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AUTHOR'S PREFATORY NOTE

The material which follows, on prerequisites to judicial review of administrative agency action, is a small portion of a text on administrative law which I have long had underway, but which the burgeoning ramifications of that subject have rendered it impracticable to complete as planned. The text was intended to be introductory and analytical, with incidental critical comments but without an attempt, except in a projected final chapter, to assess over-all needs and trends. I have not sought to assemble critical views and suggestions that have been published elsewhere, but have cited material which I am conscious of having used in specific ways. My general indebtedness to other writers on the same topics, even though I do not pretend to have exhausted their works, is too great to be acknowledged in explicit terms.** This addition to the literature must find its justification in whatever clarity its analysis may add to the prevalent understanding of a rather abstruse area of law, and in leads for professional research into sub-topics, which its citations should supply.

I am grateful to the editors of the *Indiana Law Journal* for valuable editorial assistance, as well as appreciative of their judgment that the following text has value which justifies its publication in a medium that is largely devoted to innovative writing, such as I have not attempted here.

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** See Appendix.

THREE PREREQUISITES: AN INTRODUCTION

The availability of judicial review of agency action depends in part on the effect given to three frequently-stated prerequisites to such review. These are labeled, respectively, the "ripeness" of the agency action for review (or of the controversy for decision), the exhaustion of available administrative remedies before resort to a court, and the "standing" of the person or persons seeking review to secure it. Each of these will be examined in turn, but the interrelations among them must be recognized at the outset.

Ripeness depends on the legal finality and force, particularly in relation to the procedural stage which has been reached, and on the practical consequences, of the action sought to be reviewed; exhaustion involves resort to present or past administrative means of challenging or seeking modification of otherwise reviewable agency action, prior to a resort to court; and standing turns on the strength and relevance to the agency action of the interest asserted by the person seeking review and of injury to that interest from the action.[1] These three prerequisites are not sharply distinguishable. Exhaustion of administrative remedies for completed agency action may be a prerequisite to judicial review for the same reasons as deny ripeness for judicial review to uncompleted action still lacking legal effect. Injury to an interest which is asserted as a basis of standing to challenge agency action may turn in part on whether the action carries legal force and is therefore ripe, and if so, whether administrative remedies still exist with regard to it.

Each of the prerequisites presents a facet of the solution so far reached to the problems of limiting the courts to the determination of actual controversies and of allocating functions wisely between agencies and courts, consistently with constitutional requirements, with legislative prescriptions that are applicable, and with the requirements of fairness and effectiveness in the execution of laws. The screening of court cases that results imposes its own burden of litigation over the meaning of the three prerequisites. There is a serious question, consequently, whether the game is worth the candle and whether some other screening process, involving an avowed exercise of judicial discretion under broad governing principles, to meet the needs presented in particular situations, might be prefer-

[1] "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Flast v. Cohen, 392 U.S. 83 (1967).

able. Instead, as matters stand, each of the three prerequisites has continued to be recognized even though it overlaps the others. All have received an increasingly relaxed application as the pressure for easily accessible judicial determination of important controversies has mounted. Restraint on litigants and the courts, stemming from the three prerequisites, nevertheless remains significant.

The law of ripeness and standing has been much more fully developed by the federal than by the state courts, largely because of the concern of the Supreme Court over defining the role of the judiciary properly, especially in relation to the responsibilities of the states and of the other two branches of the federal government. Some degree of judicial self-restraint in this respect is inherent in constitutional government; hence state decisions dealing with ripeness and standing, as well as exhaustion, are not infrequent. In addition, definition of the scope of new or traditional judicial remedies and interpretation of statutes providing for judicial review of agency action, setting relevant limits to the use of these remedies, take place in the state as well as the federal sphere. State administrative procedure legislation that conforms in some degree to the federal pattern also enlarges the interplay between federal and state decision, with decisions of the Supreme Court of the United States tending to become a pervasive influence.

The question whether the three prerequisites are jurisdictional, open for consideration newly at any stage of a case in court, receives varying answers. Conventionally they are so regarded, especially when the presence of a genuine controversy is questioned; but, as will appear, the contrary conception prevails when there are strong reasons not to permit a review proceeding to be defeated and neither a constitutional provision nor a statutory limitation restricts the court. In this situation, the need of the interests on each side for judicial consideration, the availability and adequacy of later alternative remedies, and the proper relationship of judicial power to agency authority are factors that are balanced against each other in determining whether judicial relief should be available in the circumstances presented.

PART I: RIPENESS OF AGENCY ACTION FOR REVIEW

Elements of Ripeness

The most essential element of ripeness of agency action for review is the presence in the action of a determination that definitively affects specific interests on which it bears. This element is present when direct enforcement is sought, and may be present even when further

proceedings are necessary to carry out the determination legally, or relief from it could be sought administratively.[2] Hence, agency action that significantly affects an interest does not lack finality merely because it is not self-enforcing or is subject to an administrative appeal, although in the latter event exhaustion of the appeal may be required before review may be had. Similarly, as will appear, an enforceable general regulation may be reviewed even though it requires implementation by the agency or a court and is subject to change, if it states conclusions that, in the absence of change, will determine agency action in later proceedings and if these proceedings are not too contingent upon further exercises of official discretion or upon further acts of the persons who are subject to the regulation. In addition, interlocutory agency action or an agency pronouncement that merely contains advice to persons concerned or states an intention of the agency, normally not reviewable because immediate effects are absent and further agency consideration is expected, may become ripe for review if significant immediate effects in fact arise. Statutes may, however, preclude review altogether, limit it in time, or confine it to particular kinds of court proceedings. On the whole, the ripeness prerequisite has become a weaker barrier than formerly to judicial review of less-than-ultimate agency determinations.

Relation of Ripeness to Kinds of Court Proceedings Involved

The issue of ripeness of agency action for review may arise in a statutory proceeding to review the action, usually as an "order," or in a suit under a court's general jurisdiction to entertain a challenge—often in an injunction suit—to the effectuation of the action sought to be reviewed. In the first kind of proceeding the issue of ripeness is often stated as turning on whether the agency action, considering its form, the stage of agency processes at which it occurs, and its effects, is really an "order."[3] In the second kind of proceeding the question

[2] Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 228 (1908) (challengers of a rate order "were not bound to wait for proceedings brought to enforce the rate and to punish them for departing from it" before securing judicial review). *Cf.* Friedman v. United States, 310 F.2d 381 (Ct. Cl. 1962).

[3] See the elaborate discussion in PBW Stock Exchange, Inc. v. SEC, 485 F.2d 718 (3d Cir. 1973), *cert. denied,* 416 U.S. 969 (1974), majority and minority opinions, where the result turned largely on the Congressionally intended meaning of "order" in the particular statutory provision involved, § 25(a) of the Securities Exchange Act, 48 Stat. 901 (1934), 15 U.S.C. § 78y(a) (1970), with reference to a regulation that was not issued expressly as an "order." In any case resting on a statute, the decision must, of course, turn on the precise terms and interpretation of the particular statutory provision; but the review provisions of the federal statutes have often been sufficiently similar to each other to produce much cross-reference among decisions as to ripeness under them and to develop a common body of interpretation.

is whether the intervention of a court is warranted under the circumstances, given the terms, legal effects and practical consequences of the agency action involved. In such an instance the issue is often stated to be whether the controversy before the court, rather than just the agency action, is ripe for judicial consideration; but a great deal turns on the nature of that action.[4]

The Federal Administrative Procedure Act recognizes, first, the reviewability of "[a]gency action made reviewable by statute," and provides, second, for review in "any applicable form of legal action" of "final agency action for which there is no other adequate remedy in a court. . . ."[5] Like the original and Revised Model Acts,[6] state administrative procedure legislation commonly provides a new mode of review for adjudicative decisions or orders. This statutory process is sometimes limited, as it is in the Revised Model Act, to "final" decisions or orders. It may be made exclusive or be accompanied by an express retention of preexisting modes of review.[7] Under the federal act and under state acts which do not supersede prior modes of review, previous precedents with regard to the requirements of ripeness continue to apply to the review proceedings that are retained; but where the new mode of review is rendered exclusive, ripeness turns chiefly on interpretation of the new legislation. Again following the original or Revised Model Act,[8] state administrative procedure legislation commonly provides for judicial review of general regulations by means of declaratory judgment proceedings.

Ripeness of "Final" Agency Action in Federal Statutory Review Proceedings

Holdings of the Supreme Court of the United States with regard to ripeness of agency orders in statutory three-judge court review proceedings took a new course, expansive of ripeness for review, in *Rochester Telephone Corporation v. United States*.[9] Review by means

[4] *See also* Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1445, 1447-52 (1971).

[5] 5 U.S.C. §§ 703, 704 (1970).

[6] MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 12, 9C U.L.A. 183 (1957); REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15, 9C U.L.A. 142 (Supp. 1967) [hereinafter cited as REVISED MODEL ACT].

[7] REVISED MODEL ACT, § 15. That Act expressly includes any "preliminary, procedural, or intermediate agency action or ruling . . . if review of the final agency decision would not provide an adequate remedy." The Administrative Review Act, ILL. REV. STAT., ch. 110, § 264 *et. seq.* (1971), provides an exclusive method of reviewing final "decisions," which "terminate . . . the proceedings" leading to them, of agencies made subject to the Act.

[8] *See* § 7 of both Acts.

