⁷¹

The Supreme Court, however, is quite willing to permit one person to assert the rights of another, even when constitutional rights are involved. An important early case is *Pierce v. Society of Sisters*.⁷² A private school was allowed to challenge a statute requiring parents to send children of specified ages to public schools. The private school was adversely affected to the extent of being put out of business, but the constitutional rights asserted were those of parents and children. The Court held that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

66. 318 U. S. 44 (1943).

67. *Cronin v. Adams*, 192 U. S. 108, 114 (1904).

68. *Standard Stock Food Co. v. Wright*, 225 U. S. 540 (1912).

69. *Blair v. United States*, 250 U. S. 273 (1919).

70. *The Winnebago*, 205 U. S. 354, 360 (1907).

71. *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 220 (1903).

72. 268 U. S. 510 (1925).

Dealing specifically with the problem of standing, the Court said only that the business and property "are threatened with destruction through the unwarranted compulsion . . . over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action."⁷³ The Court clearly recognized the standing of the school to assert the constitutional rights of parents and children.⁷⁴

Cases in support of the *Pierce* case may be more numerous than is commonly supposed. Any lawyer can probably call to mind cases otherwise familiar, in which one party asserted constitutional rights of another. In *Wuchter v. Pizzutti*,⁷⁵ the Court held that a statute providing for service of process upon the Secretary of State in an action against a non-resident motorist is unconstitutional because the statute did not provide for adequate notice to the defendant. Yet the defendant in the case had been personally served. In effect, what the defendant did was to assert successfully the constitutional rights of unknown non-resident motorists who might not be given adequate notice under the statute.

In *Helvering v. Gerhardt*,⁷⁶ the Court said in the first sentence of its opinion: "The question for decision is whether the imposition of a federal income tax for the calendar years 1932 and 1933 on salaries received by respondents, as employees of the Port of New York Authority, places an unconstitutional burden on the States of New York and New Jersey." The taxpayer was allowed to assert the constitutional rights of the states.

The Supreme Court has often cited the *Pierce* case with approval,⁷⁷ and never with disapproval. The doctrine of the case is therefore very much alive, although the holding is not easily reconciled with the line of cases represented by *Tileston v. Ullman*.⁷⁸ On the merits, the reasons in favor of the *Pierce* holding are strong; the school was adversely affected by the statute to the extent of being

73. 268 U. S. at 535.

74. The cases the Court relied upon do not seem to support the result. The one that comes the closest may be *Terrace v. Thompson*, 263 U. S. 197 (1923). The opinion of the Supreme Court in that case is consistent with the view that citizens were allowed to assert the constitutional rights of aliens. But the report of the case in the lower court reveals that the plaintiffs were not only citizens but also an alien whose constitutional rights were asserted. *Terrace v. Thompson*, 274 Fed. 841 (W.D. Wash. 1921).

75. 276 U. S. 13 (1928).

76. 304 U. S. 405 (1938).

77. The Court not only discussed the *Pierce* case with approval in *Barrows v. Jackson*, 346 U. S. 249 (1953), but it relied heavily upon the case. Other recent references with approval include *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 141 (1951); *CBS v. United States*, 316 U. S. 407, 423 (1942).

78. 318 U. S. 44 (1943).

put out of business, and the problem of constitutionality of the statute was a serious one.

Because of the theoretical reluctance of courts to decide constitutional issues, standing to raise a nonconstitutional issue might well be allowed when standing to raise a constitutional issue is denied.

*Safeway Stores v. Di Salle*⁷⁹ is a representative case involving the basic problem of whether or not a court should set aside administrative action upon the petition of a party who asserts violation of a statutory provision designed to protect a class which does not include the petitioner. A retail food chain sought review of a regulation fixing price ceilings on the ground that the regulation would violate a statutory provision designed to protect producers of agricultural commodities. The court held rather summarily that the retailer had no standing.

Probably a good many courts would dispose of the *Safeway* case in the same way. But a powerful brief could be written in favor of standing of the retailer—a brief that not many courts would resist. The brief would show that the Administrator in fixing the price ceiling has violated a specific statutory limitation on the power of the Administrator, that the regulation is contrary to the policy declared by Congress in the Act, and that the result is to inflict direct and illegal injury upon the petitioner. The specific statutory provision violated is in the nature of a restriction upon the Administrator's power: "No ceiling shall be established or maintained for any agricultural commodity below the highest of the following prices . . ."⁸⁰ This is followed by an elaborate statement of the statutory limits upon the Administrator's power. The purpose of the statutory provision is not merely to benefit the producers of agricultural commodities but to protect the entire economy of the nation, of which retailers are a part. The overall purpose is explicitly stated by Congress in the first section of the enactment: "It is the intent of Congress to provide authority necessary to achieve the following purposes in order to promote the national defense: To prevent inflation and preserve the value of the national currency; . . . to stabilize the cost of living for workers and other consumers and the costs of production for farmers and businessmen . . ."⁸¹ Congress goes on in the first section: "It is the intent of Congress that the authority conferred . . . shall be exercised . . . with full consideration and emphasis, so far as practicable, on . . .

79. 198 F. 2d 269 (Em. Ct. 1952).

80. 64 Stat. 803 (1950), 50 U. S. C. A. Appendix § 2102(d) (3) (1951).

81. 64 Stat. 803 (1950), 50 U. S. C. A. Appendix § 2101 (1951).

the maintenance and furtherance of a sound agricultural industry . . ."⁸²

What the Administrator has done is not merely to exceed his powers in a manner specifically prohibited by the provision designed to protect producers of agricultural commodities. The protection of such producers is a part of the primary overall intent of Congress in enacting the legislation and in conferring powers upon the Administrator.

The problem of standing is whether the retailer, which is directly injured by the Administrator's action in excess of his statutory authority, may assert the violation of one of the explicitly declared purposes of the entire regulatory program. No one is in a better position to assert such a violation than a party which is directly injured by the illegal regulation fixing an illegal ceiling on the particular party's prices. Such a party will know of the violation and will be in a position to object to it; the effect upon producers of agricultural commodities is relatively remote.

Furthermore, the statute specifically provides that "any person who is aggrieved by the denial or partial denial of his protest" is entitled to judicial review.⁸³ The Supreme Court interpreted such a provision in the *Sanders* case as meaning that one who is adversely affected by mere economic competition could "raise . . . any relevant question of law in respect of the order of the Commission."⁸⁴ One whose prices are directly subject to the illegal regulation is much more deserving of standing to challenge the regulation than one who is merely injured by competition, for the policy of the law is to encourage competition, but the policy of the law here is, as declared by Congress, "furtherance of a sound agricultural industry." The retailer here is therefore a person aggrieved, and the Administrator has denied its protest. The conclusion is accordingly compelled that the retailer has standing under the statute.

Resort to the doctrine of "private Attorney Generals" is unnecessary in order to show the standing of the retailer. But that doctrine is an independent reason for upholding the retailer's standing and makes the retailer's standing doubly clear. As the Supreme Court said in the *Scripps-Howard* case, private litigants objecting to illegal administrative action may have standing "as representatives of the public interest."⁸⁵ Congress might have authorized the Attorney General to bring actions to assure that the public interest is

82. *Ibid.*

83. 64 Stat. 808 (1950), 50 U. S. C. A. Appendix § 2108 (1951).

84. *FCC v. Sanders Brothers Radio Station*, 309 U. S. 470, 477 (1940).

85. *Scripps-Howard Radio v. FCC*, 316 U. S. 4, 14 (1942).

not jeopardized by administrative action which, as here, is directly opposed to the explicitly declared intent of Congress. As Judge Frank said in his outstanding opinion in the *Associated Industries* case, "Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers . . . Such persons, so authorized, are, so to speak, private Attorney Generals."⁸⁶

A third reason, wholly independent of the other two, could be asserted except for the statutory exclusion from the Administrative Procedure Act.⁸⁷ That Act provides that "any person adversely affected" shall be entitled to judicial review,⁸⁸ and the reports of the committees of both House and Senate said that this means "any person adversely affected in fact." That the retailer is adversely affected by the unduly low price ceiling is too clear for argument.

Such is the brief for the standing of the retailer in the *Safeway* case. Perhaps the position taken in the brief is sounder and in the long run will produce more satisfactory results than the position taken by the court in the *Safeway* case.

Some important cases which allow one person to assert the rights of another rest upon a special explanation which does not affect the cases discussed in this section. We now turn to those cases.

§ 7. STANDING TO ASSERT THE RIGHTS OF ANOTHER IN A PROCEEDING ALREADY PROPERLY COMMENCED; STANDING TO INDUCE A COURT TO ACT ON ITS OWN MOTION

In the preceding section, we dealt with the problem of standing of one to assert the legal rights of another, but our discussion was limited to cases involving standing to initiate a review proceeding. Now we consider the problem of standing of one to assert the legal rights of another in a proceeding which has already been properly initiated. The difference between the two kinds of standing is an important one.

In the 1953 case of *Barrows v. Jackson*,⁸⁹ whites were permitted to assert the constitutional rights of non-Caucasians; not only that, but the non-Caucasians whose constitutional rights were asserted were non-Caucasians in general and not any particular or identified ones. The plaintiffs, whites, sued the defendant, a white, in a state court for damages for breach of a restrictive covenant

86. *Associated Industries v. Ickes*, 134 F. 2d 694, 704 (2d Cir. 1943).

87. 64 Stat. 819 (1950), 50 U. S. C. A. Appendix § 2159 (1951).

88. The "except" clauses in the introductory clause of section 10 do not affect the present problem.

89. 346 U. S. 249 (1953).

against use or occupation of land by non-Caucasians. The Supreme Court held that an award of damages by the state court would violate the Fourteenth Amendment because: "To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property."⁹⁰

The Court in the *Barrows* case dealt explicitly with the standing problem. After mentioning the requirement of a "case" or "controversy," the Court said: "Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others."⁹¹ The Court then acknowledged a line of cases "that even though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he is within the class whose constitutional rights are allegedly infringed. . . . This is a salutary rule, the validity of which we reaffirm."⁹²

The Court's principal explanation for departing from the salutary rule was this: "But in the instant case, we are faced with a unique situation in which it is the action of the state *court* which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained."⁹³

This explanation is not an adequate one. Calling the situation "unique" solves nothing and provides no guide for the future. That the persons whose rights are asserted cannot present their grievance before any court is hardly a reason for disregarding the usual requirement that the party who does challenge must have proper standing. The Court gives no reason for its implicit conclusion that the rules about standing should be different when the challenged action is that of a court instead of that of a legislative or administrative body.

90. 346 U. S. at page 254.

91. 346 U. S. at page 255.

92. 346 U. S. at page 256-257.

93. 346 U. S. at page 257.

When the Supreme Court in the *Barrows* case refused to follow its usual rule on the ground that the case was "unique," the Court apparently had an instinct that the case was different from the cases it distinguished, but it failed to articulate that difference. The Court's instinct was probably entirely sound, and the difference that the Court felt involves an important principle.

The crucial difference is the difference between initiating a proceeding—setting the judicial machinery in motion—and calling to the court's attention something that the court may do on its own motion. The principle is that a party always has standing to call to a tribunal's attention (whether court or agency) the illegality of a course of action which the tribunal is contemplating. The same party in the same proceeding may lack standing to initiate a review proceeding but may have standing to ask the reviewing court to refrain from a course of action which the court may on its own motion refrain from taking. When the judicial machinery is already in motion and the question before the court is the direction of the action to be taken, the court on its own motion, whether or not any party urges it, may reject a course of action which would involve unconstitutionality or violation of statutory or common law, for the court has the affirmative obligation of avoiding any judicial action that would be unconstitutional or otherwise illegal.

When the damages action in the *Barrows* case came before the state court, the plaintiff and the defendant were both properly before the court, and the judicial machinery had been set in motion by the filing of the damages action. The state court could have ignored any problem of the standing of the defendant to assert the constitutional rights of the unidentified Negroes, and it could have held on its own motion that an award of damages by the state court would violate the constitutional law laid down by the Supreme Court in *Shelley v. Kraemer*.⁹⁴ Indeed, if the state court did not so hold, its own action would involve unconstitutionality. The fact is that both the trial court and the appellate court in the *Barrows* case did refuse damages. That refusal, in any view of the standing problem, was sound, and any possible doubt about it has to do with extension of the substantive principle of *Shelley v. Kraemer*.

The defendant having won in the state courts, the plaintiff sought review by the Supreme Court. Did the plaintiff have standing to get Supreme Court review? The answer is clearly yes, for

94. 334 U. S. 1 (1948), holding that a restrictive covenant could not be enforced in equity against Negro purchasers, because such enforcement would involve state action contrary to the Fourteenth Amendment.

the plaintiff was seeking damages for breach of the restrictive covenant and had the same standing as any other plaintiff in any damages action; it was the defendant who was asserting the constitutional rights of the unidentified Negroes. Then did the defendant have standing before the Supreme Court to assert the constitutional rights of unidentified parties not before the Court? The answer is yes, because the problem of standing is nothing more than the problem of whether the defendant could call to the Supreme Court's attention the unconstitutionality of a reversal of the judgment entered by the state courts—something that the Supreme Court not only could consider but should consider on its own motion. Therefore the result was clearly right.

The holding in the *Barrows* case was thus neither an exception to nor a violation of what the Court called the "salutary rule" that a person may not challenge the constitutionality of governmental action unless he is within the class whose constitutional rights are allegedly infringed. But the "salutary" rule needs to be restated to limit it to the question whether the person whose standing is in question may initiate a proceeding to challenge the constitutionality of governmental action. The rule does not extend to standing to raise a question which the court may raise on its own motion. The cases represented by the *Pierce* case⁹⁵ are exceptions to the so-called rule as thus modified, but the *Barrows* case is entirely consistent with the rule.

The rule applies equally to challenges of constitutionality of legislative action, judicial action, and administrative action. If we substitute an administrative agency for the state courts in the *Barrows* case, all the results will be the same.

But one further observation is important. The question whether a party has standing to set the machinery of the reviewing court in motion does not arise if the initial tribunal, whether court or agency, decides against the course of action that is assertedly unconstitutional, but that question does arise if the initial tribunal decides in favor of the course of action that is assertedly unconstitutional. In the *Barrows* case, since the trial court chose the constitutional course of action, the only question for the state appellate court was whether to reverse, and the appellate court could on its own motion decide in favor of a refusal of reversal on the ground that a reversal would be unconstitutional. The same is true of the Supreme Court of the United States.

95. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), discussed above at pages 370-371.

If in the *Barrows* case the state courts had decided for the plaintiff, then the defendant in seeking review by the Supreme Court would have had the burden of setting the Supreme Court's reviewing procedure in motion, and would have had to have standing to do so, for the defendant then would have been asking something that the Court could not do on its own motion. The defendant's standing to raise the constitutional question would have rested upon the assertion of the constitutional rights of unidentified Negroes not before the Court. Accordingly, the question of standing would have been whether to follow the so-called "salutary rule" or whether to follow the cases represented by the *Pierce* case, which are exceptions to the rule.

The major propositions of law that grow out of analysis of the *Barrows* case may be summarized: (1) One who lacks standing to set judicial machinery in motion may have standing, after the machinery is already in motion, to point out that a contemplated course of action will be unconstitutional or otherwise illegal, for the court on its own motion may properly refrain from that course of action, but the court on its own motion may not initiate a proceeding or start the judicial machinery in motion. (2) If the initial tribunal, whether court or agency, acts unconstitutionally or otherwise illegally, the party who seeks review must have standing to set the judicial machinery of the reviewing court in motion—something that the reviewing court cannot itself do. (3) If the initial tribunal, whether court or agency, refrains from a course of action on the ground that that course of action would be unconstitutional, the reviewing court may on its own motion refrain from a reversal of the initial tribunal's decision, whether or not any party before the reviewing court has standing to assert that the rejected course of action would be unconstitutional.

The old case of *Buchanan v. Warley*⁹⁶ provides further illustration of the distinction between standing to initiate a proceeding and standing to induce a court to act on its own motion. A white sued a colored person for specific performance of a contract of sale to the colored person of real property, and the defendant defended on the ground that the contract by its terms was not binding unless the defendant was legally entitled to occupy the property as a residence. The constitutionality of a segregation ordinance was thus brought into question. The white, not the colored person, was asserting unconstitutionality of the ordinance. The Court explained its decision allowing the challenge by saying that the plaintiff could challenge

96. 245 U. S. 60 (1917).

because his right to sell his property was involved. The difficulty with this explanation is that the constitutional rights are those of the colored person, not those of the person who is selling to the colored person.⁹⁷ The reality of the case is that the white was allowed to assert the constitutional rights of the Negro. But the problem of standing was not whether the plaintiff could initiate his proceeding on the basis of assertion of the rights of another; the plaintiff clearly had standing to institute a suit for specific performance. The only question of standing was whether, after proceeding had been properly commenced, the plaintiff could assert that the ordinance was unconstitutional. If no party had made any such assertion, the Court might properly on its own motion have determined what was the correct law for the disposition of the case, including the constitutional law. Therefore, the only question of standing was whether the plaintiff could call to the Court's attention the law that the Court on its own motion was free to use.⁹⁸

Challenge of administrative action on nonconstitutional grounds is governed by the same principles as challenge of any governmental action on constitutional grounds, except for the uncertain effect of the general idea of judicial reluctance to decide constitutional issues. The theory that we have developed out of the *Barrows* case, which did not involve administrative action, has been applied by the Supreme Court, but not specifically articulated, in *NLRB v. Highland Park Mfg. Co.*,⁹⁹ involving review of administrative action. The statute provided that "no complaint shall be issued pursuant to a charge made by a labor organization . . . unless there is on file with the Board an affidavit . . . by each officer of such labor organi-

97. The statement that the plaintiff has a "right" to sell to a Negro is nothing more than the verbal elevation of an interest to a right. The right to be free from a segregation ordinance runs in favor of the Negro, not in favor of the white, even though the white may be adversely affected by an infringement of the Negro's right.

With more justification one could say that the retailer in *Safeway Stores v. Di Salle*, 198 F. 2d 269 (D.C. Cir. 1952), had a "right" to be free from a price ceiling lower than what is required by the statutory system designed to protect farmers.

98. A good illustration grows out of *United States v. Jeffers*, 342 U. S. 48 (1951). The defendant in a criminal case sought exclusion of evidence obtained by officers through illegal search of the hotel room of defendant's aunts. One question was whether defendant had standing to assert the constitutional rights of his aunts to be free from illegal search. The case went off on the ground that defendant's property was seized in the search, and that defendant therefore had standing to object to both the search and the seizure. Apart from the seizure question, the Court could properly on its own motion prevent the use of evidence obtained illegally, and therefore the defendant should have standing to call to the Court's attention the illegality. The reasons for excluding evidence obtained through illegal search of others' property are the same as the reasons for excluding evidence obtained through illegal search of the defendant's property.

99. 341 U. S. 322 (1951).

zation . . . that he is not a member of the Communist Party . . .” The Board had sought enforcement in the court of appeals of an order requiring an employer to bargain with a union affiliated with the CIO, whose officers at the time had not filed the required affidavit. To the contention that the employer lacked standing to assert in the reviewing court the failure of CIO officers to file the required affidavit, the Supreme Court responded: “It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency, and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal.”¹⁰⁰

Both the result and the explanation are entirely sound. That the employer lacked either a legal right or the type of interest in the required affidavit that is ordinarily necessary for standing to initiate a proceeding is not and should not be a reason for denying standing to call to the court’s attention an infirmity which the court on its own motion may properly take into account in refusing enforcement.

Whenever the NLRB asks for enforcement of its order, therefore, the reviewing court may refuse enforcement if the court finds the order invalid on any ground, whether or not the employer who is resisting enforcement would have standing to initiate a review proceeding to challenge the validity of the order. The same is true in any case in which the employer initiates a proceeding for review and the Board counters with a petition for an order of enforcement. Only if the Board fails to ask the court for an order of enforcement may the problem arise concerning an employer’s standing to challenge the validity of the Board’s order—and the Board seeks enforcement in all or nearly all cases considered by a reviewing court.

If the *Highland Park* case had come to the reviewing court on a petition by the employer for review, and if the Board had not filed the usual petition for enforcement, then the court would have had to face the problem of the employer’s standing to challenge the order on the ground of failure to file the required non-Communist affidavit. But even if the court were to hold that the employer lacks

100. 341 U. S. at pages 325-326.

standing to challenge on that ground, the employer could still win by refusing compliance with the order, compelling the Board to seek enforcement, and resisting enforcement as in the *Highland Park* case.

§ 8. STANDING OF PARTIES BEFORE AGENCY; RELATION BETWEEN STANDING AND INTERVENTION

Four questions must be carefully distinguished: (1) standing of those who are already parties to raise particular questions in an administrative proceeding, (2) standing to intervene in an administrative proceeding, (3) standing to obtain judicial review of administrative action, and (4) standing to resist enforcement of administrative action.

We have seen in the preceding section that one who lacks standing to obtain judicial review of administrative action may have standing to resist enforcement of administrative action in a reviewing court. Similarly, one who lacks standing to obtain judicial review may have standing to raise a question in the administrative proceeding.

Those who are already parties to an administrative proceeding may be denied standing to raise particular questions that do not concern them. But a party who will be adversely affected by a particular course of action ought always to have standing to assert that that course of action will be in excess of the agency's statutory power or unconstitutional.

For example, in the *Safeway Stores* case,¹⁰¹ the court held that the retailer had no standing to get review on the ground that the Administrator had violated a statutory provision designed for the protection of farmers. Whether or not that result is sound—and we have presented the reasons for believing that it may be unsound¹⁰²—the retailer probably still should have standing to raise the same question before the Administrator. Standing of a party to raise a question before the agency is quite different from standing to obtain judicial review. One who seeks review has the burden of setting the judicial machinery in motion, and the court has no power to initiate the proceeding on its own motion. One who objects before the administrative agency is not setting machinery in motion but is trying to influence the course of action that is already in process, and the agency of its own motion may properly avoid an illegal course, whether the illegality will injure parties before

101. *Safeway Stores v. Di Salle*, 198 F. 2d 269 (Em. Ct. 1952), discussed above in section 6.

102. See discussion above at pages 372-374.

the agency or parties who are not before the agency. And so, even if the retailer had no standing to get review in the *Safeway Stores* case, the retailer, being already a party to the administrative proceeding, had standing to point out to the Administrator that a low enough ceiling would violate the statutory provision designed to protect farmers. Whether or not the retailer called that provision to the attention of the Administrator, the Administrator had the obligation to avoid a violation of it.

One who is already a party may thus object to action in excess of the agency's power even though the objector's rights are not infringed. But may one who has no standing to obtain review become a party to the administrative proceeding? The answer is that the rules governing intervention are quite different from the rules governing standing to obtain review.

Intervention in administrative proceedings is controlled by law at four levels—statutory provisions, agency rules, agency practices, and judicial decisions. Statutory provisions are usually mere grants of power and seldom answer significant questions. The Federal Trade Commission Act is typical: "Any person . . . may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person."¹⁰³ The Public Utility Holding Company Act puts unusual emphasis on public interest: "The Commission, in accordance with such rules and regulations as it may prescribe, shall admit as a party any interested State, State Commission, State securities commission, municipality, or other political subdivision of a State, and may admit as a party any representative of interested consumers or security holders, or any other person whose participation in the proceedings may be in the public interest or for the protection of investors or consumers."¹⁰⁴ One of the broadest provisions is that of the Federal Food, Drug, and Cosmetic Act: "At the hearing any interested person may be heard in person or by his representative."¹⁰⁵ The statute that has given rise to the most

103. 38 Stat. 719 (1914), 15 U. S. C. A. § 45(b). The National Labor Relations Act brings in subordinates: "In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony." 48 Stat. 926 (1934), as amended, 61 Stat. 146 (1947), 29 U. S. C. A. § 160(b).

104. 48 Stat. 832 (1935), 15 U. S. C. A. § 79s. The Federal Power Act is substantially similar. 49 Stat. 858 (1935), 16 U. S. C. A. § 825g.

105. 52 Stat. 1055 (1938), 21 U. S. C. A. § 371(e). The Interstate Commerce Act provides with respect to both administrative and judicial proceedings that "it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation or practice. . . ." 32 Stat. 848 (1903), 49 U. S. C. A. § 42.

troublesome problems about intervention, the Federal Communications Act, contains no provision about intervention but allows parties in interest to protest and in proper cases to be heard.¹⁰⁶

Although rules of practice of regulatory agencies characteristically leave specific problems for agency discretion, the rules usually recognize that intervention need not be completely granted or completely denied but that limited participation may be permitted. The FTC provides that the Commission may permit intervention "to such extent and upon such terms as it shall deem proper."¹⁰⁷ The CAB provides that "any person . . . may appear at any hearing and present any evidence which is relevant to the issues. Such persons may also suggest questions or interrogatories to be propounded by public counsel . . . With the consent of the examiner, or of the Board . . . such persons may also cross-examine witnesses directly."¹⁰⁸ The SEC allows a discretionary "leave to be heard" which may or may not include leave to call witnesses, to file briefs, to submit proposed findings, and to make oral argument. Admission as a party requires a finding that admission will be in the public interest, and either that a limited leave to be heard would be inadequate or that the petitioner in proceedings under the Securities Exchange Act may be "aggrieved."¹⁰⁹ Unlike other agencies, the

106. 66 Stat. 715 (1952), 47 U. S. C. A. § 309(c), providing for "protest" by "any party in interest." The legislative history makes clear that the intent was that those having standing for judicial review should be entitled to protest. See Sen. Rep. No. 44, 82d Cong., 1st Sess. 8 (1951).

See Note, Standing to Protest Before the FCC, Col. 55 L. Rev. 209 (1955).

107. FTC Rules of Prac., 16 C. F. R. § 2.9 (1949). The NLRB has a similar provision, except that the discretion is that of the Regional Director or the trial examiner. NLRB Rules and Regulations, Series 5, 29 C. F. R. § 102.29 (1952 Supp.).

108. CAB Rules of Prac., 14 C. F. R. § 302.14 (1953). This provision is used to mitigate the effect of denying intervention. Intervention is denied unless the petitioner "has a statutory right to be made a party," or "will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business." § 302.15.

109. SEC Rules of Prac., 17 C. F. R. § 201.17 (1949).

The FPC Rules of Prac., 18 C. F. R. § 1.8 (1949), provide that an interest making intervention appropriate may be (1) a right conferred by statute, (2) an interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioners may be bound by the Commission's action in the proceeding, including consumers, security holders, and competitors, and (3) any other interest of such a nature that petitioner's participation may be in the public interest. Other agencies might find advantageous this peculiar provision of the FPC rules: "Where there are two or more interveners having substantially like interests and positions, the Commission or presiding officer may, in order to expedite the hearing, arrange appropriate limitations on the number of attorneys who will be permitted to cross-examine and make and argue motions and objections on behalf of such interveners."

ICC permits a broadening of the issues so long as they are not "unduly broadened." The ICC rules also provide that in various designated proceedings, "an appearance may be entered . . . without filing a petition in intervention or other pleading" in certain circumstances, and that one for whom an appearance is entered "becomes a party to the proceeding."¹¹⁰

The most significant Supreme Court decision on intervention in an administrative proceeding is *FCC v. NBC (KOA)*,¹¹¹ holding (4-2) that a station, whose license is in substance modified by the grant of a license to another to broadcast on the same frequency, must be given full right of intervention, not a mere right of limited participation.

Since both standing to obtain review and the right to intervene in an administrative proceeding involve a determination of what interests are deserving of legal protection, one might initially suppose that the law governing intervention and standing would be about the same. But many factors affect one and not the other. Statutes concerning intervention usually differ from those concerning review. The central problem of intervention is usually the disadvantage to the tribunal and to other parties of extended cross-examination; judicial review involves no such problem. Adequate protection for interests obliquely affected may often be afforded through limited participation; no such compromise concerning judicial review is customary. No constitutional restrictions affect intervention; standing to obtain review is substantially affected by the constitutional requirement of case or controversy. Intervention means mere participation in a proceeding already initiated by others; obtaining judicial review normally means instituting an entirely new judicial proceeding.

In 1924 the Supreme Court held in an opinion by Mr. Justice Brandeis: "The plaintiffs may challenge the order because they are parties to it. . . . No case has been found in which either this court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein."¹¹² The statute, the Court said, ". . . declares that any party to a proceeding before the commission may, as of right, become a party to 'any suit wherein is involved the validity of such

110. ICC Rules of Prac., 49 C. F. R. § 1.73 (1949). For an excellent treatment of agency practices concerning intervention, see Att'y Gen. Comm. Ad. Proc. Monograph, FCC 16-21 (1940). The problem of lengthy cross-examination is evidently more acute in the FCC than in other agencies.

111. 319 U. S. 239 (1943). See the discussion of the Court's treatment of the standing question, above at pages 366-367.

112. Chicago Junction Case, 264 U. S. 258, 267, 268 (1924).

order.' The section does not in terms provide that such party may institute a suit to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order."¹¹³

Six years later the Supreme Court, again speaking through Mr. Justice Brandeis, took a diametrically opposite position concerning the same statute: "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it."¹¹⁴ Indeed, the Court held that even a clear *right* to intervene was insufficient to confer standing to obtain review. Other cases have held that parties to an administrative proceeding may be without standing to obtain review.¹¹⁵ The cases apparently have not picked up the idea that judicial review should sometimes be allowed because a party to an administrative proceeding may be bound by *res judicata*.¹¹⁶

Largely undeveloped by case law is the question whether standing to obtain review necessarily carries with it a right of intervention. Perhaps the most significant authority is the reasoning of a court of appeals: "It is said that the Commission is authorized to permit or deny intervention at its discretion and that, since these petitioners had no right to intervene, they can have no right to judicial review. The Commission itself admits, however, that it may not abuse its discretion. This, to us, means that there are some persons who have a right to participate in Commission proceedings and some who do not. We think it clear that any person who would be 'aggrieved' by the Commission's order, such as a competitor, is also a person who has a right to intervene. Otherwise, judicial review,

113. 264 U. S. at pages 267-268.

114. *Pittsburgh & W. Va. Ry. v. United States*, 281 U. S. 479, 486 (1930).

115. *Boston Tow Boat Co. v. United States*, 321 U. S. 632 (1944); *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940); *Moffat Tunnel League v. United States*, 289 U. S. 113 (1933); *Alexander Sprunt & Son, Inc. v. United States*, 281 U. S. 249 (1930).

But where a statute confers what the Court calls "an absolute right to intervene," the provision also carries a right of appeal. *Brotherhood of Railroad Trainmen v. B. & O. R. R.*, 331 U. S. 519 (1947).

116. The Court so reasoned in *Fishgold v. Sullivan Drydock Corp.*, 328 U. S. 275 (1946), with respect to a judicial proceeding in which a party had been allowed to intervene. But of course the principle of *res judicata* may often be equally applicable to administrative proceedings. See Davis, *Administrative Law*, Ch. 14 (1951). Rules of practice sometimes provide that leave to intervene shall not be deemed a finding that the intervening party is entitled to review. E.g., CAB Rules of Prac. § 285.6 (1946). Administrative orders allowing intervention often provide explicitly that the orders do not confer standing to obtain review. *Interstate Electric v. FPC*, 164 F. 2d 485 (9th Cir. 1947).

which may be had only by a party to the proceedings before the Commission who has been 'aggrieved' by its order, could be denied or unduly forestalled by the Commission merely by denying intervention."¹¹⁷ This reasoning applies only when the statute limits review to a "party" aggrieved. Probably the reason for the scantiness of authority is that agencies almost always allow intervention by those entitled to obtain review. One unresolved question of importance is whether or not a broadcasting station having an economic interest as a competitor of an applicant for a license is entitled to full rights of intervention in the license proceeding;¹¹⁸ the Supreme Court in the *Sanders* case recognized the standing of such a party to obtain review as a representative of the public interest.¹¹⁹

Of course, the question whether or not an intervener in a judicial proceeding reviewing administrative action may appeal to a higher court is quite different from the question whether or not an intervener in an administrative proceeding may obtain judicial review. Thus, the Supreme Court's holding that a union which had been permitted to intervene in a proceeding before a reviewing court had standing to petition the Supreme Court for review¹²⁰ is not inconsistent with the Supreme Court's holding that a union has no standing to enforce an order of the Board.¹²¹

§ 9. STANDING OF TAXPAYERS TO CHALLENGE PUBLIC EXPENDITURES

Under the doctrine of *Frothingham v. Mellon*¹²² (commonly cited as *Massachusetts v. Mellon*) the law of the federal courts is clear that a federal taxpayer has no standing to challenge the legality of a federal expenditure. Although this doctrine is deeply embedded, the combined effect of four rather solid propositions makes it highly vulnerable: (1) Reasons relied upon by the Supreme Court in the *Frothingham* opinion are contrary to the facts about our present tax system; (2) the law of the state courts is overwhelmingly and even almost uniformly opposed to the Supreme Court's doctrine; (3) the fact that the Supreme Court before de-

117. *National Coal Ass'n v. Federal Power Commission*, 191 F. 2d 462, 466-467 (D.C. Cir. 1951).

118. See Warner, *Radio and Television Law* § 13d (1948).

119. *FCC v. Sanders Bros.*, 309 U. S. 470 (1940), discussed fully above at pages 363-365.

120. *International Union of Mine, Mill, and Smelter Workers v. Eagle-Picher Co.*, 325 U. S. 335 (1945); cf. *Consolidated Edison Co. v. NLRB*, 305 U. S. 197, 218 (1938).

121. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261 (1940).

122. 262 U. S. 447 (1923).

veloping the *Frothingham* doctrine upheld the standing of federal taxpayers shows that nothing in the Constitution compels the denial of such standing; and (4) to the extent that a taxpayer is denied standing to challenge administrative action in making an expenditure which adversely affects the taxpayer in fact, the Administrative Procedure Act is violated.

In the *Frothingham* case, the Court held that a payer of federal taxes has no standing to challenge the constitutionality of a program of federal grants in aid to states for maternity hospitals. The Court said that the taxpayer's interest in the moneys of the Treasury "is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."¹²³ To have standing, the Court said, the challenger must show "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."¹²⁴

In the same opinion the Court recognized that municipal taxpayers may challenge the validity of municipal expenditures: "The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court."¹²⁵

The Court's major idea that a municipal taxpayer has a larger and more direct stake in a municipal expenditure than a federal taxpayer has in a federal expenditure may have been sound in 1923 but is now contrary to the facts. General Motors in a recent year paid well over a billion dollars in federal taxes. This means that General Motors has about a two per cent stake in every federal expenditure. When the Federal Government undertakes a program involving expenditure of ten billion dollars, the General Motors portion is about two hundred million dollars—hardly a "minute" sum in an absolute sense. Even if General Motors or some other corporation has more than a two per cent share in the expenditures of some municipality, its stake cannot possibly reach such an amount as two hundred million dollars.