[9] 307 U.S. 125 (1939). *See also* FPC v. Pacific Power & Light Co., 307 U.S. 156 (1939) (applying the same thought to review of orders by Courts of Appeals on the record of agency proceedings) and Louisville Gas & Elec. Co. v. FPC, 129 F.2d 126 (6th Cir. 1942).

of such proceedings had been made applicable to "any order of the [Federal Communications] Commission" with stated exceptions. The order involved in *Rochester Telephone* merely stated that the corporation was a telephone carrier subject to the Communications Act and was required to comply with certain general orders of the Commission which directed that rate schedules and specified information be filed. These orders, not the order directing the corporation to comply with them, were enforceable by statutory penalties. The Court held that the order directing the corporation to comply was itself reviewable in a statutory injunction proceeding before a three-judge court, even though its only legal consequences would take the form of enforcement of the previous general orders and would take place only if these were not obeyed. The Court stated:

> [I]t was not a mere abstract declaration regarding the status of the Rochester under the Communications Act, nor was it a stage in an incomplete process of administrative adjudication. The contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission.[10]

The Court distinguished a seemingly contrary decision as to reviewability in *Shannahan v. United States*,[11] in which the Interstate Commerce Commission had made a determination that subjected an electric railroad to the Railway Labor Act. That determination, the Court held, involved merely a declaration which required further action by the National Mediation Board before it could have effect.

The Court in *Rochester Telephone* also distinguished *United States v. Los Angeles & Salt Lake R. Co.*,[12] in which a valuation by the Interstate Commerce Commission of the railroad's property, which

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[10] 307 U.S. at 143-44. The opinion repudiates the contrary reasoning of Lehigh Valley R.R. v. United States, 243 U.S. 412. *Id.* at 133 n.11. The Court also overruled other aspects of the previous "negative order" doctrine, most fully enunciated in Procter & Gamble Co. v. United States, 225 U.S. 282 (1912), whereby agency orders that denied relief from certain kinds of requirements of pre-existing law were held not reviewable. Such orders are not in themselves enforceable but call in effect for enforcement of the previous law. The same is true of license refusals which are traditionally reviewable.

[11] 303 U.S. 596 (1938). *See* Rochester Tel. Corp. v. United States, 307 U.S. 125, 130, n.8 (1939). In accord with *Shannahan*, under a different statute, is Carolina Aluminum Co. v. FPC, 97 F.2d 435 (4th Cir. 1938).

[12] 273 U.S. 299 (1927).

would be prima facie evidence of the value in later rate and other regulatory proceedings, was held to be subject neither to statutory review nor to review by suit under the general equity power of the district courts, because it was "merely the formal record of conclusions reached" and any error in it could be corrected in later proceedings in which it might be used. A year after *Rochester Telephone* the Court noted broadly that "we attribute little importance [in determining reviewability] to the fact that" a certification of a collective bargaining agent for the employees in an employment unit, which might later be implemented by an order to the employer to cease refusing to bargain with the agent as the exclusive representative of the employees involved, "does not itself command action."[13] Later the Court applied the same principle to a determination of the Interstate Commerce Commission that a motor carrier was a contract carrier subject to the permit requirement of the Motor Carrier Act, noncompliance with which would render the carrier's operation illegal.[14] Declaratory agency orders under the Administrative Procedure Act are made binding by the statute and consequently are reviewable by statutory process.[15]

Columbia Broadcasting System v. United States[16] involved agency action which clearly required further proceedings in the agency before it would have legal consequences. The Federal Communications Commission, pursuant to statute, promulgated its Chain Broadcasting Regulations in an "order." Orders of the Commission, other than certain orders relating to radio station licenses, were statutorily reviewable in a three-judge district court injunction proceeding. The question was whether this particular order was so reviewable. The lower court dismissed the complaint with one judge dissenting.[17] Most

[13] American Fed'n of Labor v. NLRB, 308 U.S. 401, 408 (1940). The decision was that the National Labor Relations Act precluded review under the statute of a certification order of the Board, except as incidental to review of a later unfair labor practice order. The Court declined to decide whether, under some circumstances, such an order might be challenged in an independent suit invoking the general jurisdiction of the district courts under the Judicial Code; but the purpose of Congress was to avoid interruption of Board processes by premature judicial review. *Cf.* Boire v. Eastern Greyhound Lines, 376 U.S. 473 (1964). *See also* Part II, *infra*, at notes 17, 78-98.

[14] Schenley Distillers Corp. v. United States, 326 U.S. 432, 436 (1946), *citing* Cornell Steamboat Co. v. United States, 321 U.S. 634, 635 (1944), where the point was taken for granted. The district court in *Schenley*, 50 F. Supp. 491 (D. Del. 1943), and 61 F. Supp. 981, 986 (D. Del. 1945), discussed the matter fully. To the same effect is G.J. Amshoff v. United States, 228 F.2d 261 (7th Cir. 1955), *cert. denied*, 351 U.S. 939 (1956).

[15] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 372, n.3 (1969); New York State Broadcasters Ass'n v. United States, 414 F.2d 990 (2d Cir. 1969); Northeast Airlines v. CAB, 345 F.2d 662 (1st Cir. 1965).

[16] 316 U.S. 407 (1942).

[17] National Broadcasting Co. v. United States, 44 F. Supp. 688 (S.D.N.Y. 1942).

"orders" of the Commission are rendered in proceedings involving named parties and dispose of the claims of those parties. The Chain Broadcasting Regulations, by contrast, were in general terms, stating that no license should be granted to a commercial radio station which had a contract with a network containing certain provisions. Most regulations of the Commission are enforceable by judicial proceedings to impose statutory penalties and might therefore be reviewable as "orders" in such proceedings;[18] but those here involved were, by their terms, not susceptible to this kind of enforcement; they would be carried out by the withholding or, conceivably, the revocation of licenses of broadcasters whose contracts with networks were in violation of the regulations. The regulations were, however, specifically authorized by the statute, which empowered the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting."[19]

In a report on which the Chain Broadcasting Regulations were based[20] the Commission characterized them as the "announcement of the principles we intend to apply in exercising our licensing power," but also as "the expression of the general policy we will follow in exercising our licensing power." It assured license applicants of the "right to a hearing on the question whether [they] in fact propose to operate in the public interest," but clearly the regulations were nevertheless couched in "terms of command" and the order embodying them, as the dissenting judge in the district court pointed out, had "all the earmarks of a final order."[21] Because of these aspects of the Commission's action and the manner in which the regulations could be expected to operate, the Supreme Court, in an opinion by Chief Justice Stone, concluded that the order embodying them was reviewable under the statutory provision. The effect of the order was to "determine [the] validity" of the specified contract provisions in advance of licensing proceedings. The cancellation or refusal of a license because of failure to comply with the regulations would impose "a penalty and sanction for noncompliance far more drastic than the fines customarily inflicted for breach of reviewable administrative

[18] 48 Stat. 1100 (1934), 47 U.S.C. § 502 (1970). Regulations enforceable by penal sanctions, issued in an order, were reviewed in a three-judge court proceeding, without question as to jurisdiction, in the Assigned Car Cases, 274 U.S. 564 (1927). Florida East Coast Ry. v. United States, 410 U.S. 224 (1973), and United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), are recent instances of three-judge court review, implicitly sustained by the Supreme Court, of agency regulations involving liability to direct sanctions for violations.

[19] 48 Stat. 1082 (1934), 47 U.S.C. § 303(i) (1970).

[20] FCC, REPORT ON CHAIN BROADCASTING, ORDER No. 37, ch. VII, J, (1941).

[21] National Broadcasting Co. v. United States, 44 F. Supp. 688, 695 (S.D.N.Y. 1942).

orders." Hence the regulations had "the force of law" before they were applied as well as after. As an "exercise of the delegated legislative power," they would be, "until amended, . . . controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them."[22]

For Mr. Justice Frankfurter, dissenting with the concurrence of Mr. Justice Reed and Mr. Justice Douglas, the sanctions applicable to the Chain Broadcasting Regulations were not comparable to the penal sanctions applicable to other regulations, partly because the Commission, in his view, could not dispense with "its statutory obligation to examine each application for a license and determine whether a grant or denial is required by the public interest," and had not attempted to do so. The regulations themselves "entailed no immediate legal consequences." They did not forbid licensees to enter into any relations they might wish with networks, but only expressed a policy with regard to those relations as they might bear on the public interest involved in a particular license application or continuance. Hence, according to the dissenting opinion, the order embodying the regulation was not subject to review.[23]

Certain practical consequences of the regulations were considered by the Court, together with their legal effect, in determining reviewability. Although the regulations would not be applied in license proceedings until such proceedings arose—normally when current licenses expired—the Columbia Broadcasting System asserted, without contradiction, that affiliated stations had already announced they would not negotiate for the renewal of existing contracts with Columbia which did not conform to the regulations, or continue these contracts in effect beyond the expiration of their licenses, and that, as a consequence, the business of Columbia was already being seriously harmed. These consequences, the Court held, established the threat of sufficient injury to the network to justify its invocation of the equity jurisdiction of a three-judge court[24] and, it seems fair to add, also contributed to the

[22] Columbia Broadcasting System v. United States, 316 U.S. 407, 420-22 (1942).

[23] *Id.* at 432-38.

[24] *Id.* at 422-24. The standing of the network is also closely involved. As to immediate reviewability of a threatened restriction in a license, operative in future circumstances, because of its effect on the establishment and financing of the enterprise involved, *see* United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940). In Music Broadcasting Co. v. FCC, 217 F.2d 339 (D.C. Cir. 1954), an order of the Commission, which was subject to change after a hearing if one were requested, was held reviewable because of its immediate effect of preventing the music company from broadcasting during certain pre-dawn hours. Judge Danaher dissented, characterizing the order as interlocutory. *See also* Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 990 (1954)

reviewability of the regulations without further agency action to implement them.[25]

A similar conclusion was reached, on similar grounds, in *United States v. Storer Broadcasting Corporation*,[26] as to the legal effectiveness and reviewability of a Federal Communications Commission regulation which conditioned the future licensing of broadcasting stations on an absence of ownership by applicants of more than stated numbers of stations, thereby limiting the business opportunities of multi-station broadcasting corporations.[27] Judicial review in the *Storer* case was under the provisions of the Review Act of 1950 which, by that time, had replaced the three-judge court process as to orders of various agencies other than the Interstate Commerce Commission, including the Federal Communications Commission.[28]

In *Frozen Food Express v. United States*[29] the Court held that action by the Interstate Commerce Commission, consisting of a report as to Commission authority under the governing statute over the transportation of enumerated kinds of commodities and an order terminating the inquiry which led to the report, was ripe for review in a three-judge court proceeding. The Court noted that the carriers who did not comply with the statute as correctly interpreted by the Commission might be subject to penalties or to enforceable cease-and-desist orders. Thus, the carriers were under immediate pressure to con-

(interim approval of a restrictive agreement among shipping lines *held* immediately reviewable at the instance of a competitor with them, because of adverse effects on its business).