If the size of the tax is the criterion, as the Court assumes in the *Frothingham* opinion, then it would be sensible to hold that federal

123. 262 U. S. at page 487.

124. 262 U. S. at page 488.

125. 262 U. S. at page 486.

taxpayers may challenge federal expenditures and that municipal taxpayers may not challenge municipal expenditures. The Court in 1923 failed to take account of what is more fully realized more than three decades later—that the rates of federal taxes have no counterpart in state and local taxation. Furthermore, the tax base for federal taxes is typically many times as large as the tax base for state or municipal taxes.

On the ground upon which it was decided, the *Frothingham* case does not seem to stand analysis.

Most impressive is the almost uniformly adverse reaction of state courts to the doctrine of the case. A 1929 collection of cases showed nineteen states which at that time held that state taxpayers could challenge state expenditures and only four that denied such standing to state taxpayers.¹²⁶ At the present time, probably at least thirty-two states uphold the standing of state taxpayers, and in not a single state is the law clear that state taxpayers have no standing to challenge state expenditures. This means that since 1929, about thirteen states have for the first time upheld such standing,¹²⁷ and that each of the four states which previously had denied such standing has developed law which either upholds such standing or renders the law unclear.

The four states that formerly denied standing of a state taxpayer deserve special attention. Louisiana, expressly overruling an earlier case, now recognizes such standing.¹²⁸ New Mexico's 1926

The Court cited *Crampton v. Zabriskie*, 101 U. S. 601, 609 (1879). The Court said at the page cited: "Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question."

But compare *Doremus v. Board of Education*, 342 U. S. 429 (1952), which denied standing of township taxpayers to challenge a practice which their taxes supported, even though the state court had upheld the standing of the taxpayers.

126. 58 A. L. R. 588 (1929).

127. *Turnipseed v. Blan*, 226 Ala. 548, 148 So. 116 (1933); *Ethington v. Wright*, 66 Ariz. 382, 189 P. 2d 209 (1948); *Aiken v. Armistead*, 186 Ga. 385, 198 S. E. 237 (1938); *Wartz v. Shane*, 216 Ia. 771, 249 N. W. 661 (1933); *Standard Printing Co. v. Miller*, 304 Ky. 49, 199 S. W. 2d 731 (1946) ("conceding but not deciding" that taxpayer has standing); *Borden v. Louisiana State Board of Education*, 168 La. 1016, 123 So. 655 (1929); *Chance v. Mississippi State Textbook Board*, 190 Miss. 476, 200 So. 713 (1941); *Teer v. Jordan*, 232 N. C. 48, 59 S. E. 2d 359 (1950); *Herr v. Rudolf*, 75 N. D. 91, 25 N. W. 2d 916 (1947); *City of Austin v. Thompson*, 147 Tex. 639, 219 S. W. 2d 57 (1949); *Lyon v. Bateman*, 228 P. 2d 818 (Utah 1951) (standing denied because of lack of showing of expenditure affecting taxpayer's pecuniary interest); *Democrat Printing Co. v. Zimmerman*, 245 Wis. 406, 14 N. W. 2d 428 (1944); *Spriggs v. Clark*, 45 Wyo. 62, 14 P. 2d 667 (1932).

128. *Borden v. Louisiana State Board of Education*, 168 La. 1016, 123 So. 655 (1929), overruling *Sutton v. Buie*, 136 La. 234, 66 So. 956 (1914).

case denying standing of a state taxpayer¹²⁹ was followed in 1947 in a case involving a municipal taxpayer,¹³⁰ but in 1952 the New Mexico court recognized standing of taxpayers to challenge the teaching of religion in the public schools.¹³¹ New York's denial of standing to a state taxpayer in 1914¹³² has been recently followed,¹³³ but at the same time the New York Court of Appeals has indicated its willingness to overlook the problem of standing when an issue of unusual importance is presented,¹³⁴ and a citizen and resident of New York often has standing to challenge state action.¹³⁵ In 1947 the State of Washington court seemingly modified its doctrine when it declared: "We have never held that, in a proper case where the attorney general refused to act to protect the public interest, a taxpayer could not do so."¹³⁶ A taxpayer thus gains standing, except that he must first request the attorney general to institute a proceeding.

In 1899 the Supreme Court did not hesitate to pass upon a constitutional question raised by "a citizen and taxpayer of the United States and a resident of the District of Columbia."¹³⁷ The suit was to enjoin the Treasurer of the United States from making a disbursement to a District of Columbia hospital, and the argument was that the legislation authorizing the disbursement was unconstitutional. The defendant demurred in the lower court on the ground that the complainant had shown no right to maintain the bill. The Supreme Court nevertheless decided the merits of the constitutional issue. But that was before the Supreme Court had developed its artificial doctrine about standing.

129. *Asplund v. Hannett*, 31 N. M. 641, 249 Pac. 1074 (1926).

130. *Sierra Electric Cooperative v. Town of Hot Springs*, 51 N. M. 150, 180 P. 2d 244 (1947).

131. *Miller v. Cooper*, 56 N. M. 355, 244 P. 2d 520 (1952).

132. *Schieffelin v. Komfort*, 212 N. Y. 520, 106 N. E. 675 (1914).

133. *Bull v. Stichman*, 273 App. Div. 311, 78 N. Y. S. 2d 279 (1948), affirmed 298 N. Y. 516, 80 N. E. 2d 661, 300 N. Y. 460, 88 N. E. 2d 325 (1949).

134. *Kuhn v. Curran*, 294 N. Y. 207, 61 N. E. 2d 513 (1945).

135. *Andresen v. Rice*, 277 N. Y. 271, 14 N. E. 2d 65 (1938); *Cash v. Bates*, 301 N. Y. 258, 93 N. E. 2d 835 (1950).

136. *Reiter v. Wallgren*, 28 Wash. 2d 872, 184 P. 2d 571, 573 (1947). The court had seemed to hold in *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, 151 Pac. 108 (1915) that a state taxpayer was without standing to challenge a state expenditure.

On the basis of the opinion in the *Reiter* case, a taxpayer probably may make the attorney general the defendant in a mandamus proceeding to compel the attorney general to take action to prevent unlawful expenditure of public funds.

137. *Bradfield v. Roberts*, 175 U. S. 291 (1899). The case cannot be explained away by saying that the District of Columbia, whose expenditure was challenged, is comparable to a municipality. The plaintiff did not sue as a taxpayer of the District of Columbia, but as "a citizen and taxpayer of the United States and a resident of the District of Columbia."

Even as late as 1915 the Supreme Court considered a constitutional issue at the instance of "a property owner and taxpayer."¹³⁸ A New York statute gave a preference in employment of persons on public works to citizens of New York and of the United States, and contracts for public construction permitted cancellation for violation of the requirement. When the Public Service Commission threatened a cancellation, "a property owner and taxpayer" sued to enjoin the commissioners, arguing unconstitutionality. The Supreme Court disposed of the question of standing in three sentences: "There seems to have been no question raised as to the right of Heim to maintain the suit, although he is not one of the contractors nor a laborer of the excluded nationality or citizenship. The Appellate Division felt that there might be objection to the right, under the holding of a cited case. The Court of Appeals, however, made no comment, and we must—certainly may—assume that Heim had a right of suit; and, so assuming, we pass to the merits."¹³⁹

The federal doctrine that a taxpayer may not challenge an expenditure applies not only to a challenge of constitutionality of legislation but also to legality of administrative action. Yet the Administrative Procedure Act permits judicial review of administrative action at the instance of one who is "adversely affected,"¹⁴⁰ and both the Senate and the House committees said that this means adversely affected in fact.¹⁴¹ If this intent behind the APA is to be carried out, a federal taxpayer should have standing to challenge the legality of an administrative expenditure if he can show that he is adversely affected in fact.

The principal argument for denial of standing to a federal taxpayer to challenge a federal expenditure emphasizes the idea that we don't want the courts cluttered with cases in which taxpayers

138. *Heim v. McCall*, 239 U. S. 175 (1915).

139. 239 U. S. at pages 186-187.

The holding with respect to standing seems to be discussed with approval by the court in *Coleman v. Miller*, 207 U. S. 433, 445 (1939). And in the same case four justices cited the case in support of the proposition that "while the ordinary state taxpayer's suit is not recognized in the federal courts, it affords adequate standing for review of state decisions when so recognized by state courts." 307 U. S. at page 465. This statement is especially interesting in view of the fact that in the *Heim* case the taxpayer's objection was not to expenditure but to discrimination.

That the Supreme Court is unwilling or unable to follow its own doctrine as declared in *Coleman v. Miller* is shown by *Doremus v. Board of Education*, 342 U. S. 429 (1952), where plaintiffs who were both state and municipal taxpayers were held to have no standing to raise a constitutional issue in the Supreme Court even though the state court had considered their case on the merits.

For other such cases involving problems of standing and federalism, see the discussion below at pages 423-427.

140. Section 10(a).

141. Sen. Doc. No. 248, 79th Cong., 2d Sess. 212, 276 (1946).

are challenging every little expenditure. For instance, in *Laughlin v. Reynolds*,¹⁴² "an attorney and taxpayer" sought mandamus to evict the Bar Association of the District of Columbia from space used for library purposes in the building occupied by the federal district court. The case was disposed of on the ground of lack of standing, and few will quarrel with the result. But one may still wonder whether a better ground for decision would have been unreviewability of the discretion exercised in allowing use of the library space.

Similarly, those who support the *Frothingham* doctrine assert that Congress should be the sole judge of the manner in which taxpayers' money is to be spent. But the result of the *Frothingham* doctrine is to refuse to kill the argument that many of our major spending programs are unconstitutional, even though no one has standing to raise the constitutional issue. If taxpayers' suits to challenge such programs should be discouraged, perhaps the sound way to discourage them would be by deciding on the merits of the constitutional issue that Congress has a full power under the Constitution to tax and to spend to provide for the general welfare.¹⁴³

Because we are so far committed to the institution of judicial review of legislation, the spending programs that are constitutional might be more firmly based if they were bolstered by Supreme Court interpretations of the congressional spending power.¹⁴⁴

Rightly or wrongly, we have evolved a system of relying upon courts to keep Congress and administrative officers within their powers. The reasons for such reliance upon courts are no better and no worse when the validity of spending is challenged than when the validity of other governmental action is challenged.

§ 10. STANDING OF TAXPAYERS ON NON-FISCAL ISSUES, OF CITIZENS, AND OF RESIDENTS

In contrast with the federal courts, many state courts recognize the standing of citizens, of residents, and of persons described as

142. 196 F. 2d 863 (D.C. Cir. 1952).

143. Article I, section 8: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

144. That Congress has a full power to tax and spend to provide for the general welfare is shown by such cases as *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937); *Helvering v. Davis*, 301 U. S. 619 (1937); *City of Cleveland v. United States*, 323 U. S. 329 (1945). The *Cleveland* case upheld the power of Congress to enact the United States Housing Act of 1937, and the other two cases upheld aspects of the Social Security Act of 1935. The three cases together probably supersede *United States v. Butler*, 297 U. S. 1 (1936), holding that Congress could not use the spending power to regulate agricultural production.

"citizens and taxpayers" to challenge administrative action. Standing of taxpayers is very common, even when the issue is non-fiscal and therefore has nothing to do with the amount of public expenditures or with the amount of taxes to be paid. The effect of this batch of cases is to say that one who has status as a member of the public has standing to challenge the administrative action.

An outstanding example of this attitude is that of the New York Court of Appeals in the 1945 decision in *Kuhn v. Curran*.¹⁴⁵ The petitioner was "a resident and taxpayer." The challenged statute altered the state into ten judicial districts and contained provisions concerning numbers of justices and of stenographers and clerks. The court dealt with the problem of standing in two sentences: "In view of the importance to the public of an authoritative determination of that question at the present time, we do not pause to consider whether the question is presented in appropriate proceedings. Sufficient, at present, that a controversy exists between the parties to the proceedings immediately affecting them, and that all parties entitled to be heard in regard to the questions involved are here represented."¹⁴⁶ The court then considered the merits of the constitutional issue.

Some other New York cases are similarly liberal. In *Andresen v. Rice*,¹⁴⁷ the legislature had placed the state police force in non-competitive or unclassified service, and one who had not applied for a position on the force challenged the constitutionality of the legislation. The court justified the petitioner's standing by pointing out that "He is of age to make such application, but, more than that, he is a citizen and resident of the state of New York, and, being such, is capable of presenting to the courts his petition for the enforcement by officials of their mandatory duties."¹⁴⁸

In the 1950 case of *Cash v. Bates*,¹⁴⁹ some disabled veterans who were ineligible for appointment were held to have standing to seek removal from office of veterans with disability ratings of 0% (meaning that their disabilities did not appreciably impair earning capacity). The plaintiffs had disabilities of 10% or more, but they were on an eligibility list that had expired. The court upheld the plaintiffs' standing on the ground that "as citizens and taxpayers

145. 294 N. Y. 207, 61 N. E. 2d 513 (1945).

146. 294 N. Y. at page 213, 61 N. E. 2d at page 515.

147. 277 N. Y. 271, 14 N. E. 2d 65 (1938).

148. 277 N. Y. at page 281, 14 N. E. 2d at page 69.

149. 301 N. Y. 258, 93 N. E. 2d 835 (1950).

In *McCabe v. Voorhis*, 243 N. Y. 401, 153 N. E. 849 (1926), the court held that "a resident and voter" could bring mandamus to compel the board of elections to omit from a ballot a proposition for submission on referendum."

they are entitled to an opportunity to insist" upon compliance with the civil service laws.

A leading New York case is *People ex rel. Pumpyansky v. Keating*,¹⁵⁰ upholding the standing of "a resident and citizen" to challenge the validity of a license issued to a seller of newspapers for a booth on a street corner. The court said that the relator "is entitled to maintain this proceeding as a citizen," even though he "makes no claim to a special interest."

By no means all of the New York cases are as liberal as the ones here summarized,¹⁵¹ but that only shows that the barriers to standing can be largely broken down and the courts can still maintain a discretionary control over the determination of standing problems. Probably the litigation over problems of standing is less in New York than it is in the federal courts.

Many of the New Jersey cases similarly allow standing to citizens and taxpayers. In 1879 the court upheld the standing of a citizen and taxpayer to require an officer to show him letters upon which saloon licenses were issued.¹⁵² The court reasoned that the right of examination depended upon the right to bring an action, and that "an inhabitant and taxpayer" could litigate. The court specifically met the fear of flooding the courts: "The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even in successful litigation, and the discretion of the court, have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks."¹⁵³

Recent New Jersey law is shown by the *Doremus* case,¹⁵⁴ which later went to the United States Supreme Court. A citizen and taxpayer challenged the requirement of Bible reading in the public schools. The New Jersey court considered the merits even though

150. 168 N. Y. 390, 61 N. E. 637 (1901).

151. For instance, in *Bull v. Stichman*, 273 App. Div. 311, 78 N. Y. S. 2d 279, affirmed without opinion 298 N. Y. 516, 80 N. E. 2d 661 (1948), a "citizen and taxpayer" was held to have no standing to challenge the unconstitutionality of a public expenditure.

152. *Ferry v. Williams*, 41 N. J. L. 332 (1879).

Accord: *Botts v. Wurts*, 63 N. J. L. 289, 43 Atl. 744 (1899); *Gimbel v. Peabody*, 114 N. J. L. 574, 178 Atl. 62 (1935) (citizen and taxpayer may get review of township's establishment of a greyhound track); *Stroud v. Consumers' Water Co.*, 56 N. J. L. 422, 28 Atl. 578 (1894) (payer of poll tax may challenge ordinance authorizing purchase of water works). In *Simmons v. Mayor of Wenonah*, 6 N. J. Misc. 902, 143 Atl. 73 (1928) one who had no real property and had not yet paid personal property taxes was held to have no standing as a taxpayer.

153. 41 N. J. L. at page 339.

154. *Doremus v. Board of Education*, 5 N. J. 435, 75 A. 2d 880 (1950), appeal dismissed for lack of standing 342 U. S. 429 (1952).

it acknowledged that no showing had been made that the requirement added to costs of the school.

In Massachusetts private citizens are allowed to challenge regulations issued by the commissioner of public welfare. In *Nichols v. Commissioner*,¹⁵⁵ the petitioners were "private citizens" who were seeking "the vindication of a public right which, in this instance, is the due execution of the laws of this Commonwealth. . . . They neither have nor represent any private interest."¹⁵⁶ The court upheld their standing, citing many Massachusetts cases.

In *Pettengell v. Alcoholic Beverages Control Commission*,¹⁵⁷ "registered voters and taxpayers" had standing to compel the commission to revoke a liquor license issued in excess of a quota.

In a 1951 Massachusetts case the plaintiffs were eleven citizens of the Commonwealth "interested in the execution of laws," seeking mandamus against state officers.¹⁵⁸ The court reviewed the Massachusetts cases holding that where no private interest is asserted a citizen has standing to assert a question of "public right." The principle, the court said, was "fully established."

In 1888 the Minnesota court declared that "the great weight of American authority is that where the object is, as in these cases, to enforce a public duty . . . any private person may move to enforce it."¹⁵⁹ The plaintiffs were described as "freeholders, taxpayers, and legal voters," and they were held to have standing to raise the question whether officers should be required to move their offices from one village to another. In 1950 the same court with the greatest of ease held that "a taxpayer may . . . maintain an action . . . to restrain illegal action on the part of public officials," without showing a special interest.¹⁶⁰

In 1954 members of a bar association challenged the validity of the Minnesota governor's veto of a legislative enactment increasing

155. 311 Mass. 125, 40 N. E. 2d 275 (1942).