[25] See further the discussion of this point in PBW Stock Exchange, Inc. v. SEC, 485 F.2d 718 (3d Cir. 1973), *cert. denied*, 416 U.S. 969 (1974), note 3 *supra*, in relation to statutory court of appeals review of regulations considered as a possible "order."

[26] 351 U.S. 192 (1956). In the intervening case of FCC v. American Broadcasting Co., 347 U.S. 284 (1954), the Court affirmed a three-judge court's judgment enjoining the enforcement of Commission regulations which the Supreme Court labeled "interpretative," *id.* at 289 n.7, and which the lower court said "would be considered by the Commission," in deciding upon license applications. American Broadcasting Co. v. United States, 110 F. Supp. 374, 384 (S.D.N.Y. 1953). The issues of ripeness and standing were not discussed, but adverse effects of the regulations on the businesses of the plaintiffs had been alleged and were not disputed. Both courts, notwithstanding their characterization of the regulations, appeared, in reality, to regard them as virtually a final disposition of the matters they covered, reviewable within the principle of the Columbia Broadcasting System case.

[27] More recently, under the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (1970), the Federal Power Commission issued a new general rule in the form of an order, exempting small producers of gas from existing price limits on new sales, but providing for substituted future Commission controls over the prices resulting from these sales, which might result in retroactive refund costs for purchasers for resale. The rule was assumed to be directly reviewable by a court of appeals under the review povision of the Act, 15 U.S.C. § 717r (1970), at the instance of purchasers and other persons affected adversely. FPC v. Texaco, Inc., 407 U.S. 380 (1974).

[28] Review Act of 1950, ch. 1189, § 4, 64 Stat. 1130 (1950), *as amended* 28 U.S.C. § 2344 (1970).

[29] 351 U.S. 40 (1956).

form their businesses to the conclusions in the report. A strong dissent by Mr. Justice Harlan pointed out that, as actually occurred in a companion case involving a cease-and-desist order against a carrier which failed to comply with the Commission's interpretation,[30] the Commission in deciding upon its order would not regard its prior general conclusion as binding and would re-examine the issues. Hence the prior order determined nothing and should not be regarded as reviewable.

The principle of *Frozen Food Express* is capable of wide extension. In light of the existing strong tendency toward enlarging the availability of judicial review of administrative action whenever a significant interest is affected by the action, it seems likely that pronouncements addressed to affected persons generally, which wear a sufficient agency imprimatur and in fact produce identifiiable consequences to interests that are legally cognizable, even though the pronouncements contain no command, may well be considered to fall within statutory provisions for review of agency orders.[31] It would follow that agency pronouncements in the form of regulations, which are not directly enforceable but give notice of policies that will be applied, and which have adverse consequences for affected interests, are subject to such review when the governing statute permits[32] and when the agency and court procedures involved render the review feasible.[33]

Agency actions which, like that in *Rochester Telephone Corp. v.*

[30] East Texas Motor Freight Lines v. Frozen Food Express, 351 U.S. 49 (1956).

[31] *See* Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1445, 1446-48 (1971). *See also* Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 914 (1973) ("order" stated as a newly formulated "reminder" to broadcasters of their pre-existing duty *held* reviewable); Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), *clarified on rehearing*, 463 F.2d 822 (D.C. Cir. 1972) (so as to a "policy statement" covering procedures and standards in license renewal). *Compare* Hearst Radio, Inc., v. FCC, 167 F.2d 225 (D.C. Cir. 1948) (policy statement in an informational publication *held* not reviewable under the general jurisdiction).

[32] *See, e.g.*, Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1116 (D.C. Cir. 1971) (procedural rules which governed the character of subsequent proceedings). A published "regulation" establishing policy may in some contexts be looked upon as an "order," whether so designated by the agency or not, made reviewable as such by a statute, Public Service Comm'n v. FPC, 463 F.2d 883 (D.C. Cir. 1972), but the opposite may also be true. *Cf.* PBW Stock Exch., Inc. v. SEC, 485 F.2d 718 (3d Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). Alleged illegality in a similar regulation can also be challenged "on allegation of failure [t]o perform any act or duty not discretionary . . . ," made actionable as such by statute. Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd by an equally divided Court on cert. to ct. of appeals' affirmance*, 412 U.S. 541 (1973).

[33] As to the prerequisite of agency records of hearings under many statutory provisions for review, which can be satisfied after judicial remand when such a record is otherwise absent or inadequate, *see*, in relation to agency pronouncements not backed in the first instance by such a record, American Sumatra Tobacco Corp. v. SEC, 93 F.2d 236 (D.C. Cir. 1937); Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970),

United States[34] establish decisively the basis for future legal rights and liabilities of named or identified persons, such as a carrier and future users of its service, are recognized more easily than general pronouncements as final "orders" which are subject to federal statutory review. In *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*[35] the Federal Maritime Commission approved a change in the fee structure contained in a filed tariff of charges for the use of port terminal facilities. The Court held its action to be an "order" subject to the Administrative Orders Review Act.[36] The Court declared the "relevant considerations in determining finality" to be "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequence will flow from the agency action."[37]

Ripeness of "Final" Agency Action in Suits Under the General Jurisdiction of the Federal Courts

The district court in the *Columbia Broadcasting System* case suggested that the agency action before the court, which it regarded as not an order reviewable in a statutory proceeding, might be subject to challenge in a suit under a federal court's general jurisdiction, if the requirements of justiciability were met.[38] The Supreme Court in *Shields v. Utah Idaho Central R. Co.*[39] had held that a determination of the Interstate Commerce Commission was so reviewable even though it was substantially identical to that in the *Shannahan* case[40] where no "order" was thought to have issued and statutory review was denied. The requirement in *Shannahan* and later cases that there be an "order" as a prerequisite to statutory review continues even though it lacks substance since *Frozen Food Express.*[41] Whether there is any signifi-

vacated as moot, 404 U.S. 403 (1972); Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970). *Compare* Mallory Coal Co. v. National Bituminous Coal Comm'n, 99 F.2d 399, 405-06 (D.C. Cir. 1938); Texaco, Inc. v. FPC, 317 F.2d 796, 802-03 (10th Cir. 1963), *rev'd as to other points,* 377 U.S. 33 (1964); United Gas Pipeline Co. v. FPC, 181 F.2d 796 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 827 (1950). As to later review of a "policy statement" not preceded by a hearing, where review is incident to agency action applying the policy, see Pacific Lighting Serv. Co. v. FPC, 518 F.2d 718 (9th Cir. 1975).

[34] 307 U.S. 125 (1939). *See* discussion in text accompanying notes 9-10 *supra.*

[35] 400 U.S. 62 (1970).

[36] 28 U.S.C. § 2341-51, 2353 (1970).

[37] Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget, 400 U.S. 62, 71 (1970).

[38] National Broadcasting Co. v. United States, 44 F. Supp. 688, 692 (S.D.N.Y. 1942).

[39] 305 U.S. 117 (1938).

[40] *See* note 11 *supra* & text accompanying.

[41] *See* text accompanying note 24 *supra*; *compare* Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970), *with* Public Util. Comm'n v. United States, 356 F.2d 236 (9th Cir. 1966). In

cant difference between the characteristics of agency action, other than interlocutory action, necessary to make it an "order" or a "final order" under a statute and those which might make it ripe for review under the general jurisdiction of the courts, depends in part on the prerequisites to invocation of the latter. These involve aspects of particular remedies the general jurisdiction embraces, which are common for the most part to both federal and state remedies; and they derive also from the separation of powers, the need to conserve judicial resources while providing adequate remedies, and the importance of according due scope to the discharge of agency responsibilities.

The general jurisdiction to entertain injunction and declaratory judgment suits extends to possibly invalidating merely anticipated agency action which is sufficiently threatened, as well as to forestalling the effects of past action. With respect to injunction, the requisite injury or threat of it to the planitiff's interest must be alleged.[42] Injury or the threat of it at the hands of an agency, rather than a specific agency action that allegedly causes the injury, is then the crux of the matter and the issue of ripeness is focused in this context upon the controversy rather than focusing mainly upon the agency action. When the validity of a statute on its face is challenged and other prerequisites to a proceeding in court are met, the mere existence of the statute and of an agency or officers charged with its application can create a ripened controversy,[43] without any specific prior agency action. When agency action has occurred, the question arises whether that action is sufficiently definitive in nature and effect

A.E. Staley Mfg. Co. v. United States, 310 F. Supp. 485 (D.Minn. 1970), a three-judge court held a published ICC interpretation of railway tariffs, substantially modifying their effect, which had not been preceded by opportunity for hearing procedures normally available when tariff changes were under consideration, to be an "order" that was statutorily reviewable. *See also* Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), discussed at note 31 *supra*. By contrast, a mere interpretation, statement of fact, or policy statement could be held not to be an order subject to statutory review, but to be action which, because of its effects, was challengeable under the general jurisdiction. *See, e.g.*, FTC v. Nash-Finch Co., 288 F.2d 407 (D.C. Cir. 1961) (review under Declaratory Judgment Act *held* available regardless of whether statutory review could be had). *Compare* Hearst Radio, Inc. v. FCC, 167 F.2d 225 (D.C. Cir. 1948) (review in declaratory judgment action not available); *see also* Kukatush Mining Corp. v. SEC, 309 F.2d 647, 652 (D.C. Cir. 1962) (Bazelon, Ch. J. dissenting), suggesting the District of Columbia Code as an independent source of jurisdiction to review.

[42] In any case, other prerequisites to a court action, including the involvement of a sufficient plaintiffs' interest and the presence of issues suitable for judicial determination, must of course be met.

[43] *See, e.g.*, Buckley v. Valeo, 96 S. Ct. 612, 680-682 (1976); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Public Util. Comm'n v. United States, 355 U.S. 534 (1958) (United States Government challenge to state statute providing regulation of Government transactions); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 421 (1949) (statutory provision operative 50 years later, having immediate effect on financing

to create such a controversy relating to the statute, to that action, or to both. If the relevant agency action has been preliminary, such as a mere statement of intention to apply a certain policy or the launching of an inquiry or acceptance of a complaint, without any command or sanctions as yet, it may not suffice.[44] The agency action must carry implementation significantly forward and inflict or sufficiently threaten ascertainable injury, before ripeness arises. In determining when this point is reached, prior to some enforceable order on which the court could focus attention, the court may consider all that the agency has done and the consequences, both immediate and future, having in mind whether a case or controversy in the constitutional sense is presented and whether opportunity should be preserved for further agency action, possibly leading to the availa-

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of corporation); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); *Ex parte* Young, 209 U.S. 123, 161 (1908).

Continental Baking Co. v. Woodring, 286 U.S. 352 (1932), distinguished those aspects of the statute that required discretionary agency application, as to which a ripened controversy had not arisen, 286 U.S. at 367-68. *See also* Lake Butler Apparel Co. v. Secretary of Labor, 519 F.2d 84, 86-87 (5th Cir. 1975) (validity of provision of statute enforceable by cumulative penalties is not an issue ripe for review in advance of actual threat of enforcement); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1214-16 (8th Cir. 1972); Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972); National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969), *appeal dismissed voluntarily*, 400 U.S. 801 (1970); City of Altus v. Carr, 255 F. Supp. 828, 835-37 (W.D. Tex. 1966), *aff'd* 385 U.S. 35 (1966); Senior Citizens League v. Dep't of Social Security, 38 Wash. 142, 228 P.2d 478 (1951) (statute allegedly curtailing public assistance rights previously bestowed may be challenged without prior assertion and denial of claims before agency).

A classic discussion of circumstances in which a controversy over the constitutionality of a statute may be ripe for judicial consideration in the absence of steps to enforce the statute may be found in the several opinions in Poe v. Ullman, 367 U.S. 497 (1961). *Compare* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Epperson v. Arkansas, 393 U.S. 97 (1968); Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971), and Crossen v. Breckenridge, 446 F.2d 833 (6th Cir. 1971). In Pierce v. Society of Sisters, 268 U.S. 510 (1925), injunctive relief was held to be obtainable in a federal court against the enforcement of a challenged state statute which was clear in its terms, even before its effective date. *See generally* as to determining the constitutionality of proposed statutes or ordinances by declaratory judgments, Annot., 114 A.L.R. 1361, 1365-1366 (1938). Even when a ripened controversy exists (or is assumed to exist), relief by injunction may be unavailable because of restrictions applicable to that remedy. Watson v. Buck, 313 U.S. 387, 400-01 (1941). When a statute, although clear in its terms, comes into operation only as respects persons, projects, or geographical areas that are to be officially designated, action that places it in effect in relation to the plaintiffs is often necessary to challenge its validity; but in the consideration of such a challenge the focus is then on the statute. *See* Flast v. Cohen, 392 U.S. 83 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947); Wallace v. Currin, 95 F.2d 856 (4th Cir. 1938), *aff'd*, Currin v. Wallace, 306 U.S. 1 (1939).

[44] *See* W.E.B. DuBois Clubs of America v. Clark, 389 U.S. 309 (1967); Alabama v. United States, 373 U.S. 545 (1963); First Nat'l Bank v. Albright, 208 U.S. 548 (1908); Helco Products Co. v. McNutt, 137 F.2d 681 (D.C. Cir. 1943). In Laird v. Tatum, 408 U.S. 1 (1972), the plaintiffs failed because in the view of the Supreme Court majority the system of military surveillance of civilian political activity which they challenged was not alleged or shown to have resulted in specific acts or consequences that were illegal or suppressive of the First Amendment freedoms for which the plaintiffs sought protection. *See also* Donohoe v. Duling, 465 F.2d 196 (4th Cir. 1972). In O'Shea v. Littleton, 414

bility of other judicial remedies.[45] The court's balancing of the need for immediate protection of the interest opposing the agency, of preserving opportunity for further agency action, and of conserving judicial resources will obviously play a greater role than the more conceptual aspects of ripeness. Nevertheless these aspects serve to structure the decisions in a wide variety of factual and legal contexts. In a case coming to the Supreme Court from the state courts the determination of ripeness for consideration at the federal level is made with attention to special federal concerns.[46]

Appraisal of the consequences of agency action turns in part on the nature of the interest which a plaintiff seeks to protect; hence the issue of standing may also be involved and may have a close bearing. If the interest for which protection is sought is both publicly

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U.S. 488 (1974), illegal and intimidating acts of local law enforcement officers were alleged to have been committed as part of an oppressive course of conduct by local law enforcement authorities against members of the Negro race as a class, but were held not to have been sufficiently related in the allegations to any named plaintiff to support jurisdiction. The issue was standing rather than ripeness. The *Tatum* and *O'Shea* decisions rejected the view advanced in dissent, that the intimidating effect on all members of a class of systematic official surveillance of the members, or the effects on all members of repeated illegal acts against some, should suffice to establish ripeness of the official actions for review and standing by all members of the class to bring an action challenging the conduct. *Cf.* Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1 (9th Cir. 1974), and contrast Part I of the opinion of the Court in Allee v. Medrano, 416 U.S. 802 (1974), where continuing police misconduct against plaintiffs and members of their class was established.

[45] *See* Sampson v. Murray, 415 U.S. 61, 63, 80 (1974) (district court "not totally without jurisdiction" to review dismissal of probationary federal employee, which was still subject to possible administrative correction; but interim judicial stay of the dismissal was without authority). *Cf.* West Penn Power Co. v. Train, 522 F.2d 302, 310-14, 316-17 (3d Cir. 1975); Beard v. Stahr, 370 U.S. 41 (1962) (threatened military discharge after inadequate hearing, *held* not reviewable); City Bank Farmers Loan & Trust Co. v. Schnader, 291 U.S. 24 (1934) (threatened tax assessment based on attorney general's opinion *held* reviewable); Wilderness Society v. Morton, 479 F.2d 842, 848 n.1 (D.C. Cir. 1973) (anticipated action on permit applications not yet made *held* not reviewable); National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 694-704 (D.C. Cir. 1971) (distinguishing Helco Products Co. v. McNutt, 137 F.2d 68 (D.C. Cir. 1943) (judicial review of published interpretation *held* appropriate); A.O. Smith Corp. v. FTC, 530 F.2d 515 (3d Cir. 1976) (elaborate weighing by court of effects of a new agency rule on public and private interests effected); Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974) (controversy ripe because of enforcement but need for injunction not shown); Lehmann v. State Bd. of Pub. Accountancy, 208 Ala. 185, 94 So. 94 (1922), *aff'd* 263 U.S. 394 (1923) (validity of charges against a professional practitioner cannot be judicially determined until agency proceedings against him have run their course).

See also Mottola v. Nixon, 464 F.2d 178 (9th Cir. 1972) (military order enlarging theater of hostilities which merely increases the likelihood that the active armed forces will be augmented and ordered into combat zones does not affect inactive reservists sufficiently to be reviewable at their instance; opinion couched in terms of standing); National Student Ass'n v. Hershey, 412 F.2d 1103, 1116-17 (D.C. Cir. 1969) (two of three aspects of challenged official directive as to Selective Service policy *held* not to have sufficient adverse effect on registrants' interest to create a ripened controversy).

[46] Poe v. Ullman, 367 U.S. 497, 506-07 (1961). See Doremus v. Board of Educ., 342 U.S. 429 (1952), with regard to the same aspect of determining standing.

important and likely to wither under adversity, as tends to be true of freedom of publication, speech, or association and of certain other civil liberties, an agency statement which is intended to produce compliance because of fear of consequences, or to lead to action against the interest, may be a determination ripe for review, even though in itself it lacks legal force.[47] If, by contrast, the interests involved are looked upon as less vulnerable, as corporate business interests at times have been, even rather definite agency action limiting the interest, such as a statement of intention to terminate it under defined circumstances, thereby affecting its value, may not suffice to generate a ripened controversy.[48] When injunctive or declaratory relief against state law enforcement action is sought in a United States district court, the ripeness issue which may be present tends to be subordinated to the related question of whether, considering the character and stage of the state processes which are under way, the desired form of relief in a federal court may properly be considered by the court.[49]

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[47] *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969), discussed at note 45 *supra*, as to the third aspect of the directive there involved; Thoms v. Heffernan, 473 F.2d 478, 484-85 (2d Cir. 1973), *vacated on other grounds*, 418 U.S. 908 (1974); Poe v. Menghini, 339 F. Supp. 986, 991 (D. Kan. 1972). *Cf.* Keyishian v. Board of Regents, 385 U.S. 589, 596, 604 (1967) (entire anti-subversion "statutory and regulatory complex," enforceable by termination of teacher employment, renders teachers "aggrieved" and satisfies prerequisites to action in court).