156. 311 Mass. at page 130, 40 N. E. 2d at page 278.

157. 295 Mass. 473, 4 N. E. 2d 324 (1936), relying upon *Brooks v. Secretary of the Commonwealth*, 257 Mass. 91, 153 N. E. 322 (1926).

158. 327 Mass. 310, 98 N. E. 2d 621 (1951).

But compare *Finlay v. City of Boston*, 196 Mass. 267, 82 N. E. 5 (1907); *Chandler v. Railroad Commissioners*, 141 Mass. 208, 5 N. E. 509 (1886); *McGlue v. Essex County Commissioners*, 225 Mass. 59, 113 N. E. 742 (1916); *Mullholland v. State Racing Commission*, 295 Mass. 286, 3 N. E. 2d 773 (1936).

The Massachusetts court commonly assumes standing without discussion. *Amory v. Assessors of Boston*, 306 Mass. 354, 28 N. E. 2d 436 (1940); *Allydon Realty Corp. v. Holyoke Housing Authority*, 304 Mass. 288, 23 N. E. 2d 665 (1939).

159. *Currie v. Weld*, 39 Minn. 426, 40 N. W. 561 (1888).

160. *Phillips v. Brandt*, 231 Minn. 423, 43 N. W. 2d 285 (1950).

the salaries of judges.¹⁶¹ The Minnesota court considered the merits of the constitutional issue without mentioning the question whether the plaintiffs had standing to raise the issue. The action is in line with many cases in other states in which the courts adverted to the standing question. One may surmise that the cases are numerous in all jurisdictions in which the court does not bother to state who are the parties plaintiff, thereby concealing what might otherwise be a significant problem of standing.¹⁶²

South Dakota follows a practice like that of Minnesota, having held as early as 1896 that "any taxpayer or elector may apply for and obtain a writ of mandamus, in a proper case, to enforce the performance of such public duty."¹⁶³ One described as a "citizen of the United States and a resident, freeholder, taxpayer and elector" was held to have standing to compel a board to submit to voters a question of location of the county seat. In 1952 the South Dakota court, holding that residents, citizens, and taxpayers could sue to cancel a public grant of an easement, declared: "It is settled law of this state that a taxpayer or elector having no special interest may institute an action to protect a public right."¹⁶⁴ The cases in Nebraska¹⁶⁵ and New Mexico¹⁶⁶ are substantially similar. In California¹⁶⁷ "a citizen of the United States and a resident and taxpayer" of a city and county, who had filed an application for appointment as a notary public, had standing in a mandate proceeding to force the governor to exercise his discretion to appoint notaries public for the city and county.

The various state cases reviewed in this section contrast sharply with the attitude of the federal courts. Indeed, the experience in

161. *State ex rel. Gardner v. Holm*, 62 N. W. 2d 52 (Minn. 1954).

162. The Supreme Court in *Adler v. Board of Education*, 342 U. S. 485 (1952) failed to state who the plaintiffs were even though a dissenting justice asserted that the plaintiffs lacked standing.

163. *Adkins v. Lien*, 9 S. D. 297, 68 N. W. 748 (1896).

164. *Lien v. Northwestern Engineering Co.*, 74 S. D. 476, 54 N. W. 2d 472 (1952).

165. *Rein v. Johnson*, 149 Neb. 67, 30 N. W. 2d 548 (1947), certiorari denied 335 U. S. 814 (1948) (resident taxpayers may enjoin expenditure without showing special interest peculiar to themselves); *Lynch v. City of Omaha*, 153 Neb. 147, 43 N. W. 2d 589 (1950) (resident taxpayer, pursuant to statutory authorization, may defend suit on behalf of city); *Nobel v. City of Lincoln*, 153 Neb. 79, 43 N. W. 2d 578 (1950) (taxpayers may force city council to proceed with construction of municipal auditorium and restrain holding of election).

166. *Zellers v. Huff*, 55 N. M. 501, 236 P. 2d 949 (1951) (citizens, taxpayers, and parents of schoolchildren may enjoin teaching of religion in public schools); *Miller v. Cooper*, 56 N. M. 355, 244 P. 2d 420 (1952) (taxpayers alone have standing to enjoin teaching of religion, court assuming standing on authority of *Zellers* case).

167. *Hollman v. Warren*, 32 Cal. 2d 351, 196 P. 2d 562 (1948).

these state courts raises the question—and even goes far toward answering the question—whether the federal courts have too readily assumed that opening the judicial doors to those who are earnestly trying to prevent illegal official action is dangerous to the integrity of the judicial process. If any special evils flow from the extreme liberality of these state courts on the problem of standing, the evils are not apparent in the reported opinions. The courts are not flooded by cases brought by officious intermeddlers, and no sign appears that the adversary system has been either destroyed or impaired.

§ 11. COMPETITORS

Should one whose only interest in administrative action is avoiding new or increased competition or reducing existing competition have standing to challenge the administrative action?

The answer to this question is generally yes in both the federal courts and the state courts, but the answer is not wholly free from unnecessary complication.

The *Sanders* decision is clear and authoritative.¹⁶⁸ An existing radio station, though lacking a legal right, has standing to challenge an order of the FCC granting a certificate to a new competitor station. The result does not rest upon peculiarities of competition in radio broadcasting, for the Court emphasized that “the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads . . .”¹⁶⁹ Therefore the *Sanders* case, decided by a unanimous Supreme Court and further refined by two later Supreme Court decisions,¹⁷⁰ is clear and unequivocal in holding that when legislation has not changed the basic system of free competition, a competitor does have standing to challenge administrative action which has an adverse effect only in that new competition is authorized. Since the prevailing policy of the law in absence of legislation favors competition, the holding is a very strong one.

The *Sanders* case was decided under a statutory provision allowing review upon application of a “person aggrieved or whose interests are adversely affected.” Since the Administration Proce-

168. *FCC v. Sanders Brothers Radio Station*, 309 U. S. 470 (1940), further developed by *Scripps-Howard Radio v. FCC*, 316 U. S. 4 (1942), and *FCC v. NBC (KOA)*, 319 U. S. 239 (1943). All three cases are discussed above at pages 363-368.

169. 309 U. S. at page 474.

170. 3 *Scripps-Howard Radio v. FCC*, 316 U. S. 4 (1942), and *FCC v. NBC (KOA)*, 319 U. S. 239 (1943).

dure Act allows judicial review upon application of "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute," the *Sanders* doctrine is applicable to all administrative action subject to section 10(a) of the APA, and it should be persuasive authority in the state courts whenever a statute provides for review at the instance of one who is "aggrieved or adversely affected."

In absence of such a statutory provision, a competitor may lack standing under cases such as *Tennessee Electric Power Co. v. TVA*,¹⁷¹ which denied standing to eighteen power companies to challenge the constitutionality of new competition through the TVA. But, as we have seen above,¹⁷² the reasoning of the Court in the *Tennessee Electric* case is of questionable soundness and will not necessarily be followed.¹⁷³ Even if it is followed, the exception from the usual law that a competitor has standing is only a small one, for the APA applies to nearly all reviewable administrative action of federal agencies.

A rather significant case is *National Coal Ass'n v. Federal Power Commission*,¹⁷⁴ holding a grant of a certificate of convenience and necessity under the Natural Gas Act to construct a pipeline to Oak Ridge, Tennessee, could be challenged by (1) the National Coal Association, a trade association of bituminous coal mine owners and operators, some of whom were said to sell to the Oak Ridge atomic energy plant, (2) the United Mine Workers of America, a labor union of coal miners, including many allegedly employed in mines supplying coal to the atomic energy plant, and (3) the Railway Labor Executives Association, whose membership is composed of the chief executive officers of unions whose members were allegedly employed by railroads competing with the pipelines as car-

171. 306 U. S. 118 (1937).

172. See pages 360-361, *supra*.

173. Whether the *Tennessee Electric* case can be reconciled with *Frost v. Corporation Commission*, 278 U. S. 515 (1929) is doubtful. One who had been licensed to operate a cotton gin was held to have standing to challenge the validity of a grant of a license to a competitor.

In *Alabama Power Co. v. Ickes*, 302 U. S. 464, 484-485 (1938), the Court made a curious explanation of the *Frost* case: "The difference between the *Frost* case and this is fundamental; for the competition contemplated there was unlawful while that of the municipalities contemplated here is entirely lawful." Yet the court earlier in the *Alabama Power Co.* opinion had stated the issue: "The ultimate question which, therefore, emerges is one of great breadth. Can anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan?" 302 U. S. at page 480. The *Frost* holding may be based on better wisdom than either the *Tennessee Electric* or the *Alabama Power* holding.

174. 191 F. 2d 462 (D.C. Cir. 1951).

riers of fuel. The statute provided for judicial review at the instance of "any party . . . aggrieved . . ." The court recognized that the standing of the petitioners rested upon injury to them from displacement of coal by natural gas, loss of markets to the coal companies, unemployment of miners and of railroad employees. The court first upheld the standing of the National Coal Association and then reasoned: "We see no reason, and none is suggested to us, for considering the interest of employees in retention of their employment in the competing companies as any less substantial than the interest of competitors in retaining their markets or the prospect of loss of employment any less direct and immediate than the loss of markets with which the competing companies are threatened."¹⁷⁵ The court relied heavily upon the "comprehensive discussion" by Judge Frank in the *Associated Industries* case.¹⁷⁶

Another strong case upholding standing of competitors is *American President Lines v. Federal Maritime Board*,¹⁷⁷ holding that two competitors of a company to which the Board had awarded subsidies could challenge the legality of the Board's action. The opinion rests heavily upon the "adversely affected" provision of the Administrative Procedure Act. The court specifically and correctly said that "The doctrine of *Alabama Power Co. v. Ickes*. . . is not applicable to proceedings under the Administrative Procedure Act."¹⁷⁸

In *Atlantic Freight Lines v. Summerfield*,¹⁷⁹ the court held that a motor carrier competing with the Baltimore & Ohio Railroad had no standing to enjoin the Postmaster General from issuing a stamp commemorating the 125th anniversary of B. & O. incorporation. One can hardly quarrel with the result, but one may wonder whether the holding would be more soundly based if the ground for the decision had been unreviewability of the Postmaster General's discretion instead of lack of standing.

Food and Drug Administration cases raise in aggravated form the problem of competitors' interests. The Act permits any person "adversely affected" to get review. A manufacturer of corn syrup had standing to challenge an order fixing a definition or a standard of identity of sweetened condensed milk so as to forbid use of corn syrup; the court thought the manufacturer could uphold the inter-

175. 191 F. 2d at page 464.

176. *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir. 1943).

177. 112 F. Supp. 346 (D.C. 1953).

178. *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938).

179. 204 F. 2d 64 (D.C. Cir. 1953), *cert. denied* 346 U. S. 828 (1953).

est of consumers.¹⁸⁰ Butter producers had standing to contest an order fixing a definition and standard of identity for oleomargarine, although the court so held "with some misgivings."¹⁸¹ But producers of cane sugar had no standing to object to an order permitting, without disclosure on the label, the use of dextrose and corn syrup in canned fruits; the injury to cane sugar producers resulted from a prior requirement of disclosure on the label of use of dextrose and corn syrup.¹⁸² A producer of lecithin had no standing to challenge an order permitting processors of cacao products to use lecithin without stating on the label that lecithin was used; the court pointed out that the order did not prohibit disclosing on the label the use of lecithin.¹⁸³ Undercutting all these cases, however, is a holding that a consumer as such has standing to challenge an order permitting use without disclosure on the label of synthetic as well as natural sources of vitamin A in oleomargarine; the opinion is so well grounded that problems of standing of competitors ought no longer to arise in this field.¹⁸⁴

180. *A. E. Staley Mfg. Co. v. Secretary of Agriculture*, 120 F. 2d 258 (7th Cir. 1941).

181. *Land O'Lakes Creameries v. McNutt*, 132 F. 2d 653 (8th Cir. 1943).

182. *United States Cane Sugar Refiners' Ass'n v. McNutt*, 138 F. 2d 116 (2d Cir. 1943).

183. *American Lecithin Co. v. McNutt*, 155 F. 2d 784 (2d Cir. 1946), cert. denied 329 U. S. 762 (1946).

The Court of Appeals for the District of Columbia held in 1948 that a coal mining company leasing coal lands from the federal government had no standing to enjoin the Secretary of the Interior from leasing lands to a competitor. *Sheridan-Wyoming Coal Co. v. Krug*, 83 App. D. C. 162, 168 F. 2d 557 (1948). Early in 1949 the court reconsidered the case and held that the company had standing because its lease from the government in legal contemplation (though not in specific terms) embodied a regulation issued by the Secretary and published in the Federal Register to the effect that the Secretary would lease more land "only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met." *Sheridan-Wyoming Coal Co. v. Krug*, 84 App. D. C. 172, 172 F. 2d 282 (1949). The Supreme Court reversed on the merits, without making a clear decision on the issue of standing. *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U. S. 621 (1950). The statute requiring the government as a purchaser to follow a system of competitive bidding in some circumstances is designed for the government's benefit and not for the protection of sellers and therefore is held to confer no rights on bidders, who accordingly have no standing to challenge violations of the statute. *Walter P. Villere Co. v. Blinn*, 156 F. 2d 914 (5th Cir. 1946); *Fulton Iron Co. v. Larson*, 84 App. D. C. 39, 171 F. 2d 994 (1948), certiorari denied 336 U. S. 903 (1949).

Taxpayers and citizens of communities near Muscle Shoals have no standing to maintain a declaratory judgment proceeding to compel the TVA to follow a statutory provision that "The Corporation shall maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama." *Frahn v. TVA*, 41 F. Supp. 83 (N.D. Ala. 1941).

184. *Reade v. Ewing*, 205 F. 2d 630 (2d Cir. 1953).

Standing to challenge orders of the Interstate Commerce Commission is affected by the fundamentals of the Interstate Commerce Act, including especially the idea that Congress has moved away from the basic principle of enforced competition. If a competitor has standing in a field in which that basic principle still governs, such as radio broadcasting, then a competitor affected by regulation of the ICC has an even stronger case for standing. The specific provision coming most into play is section 1(20) of the Interstate Commerce Act, providing that any unlawful construction, operation, or abandonment may be enjoined "at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest." The Supreme Court applies this provision in cases challenging the Commission's grant of certificates.¹⁸⁵ Other features of the statutes have only oblique bearing on issues of standing.¹⁸⁶

In none of the Supreme Court decisions¹⁸⁷ denying standing

185. *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382 (1932).

186. In some measure, congressional policies may be gleaned from provisions not dealing with standing to obtain review. For instance, § 13 (1) of the Interstate Commerce Act provides that "any person" may petition the Commission and that unless the carrier satisfies the complaint "it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." 41 Stat. 484 (1920), 49 U. S. C. § 13(1) (1946). This mandatory jurisdiction shows a basic policy favoring consideration of any and all interests asserted, and such a policy may bear at least indirectly on problems of standing to obtain review. Nevertheless, the Supreme Court's opinions do not seem to reason in this manner.

The Motor Carrier Act differs in providing that "the Commission may investigate," and that "Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint." 49 Stat. 546 (1935), 49 U. S. C. A. § 304(c).

187. *L. Singer & Sons v. Union Pac. R. R.*, 311 U. S. 295 (1940); *Moffatt Tunnel League v. United States*, 289 U. S. 113 (1933); *Pittsburgh & W. Va. Ry. v. United States*, 281 U. S. 479 (1930); *Edward Hines Trustees v. United States*, 263 U. S. 143 (1923); cf. *Home Furniture v. United States*, 271 U. S. 456 (1926).

The ICC cases, except the Singer case, are summarized in Fort, *Who May Maintain Suits to Set Aside Orders of the Interstate Commerce Commission*, 12 I. C. C. P. J. 792 (1945). See also Goldman, *Standing to Challenge Orders of the I. C. C.*, 9 *Geo. Wash. L. Rev.* 648 (1941).

Under a similar provision of the Civil Aeronautics Act, carriers customarily have standing to object to illegal competition. *Eastern Airlines v. CAB*, 185 F. 2d 426 (D.C. Cir. 1950), dismissed as moot 341 U. S. 901 (1951); *Alaska Air Transport v. Alaska Airplane Charter Co.*, 72 F. Supp. 609 (D. Alaska 1947); *Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd.*, 73 F. Supp. 68 (D. Hawaii 1947), reversed on other grounds, 174 F. 2d 63 (9th Cir. 1949). This is true even where a carrier operates without a certificate of convenience and necessity, but with letters of registration. *Flying Tiger Line v. Atchison, T. & S. F. Ry.*, 75 F. Supp. 188 (S.D. Calif. 1947). But one who was lawfully operating as an irregular air carrier was held to have "no legal right" because it operated "under a revocable license in which it has no property interest," and therefore was without standing to object to unlawful

under the Interstate Commerce Act was the petitioner a carrier. Even a mere competitive interest of a carrier is sufficient for enforcing the Act or for challenging action of the Commission. In the *Chicago Junction Case*,¹⁸⁸ the Commission had approved acquisition by the New York Central of control of certain terminal railroads, and carriers which had previously competed on equal terms with the Central for traffic originating on the terminal railroads sought to challenge the order. The Supreme Court held (6-3) that the plaintiffs had the necessary "legal interest," pointing out that much traffic had been diverted from plaintiffs' lines to those of the New York Central; that the annual loss in net earnings would be about ten million dollars; and that if "a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here."¹⁸⁹ Even though the philosophy that an adverse financial effect upon a competitive interest is enough to confer standing seems to be the precise antithesis of that of such cases as *Alabama Power* and *Tennessee Electric Power*, the holding may be fitted into the law declared in those cases by saying either that the Act gave the railroad competitors a substantive right to be free from illegal competition or that the Act made a mere business interest of a carrier sufficient for standing, and that no comparable statutory provision conferred standing upon the power companies.¹⁹⁰ Probably the best explanation for such a position was made by Mr. Justice Brandeis in *Texas & Pac. Ry. v. Gulf, C. & S. F. Ry.*,¹⁹¹ an opinion not discussing the question of standing. Referring to the Transportation Act of 1920, he said: "It is recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall on the public;

competition. *Trans-Pacific Airlines, Ltd. v. Inter-Island Steam Nav. Co.*, 75 F. Supp. 690 (D. Hawaii 1948). This case seems inconsistent with the other airline cases and with the Supreme Court's ICC cases. The court may have been getting beyond the realm intended for judicial judgment in asserting: "I fail to see where an economic battle between a lawful irregular air carrier and an alleged unlawful irregular air carrier if allowed to continue would materially change the air transportation situation in Hawaii." 75 F. Supp. at 694.