[48] *See, e.g.*, Eccles v. People's Bank, 333 U.S. 426 (1948), in which the bank sought a declaration of invalidity of a condition the Board of Governors of the Federal Reserve System had attached to the bank's membership in the system, whereby the Board declared its intention to terminate the membership if a named banking chain acquired an interest in the bank. Intervening action by the Board, when a unit of the chain acquired some shares in the bank, had established that the condition was not as absolute as it seemed, but left room for a Board determination as to whether the interest acquired was in such form as to endanger the independence of the bank. Two dissenting Justices pointed out that the Board's action had an immediate effect on the market for the bank's stock, sufficient to warrant a judicial determination of the issue presented. *See also* Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950) (seizure of goods upon probable cause prior to institution of judicial enforcement proceedings against them was at a "preliminary stage" of enforcement and was not reviewable action any more than other forms of initiation of porceedings "where only property rights are concerned"); Continental Bank & Trust Co. v. Martin, 303 F.2d 214 (D.C. Cir. 1962). *Cf.* Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954) (enforcement steps which threatened heavy loss to the challenging corporation and impaired its financial standing sufficed to justify judicial determination of the statutory authority of the agency but not the issue of constitutionality of the governing statute); Independent Broker-Dealers' Trade Ass'n v. SEC, 442 F.2d 132 (D.C. Cir. 1971) (SEC communications to stock exchange, contributing to exchange action adverse to plaintiffs, were sufficiently definite action to be reviewable); Alaska Airlines, Inc. v. Pan American World Airways, 321 F.2d 394 (D.C. Cir. 1963) (tentative conclusion, allegedly without authority, to be considered further in a show-cause proceeding, that airline certificate should be terminated, *held* not reviewable); MacDonald v. Best, 186 F. Supp. 217 (N.D. Cal. 1960) (effects on mining claim of threatened forfeiture based on prior agency legal opinion *held* to confer jurisdiction to enjoin).

The issuance of a clear but non-binding agency "guideline" as to future agency action, applicable to circumstances that are fairly certain to arise, may either create a sufficient controversy because of some immediate impact[50] or fail to do so because of the absence of assurance that the guideline will actually be followed.[51] Agency conduct threatening future agency action that would not be subject to judicial review may give rise to a ripened controversy if other conditions of justiciability are met, even though if judicial review after additional agency action were available, the threat alone would not suffice.[52]

Regulations which are issued under a power to make legally binding rules may, like statutes, either have effects which render them subject to immediate challenge by persons concerned,[53] or be

[49] *See, e.g.*, Ellis v. Dyson, 421 U.S. 426 (1975); Allee v. Medrano, 416 U.S. 802 (1974), discussed at note 44 *supra*; Steffel v. Thompson, 415 U.S. 452 (1974) (police threats of arrest for handbill distribution); Dombrowski v. Pfister, 380 U.S. 479 (1965) (official actions included bad-faith harassment of plaintiffs by means of threats and illegal search and seizure); Baggett v. Bullitt, 377 U.S. 360 (1964); Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972). *Cf.* Schlesinger v. Councilman, 420 U.S. 738 (1975), where the Court, in an analogous injunction suit against pending court martial proceedings, distinguished between judicial jurisdiction to entertain the action and "equitable jurisdiction" for the court to "exercise its remedial powers."

[50] *See, e.g.*, Ramer v. Saxbe, 522 F.2d 695 (D.C. Cir. 1975) (Bureau of Prisons written policies, not made publicly available but distributed to local penal administrators, *held* reviewable as regulations); State ex rel. Time Ins. Co. v. Smith, 184 Wis. 455, 200 N.W. 65 (1924).

[51] Standard Scale Co. v. Farrell, 249 U.S. 571 (1919) (guidelines supplied by state official to local officers who were not legally bound to follow them); Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974) (non-binding statement of policy); National Ethical Pharm. Ass'n v. Weinberger, 503 F.2d 1051 (4th Cir. 1974) (general characterization of drugs requiring agency clearance, still to be applied in specific instances); Sea-Land Serv., Inc. v. FMC, 402 F.2d 631 (D.C. Cir. 1968) (agency "report" which it probably would follow in future contingencies); Duke v. State *ex rel.* Shaw, 247 N.C. 236, 100 S.E.2d 506 (1957) (interpretative tax regulation). Property tax assessments which have become final, unlike the foregoing guidelines and the valuation in United States v. Los Angeles & Salt Lake R.R., 273 U.S. 299 (1927), are not mere guides but determine the actions of other officials in collecting taxes, and would no doubt be ripe for review by statutory processes if any were provided. Language in *Ex parte* Williams, 277 U.S. 267 (1928), which seems to indicate broadly that assessments, because they "are merely findings of fact," are not "orders" which can be reviewed, must be read in context. Tax collections based on such assessments may under some circumstances be enjoined, Great Northern Ry. v. Weeks, 297 U.S. 135 (1936); Annot., 80 L. Ed. 546 (1936); but for traditional and practical reasons judicial review under the general jurisdiction is largely precluded.

[52] *See* Commercial State Bank v. Gidney, 174 F. Supp. 770, 776 (D.D.C. 1959), *aff'd per curiam*, 278 F.2d 871 (D.C. Cir. 1960).

[53] *See* cases cited in note 56 *infra* and California v. LaRue, 409 U.S. 109 (1972); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953); States Marine Int'l, Inc. v. Peterson, 518 F.2d 1070 (D.C. Cir. 1975); Florida v. Weinberger, 492 F.2d 488 (5th Cir. 1974); National Ind. Coal Operators Ass'n v. Morton, 494 F.2d 987 (D.C. Cir. 1974) (ripeness of procedural regulations assumed without discussion); B.F. Goodrich Co. v. FTC, 208 F.2d 829 (D.C. Cir. 1953); American Medical Ass'n v.

so contingent on future events as to preclude immediate judicial review.[54] It has been argued unsuccessfully that a ripened controversy under the general jurisdiction does not arise before attempted enforcement, even of a regulation which is definite in its terms and has an immediate economic impact, because administrative judgment is inescapably involved in determining whether to commence enforcement proceedings in particular instances, and should not be interfered with.[55] The argument was made in the context of statutory provisions which gave some support to the view that Congress intended to preclude review of the regulation prior to enforcement action. Without such a context, the argument could not prevail over the frequent practice of permitting pre-enforcement review of clear regulations under the general jurisdiction, despite contingencies that inescapably surround their effectuation.[56]

Binding orders with respect to specific named persons are often ripe for review under the general jurisdiction prior to enforcement, if such a review is not foreclosed by statute;[57] and agency action

Weinberger, 395 F. Supp. 515 (N.D. Ill. 1975) (regulation not yet in effect *held* reviewable); Brown v. Schlesinger, 365 F. Supp. 1204 (E.D. Va. 1973); Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971); Pharmaceutical Mfr. Ass'n v. Richardson, 318 F. Supp. 301 (D. Del. 1970); Cermeno-Cerna v. Farrell, 291 F. Supp. 521, 526 (C.D. Cal. 1968); Sigma Chi Fraternity v. Regents of the University of Colorado, 258 F. Supp. 515, 521-22 (D. Colo. 1966); Democratic State Central Comm. v. Andolsek, 249 F. Supp. 1009 (D. Md. 1966); Pharmaceutical Mfr. Ass'n v. Finch, 318 F. Supp. 301 (D. Del. 1970) (procedural regulation imposing burden); Salazar v. Hardin, 314 F. Supp. 1257 (D. Colo. 1970); *In re* Rules and Regulations of Division of Social Administration, 118 Ohio App. 407, 195 N.E.2d 112 (1963); Oregon Newspaper Publishers Ass'n v. Peterson, 244 Ore. 116, 415 P.2d 21 (1966). In Keyishian v. Board of Regents, 385 U.S. 589 (1967) the Board's actions implementing a statute gave greater definiteness to it than it would otherwise have had and led Mr. Justice Clark, dissenting, to contend that the decision should have dealt with the legislation as it was being applied by changed regulations, rather than with its full potential force.

[54] Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967); Stearns v. Wood, 236 U.S. 75 (1915) (regulations establishing maximum rank and conditions of service of national guard officers in future emergencies); Mulry v. Driver, 366 F.2d 544, 547 (9th Cir. 1966) (regulation restricting professional freedom of staff physicians in possible future cases). *Cf.* the suggestion of Judge Thornberry, concurring, in Saxon v. Georgia Ass'n. of Ind. Ins. Agents, Inc., 399 F.2d 1010 (5th Cir. 1968), with relation to standing, that action by an agency pursuant to a general ruling may be challenged by individuals whom the action harms collaterally, whereas the ruling itself may not be, inasmuch as it does not give rise to a sufficiently immediate controversy; Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970) (proposed regulation, announced at start of rulemaking proceedings, is not reviewable action).

[55] Justice Fortas, concurring and dissenting in Gardner v. Toilet Goods Ass'n, and companion cases, 387 U.S. 167 (1967). *See also* Helco Prod. Co. v. McNutt, 137 F.2d 681 (D.C. Cir. 1938) which, however, involved discretion in the enforcement of a statute, not of regulations.

[56] Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953); Colorado v. Toll, 268 U.S. 228 (1925); Houston v. St. Louis Ind. Packing Co., 249 U.S. 479 (1919); Waite v. Macy, 246 U.S. 606 (1918); Philadelphia Co. v. Stimson, 223 U.S. 605, 619-23 (1912); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975). *See also* cases cited in note 53 *supra*.