188. 264 U. S. 258 (1924).

189. 264 U. S. at page 267.

190. The Court said that the Transportation Act of 1920 "prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company." *Ibid.*

191. 270 U. S. 266 (1926).

that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."¹⁹²

This basic policy should be a sufficient answer to the three dissenting justices in the *Chicago Junction Case*, who argued with considerable force that nothing in the Act conferred upon the complainants a right of action, that the Act had merely given the Commission power to determine whether such an acquisition would be in the public interest, that under the Act "it is the public, not private, interest which is to be considered,"¹⁹³ and that the complainants had no standing to vindicate the rights of the public.

Once this Brandeis analysis is accepted, other decisions recognizing the standing of carriers follow easily. Thus, *Western Pac. C. R. Co. v. Southern Pac. Co.*¹⁹⁴ held that the Southern Pacific as a competitor had standing to enjoin the Western Pacific from constructing an extension before the ICC had granted approval. The Court said: "It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation."¹⁹⁵ This is the equivalent of a statement that the complainant need not possess "a definite legal right" and therefore contradicts the Court's language in the *Tennessee Electric Power* case. Yet the contradiction is one of language, not of substance, for nothing should hinge on the question whether the statute is regarded as conferring a legal right or is regarded as conferring standing upon one who has no legal right but has a financial interest.

In *Claiborne-Annapolis Ferry Co. v. United States*,¹⁹⁶ the view of the *Western Pacific* case was extended to permit a ferry company to challenge the Commission's approval of a railroad's application to operate another ferry nearby; the Court reasoned that if a competitor could challenge operation without a certificate a com-

192. 270 U. S. at page 277.

193. 264 U. S. 258, 271 (1924). As if in anticipation of the *Sanders* doctrine, which came sixteen years later, Mr. Justice Sutherland argued: "The complainants have no standing to vindicate the rights of the public, but only to protect and enforce their own rights." 264 U. S. at page 271-72.

194. 284 U. S. 47 (1931).

195. 284 U. S. at pages 51-52. Mr. Justice Stone, in dissent in *L. Singer & Sons v. Union Pac. R. Co.*, 311 U. S. 295, 314 (1940), cited the *Western Pacific* case and declared that a competing carrier may have standing if its "welfare, although not its legal right, is adversely affected."

196. 285 U. S. 382 (1932).

petitor could challenge operation under a certificate improperly granted.¹⁹⁷

When the competitive interest is that of a shipper instead of that of a carrier, standing is much less likely to be upheld. An early Supreme Court case denying standing was *Edward Hines Trustees v. United States*, holding that shippers had no standing to challenge an ICC order relieving their competitors of certain penalty charges.¹⁹⁸ Much more troublesome was *Alexander Sprunt & Son, Inc. v. United States*.¹⁹⁹ From interior points to Gulf ports, the export or ship-side rates on cotton were 3 or 3.5 cents higher than the city-delivery rates. Other shippers complained that the city-delivery rates were applied to Sprunt and other owners of warehouses and compresses at the wharves even though the shipments were intended for export. The Commission, without inquiring into reasonableness of the rates, ordered a 1-cent increase in city-delivery rates and a 2-cent reduction in the ship-side rates. The Court agreed that the order "worsened the economic position" of Sprunt who was therefore entitled to intervene before the Commission, but held that an independent suit could be maintained by a shipper "only where a right of his own is alleged to have been violated by the order. . . . The appellants [Sprunt] have no independent right which is violated by the order. . . ." ²⁰⁰ The holding is not that a shipper may not challenge an order increasing his own rate or decreasing the rate of his competitors; the holding is that the shipper could successfully challenge the order only by showing that the rate was either unreasonable or unjustly discriminatory.

197. That the cases upholding the standing of carriers, all decided by the old Court, are not thrown overboard by the new Court is proved by *Alton R. Co. v. United States*, 315 U. S. 15 (1942), which upheld the standing of competing railroads to challenge an order granting a certificate to a motor carrier. Mr. Justice Douglas declared for a unanimous Court: "They clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of Fleming for automobile traffic in territory served by him. . . . They are members of the national transportation system which that Act was designed to coordinate. . . . Hence they are parties in interest. . . ." 315 U. S. at page 19.

198. 263 U. S. 143 (1923). The Court said: "Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges." 263 U. S. at page 148.

Cases earlier than this did not seem to be concerned about the question of standing. See, e.g., *ICC v. United States ex rel. Humboldt S. Co.*, 224 U. S. 474 (1912); *United States ex rel. Louisville Cement Co. v. ICC*, 246 U. S. 638 (1918).

199. 281 U. S. 249 (1930).

200. 281 U. S. at page 255. In *Mitchell v. United States*, 313 U. S. 80 (1941), a Negro was held to have standing to challenge an order permitting discrimination against colored citizens even though he did not show that he intended to make another railroad journey.

An especially revealing case in which the Court divided six to three is *L. Singer & Sons v. Union Pacific R. Co.*,²⁰¹ holding that neither a city engaged in constructing new market facilities at a cost of \$500,000, nor the private operators of a market, had standing to secure an injunction against unlawful construction of a rail extension to serve a rival market. The Act provided for issuance of an injunction "at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest." Five justices, in a separate concurring opinion, reasoned: "A city . . . would naturally turn to its state commission to assert its interest. . . . It is reading § 1(20) without illumination of the scheme and purposes of the Transportation Act to expand the categories of public agencies explicitly named by Congress. . . . To do so would disregard recognition of a state utility commission as the special repository of all the interests of a state in this particular field."²⁰² Having disposed of the city's claim, the five justices then announced that "a private and more limited sufferer" necessarily lacked standing. "To entrust the vindication of this public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress."²⁰³

Seldom does one encounter Supreme Court reasoning which so readily crumbles upon close analysis. The reliance is almost entirely upon "the scheme of enforcement that Congress has devised." A provision conferring standing upon state commissions is transformed into a provision giving state commissions exclusive power to represent "all the interests of a state." Yet the Act confers standing upon state commissions and adds the words "or any party in interest." Representation of a general public interest by a state commission is not incompatible with the direct assertion of proprietary interests by a city owning affected property. To allow a city to protect its own proprietary interest would not "expand the categories of public agencies explicitly named by Congress" but

201. 311 U. S. 295 (1940), 13 So. Calif. L. Rev. 450 (1940).

202. 311 U. S. at pages 305-06.

203. A seemingly incidental argument was that standing in the city and in the market "would put upon the district courts the task of drawing fine lines in determining when a private claim is so special that it may be set apart from the general public interest and give the claimant power to litigate a public controversy." 311 U. S. at page 307. But whether the view of the majority or that of the minority of the Court prevails, such a line must be drawn somewhere. The question is whether the line should be between the competing market and the competing carrier, or whether it should be between the competing market and one who has no interest other than common concern for obedience to law.

would merely avoid reading out of the statute the words "or any party in interest." The statement that standing of a private litigant would "impinge on the responsibility of the public authorities" is unsupported, does not carry conviction, and contradicts the concurring justices' express recognition that a competing carrier adversely affected has standing. The opinion suggests no reason for the view that a suit by a competing market would any more "impinge on the responsibility of the public authorities" than a suit by a competing carrier.

Mr. Justice Stone for the three dissenters pointed out that the phrase "parties in interest" is not meaningless; that petitioners had an interest other than common concern for obedience to law; that the statute plainly indicates that parties in interest may be others than the public bodies named; and that the statute gives no warrant for saying that a railroad competitor may bring suit to enjoin an unauthorized extension but that the market competitor "can only ask some public body to bring it."

The minority view is exceedingly well supported, although a line could reasonably be drawn between a competing carrier and a competing market, on the ground that harm to a carrier may mean harm to the public,²⁰⁴ but that harm to an unregulated market does not to the same extent mean harm to the public. Even so, the minority position may still be the preferable interpretation of congressional intent. Congress clearly expressed its choice to permit not only public authorities but also "any party in interest" to sue to enjoin an unauthorized extension. The paramount purpose was probably the simple one of wanting to assure enforcement; one way to get the job done, despite possible inadequacy of public authorities, was to allow "any party in interest" to institute a suit for an injunction. If the purpose was to assure enforcement, and if, as Mr. Justice Stone pointed out, "it stands conceded that the proposed extension . . . is unauthorized and unlawful," then the conclusion is easy that anyone with an economic interest should have standing to institute a proceeding to enforce the Act.

State courts usually uphold the standing of competitors to challenge administrative action that adversely affects their competitive interests. A Missouri case is representative.²⁰⁵ The public service commission authorized sale of electrical properties to a cooperative, and public utility competitors challenged the action. The statute

204. See *Texas & Pac. R. Co. v. Gulf, C. & S. F. Ry.*, 270 U. S. 266, 277 (1926).

205. *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 352 Mo. 905, 180 S. W. 2d 40 (1944).

provided for review of an order at the instance of "any corporation or person or public utility interested therein." In upholding the standing of the competitors the court said that "pecuniary interest" was unnecessary, and that "any local partisan interest . . . such as a customer, representative of the public in the locality . . . or as a competitor . . . is surely sufficient."

In other states, competitors are commonly allowed to challenge grants of operating certificates.²⁰⁶ Even when a statute limited review to "any party to a cause before the Commission," the Michigan court has held that a competitor who was not given notice of the administrative proceeding and therefore was not a party has standing to challenge the grant of a permit.²⁰⁷ A seller of liquor is held to have standing to challenge grant of a license which will result in increased competition.²⁰⁸ But competitors of a small loan company were denied standing when they were not objecting to grant of a license but to attachment to the grant of a condition that did not directly affect them.²⁰⁹ And a milk dealer who was not permitted to become a party to the administrative proceeding leading to grant of a license to a competitor was denied standing because the statute allowed review only upon petition of "an aggrieved party."²¹⁰

§ 12. CONSUMERS, RATEPAYERS, TENANTS

When prices, rates, or rents are administratively fixed, or other similar regulatory action is taken, do the purchasers, ratepayers, shippers, passengers, or tenants have standing to challenge an order?

The Supreme Court somewhat surprisingly gave a negative answer to this question in *Atlanta v. Ickes*,²¹¹ in which a city that

206. *Kirkby v. Michigan Public Service Commission*, 320 Mich. 608, 32 N. W. 2d 1 (1948) (upholding standing of organization of motor carriers, statute providing for challenge by "any interested party"); *Kosciudko County Rural E. M. Corp. v. Public Service Commission*, 225 Ind. 666, 77 N. E. 2d 572 (1948) (competitor allowed to challenge under statute "any person feeling aggrieved"); *Corporation Commission v. Southern Pac. Co.*, 67 Ariz. 87, 191 P. 2d 719 (1948) (railroad may challenge grant of certificate to motor carrier under "any party in interest" statute).

207. *Koss v. Michigan Public Service Commission*, 333 Mich. 395, 53 N. W. 2d 491 (1952).

208. *Saltzman v. O'Connell*, 282 App. Div. 732, 122 N. Y. S. 2d 409 (1953); *France v. O'Connell*, 124 N. Y. S. 2d 771, affirmed 126 N. Y. S. 2d 207 (1954).

209. *Personal Finance Co. v. Lyon*, 203 Misc. 710, 121 N. Y. S. 2d 72 (1953).

210. *Application of Dairymen's League Co-operative Ass'n*, 282 App. Div. 69, 121 N. Y. S. 2d 857 (1953), appeal dismissed 306 N. Y. 595, 115 N. E. 2d 825.

211. 308 U. S. 517 (1939).

consumed a substantial amount of coal was denied an injunction and a declaratory judgment against an order fixing minimum prices for coal. The lower court had decided against the city on the merits. The Supreme Court's per curiam opinion, except for citations, was all in one sentence: "The judgment is affirmed on the ground that the appellant has no standing to maintain this suit." The holding is reasonably clear that a consumer which is required by a minimum price order to pay an increased price for the coal it purchases has no standing to challenge the legality of the order, and one justice has more recently cited the case for the proposition that "This Court has held that a consumer has no standing to challenge a minimum price order like the one before us."²¹² Not one of the four cases the Court cited in the *Atlanta* case supports the result.²¹³

For three reasons, the *Atlanta* case probably is not now law. The Administrative Procedure Act would now apply; under section 10(a) any person "adversely affected" is entitled to review. The argument that the purchaser who has to pay a higher price by virtue of the order is not adversely affected is hardly tenable. The second reason is that the *Atlanta* case is not supported by its citations and that the thorough consideration of the problem came in the *Associated Industries* case,²¹⁴ which held the opposite on the basis of the *Sanders*²¹⁵ and other FCC cases decided since the *Atlanta* case.

A third reason for believing that the *Atlanta* case is no longer law is the Supreme Court's holding in the 1953 case of *Chapman*

212. Frankfurter, J., dissenting in *Stark v. Wickard*, 321 U. S. 288, 319 (1944).

213. *Tennessee Electric Power Co. v. TVA*, 306 U. S. 118, 142 (1939), and *Alabama Power Co. v. Ickes*, 302 U. S. 464, 479-480 (1938), held that competitors may not challenge the validity of the TVA or the validity of federal loans and grants to municipal corporations. *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240-241 (1937), held the federal declaratory judgments act constitutional. *Alexander Sprunt & Son v. United States*, 281 U. S. 249, 255-256 (1930), said that the complaining shipper had no standing but still passed upon the merits to the extent that the Court held that the shipper "had no independent right which is violated." The dictum pages in the citations in this note are those cited by the Court; in each instance the language falls short of supporting the conclusion that a consumer has no standing to challenge a minimum price order.

214. *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir. 1943), dismissed as moot 320 U. S. 707 (1943), discussed fully above at pages 367-369.

This decision may well be an instance of the rare phenomenon of a lower court's decision superseding a recent Supreme Court decision. This may be true even in spite of the language of the lower court in distinguishing the *Atlanta* case.

215. *FCC v. Sanders Brothers*, 309 U. S. 470 (1940), discussed fully above at pages 363-365.

v. Federal Power Commission,²¹⁶ upholding the standing of a cooperative representing consumers even though the interest of the consumers was much less direct than that of the city in the *Atlanta* case. The challenged order granted a license to the Virginia Electric and Power Company to construct a dam. The cooperative and the Secretary of the Interior asserted that Congress had provided that the dam could be developed only by public authority under the Secretary, not by a licensed private company. The cooperative, which was engaged in supplying electricity to its members, had an interest in the question only to the extent that a statute gave it a preference in the sale of power developed through public authority. The court of appeals denied the standing of both the Secretary and the cooperative.²¹⁷ The Supreme Court upheld the standing of both, but because of "differences of view" wrote no opinion on the issue of standing.²¹⁸

A tenant's standing to get review of a certificate authorizing an eviction was upheld by the Supreme Court in *Parker v. Fleming*²¹⁹ even though the literal language of the statute required a denial of standing. The statute provided that "any person who is aggrieved by the denial . . . of his protest" may get review, but also provided that only a person "subject to any provision of such . . . order" may make a protest. The Administrator dismissed the protest for lack of standing, and the Emergency Court of Appeals affirmed, and the Supreme Court reversed six to three. The Court acknowledged that OPA Procedural Regulation No. 1 had deemed a person "subject to" a regulation or order only when the regulation or order "prohibits or requires action by him," and the Emergency Court of Appeals had upheld that interpretation. But later the Emergency Court had held that meat packers were "subject to" an order denying a subsidy and accordingly could protest. The Court remarked that "If these tenants cannot 'protest' this order issued under these regulations, no one can. . . ." The Court significantly rejected the narrow analytical materials showing congressional intent, in favor of the apparent policy consideration that one so immediately affected as a tenant by an eviction should have standing to challenge the

216. 345 U. S. 153 (1953).

217. United States ex rel. Chapman v. Federal Power Commission, 191 F. 2d 796 (4th Cir. 1951).

218. 345 U. S. at page 156.

Both the Secretary and the cooperative had been allowed to intervene before the Commission. The statute provided review upon the petition of "any party . . . aggrieved . . ."

219. 329 U. S. 531 (1947).

order. The Emergency Court later held that a tenant may contest an order retroactively raising a rent ceiling.²²⁰

In *Henderson v. United States*,²²¹ the Court held that a colored passenger who had been subjected to segregation by a railroad and who was free to travel again on the railroad had standing to challenge an order of the Interstate Commerce Commission.