[57] Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 228 (1908); Berk v. Laird, 429

which is merely permissive is similarly reviewable if it determines "legal rights and relationships" that are not too subject to contingencies.[58] Determinations of the status of designated persons or businesses, which give rise to changed rights or duties on their part, are also reviewable, at their instance, even if further agency action is required for enforcement of the obligations.[59] A ruling by an agency which is intended to state legal rights or to guide future agency action may be reviewable even though it does not have legal force.[60]

Ripeness as Affected by Contingencies

When agency actions or their effects are contingent on future developments, the nature of the contingencies becomes a factor bear-

F.2d 302 (2d Cir. 1970) (order dispatching serviceman to combat zone); Lodge 1858, Amer. Fed. of Gov't Employees v. Paine, 436 F.2d 882 (D.C. Cir. 1970) (orders separating certain government employees from their positions and reducing others in grade); Escalera v. N.Y. City Housing Authority, 425 F.2d 853, 865 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1972) (eviction and rent payment orders against public housing tenants); Getty Oil Co. v. Ruckelshaus, 342 F. Supp. 1006 (D. Del. 1972). In Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947), and Coffman v. Breeze Corporations, 323 U.S. 316 (1945), orders that debtors of the plaintiffs pay certain moneys to the Government instead of to the creditors were stated to be reviewable in actions against the debtors for the money—in the *Aircraft & Diesel* case without exhaustion of a statutory remedy in the Tax Court with respect to the orders there involved. Because, consequently, the proper remedy was at law, injunction suits against the payments could not be maintained. *See also* General Motors Corp. v. Volpe, 321 F. Supp. 1112 (D. Del. 1970), where review in an injunction and declaratory judgment action was denied because, in the circumstances, defense in an enforcement action was considered to provide a sufficient alternative remedy.

[58] *See* First Nat'l Bank v. Smith, 508 F.2d 1371 (8th Cir. 1974) ("preliminary" approval of new national bank *held* final in effect); Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97, 102 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1970) (federal agency consent to a state highway project). *See also* text accompanying note 51 *infra* and B.F. Goodrich Co. v. Northwest Indus., Inc., 424 F.2d 1349, 1354 (3d Cir. 1970), *cert. denied*, 400 U.S. 822 (1970) (order rejecting a particular objection to a corporate acquisition, even though additional implementations of the acquisition were still required, is reviewable—but by statutory process alone under the particular statute involved).

[59] LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949); Shields v. Utah Idaho Cent. R.R., 305 U.S. 177 (1938); Air Line Dispatchers Ass'n v. National Mediation Bd., 189 F.2d 685 (D.C. Cir. 1951) (Administrative Procedure Act contributes to immediate reviewability of a negative determination of status and of agency jurisdiction, which results in withholding statutory benefits, even though agency action concerning the benefits, if undertaken, would not have been reviewable). *Compare* American Air Export & Import Co. v. O'Neill, 221 F.2d 829 (D.C. Cir. 1954); (*Shields* distinguished because in that case, but not in this, there were criminal penalties for failure to heed the agency's pronouncement). In Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609 (1973), involving statutory judicial review of a final withdrawal of approval of a new drug, the Court notes that the agency's threshold determination that the drug was indeed a new one subject to this withdrawal power could itself have been "a declaratory order that is reviewable" in a district court, although not directly in a court of appeals in a proceeding under the statute. *Id.* at 627. *See also* the holdings as to federal statutory review since the *Rochester Telephone* decision, text accompanying notes 9-14, *supra*.

[60] Work v. Louisiana, 269 U.S. 250 (1925); Independent Broker-Dealers' Trade Ass'n v. SEC, 442 F.2d 132 (D.C. Cir. 1971); B.C. Morton Int'l Corp. v. FDIC, 305 F.2d 692 (1st Cir. 1962), and Note, 112 U. PA. L. REV. 135 (1963). *See also* note 41 *supra*.

ing on the issue of ripeness, as the foregoing cases indicate. The contingent events may consist of additional steps by officials, which may be either discretionary or nondiscretionary, or of acts of private persons. As to additional official steps, a majority of the Supreme Court held in *Chicago & Southern Airlines v. Waterman Steamship Corp.*[61] that an order of the Civil Aeronautics Board which was subject to Presidential action before it could go into effect was "no final administrative determination" which a court could review, and did not become such after the President acted, even as to provisions which he left undisturbed. His action, however, was not subject to Board control and therefore not predictable by the Board, as were the anticipated actions in the *Frozen Food Express*[62] case and others cited above, or the results of the "guidelines" in *Standard Scale Co. v. Farrell*[63] and *Sea-Land Service, Inc.*[64] In *State v. FPC*,[65] one feature of the agency action involved, which was held not ripe for review, was definite in terms, but its effective date had been postponed until its probable consequences could be better ascertained, with resulting doubt whether it would go into effect.[66] The situation is similar when, in the absence of agency action, a statute which is not invalid on its face is challenged because of the danger of unconstitutionality of its application; the content, scope, or incidence of future enforcement action may be too speculative to warrant judicial consideration.[67]

[61] 333 U.S. 103, 113 (1947). *Cf.* Abrams v. Van Schaick, 293 U.S. 188 (1934), reciting the contingencies that surrounded the anticipated action of a state superintendent of insurance, which was subject to court approval but which the plaintiffs had sought unsuccessfully to enjoin in a state court in advance. These contingencies led to the conclusion that a federal constitutional question underlying the case was not at that stage properly before the Court on appeal.

[62] 351 U.S. 40 (1956). Procedural regulations were similarly held subject to challenge in advance of their application in Harlem Valley Transportation Ass'n v. Stafford, 500 F.2d 328 (2d Cir. 1974); Phillips Petroleum Co. v. FPC, 475 F.2d 842 (10th Cir. 1973); and Leyden v. FAA, 315 F. Supp. 1398 (E.D.N.Y. 1970) on the ground that much is gained by prompt review of the legality of a stated agency procedural policy, even though the agency might desist from applying the policy in specific instances.

[63] 249 U.S. 571 (1919). *See* Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring). "Lack of finality also explains the decision in Standard Scale. . . . There the Court was faced by an advisory 'specification' of characteristics desirable in ordinary measuring scales. The specification could be enforced only by independent local officers' withholding their approval of the equipment. Justiciability was denied." *Id.* at 155.

[64] 402 F.2d 631 (D.C. Cir. 1968).

[65] 503 F.2d 844, 870-71 (5th Cir. 1974). *See also* Norvell v. Sangre de Cristo Dev. Co., 519 F.2d 370 (10th Cir. 1975) (agency action, suspended by court order to await environmental impact statement, was thereby rendered too contingent to be subject to judicial review of other aspects).

[66] *Id.* at 870-71.

[67] Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 459-62, 466, 468-70 (1945); Dash v. Mitchell, 356 F. Supp. 1292, 1299-1301 (D.D.C. 1972); Amalgamated Meatcutters v. Connally, 337 F. Supp. 737, 760-61 (D.D.C. 1971); Allegheny Airlines, Inc.

On the private side, action by the recipient of an agency authorization, taking advantage of it, usually is required before most of the consequences of the authorization can arise. Yet the possibility that the recipient may not act on the authorization may be insufficient to prevent the authorizing order from being immediately reviewable at the instance of third persons who are otherwise entitled to seek review. There are inconsistent decisions on this point.[68]

In the *Columbia Broadcasting System* case the contingency in which the regulation would operate was that an application be made for the issuance or renewal of a radio station license under arrangements in conflict with the regulation. The likelihood of its occurrence was so great as almost to eliminate the contingency. In *Storer*, conduct of the Storer Corporation or of other broadcasters who might purchase its stock in the open market could have brought the continued licensing of Storer into conflict with the regulation. Here the contingencies were less certain to arise than in *Columbia Broadcasting*, but still quite probable and a license to Storer for an additional station was in fact refused in a companion proceeding because of the regulation.[69] In *Frozen Food Express* the contingencies were not only whether the occasion for enforcement would arise but also whether the conclusions stated in the "order" under review would then be followed. In *Texaco Inc. v. FPC* the court of appeals,[70] at the instance of the applicant, reviewed two license refusals based on a challenged regulation, holding them invalid for procedural reasons. At the same time the court declined to review directly, in separate

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v. Fowler, 261 F. Supp. 508, 521 (S.D.N.Y. 1966) (agency proceedings under way but no determinations yet made).

[68] *See, e.g.*, Chicago Junction Case, 264 U.S. 258, 263-64 (1924) (review accorded); Mid-America Pipeline Co. v. Iowa State Commerce Comm'n, 253 Iowa 1143, 1147, 114 N.W.2d 622, 624 (1962) (nonstatutory review accorded). *See also* Newspaper Guild v. Saxbe, 381 F. Supp. 48 (D.D.C. 1974) (interpretative regulation dispensing with need for agency clearance of defined class of private transactions *held* by implication to be reviewable as to legality). By contrast, a permissive order allowing carriers subject to the Interstate Commerce Act to increase their rates across the board has so far been considered nonreviewable at the instance of shippers who might still complain of any resulting rates to which they might be subjected. *See, e.g.*, Alabama Power Co. v. United States, 316 F. Supp. 337 (D.D.C. 1969), *aff'd* by an equally divided Court, 400 U.S. 73 (1970). *Cf.* Goldman, *Standing to Challenge Orders of the I.C.C.*, 9 GEO. WASH. L. REV. 648 (1941). *Compare* Goodman v. Public Serv. Comm'n, 467 F.2d 375 (D.C. Cir. 1972) (permissive rate increase order, requiring later specification of rate schedule, held reviewable). *See also* B.F. Goodrich Co. v. Northwest Indus., Inc., 424 F.2d 1349 (3d Cir. 1970), *cert. denied* 400 U.S. 822 (1970), in which many contingencies still surrounded the corporate acquisition from which the agency had removed a particular barrier.

[69] United States v. Storer Broadcasting Corp., 351 U.S. 192, 197 (1956). *See also* California Oregon Power Co. v. FPC, 239 F.2d 426, 433 (D.C. Cir. 1956).

[70] 317 F.2d 796 (10th Cir. 1963), *rev'd on other grounds*, 377 U.S. 33 (1964).

proceedings, either the merits of the regulation or those of a condition the Federal Power Commission had attached to certain authorizations it had issued for the sale of natural gas by producers to pipeline companies, requiring the regulation to be observed, because the regulation ruled out certain grounds for rate increases that had not yet been sought and were, therefore, still in the realm of mere possibility.[71] The contingency that rate increases on the forbidden grounds would be desired seems to have been as likely to arise as the contingencies in *Storer*, and the likelihood that consequences adverse to the objectors would result was seemingly as great. Consistency in the decisions on this aspect of ripeness has obviously not been achieved. As previously noted, the matter turns on practical considerations as viewed by the courts.