After a court of appeals had specifically held that patrons of a street car and bus company had standing to challenge an order permitting broadcast of music and commercials in the vehicles, where the statute provided for review on petition of "any person . . . affected," the Supreme Court passed upon the merits without even mentioning the standing issue.²²² The standing of users of parcel post service to challenge increased rates has been upheld by a lower court.²²³

Case law on standing of consumers to challenge orders fixing public utility rates is scanty. The government, as a consumer of electricity, has been held²²⁴ to have standing to challenge a District of Columbia rate order, under a statute permitting challenge by "any public utility, or any other person or corporation affected by any final order. . . ." The court's simple explanation seems wholly adequate—that giving words their ordinary meaning, a consumer is a person affected. The cases denying standing of consumers to challenge maximum rate orders generally rest upon special considerations.²²⁵

Two recent cases denying standing of patrons rest upon the *Singer* case.²²⁶ A user of and tollpayer of a toll bridge was denied

220. *Pitts v. Woods*, 169 F. 2d 662 (Em. App. 1948).

221. 339 U. S. 816 (1950), relying upon *Mitchell v. United States*, 313 U. S. 80 (1941).

222. *Pollak v. Public Utilities Commission*, 191 F. 2d 450 (D.C. Cir. 1951), *reversed on merits*, *Public Utilities Commission v. Pollak*, 343 U. S. 451 (1952).

223. *Doehla Greeting Cards, Inc. v. Summerfield*, 116 F. Supp. 68 (D.C. 1953).

224. *United States v. Public Utilities Commission*, 80 App. D. C. 227, 151 F. 2d (1945).

225. *Wright v. Central Ky. Natural Gas Co.*, 297 U. S. 537 (1936) (consumers held to have no standing to complain when city and company compromised); *City of New York v. New York Tel. Co.*, 261 U. S. 312 (1923) (city as a subscriber to telephone service denied intervention in judicial proceeding in which company challenged order of Public Service Commission); *Smith v. Illinois Bell Tel. Co.*, 270 U. S. 587 (1926) (subscribers bound by decree because commission "represents the public and especially the subscribers"); cf. *Alston Coal Co. v. FPC*, 137 F. 2d 740 (10th Cir. 1943) (coal company denied intervention in FPC proceeding investigating gas rates).

226. *L. Singer & Sons v. Union Pacific R. Co.*, 311 U. S. 295 (1940), discussed above at pages 404-405.

standing to compel disclosure of records of the toll bridge even though the statute provided that records "shall be available for the information of all persons interested."²²⁷ The holding that the plaintiff was not a person interested is an extreme one. A dentist who used a ferry from Newport News to Norfolk was held to have no standing to challenge an order permitting abandonment of the service.²²⁸

*Reade v. Ewing*²²⁹ may be a fair sample of the direction in which the law of standing is growing. A dealer in fish oils used for a natural source of vitamin A. sought review of an order of the Federal Security Administrator allowing the vitamin content of oleomargarine to be supplied by synthetic as well as natural sources, without disclosure on the label. Whether a dealer as such had standing under the precedents was doubtful. The court pointed out that the petitioner and members of his family were consumers of oleomargarine and held that in their capacity as consumers they had standing to challenge the order. The statute provided that "any person who will be adversely affected by such order may file a petition." The court reasoned that Congress could have authorized the Attorney General to sue, that such a suit would satisfy the case or controversy requirement, and that Congress here has created a class of private Attorney Generals to vindicate the right of the United States against its wrongdoing officer. The reasoning is important, for it can be used whenever the "adversely affected" provision of the Administrative Procedure Act is applicable.

A good sample of state cases on standing of a consumer is an Indiana decision that one who used gas for cooking and heating a residence has standing to challenge a public service commission order approving sale of assets by one public utility company to another, under a statute that one who is "adversely affected" may obtain review.²³⁰ The court recited a rule to which state courts often pay lip service that "merely a general interest common to all members of the public" is not enough, but held that "consumers of the products of such utilities have the undoubted right to assert that they are adversely affected."²³¹ If, as in New Jersey, "a resi-

227. *Borah v. White County Bridge Commission*, 190 F. 2d 213 (7th Cir. 1952).

228. *Johnson v. Chesapeake & Ohio Ry.*, 188 F. 2d 458 (4th Cir. 1951).

229. 205 F. 2d 630 (2d Cir. 1953).

230. *Terre Haute Gas Corp. v. Johnson*, 221 Ind. 499, 45 N. E. 2d 484 (1942).

231. In *M. W. Smith Lumber Co. v. Alabama Public Service Commission*, 247 Ala. 318, 24 So. 2d 409 (1946) a commercial consumer sought to challenge an order refunding one month's bill to residential consumers; the court held that the plaintiff had failed to show that any substantial right would be affected by the order.

dent, citizen, and owner of real estate" may challenge an increase in the fare of a street railway, on the ground that "the matter probably concerns every resident of the city,"²³² then upholding the standing of passengers who pay the fare ought to be easy.

§ 13. EMPLOYERS AND EMPLOYEES

In *National Coal Ass'n v. Federal Power Commission*,²³³ parties held to have standing to challenge grant of a certificate to construct a natural gas pipeline included not only an association of coal producers but also the United Mine Workers, representing employees of coal producers, and the Railway Labor Executives Association, representing employees of competing railroads.

One of the most extreme decisions in the entire law of standing is *Gange Lumber Co. v. Rowley*.²³⁴ After a statutory period of limitation had expired, a state agency made an award of workmen's compensation, relying upon a retroactive statutory extension of the period. The employer challenged the award, contending denial of due process. The state supreme court held against the employer on the merits. The federal Supreme Court held that the employer "has not made the showing of substantial harm, actual or impending, to any legally protected interest which is necessary to call in question the statute's validity."²³⁵ Under the workmen's compensation system of the State of Washington, the employer pays premiums into a fund of the state treasury, from which injured employees are compensated. The premium rates are determined by a complex system resting in part upon a two-year cost experience of each class of employers and in part upon a five-year cost experience of each employer. The questionable feature of the *Gange* decision lies in the Court's failure to heed the provision of the state statute:

232. *O'Brien v. Board of Public Utility Commissioners*, 92 N. J. L. 44, 105 A. 132 (Sup. Ct. 1918), affirmed on other grounds, 92 N. J. L. 587, 106 A. 414 (1919). See Witmer, *Consumers' Appeals from Public Service Commission Rate Orders*, 8 U. of Chi. L. Rev. 258 (1941).

233. 191 F. 2d 462 (D.C. Cir. 1951).

But compare *Parker v. Bowron*, 40 Cal. 2d 344, 254 P. 2d 6 (1953), denying standing of unions in a mandate proceeding to compel city officials to fix certain wages for the city's employees.

In *Pennsylvania Commercial Drivers Conference v. Pennsylvania Milk Control Commission*, 360 Pa. 477, 62 A. 2d 9 (1948), the court's language seems to indicate that unions representing employees of dairy companies have no standing to challenge an order of the Commission limiting deliveries of milk to every other day. But a close examination of the case shows that the unions were not objecting to the every-other-day delivery but rather to administrative action on a subject that "is normally handled through the processes of collective bargaining."

234. 326 U. S. 295 (1945).

235. 326 U. S. at pages 307-308.

"Any claimant, employer or other person aggrieved by any such order, decision or award must, before he appeals to the courts, serve upon the director . . . an application for rehearing . . . Within thirty days after the final order of the joint board upon such application for rehearing has been communicated to such applicant . . . such applicant may appeal to the superior court. . . ." ²³⁶

Largely on the authority of the *Gange* case, a court of appeals has held that an employer has no standing to challenge payments from a federal fund for unemployment compensation to striking employees.²³⁷ The court reasoned: "Their payment could not possibly affect the rate of contribution by the carriers for the current years."²³⁸

In the field of the National Labor Relations Board, problems of standing must distinguish carefully between standing to enforce, standing to resist enforcement, and standing to obtain review. As we have seen,²³⁹ an employer who is resisting enforcement has standing to assert that the Board's order is unlawful by reason of failure of officers of a union to file a non-Communist affidavit.²⁴⁰ An employer would not necessarily have standing to obtain judicial review on that ground.²⁴¹

Although shippers and carriers may often represent their own

236. Wash. Rev. Stat. Ann. § 7697 (1932).

Instead of setting forth this provision in its opinion, the Court merely summarized it in a footnote. Instead of stating explicitly that the statute gave the employer a right of review, the Court said only: "Appeal lies from the board's order to the Superior Court. . . ." The Court, however, could hardly have been unaware of the employer's right of review, for the employer had obtained review in the state courts in this very case. The result therefore seems to be the extreme one of denying the employer's standing even though the statute conferred such standing. Such a result is unique among Supreme Court cases.

The opinion intimates that a complainant might lack standing to raise constitutional questions even though he has standing to raise nonconstitutional questions. Thus, the Court said: "The Fourteenth Amendment, through the due process clause, does not assure protection from the states' regulatory powers against injuries so remote, contingent and speculative." This statement seems also to demonstrate a seeming merger of the standing question with the constitutional question; in some measure the Court in this statement passes upon the constitutional issue.

237. *Railway Express Agency v. Kennedy*, 189 F. 2d 801 (7th Cir. 1951).

238. 189 F. 2d at page 805.

But compare *Tube Reducing Corp. v. Unemployment Compensation Commission*, 1 N. J. 182, 62 A. 2d 473 (1948), affirming 136 N. J. L. 410, 56 A. 2d 596 (1948), holding that employer has special interest in unemployment compensation fund.

239. See pages 379-381, above.

240. *NLRB v. Highland Park Mfg. Co.*, 341 U. S. 322 (1951).

241. In *Bethlehem Steel Co. v. NLRB*, 191 F. 2d 340 (D.C. Cir. 1951), the employer petitioned for review on this ground, and the employer's standing was upheld, but the Board also sought enforcement.

interests under the Interstate Commerce Act, and although broadcasting stations may often represent the public interest under the Federal Communications Act, unions and employees seeking to enforce Labor Board action against an employer ordinarily have standing neither as representatives of their own interests nor as representatives of the public interest.

The leading case on standing to enforce is *Amalgamated Utility Workers v. Consolidated Edison Co.*²⁴² The Board ordered the company to cease and desist and to take affirmative action, including reinstatement of six employees with back pay. After a decree of enforcement had been modified and affirmed by the Supreme Court, the union brought a proceeding to have the company adjudged in contempt for failure to comply. The Act provided: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . This power shall be exclusive. . . ." ²⁴³ The Court, specifically rejecting the union's contention that the Act "creates private rights,"²⁴⁴ held that the Board alone is authorized to take proceedings to enforce its order.²⁴⁵ The Court quoted from the legislative history, including a statement of the House Committee that "No private right of action is contemplated." The Court observed that the legislative history showed a deliberate design that the Act should be unlike the Interstate Commerce Act, which imposes duties upon carriers and confers corresponding rights upon individuals, but was intended to be like the Federal Trade Commission Act, which, as the Supreme Court held in the *Klesner* case, "does not provide private persons with an administrative remedy for private wrongs."²⁴⁶

The *Amalgamated* case, decided by a unanimous Court, furnishes the cornerstone for much case law, and seems deeply embedded; yet the Court's reasoning proves the congressional intent that the Board should be the exclusive authority to institute and conduct administrative proceedings, but in no way proves the intent to make the Board the exclusive authority to enforce an order of the Board. Furthermore, practical reasons for centralized

242. 309 U. S. 261 (1940).

243. 49 Stat. 453 (1935), 29 U. S. C. A. § 160(a).

244. The union argued that the Act confers standing upon private persons by the provision permitting "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought to obtain review." See 49 Stat. 453 (1935), 29 U. S. C. A. § 160(f). The Court rejected the argument by saying that "it is an opportunity afforded to *contest* a final order of the Board, not to *enforce* it." (Court's italics.)

245. *Amalgamated Utility Workers v. Consolidated Edison*, 309 U. S. 261, 265 (1940).

246. *FTC v. Klesner*, 280 U. S. 19, 25 (1929).

planning relate almost entirely to instituting administrative proceedings and hardly at all to instituting contempt proceedings. If the Board's funds and staff are inadequate for providing prompt enforcement of judicial decrees, what can be lost by permitting those whose interests are most immediately affected—the union and the employees—to assure that a judicial decree is diligently policed and enforced?²⁴⁷ Such an interpretation, which would not be inconsistent with the underlying theory that the Act is primarily concerned with “public rights” rather than with “private rights,”²⁴⁸ is now helped by the LMRA's elimination of one of the principal props of the *Amalgamated* case—the clause making the Board's power to prevent unfair labor practices “exclusive.”²⁴⁹

Comparison with FCC cases reveals extreme incongruity: the Communications Act explicitly provides that no license creates “any right, beyond the terms, conditions, and periods of the license,”²⁵⁰ and the Labor Act provides that “employees shall have the right to self-organization”;²⁵¹ yet the rival broadcasting station is permitted to assert the public interest in *opposing* the position of the public agency, while the union or employee is denied standing to assert its own interest or the public interest in *enforcing* the position of the public agency. The broadcasting station has a remedy without a right; the union has a right without a remedy (unless the Board chooses to enforce it); in neither case can any substantial reason be given for rejecting the simple idea that the private

247. A union has standing to enjoin an employer's violation of the Railway Labor Act. *Virginia Ry. v. System Federation*, 300 U. S. 515 (1937). But that Act provides no administrative enforcement machinery, and the choice was between judicial enforcement and no enforcement.

In *Stewart Die Casting Corp. v. NLRB*, 132 F. 2d 801 (7th Cir. 1942), both the advantages and disadvantages of exclusive enforcement power in the Board are brought into bolder relief. After the court had entered an enforcing decree, and after the Board had applied to the court for a contempt order, the Board and the company composed their differences as to amounts due discharged employees and the company paid the Board \$300,000 to cover its entire back pay liability to employees. The court applied the rule of the *Amalgamated* case and held that the aggrieved employees had no right to intervene or to be heard on their contention that they were deprived of back wages due them.

248. For a thorough discussion of that underlying theory, see Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 Harv. L. Rev. 720 (1946).

249. A Court of Appeals, in holding that a union may not under the new Act maintain a suit against an employer to enjoin an unfair labor practice, quotes from a conference committee report to show that the Act eliminated the clause “because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable.” *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183 (4th Cir. 1948).

250. 48 Stat. 1081 (1934), 47 U. S. C. A. § 301.

251. 49 Stat. 452 (1935), 29 U. S. C. A. § 157. The Act in its first section refers to “the right of employees to organize.” 49 Stat. 449 (1935), 29 U. S. C. A. § 151.

party should be allowed to represent his own interest, the determination depending in the customary fashion upon whatever public interest should be taken into account.²⁵²

Whether a union or an employee may challenge an order of the Board in a case involving an unfair labor practice of an employer is not clear; apparently the question has been of little practical consequence. The Act provides: "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order. . . ."²⁵³ It is hard to see how anyone could be aggrieved by a denial of relief against an employer if a union or an employee is not so aggrieved; unless the words "or denying" are to be without effect, the union or the employee must have standing to challenge a Board order. Yet decisions of lower courts are in conflict.²⁵⁴

The Supreme Court has held that the Act does not provide for review of a certification order at the instance of an aggrieved union.²⁵⁵ In so holding, the Court left open the question whether a union could maintain an independent suit in a district court to set aside the Board's action. That question arose in the bizarre case of *Inland Empire District Council v. Millis*.²⁵⁶ A union sought to enjoin enforcement of a certification order on the ground that the Board had denied the union due process of law by holding a hearing after rather than before an election among employees. The Court said that the question whether a union could challenge a certification in an injunction proceeding, "should not be decided in the absence of some showing that the Board has acted unlawfully." The Court then discussed the lawfulness of the Board's action and upheld it.

252. Yet the Court on occasion seems to find expedient the recognition of private rights on the part of unions or employees. Thus, in *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 258 (1939), the Court said: ". . . the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights." See Hart and Prichard, *The Fansteel Case*, 52 Harv. L. Rev. 1275 (1939).

253. 49 Stat. 453 (1935), 29 U. S. C. A. § 160(f).

254. *Jacobsen v. NLRB*, 120 F. 2d 96 (3d Cir. 1941) (held, without mentioning the key words "or denying," that employees could challenge the Board's dismissal of a complaint); *Anthony v. NLRB*, 132 F. 2d 620 (6th Cir. 1942) ("A workman has no personal claim for back pay or reinstatement in employment enforceable in this court. Hence he is not a 'person aggrieved' within the meaning of that Act."); *Hamilton v. NLRB*, 160 F. 2d 465 (6th Cir. 1947, certiorari denied 332 U. S. 762) (employee denied reinstatement by Board denied relief by reviewing court, on ground that finding was supported by substantial evidence, no mention being made of employee's standing to obtain review.)

255. *AFL v. NLRB*, 308 U. S. 401 (1940). For an extreme application of this doctrine, see *NLRB v. NBC*, 150 F. 2d 895 (2d Cir. 1945), criticized adversely by Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 Harv. L. Rev. 720, 731-32 (1946).

256. 325 U. S. 697 (1945)

Therefore, according to the theory of the opinion, the question whether the union could raise the question of lawfulness was not passed upon. Yet the Court did pass upon the lawfulness question—the merits of the case. On the basis of what the Court did as distinguished from what it said, the conclusion seems to be that when a union objects to a certification on constitutional grounds, the union may get immediate review of the constitutional issue through an injunction proceeding. Whether or not this result is limited to constitutional issues is the subject of conflicting decisions in the lower federal courts.²⁵⁷

§ 14. REGULATED PARTIES

Although the standing of regulated parties to challenge regulatory action is normally assumed, a few problems of the standing of such parties have been troublesome.

The FCC's chain broadcasting regulations were designed to regulate the networks, even though the regulations took the form of providing that a license of a station which had entered into a network contract containing designated types of restrictive provisions would not be renewed. A divided Supreme Court upheld the standing of the network to challenge the regulations before they had been applied in a license proceeding.²⁵⁸

*Stark v. Wickard*²⁵⁹ combines a problem of unreviewability with a problem of standing of a regulated party. A minimum-price order required the handler to divide his payment to the producer into two parts, one to be paid directly to the producer, and the other to be paid into a fund out of which deductions were made before the amounts were paid to producers. The validity of such a deduction had previously been challenged by handlers, and the Supreme Court had held that they had no standing: "If the deductions from the fund are small or nothing, the patron [producer] receives a higher uniform price but the handler is not affected."²⁶⁰ In

257. Denying review: *New Bedford Loomfixers' Union v. Alpert*, 110 F. Supp. 723 (D. Mass. 1953); *International Union v. International Union*, 173 F. 2d 557, 559 (8th Cir. 1949); *Fitzgerald v. Douds*, 167 F. 2d 714 (2d Cir. 1948). Granting review: *Fay v. Douds*, 172 F. 2d 720, 723 (2d Cir. 1949); *Klein v. Herrick*, 41 F. Supp. 417 (S.D. N.Y. 1941).

258. *Columbia Broadcasting System v. United States*, 316 U. S. 407, (1942), discussed fully in Davis, *Administrative Law* 648-652 (1951). The significance of the holding on the standing question, as distinguished from the ripeness question, is lessened by the ownership by CBS of seven stations. Compare *FCC v. American Broadcasting Co.*, 347 U. S. 284 (1954).

259. 321 U. S. 288 (1944).

260. *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533, 561 (1939).

the *Stark* case, a divided Court upheld the producers' standing. The deduction reduced the amount they received for their milk and the Court found the requisite "interference with some legal right of theirs" in the statute: "The statute endows the producer with . . . the right to be paid a minimum price." The surprise is that two justices dissented. The key to the Frankfurter dissent was the view that "To create a judicial remedy for producers when the statute gave none is to dislocate the Congressional scheme of enforcement."²⁶¹ The Black dissent was on the ground stated by the court of appeals—that the producers showed no "substantive private legally protected interest."²⁶² The view of Mr. Justice Black thus was that a producer whose prices are fixed has no standing to challenge the administrative action which determines the amount he will receive for his milk.

In the *Lukens* case²⁶³ a party whose employees' wages were subjected to regulation through the Walsh-Healy Act was held without standing on the ground that the government was acting in its proprietary capacity; the holding has been legislatively reversed.²⁶⁴

In *Safeway Stores v. DiSalle*,²⁶⁵ a retailer whose prices were fixed was held to have no standing to object on the ground of violation of a statutory provision designed to protect producers of agricultural commodities.

This leaves the troublesome case of *Joint Anti-Fascist Refugee Committee v. McGrath*,²⁶⁶ involving a mixed problem of standing and ripeness. The five justices of the majority wrote five opinions. The Committee and two other organizations, placed on the "subversive list" by the Attorney General, who provided the organizations no opportunity to be heard, were held to have standing to challenge the action in a declaratory proceeding. The case is fully discussed elsewhere.²⁶⁷

§ 15. PUBLIC AUTHORITIES

The outstanding decision on standing of a public official to challenge administrative action is probably *Chapman v. Federal Power Commission*,²⁶⁸ upholding standing of the Secretary of the Interior

261. 321 U. S. at page 317.

262. *Stark v. Wickard*, 136 F. 2d 786, 789 (D.C. Cir. 1943).

263. *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940), more fully discussed above at pages 362-363.

264. See page 363, *supra*.

265. 198 F. 2d 269 (D.C. Cir. 1952), more fully discussed above at pages 372-374.

266. 341 U. S. 123 (1951).

267. See Davis, *Administrative Law* 662-663 (1951).

268. 345 U. S. 153 (1953).

to challenge an order granting a license to construct a dam. Since a division within the Court precluded the Supreme Court from writing an opinion on the standing question, we must rely upon the opinion of the court of appeals for analysis.²⁶⁹ The Secretary and a cooperative association²⁷⁰ had been permitted to intervene before the Commission, and the statute allowed review upon the petition of "any party . . . aggrieved . . ." The Court observed that "The Solicitor General gave his permission that the Secretary of the Interior file a petition for review of the Commission's order; but it is clear that this could not confer any right to seek review unless the Secretary is a party aggrieved within the meaning of the statute."²⁷¹

The basis for the Secretary's standing was his statutory duty to act as sole marketing agent of surplus power developed at public hydroelectric projects in order to "encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles."²⁷² The Secretary's position was that the licensing of the private company disturbed the congressional policy administered by the Secretary. In addition to this specific interest of the Secretary, he had general duties relating to the conservation and utilization of water resources. The Supreme Court evidently thought these interests sufficient for the Secretary's standing, for it reversed the holding of the court of appeals that the statute "confers no right or interest in any power project or its development, or any responsibility with regard thereto, upon the Secretary . . ."²⁷³ The Court said that the choice between private and public enterprise was for the Commission, not for the Secretary: "Before a member of the cabinet may attack the Commission's action before the courts he must be able to point to some special interest for which he is charged with responsibility that may be adversely affected by the action attacked."²⁷⁴ Lack of a Supreme Court opinion on the issue of standing leaves the meaning of the case uncertain.

When a state public utilities commission sought to challenge an order of the Federal Power Commission granting a certificate to one company to sell natural gas and revoking the certificate of another company, the court decided the merits despite a contention

269. *United States ex rel. Chapman v. Federal Power Commission*, 191 F. 2d 796 (4th Cir. 1951).

270. See discussion of the standing of the cooperative above at pages 407-408.

271. 191 F. 2d at page 799.

272. 58 Stat. 890 (1944), 16 U. S. C. A. § 825s (1953 Supp.).

273. 191 F. 2d at page 799.

274. 191 F. 2d at page 800.

that the petitioner lacked standing, but the court avoided a specific holding that the petitioner had standing.²⁷⁵ In *Phillips Petroleum Co. v. Wisconsin*,²⁷⁶ the State of Wisconsin was allowed to challenge a decision of the FPC to the effect that the FPC had no jurisdiction to regulate the prices charged by an independent producer of natural gas. Neither the Supreme Court nor the court of appeals discussed the question of standing. Wisconsin was a party to the proceeding before the Commission, and the Natural Gas Act provides: "Any party to a proceeding . . . aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order . . ."²⁷⁷

Scattered state cases pass upon various problems of standing of public authorities. In West Virginia the Director of Unemployment Compensation is held to have standing to obtain judicial review of a denial of claims by a Board of Review, under a statute allowing "any party aggrieved" to obtain review.²⁷⁸ But in Pennsylvania the Department of Labor and Industry has no standing to appeal from a decision of the Unemployment Compensation Board of Review, for the Department is not a "party . . . aggrieved" within the meaning of the statute.²⁷⁹ The Attorney General of Missouri lacks standing to obtain review of approval by the Public Service Commission of sale of franchises from one electric company to another.²⁸⁰ In upholding the standing of the Attorney General to intervene in a review of an order permitting construction of a dam, the Wisconsin court gave a reason which some lawyers may believe to be of questionable soundness: "To hold that the Public Service Commission should not only decide between these conflicting interests in its judicial capacity, but also should represent the state in protecting public rights, would make the Commission both judge and advocate at the same time. Such a concept violates our sense of fair play and due process which we believe administrative agencies acting in a quasi judicial capacity should ever observe."²⁸¹ The Commission

275. *Public Utilities Commission v. Federal Power Commission*, 205 F. 2d 116 (3d Cir. 1953).

276. 347 U. S. 672 (1954).

277. 52 Stat. 831 (1938), 15 U. S. C. A. § 717r. The statute also provides: "Any person, State, municipality, or State commission aggrieved by an order . . . may apply for a rehearing . . . No proceeding to review any order . . . shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon."

278. *State v. Hix*, 132 W. Va. 516, 54 S. E. 2d 198 (1949).

279. *Department of Labor and Industry v. Unemployment Compensation Board*, 362 Pa. 342, 67 A. 2d 114 (1949).

280. *McKittrick v. Public Service Commission*, 352 Mo. 29, 175 S. W. 2d 857 (1943).

281. *Muench v. Public Service Commission*, 261 Wis. 492, 514, 53 N. W. 2d 514, 523 (1952).

can protect the public interest without assuming the role of advocate; furthermore, the Commission could properly direct members of its staff to assume the role of advocate if that were desirable. The People's Counsel in Maryland has standing as a "person in interest" to challenge a public utility rate order.²⁸² In a dispute about respective powers of two Connecticut boards, the Board of Education has standing to get a declaratory judgment against the Board of Finance even though the court seems to say that "no justiciable right is involved."²⁸³

In Maryland, Ohio, and Pennsylvania, a zoning board of adjustment has no standing to appeal from the decision of a lower court reversing an order of the board.²⁸⁴ The Ohio court reasons that although the board represents the public interest, it may not become a partisan.²⁸⁵ Such a board may take an appeal in Texas, Connecticut, Minnesota and Oklahoma.²⁸⁶ The reasoning of the Connecticut court is that the board is in the best position to protect the public interest.²⁸⁷ The latter cases are in accord with the federal system.²⁸⁸ If a board is represented in the reviewing court by an officer who does not participate in the board's judicial function, the board's judicial balance is hardly upset by having its decisions defended in a reviewing court. Even if members of the board personally participate in the review proceeding, arguing in favor of positions taken is not much different from the action of judges in writing argumentative majority or dissenting opinions, and is not much different from arguing before legislative committees in favor of the policies chosen.²⁸⁹

282. *Bosley v. Dorsey*, 191 Md. 229, 60 A. 2d 691 (1948).

283. *Board of Education v. Board of Finance*, 127 Conn. 345, 16 A. 2d 601 (1940).

284. *Board of Zoning Appeals v. McKinney*, 174 Md. 551, 199 A. 540 (1938); *A. Di Cillo & Sons v. Chester Zoning Board of Appeals*, 158 Ohio St. 302, 109 N. E. 2d 8 (1952); *Department v. Unemployment Compensation Board*, 362 Pa. 342, 67 A. 2d 114 (1949).

285. 158 Ohio St. at page 305, 109 N. E. 2d at page 10.

286. *Board of Adjustment v. Stovall*, 147 Tex. 366, 216 S. W. 2d 171 (1949); *Rommell v. Walsh*, 127 Conn. 16, 15 A. 2d 6 (1940); *Moede v. Board of County Commissioners*, 43 Minn. 312, 45 N. W. 435 (1890); *Board of Commissioners v. Woodford School District*, 165 Okla. 227, 25 P. 2d 1057 (1933).

287. 127 Conn. at page 21, 15 A. 2d at page 9.

288. Every volume of reports of federal decisions contains cases in which federal agencies are parties, and no one ever challenges the propriety of this practice.

289. A city, town, city council, or borough council often has standing to represent the public interest before a reviewing court in a zoning case. *Mayor and City Council v. Shapiro*, 187 Md. 623, 51 A. 2d 273 (1947); *Perelman v. Board of Adjustment*, 144 Pa. Super. 5, 18 A. 2d 438 (1941); *Keating v. Patterson*, 132 Conn. 210, 43 A. 2d 659 (1945).

§ 16. PARTIES AFFECTED BY ZONING

Zoning gives rise to a few special problems of standing. One whose application for a zoning permit is denied may of course challenge the denial.²⁹⁰ Both adjoining landowners and an owner of lands in the immediate vicinity have standing to challenge the grant of a variance.²⁹¹ The usual test as to what landowners may challenge a variance is stated by the Rhode Island court: "Generally speaking the owner of property, the use of which naturally would be affected adversely by a decision granting an exception or variance, is considered to be an aggrieved person having a right to such a review."²⁹² The court in applying this test held that an owner "within a street or two of applicant's land and . . . in the same established residential zoning district" may challenge because "the proposed change is such that it naturally and reasonably would affect the value and use of property in the immediate vicinity."²⁹³ Parties who were "competitors, taxpayers, property owners and electors" were held to have standing to object to a variance in favor of a liquor store on the ground that they were owners of residential property in the vicinity; the court said that their status as competitors was not enough.²⁹⁴ A resident and taxpayer who owned a home about a half mile from the property to which the variance was granted was held to have standing, but the court relied upon the challenger's status as a taxpayer: "The expense of the local police . . . is largely dependent on the number of the liquor saloons. . . . If licenses are granted with too free a hand . . . the burdens of taxation are likely to be increased. . . . Every taxpayer, therefore, has a certain, though it may be small, pecuniary interest . . . and . . . an additional interest, common to every citizen, in promoting the general welfare."²⁹⁵

A few cases are less liberal.²⁹⁶ A company having a large indus-

290. *Smith v. Selligman*, 270 Ky. 69, 109 S. W. 2d 14 (1937).

291. *Lynch v. Borough of Hillsdale*, 136 N. J. L. 129, 54 A. 2d 723 (1947).

292. *Flynn v. Zoning Board*, 77 R. I. 118, 122, 73 A. 2d 808, 810 (1950).

293. *Ibid.*

294. *Farr v. Zoning Board*, 139 Conn. 577, 95 A. 2d 792 (1953).

A competitor as such has no standing to object to a variance. *Circle Lounge & Grille v. Board of Appeal*, 324 Mass. 427, 86 N. E. 2d 920 (1949).

295. *O'Connor v. Board of Zoning Appeals*, 140 Conn. 65, 98 A. 2d 515, 518 (1953).

296. A lower court in New York is much less liberal. The Board issued a permit for a guest house or motel in a rural residential district. The petitioners owned residential property a mile and a half by air line and two miles or more by road from the site of the guest house or motel. The court held the petitioners not "aggrieved" under the statute: "A person is entitled to proceed to attack the validity of such a decision only where he is specially and adversely affected thereby." *Blumberg v. Hill*, 119 N. Y. S. 2d 855, 857 (N.Y. Sup. Ct. 1953).

trial establishment directly across the street from the place to which a liquor store was to move, and also owned a private playground three hundred feet away, was held not to be a "party aggrieved" because the interest was "too remote."²⁹⁷ A user of a ditch which would become overloaded with water because of a drainage improvement is held not to be a "party aggrieved" by the improvement, because the user is only "remotely or indirectly affected."²⁹⁸

Somewhat surprisingly, in Maryland an association of property owners and taxpayers has no standing, even though its members are "interested" or "aggrieved" within the meaning of the statute, although the president of the association was held to have standing as a taxpayer.²⁹⁹ Another association of property owners is denied standing because the association is not an owner of property and because no showing was made that any of its rights were adversely affected.³⁰⁰

A mortgagee can be an "aggrieved person" to object to a variance.³⁰¹ The president and principal stockholder of a corporation which owns land asserted to be injuriously affected is held in New Jersey to have no standing because he has no "personal property interest which will be specially affected in an injurious manner."³⁰²

Standing is often denied because pleadings fail to show the interest of the complaining parties.³⁰³

A Rhode Island case is unusual in that it deals with the standing of defendants. The remonstrants had appeared before the Board to oppose issuance of a permit, which the Board had denied. The petitioner sought review, and the remonstrants contended in the reviewing court that as a matter of right they could appear, file briefs and present argument. The court said that the remon-

297. *Giammaria v. American Bridge Co.*, 166 Pa. Super. 263, 70 A. 2d 402 (1950).

298. *Schoenfelder v. Beckman*, 238 Minn. 15, 55 N. W. 2d 305 (1952).

299. *Windsor Hills Improvement Ass'n v. Baltimore*, 195 Md. 383, 73 A. 2d 531 (1950).

300. *Property Owners Ass'n v. Board of Zoning Appeals*, 123 N. Y. S. 2d 716 (N.Y. Sup Ct. 1953). *Contra: Hudson Bergen County Ass'n v. Board of Commissioners*, 135 N. J. L. 502, 52 A. 2d 668 (1947) (association representing liquor stores has standing in liquor license case).

The federal courts permit an association to represent members who would have standing. *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir. 1943), dismissed as moot 320 U. S. 707 (1943).

301. *Eckerman v. Murdock*, 276 App. Div. 927, 94 N. Y. S. 2d 557 (1950).

302. *Menges v. Bernards Township*, 4 N. J. 556, 73 A. 2d 540 (1950).