Ripeness of Temporary Agency Action

Orders of temporary duration dealing with substantive rights, whether or not they terminate a proceeding, are immediately reviewable, either as "orders" under statutory provisions or under the general jurisdiction, if they have consequences that are not remediable later and that should be prevented if the orders are invalid. Interlocutory orders determining procedures or other aspects of the con-

[71] 317 F.2d at 803-04. *Cf.* B.F. Goodrich Co. v. FTC, 208 F.2d 829 (D.C. Cir. 1953). *See also* Sun Oil Co. v. FPC, 304 F.2d 290 (5th Cir. 1962), *cert. denied,* 371 U.S. 861 (1962). In Sunray Mid-Continent Oil Co. v. FPC, 270 F.2d 404, 407 (10th Cir. 1959), cited by the Court of Appeals in *Texaco,* the opinion quotes from Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939), to the effect that a challenged order is not reviewable when it affects the rights of the challenger adversely "only . . . on the contingency of future administrative action." The contingency in the *Sunray Mid-Continent* case was the Commission's possible exercise of a power which it reserved in its grant of certification for gas sales, to deny permission for the discontinuance of service upon the request of the seller. The likelihood of a request for such permission was substantially less than the probability that the contingencies involved in the other gas cases would arise; and, in addition, a request, if it were made, might be granted as well as refused. In all the foregoing gas cases the business risks of the challengers, affecting their financing, were increased to at least some degree by the contingencies; but this factor is not dealt with in the opinions. In Sunray DX Oil Co. v. FPC, 351 F.2d 395 (10th Cir. 1965), 370 F.2d 181, 191-94 (10th Cir. 1966), by contrast, the court emphasized the present business risks resulting from the contingency of future agency action as a reason for immediate reviewability of the orders involved. These orders asserted the agency's authority to require future refunds of money previously collected in the sale of gas by certificate holders, but necessitated further action by it before the refund obligations could become definite. Also see the case on review by the Supreme Court, FPC v. Sunray DX Oil Co., 391 U.S. 9, 42-43 (1968); Continental Oil Co. v. FPC, 378 F.2d 510, 530 (5th Cir. 1967), *cert. denied,* 391 U.S. 917-19, No.'s 504, 520, 526, 628 (1968); and the excellent discussion by Judge Washington, in California Oregon Power Co. v. FPC, 239 F.2d 426, 432-34 (D.C. Cir. 1956). In Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), occasion for future license renewal coming under the policy statement for which review was sought was certain to arise; but it was only probable that the statement would then be followed.

duct of proceedings, which are considered below, are subject to the same basic principle; but the review which is incident to later review of final agency action is generally considered to suffice as to them, unless the loss from delay appears excessive.[72] On the substantive side, the suspension, pending further proceedings, of an existing authorization or license essential to a business or other important interest is likely to be ripe for review. Immediate review may be prevented, however, by such considerations as the importance of allowing agency protection to the public interest to run its course.[73] The interim approval of an application or proposal requiring advance approval, or decision not to suspend a previous authorization pending further action, is likely to be similarly ripe for review at the instance of persons, if any, who have standing to challenge it.[74] Suspension

[72] Covering both substantive and procedural interlocutory orders, § 15 of the Revised Model Administrative Procedure Act, which has been followed in a substantial number of states, provides that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." The Federal Act, recognizing that "[a] preliminary, procedural, or intermediate agency action or ruling" may sometimes be "directly reviewable," provides that such an order which is not so reviewable "is subject to review on the review of the final agency action." 5 U.S.C. § 704 (1970).

[73] *Compare* Nor-Am Agricultural Products, Inc. v. Hardin, 435 F.2d 1151 (7th Cir. 1970) (ripeness negated by particular statutory purposes and provisions), *with* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 590-92 (D.C. Cir. 1971), and Environmental Defense Fund v. EPA, 465 F.2d 528 (D.C. Cir. 1972); R.A. Holman & Co. v. SEC, 299 F.2d 127 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 911 (1962) (review available in declaratory judgment action); American Home Products Corp. v. Finch, 303 F. Supp. 448 (D. Del. 1969) (same in suit for injunctive relief) (for decision at later stage see 328 F. Supp. 612 (1971)); Upjohn Co. v. Finch, 303 F. Supp. 241 (W.D. Mich. 1969) (same in suit for injunction and declaratory judgment); Airline Ground Serv. Inc. v. Checker Cab Co., 151 Neb. 837, 39 N.W.2d 809 (1949) (order held to be final in reality, even though only temporary in form); Russo v. Walsh, 18 N.J. 205, 113 A.2d 516 (1955) (suspension of public officer pending possible removal *held* immediately reviewable as to existence of power, because of public importance of issue; larger question of ripeness not considered); Halsey, Stuart & Co. v. Public Serv. Comm'n, 212 Wis. 184, 248 N.W. 458 (1933) (agency action sustained on the merits). *Cf.* Relco, Inc. v. Consumer Products Safety Comm'n, 391 F. Supp. 841 (S.D. Tex. 1975) (public warning as to danger from product, carrying "finality in its most certain and practical sense," but subject to later correction after hearing, held preliminary and not reviewable except as to subdelegation of its issuance). *See also* Federal Power Comm'n v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949) (issue of agency jurisdiction decided without question as to ripeness of interim order).

[74] Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); United Telegraph Workers v. FCC, 436 F.2d 920 (D.C. Cir. 1970) (order sanctioning experimental service); National Air Carrier Ass'n v. CAB, 436 F.2d 185 (D.C. Cir. 1970); Pennsylvania Gas & Water Co. v. FPC, 427 F.2d 568 (D.C. Cir. 1970); City of Los Angeles v. FMC, 388 F.2d 582 (D.C. Cir. 1967); Folkways Broadcasting Co. v. FCC, 379 F.2d 447 (D.C. Cir. 1967); Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 990 (1954); Columbia Broadcasting System v. FCC, 211 F.2d 644 (D.C. Cir. 1954) (refusal to suspend license for test broadcasting, pending hearing on objections); American Broadcasting Co. v. FCC, 191 F.2d 492 (D.C. Cir. 1951); Merchants Delivery Co. v. United States, 265 F. Supp. 669 (W.D. Mo. 1967) (temporary certificate to motor carrier reviewable for abuse of discretion); Smith v. Delaware Coach Co., 31 Del. Ch. 256, 70 A.2d 257 (1949) (temporary rate increase); American Vitrified Prod. Co. v. Public Serv. Comm'n, 131 Ind.

of payments by the government under a statute, on the other hand, is not reviewable when adjustment can be made after further consideration;[75] but if prompt payment is part of the statutory purpose, its postponement or suspension becomes reviewable.[76] An order, not immunized from review because wholly discretionary, limiting rates that can be charged by a utility pending agency decision, or an order conditioning a temporary authorization in some other way that imposes irremediable disadvantage on the person authorized, is ripe for review.[77] Similarly, denial of a temporary authorization to engage

App. 378, 176 N.E.2d 145 (1961); City of Pittsburgh v, Pennsylvania Pub. Util. Comm'n, 178 Pa. Super. 368, 115 A.2d 858 (1955) (same). *Cf.* Lehmann v. State Bd. of Pub. Acc'tc'y, 208 Ala. 185, 94 So. 94 (1922), *aff'd* 263 U.S. 394 (1923).

When, however, advance approval for private conduct is not a prerequisite, but an agency has power summarily to impose a suspension pending investigation, a decision as to suspension is likely under Federal statutes to be wholly discretionary and hence immune from review without reference to any issue of ripeness. Port of N.Y. Auth. v. United States, 451 F.2d 783 (2d Cir. 1971); Municipal Light Bds. v. FPC, 450 F.2d 1341 (D.C. Cir. 1971); Associated Press v. FCC, 448 F.2d 1095, 1103 (D.C. Cir. 1971); Radrizzi v. ICC, 441 F.2d 1236 (8th Cir. 1971); Minnesota v. United States, 238 F. Supp. 107 (D. Minn. 1965); Luckenbach S.S. Co. v. United States, 179 F. Supp. 605 (D. Del. 1959), *vacated in part as moot*, 364 U.S. 280 (1960). *Cf.* Arrow Transp. Co. v. United States, 372 U.S. 658, 670 (1963). Termination of an investigation and of a suspension that led to it may, by contrast, be in effect a determination on the merits, reviewable as such. City of Chicago v. United States, 396 U.S. 162 (1969). The effects of a nonsuspension in itself, pending a final determination, may at times be sufficiently irreparable to justify judicial review. Michigan Power Co. v. FPC, 494 F.2d 1140, 1143 (D.C. Cir. 1974); Atlanta Gas Light Co. v. FPC, 476 F.2d 142, 148 (5th Cir. 1973); Natural Resources Defense Council v. Train, 519 F.2d 287 (D.C. Cir. 1975), in which the agency's designation of an initial list of water pollutants that might be subjected to effluent standards was held by a majority of the court to be statutorily final and therefore subject to judicial review of challenged omissions from the list.

[75] Aquavella v. Finch, 306 F. Supp. 860 (W.D.N.Y. 1969). *Cf.* Adams v. Nagle, 303 U.S. 532, 544 (1938) (collection of assessment against shareholders of national bank is not subject to challenge in advance of payment).

[76] California Dep't of Human Resources Dev. v. Java, 402 U.S. 121 (1971) (unemployment compensation payments).