303. *Winston v. Zoning Board*, 407 Ill. 588, 95 N. E. 2d 864 (1950); *Dimitri v. Zoning Board*, 61 R. I. 325, 200 A. 963 (1938).

strants were not "aggrieved" within the meaning of the statute because the decision was in their favor, but the court nevertheless permitted them to file briefs and to present argument.³⁰⁴

§ 17. PROBLEMS OF FEDERALISM AND STANDING

As we have seen throughout this discussion, the state courts often uphold the standing of parties who in the same circumstances would be denied standing in the federal courts. The troublesome problem of federalism concerning the law of standing arises when the Supreme Court finds that the plaintiff in a case coming up through state courts lacks standing under the practice developed by the federal courts. Should the Supreme Court (1) follow the state law on the question of standing, (2) apply the same law of standing that would be applied if the case had originated in a federal court, or (3) take some intermediate view between these extremes? Each of the three possible positions seems to have some support.³⁰⁵

A rather complete deference to the state on the standing question was shown in *Heim v. McCall*.³⁰⁶ A New York statute gave a preference in employment of persons on public works to citizens of New York and of the United States, and contracts for public construction permitted cancellation for violation of the requirement. When the Public Service Commission threatened a cancellation, "a property owner and taxpayer" sued to enjoin the commissioners, arguing unconstitutionality. The Supreme Court devoted three sentences to the question of standing: "There seems to have been no question raised as to the right of Heim to maintain the suit, although he is not one of the contractors nor a laborer of the excluded nationality or citizenship. The Appellate Division felt that there might be objection to the right, under the holding of a cited case. The Court of Appeals, however, made no comment, and we must—certainly may—assume that Heim had a suit of right; and, so assuming, we pass to the merits."³⁰⁷

304. *M. & L. Die & Tool Co. v. Board of Review*, 76 R. I. 417, 71 A. 2d 511 (1950).

305. That some cases take the first position and some cases take the second position may mean that the overall position is essentially the third or intermediate position.

The language of Mr. Justice Frankfurter in *Coleman v. Miller*, 307 U. S. 433, 465 (1939) is a theoretical recognition of the third position: "The doctrines affecting standing to sue in the federal courts will not be treated as mechanical yardsticks in assessing state court ascertainment of legal interest brought here for review. . . . Thus, while the ordinary state taxpayer's suit is not recognized in the federal courts, it affords adequate standing for review of state decisions when so recognized by state courts."

306. 239 U. S. 175 (1915).

307. 239 U. S. at pages 186-187.

In a 1939 case the majority of the Court discussed the *Heim* case with seeming approval,³⁰⁸ and Mr. Justice Frankfurter cited it in support of the proposition that "while the ordinary state taxpayer's suit is not recognized in the federal courts, it affords adequate standing for review of state decisions when so recognized by state courts."³⁰⁹ The Frankfurter view is puzzling in that the taxpayer in the *Heim* case was challenging discrimination, not expenditure. Even though the *Heim* case stands alone in contrast with much law that the Supreme Court has later developed on the problem of standing, the ease and simplicity of the *Heim* case may be much more desirable than the difficulty and complexity of the Supreme Court's present doctrine.

An extreme decision in the opposite direction is *Gange Lumber Co. v. Rowley*,³¹⁰ which has already been discussed.³¹¹ The Supreme Court refused to decide the merits on the ground of lack of standing, even though the state court had decided the merits in a suit by the employer and even though the state statute specifically provided that judicial review could be had by an "employer."

If all federal cases denying standing rested upon theoretical lack of "case" or "controversy," then the theory would force the Supreme Court to apply its own standing doctrine in all cases coming up from state courts. But the Supreme Court has not clarified the extent to which its standing doctrine has a constitutional base, and the extent to which the doctrine rests merely upon ideas of convenience and orderly procedure. Probably the most significant pronouncement on this question came in *Barrows v. Jackson*:³¹² "The requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to 'cases' and 'controversies.' . . . Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others."

A typical example of state liberality and federal strictness with respect to standing is *Doremus v. Board of Education*.³¹³ Despite "jurisdictional doubts," the New Jersey Supreme Court upheld

308. *Coleman v. Miller*, 307 U. S. 433, 445 (1939).

309. 307 U. S. at page 465.

310. 326 U. S. 295 (1945).

311. See pages 411-412, above.

312. 346 U. S. 249, 255 (1953).

313. 342 U. S. 429 (1952).

the plaintiffs' standing and held that requiring Bible reading in the public schools was constitutional. One plaintiff was "a citizen and taxpayer of the State of New Jersey and of the Township of Rutherford," and the other was the parent of a daughter who had graduated from the school. The Supreme Court held that neither plaintiff had standing to raise the constitutional issue, and dismissed the appeal.³¹⁴ The Court discussed the standing problem in terms of presence or absence of "a justiciable case or controversy." The parent lacked standing because the daughter had graduated and because "this Court does not sit to decide arguments after events have put them to rest."³¹⁵ The taxpayer lacked standing because it was not "a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference."³¹⁶ The Court did not mention *Heim v. McCall*,³¹⁷ in which the Court passed upon the merits of a constitutional issue in a suit by a taxpayer even though the suit was not a "pocketbook action."³¹⁸

Furthermore, the Court did not explain in the *Doremus* opinion why the taxpayer could not be regarded as a representative of the public interest, in the same way that the Supreme Court regarded the broadcasting station in the *Sanders* case as a representative of the public interest.³¹⁹ The public interest in enforcement of the First Amendment ought to be as strong as the public interest in enforcement of the Communications Act. The reality is, of course, that the *Heim* case was 1915, before the Supreme Court had created

314. The dismissal of the appeal probably has the effect of preventing the decision of the New Jersey Supreme Court in favor of constitutionality under the Federal Constitution from having final effect either as *res judicata* or as *stare decisis*. Indeed, the Court said in the *Doremus* opinion that "we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute" a case or controversy. 342 U. S. at page 434. Compare *Fidelity National Bank & Trust Co. v. Swope*, 274 U. S. 123 (1927). But compare *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U. S. 541, 549-550 (1948).

315. 342 U. S. at page 433.

316. 342 U. S. at page 434.

317. 239 U. S. 175 (1915).

318. In *Frothingham v. Mellon*, 262 U. S. 447, 486 (1923), the Court said that standing of a municipal taxpayer to prevent misuse of municipal moneys "is the rule of this court." The Court cited *Crampton v. Zabriskie*, 101 U. S. 601, 609 (1879). But these cases were "pocketbook" cases.

Everson v. Board of Education, 330 U. S. 1 (1947) upheld standing of a taxpayer to challenge constitutionality of public support of transportation to parochial schools, but the taxpayer was seeking to reduce the expenditure.

McCollum v. Board of Education, 333 U. S. 203 (1948), and *Zorach v. Clauson*, 343 U. S. 306 (1952) upheld the standing of plaintiffs who were both taxpayers and parents of school children.

319. *FCC v. Sanders Brothers*, 309 U. S. 470 (1940), fully discussed above with the sequel cases at pages 363-369.

the present artificial law of standing, and that the Supreme Court has not yet chosen to extend the *Sanders* doctrine beyond the field of the Federal Communications Commission. Yet the Court has never stated any reason why the *Sanders* doctrine should be limited to the communications field, and the Court of Appeals for the Second Circuit has at least twice taken a strong position that it should not.³²⁰

The Court in the *Doremus* case did not even attempt to answer the dissenting opinion of Mr. Justice Douglas, with whom Justices Reed and Burton concurred: "New Jersey can fashion her own rules governing the institution of suits in her courts. If she wants to give these taxpayers the status to sue . . . I see nothing in the Constitution to prevent it. And where the clash of interests is as real and as strong as it is here, it is odd indeed to hold that there is no case or controversy within the meaning of Art. III, § 2 of the Constitution."³²¹

On the same day the *Doremus* case was handed down, the Court announced its decision in *Adler v. Board of Education*,³²² upholding the constitutionality of New York's Feinberg Law in a suit by parents and teachers. Mr. Justice Frankfurter in dissent asserted vigorously that the problem of standing of the teachers was controlled by *United Public Workers v. Mitchell*,³²³ which held that federal employees could not challenge validity of the Hatch Act before it had been applied in an enforcement proceeding. But the majority of the Court in the *Adler* case ignored the problem of standing and dealt only with the merits. Whether the reason is that the *Mitchell* case originated in a federal court and the *Adler* case originated in a state court, or whether the *Mitchell* case is

320. *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir. 1943), dismissed as moot 320 U. S. 707 (1943); *Reade v. Ewing*, 205 F. 2d 630 (2d Cir. 1953).

321. 342 U. S. at page 436.

In support of the dissenting position is *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U. S. 541 (1948). A New York statute required insurance companies to pay to the state all unclaimed benefits under policies issued by companies doing business in New York for delivery in New York on lives of residents of New York. Nine companies sought a declaration and an injunction. The Court reasoned: "The [New York] Court of Appeals refused to accept appellants' arguments for invalidation of the law on federal constitutional or any other grounds. This decision compelled the appellants to comply . . . unless this Court reviewed the federal constitutional issues and decided them in appellants' favor. Consequently a case or controversy . . . is here." 333 U. S. at page 550.

The decision of the New Jersey courts in the *Doremus* case was binding upon the taxpayer plaintiff on the question of constitutionality of Bible reading in the public schools, unless the Supreme Court reviewed and decided in the plaintiff's favor.

322. 342 U. S. 485 (1952).

323. 330 U. S. 75 (1947).

otherwise distinguishable, or whether the *Mitchell* case is overruled or superseded, the Court did not bother to state. The rules the Court has invented for its own guidance are thus seemingly violated without explanation.

After the Court's strong insistence in *Doremus* that a state taxpayer lacks standing in a case which is not a "pocketbook action," the Court later the same year decided the merits of a constitutional issue in *Wieman v. Updegraff*,³²⁴ in which "a citizen and taxpayer" sued in an Oklahoma court to enjoin payment of compensation to employees who had not taken a loyalty oath prescribed by statute. Since the compensation of employees of the state is the same whether or not the employees have taken the loyalty oath, the suit was not a "pocketbook action." But the Court had nothing to say about the problem of standing, thus in effect reverting to the 1915 view in the *Heim* case.³²⁵

That the Supreme Court is either unwilling or unable to follow a consistent body of principles on the law of standing when cases come up from the state courts is abundantly demonstrated. Of all the state and federal judges in the country, the six in the majority in the *Doremus* case are a tiny minority. If the Supreme Court would cast off the artificialities of its doctrine of standing and revert to the more natural position of most of the state courts, the Court would then find easier the achievement of a consistent practice. As it is, the litigant cannot know in advance whether the Supreme Court will take a strict position on the problem of standing, as in *Doremus*³²⁶ and *Mitchell*,³²⁷ or whether the Court will simply ignore the rules it has invented for its own guidance, as in *Adler*³²⁸ and *Wieman*.³²⁹

§ 18. A BRIEF CRITIQUE OF THE LAW OF STANDING

A careful examination of the federal and state law of standing leads to the conclusion that a very simple and natural proposition is entirely sound: One who is in fact adversely affected by govern-

324. 344 U. S. 183 (1952).

325. A possible explanation of the *Wieman* case is that employees who had not taken the oath intervened, and "also sought a mandatory injunction directing the state officers to pay their salaries regardless of their failure to take the oath." Perhaps if the plaintiff "citizen and taxpayer" lacked standing, the employees had standing. The weaknesses of this explanation are that (1) the Court did not mention it, and (2) the Court decided not only the cross-action by the employees but also the original injunction suit by the citizen and taxpayer.

326. *Doremus v. Board of Education*, 342 U. S. 429 (1952).

327. *United Public Workers v. Mitchell*, 330 U. S. 75 (1947).

328. *Adler v. Board of Education*, 342 U. S. 485 (1952).

329. *Wieman v. Updegraff*, 344 U. S. 183 (1952).

mental action should have standing to challenge that action if it is judicially reviewable.

This simple and natural proposition has full support in the Administrative Procedure Act, which in section 10(a) provides for review upon petition of "any person . . . adversely affected." Committee reports of both House and Senate explained: "This subsection confers a right of review upon any person adversely affected in fact . . ."³³⁰

The simple and natural proposition finds much greater support in state law than in the law developed by the Supreme Court of the United States. The law of the Supreme Court is both needlessly complex and needlessly artificial. The Supreme Court has recently called its law of standing a "complicated specialty of federal jurisdiction."³³¹ The Court is right that the complications are a specialty of federal jurisdiction and that the complications are largely unknown to state law. But the problems of standing that come to the state courts are intrinsically no easier than the problems of standing that come to the federal courts. The difference is that the federal courts have invented a law of standing that is too complex for the federal courts to apply consistently,³³² whereas the state courts, relatively speaking, have perceived the merits of the simple proposition that those who are in fact adversely affected should be allowed to challenge.

The federal courts cannot justify their law of standing by saying that the "case" or "controversy" requirement of Article III of the Constitution requires the artificiality and the complexity. Nothing in the Constitution—except what the Supreme Court has put there—requires a departure from the simple and natural proposition that one who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable. Whenever a private party who is in fact adversely affected asserts that administrative action is illegal, and whenever the defendant in the proceeding asserts that the action is legal, the technical requirement of "controversy" is met. This is what the Supreme Court itself has held in the *Sanders* case.³³³ What is needed is a consistent application of the *Sanders* doctrine.

330. Sen. Doc. No. 248, 79th Cong., 2d Sess. 212, 276 (1946).

331. *United States ex rel. Chapman v. FPC*, 345 U. S. 153, 156 (1953).

332. Contrast *Adler v. Board of Education*, 342 U. S. 485 (1952) with *United Public Workers v. Mitchell*, 330 U. S. 75 (1947); contrast *Doremus v. Board of Education*, 342 U. S. 429 (1952), with *Wieman v. Updegraff*, 344 U. S. 183 (1952); contrast *Pierce v. Society of Sisters*, 268 U. S. 510 (1925) with *Tileston v. Ullman*, 318 U. S. 44 (1943).

333. *FCC v. Sanders Brothers*, 309 U. S. 470 (1940).

The doctrine of "private attorney generals," as developed in the Second Circuit,³³⁴ permits an adversely affected private party to assert the public interest in challenging administrative action, whenever a statute provides for challenge by one who is "aggrieved," or "adversely affected." This doctrine provides great potentiality for movement in the right direction if the Supreme Court will consistently follow it, especially since the Administrative Procedure Act supplies the statutory basis for the doctrine whenever that Act is applicable. The Supreme Court itself laid the foundation for the doctrine in the *Sanders* case.

In several prominent cases, the Supreme Court has failed to observe an important distinction—the distinction between standing to institute a proceeding or to start the judicial machinery in motion, and standing of one who is already properly a party to a judicial proceeding to call to the court's attention something that the court may properly do on its own motion. In the *Barrows* case,³³⁵ the only problem of standing was of the latter type, so that the many cases dealing with problems of the former type were all easily distinguishable, but neither the eight justices of the majority nor the single dissenting justice recognized that fact.

On the problem of whether one party has standing to institute a judicial proceeding to assert the constitutional or other rights of another, the Supreme Court has decided both ways. In the outstanding *Pierce* case,³³⁶ a parochial school was allowed to assert the constitutional rights of parents and of children. But in the *Tileston* case,³³⁷ a physician was denied standing to assert the constitutional rights of his patients. When the Administrative Procedure Act is applicable, one who is adversely affected in fact should be allowed to challenge governmental action even though the rights asserted are those of others.³³⁸

The Supreme Court's doctrine that a federal taxpayer has no standing to challenge the legality of a federal expenditure but that a municipal taxpayer has standing to challenge the legality of a municipal expenditure rests principally upon the idea, which had

334. *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir. 1943), dismissed as moot 320 U. S. 707 (1943); *Reade v. Ewing*, 205 F. 2d 630 (2d Cir. 1953).

335. *Barrows v. Jackson*, 346 U. S. 249 (1953).

Another case where the distinction would have been especially helpful is *NLRB v. Highland Park Mfg. Co.*, 341 U. S. 322 (1951).

336. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

337. *Tileston v. Ullman*, 318 U. S. 44 (1943).

338. This proposition is inconsistent with some of the cases but it is in conformity with (a) the clear legislative history of the APA (see note 1 above), and (b) the clear holding in *FCC v. Sanders Brothers*, 309 U. S. 470 (1940).

a good deal of plausibility when the doctrine was enunciated in 1923, that a federal taxpayer's interest is too "minute."³³⁹ Now that federal taxes take about half of all corporate income, and now that individual corporations pay federal taxes of up to a billion dollars a year or more, the 1923 idea is contrary to the plain facts.

Despite the great prestige of the Supreme Court, and despite the prominence of that Court's decision in *Frothingham v. Mellon*,³⁴⁰ the state courts have almost uniformly held that state taxpayers have standing to challenge state expenditures, even though no state taxpayer could conceivably have a stake in state expenditures as large as that of our large corporations in federal expenditures.

Indeed, many state courts have gone much further than merely to allow those who are in fact adversely affected to challenge governmental action. State decisions are numerous which recognize the standing of "citizens," or "residents," or of taxpayers whose taxes are not affected by the challenged action. Those who imagine that opening the judicial doors to such cases will cause a flood of actions by crackpots and officious intermeddlers will do well to examine the decisions in such states as New York, New Jersey, and Massachusetts.³⁴¹

Despite the Supreme Court's artificialities, some of the lower federal courts have developed their own sensible ideas about keeping the judicial doors open to parties who are adversely affected in fact. Outstanding cases uphold the standing of a coal association, of a labor union of coal miners, and of a railway labor union to challenge the grant of a certificate to construct a natural gas pipeline;³⁴² uphold the standing of competitors to challenge an award of subsidies;³⁴³ and uphold the standing of a consumer to challenge an order permitting use without disclosure on the label of synthetic sources of vitamin A in oleomargarine.³⁴⁴

Of all the federal and state judges in the country, the judges of the majority of the Supreme Court of the United States in the many extreme cases denying standing are only a tiny minority.

339. *Frothingham v. Mellon*, 262 U. S. 447 (1923).

340. *Ibid.*

341. See the review of these cases in section 11, above.

342. *National Coal Ass'n v. FPC*, 191 F. 2d 462 (D.C. Cir. 1951).

343. *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346 (D.C. 1953).

344. *Reade v. Ewing*, 205 F. 2d 630 (2d Cir. 1953).