[77] Prendergast v. N.Y. Telephone Co., 262 U.S. 43 (1923); Phillips Petroleum Co. v. FPC, 227 F.2d 470, 475 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); Atlantic Seaboard Corp. v. FPC, 201 F.2d 568 (4th Cir. 1953); Sohio Petroleum Co. v. FPC, 298 F.2d 465 (10th Cir. 1961); Pure Oil Co. v. FPC, 292 F.2d 350 (7th Cir. 1961); and Sunray Mid-Continent Oil Co. v. FPC, 270 F.2d 404 (10th Cir. 1959) (conditions limiting rates, attached to temporary certificates of convenience and necessity). *Cf.* Lewiston, Greene, & Monmouth Tel. Co. v. New England Tel. & Tel. Co., 299 A.2d 895 (Me. 1973) (interim rate division order *held* reviewable under statutes as to constituional issues). *Compare* Texaco, Inc. v. FPC, 290 F.2d 149, 157 (5th Cir. 1961), and Humble Oil Co. v. FPC, 236 F.2d 819 (5th Cir. 1956), where the court based its conclusion, that a condition attached to a temporary certificate was nonreviewable, partially on the ground that the statutory review proceeding, which had been invoked, required an agency record, absent in these cases because the temporary certificate was issued without a hearing. As in the other cases under the Natural Gas Act cited above, the issue presented on review was essentially one of law, involving the Commission's power to act. In American Sumatra Tobacco Co. v. SEC, 93 F.2d 236 (D.C. Cir. 1937), the court of appeals held the agency was under a duty to provide a record, even without a statutory requirement for it, in aid of review of an order which the court held was reviewable on the record by the court. The court took the same position, casting doubt on United Gas Pipe Line Co. v. FPC, 181 F.2d 796 (D.C. Cir. 1950), in Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1098, 1099 (D.C. Cir. 1970). In

in business, which withholds the use of a large investment already made, may be reviewable.[78]

Ripeness of Interlocutory Procedural Orders for Statutory Review Proceedings

Interlocutory procedural orders are normally not embraced by statutory provisions for the review of "orders" or, more specifically, "final orders." Unless some other process for immediate review is available, judicial consideration of these orders must await an order terminating the proceedings. The interlocutory orders can then be scrutinized, insofar as they affect the validity of the ultimate result.[79] The Supreme Court has said that statutory provision for the review of orders relates "to orders of a definitive character dealing with the merits of a proceeding . . . and resulting from a hearing upon evidence and supported by findings appropriate to the case."[80] Later the Court, citing this prior utterance, noted that even a provision for the review of "any order, affirmative or negative," is subject to "self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review."[81] Earlier the Court had held that an order setting a case for hearing, even though the agency's statutory authority to proceed was challenged, was not immediately reviewable by a statutory three-judge court.[82] Subject to exceptions discussed below,[83] when review

Sunray DX Oil Co. v. FPC, 351 F.2d 395 (10th Cir. 1965), 370 F.2d 181, 191-94 (10th Cir. 1966), the court emphasized the business risks which resulted from the agency action as an important reason for immediate reviewability of the orders there involved. These orders asserted the agency's authority to require future refunds of money previously collected in the sale of gas, but required further action by it before the refund obligations could become definite. *See also* the same case in the Supreme Court, FPC v. Sunray DX Oil Co., 391 U.S. 9, 42-43 (1968).

[78] Algonquin Gas Transmission Co. v. FPC, 201 F.2d 334 (1st Cir. 1953).

[79] *See* Ecology Action v. AEC, 492 F.2d 998 (2d Cir. 1974); Citizens for a Safe Environment v. AEC, 489 F.2d 1018 (3d Cir. 1974), where only "final orders" were reviewable, distinguishing on this ground Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972), where "orders" were reviewable; City of Trenton v. FCC, 441 F.2d 1329, 1333 (3d Cir. 1971) (general order halting temporarily a class of proceedings before the Commission); Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524 (D.C. Cir. 1970). *Cf.* Thompson Prod., Inc. v. NLRB, 133 F.2d 637 (6th Cir. 1943).

[80] FPC v. Metropolitan Edison Co., 304 U.S. 375, 384 (1938).

[81] Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 106 (1948).

[82] United States v. Illinois Cent. R.R., 244 U.S. 82 (1917). *See also* N.Y. Shipping Ass'n, Inc. v. FMC, 495 F.2d 1215 (2d Cir. 1974) (temporary order held equivalent of refusal to dismiss, without prejudice to merits, hence not immediately reviewable); Canadian River Gas Co. v. FPC, 110 F.2d 350 (10th Cir. 1940); Territo v. United States, 170 F. Supp. 855 (D.N.J. 1958). *Compare* Associated Press v. FCC, 448 F.2d 1095 (D.C. Cir. 1971), in which the court reviewed on the merits and sustained two orders accepting a

is sought pursuant to statute, noninterference with the orderly progress of agency proceedings is in general more important than immediate redress for alleged errors or wrongs that can largely be remedied later by the agency or on review of a final order.[84]

Decisions applying the foregoing principle have withheld immediate review of rulings which related to pleadings or evidence,[85] rejected an application without prejudice,[86] declined to accept settlements,[87] determined the burden of proof or the order in which evidence should be adduced,[88] refused the issuance of subpoenas to private parties,[89] or denied access to a hearing examiner's intermediate report.[90]

Because of the Supreme Court's disposition of one of the points involved in *Consolidated Edison Co. v. NLRB*,[91] rulings on evidence by federal agencies presented special problems in subsequent years. The Court branded as an abuse of discretion the action of a hearing examiner and of the National Labor Relations Board in rejecting the testimony of two witnesses for the company but, affirming the lower court, refused to set aside the Board's order on this ground, because "[p]etitioners did not avail themselves" of the "appropriate procedure", which was "to apply to the Court of Appeals for leave to adduce the additional evidence".[92] The case involved two proceedings, one brought by the Board to enforce a cease-and-desist order

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common carrier tariff for filing, suspension, and investigation, allegedly without statutory authority to do so, but at the same time rejected as not ripe for review certain alleged reflections of agency bias during interim proceedings.

[83] See text accompanying notes 102-105 *infra*.

[84] Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524 (D.C. Cir. 1970); Iowa City-Montezuma Shippers Ass'n v. United States, 338 F. Supp. 1383, 1387 (S.D. Iowa 1972) (review of denial of claimed rights to discovery and cross-examination).

[85] *See e.g.*, Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524 (D.C. Cir. 1970); Texaco, Inc. v. FPC, 329 F.2d 223 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 941 (1962); Texaco, Inc. v. FTC, 301 F.2d 662 (5th Cir. 1962), *cert. denied*, 371 U.S. 822 (1962).

[86] *See, e.g.*, Fort Harrison Telecasting Corp. v. FCC, 297 F.2d 779 (D.C. Cir. 1961). Although the order terminates the proceeding, a new one can be begun. Hence, the situation is analogous to deferment of an agency's consideration of an application that remains pending.

[87] *See, e.g.*, Amerada Petroleum Corp. v. FPC, 285 F.2d 737 (10th Cir. 1960).

[88] *See, e.g.*, Long Island R.R. v. United States, 193 F. Supp. 795 (E.D.N.Y. 1961); United Gas Pipe Line Co. v. FPC, 206 F.2d 842 (3d Cir. 1953).

[89] *See, e.g.*, Laundry Workers Int'l Union v. NLRB, 197 F.2d 701 (5th Cir. 1952); *cf.* Sayre Land Co. v. Pennsylvania Pub. Util. Comm'n, 167 Pa. Super. Ct. 1, 74 A.2d 713 (1950) (order granting discovery).

[90] *See, e.g.*, Aluminum Co. of America v. FPC, 130 F.2d 445 (D.C. Cir. 1942).

[91] 305 U.S. 197 (1938).

[92] *Id.* at 226 (footnote omitted).

and one by the respondent to review the order as "final", both of which were subject to a statutory provision which specified that

> [i]f either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that . . . there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, . . . the court may order such additional evidence to be taken before the Board, . . . and to be made part of the record.[93]

The court of appeals had held that there was a failure to follow the statute because "the petitioners have not applied to this court for the taking of additional evidence."[94] In that court the Board's answer to the petition for review of the final order had contended with respect to the exclusion of the testimony that "the statute affords petitioners now, before final hearing, the remedy therefor by application to this Court for leave to adduce additional evidence. . . ."[95] The Supreme Court decision, therefore, despite the ambiguity of its wording, seems to have been intended to mean that leave to adduce additional evidence must be sought by specific application to the court in proceedings to enforce or review a final order—not by way of immediate challenge in court to an interlocutory order excluding the evidence. The statutory provision in context has this meaning.

The matter again came before the Supreme Court in *Communist Party v. Subversive Activities Control Board*,[96] under a similar provision of the review section of the Internal Security Act. The Court refused to decide whether a challenge to the exclusion of evidence could still be made on review of a final order under such a statute, because the issue had not been presented—although it might have been—when the same case was previously before the Court. Chief Justice Warren, dissenting, contended that the issue should have been passed upon and decided favorably to the petitioner's right to offer the challenge[97] because a remand to correct the exclusion, which in his view was erroneous, would have avoided the necessity of deciding

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[93] 29 U.S.C. § 160(e) (1970).

[94] Consolidated Edison Co. v. NLRB, 95 F.2d 390, 397 (2d Cir. 1938).

[95] Consolidated Edison Co. v. NLRB, 305 U.S. 197, 226; Record, Vol. 7, part 2, at 1698-99. *Also see* the Solicitor General's Brief in the Supreme Court for the Board, at 53. The brief for Consolidated Edison, at 73, objected to the lower court's holding that "upon the hearing of their petition for review" the petitioners should have sought leave to adduce the additional testimony.

[96] 367 U.S. 1, 30-31 (1961).

[97] *Id.* at 119. The excluded "evidence" consisted of documents containing previous statements of a witness, which were in the possession of the Government and which the petitioner wished to use for impeachment purposes. *Id.* at 117.

the constitutional questions in the case which the majority undertook to decide. He criticized the *Consolidated Edison* holding because he thought it "established a cumbersome procedure whereby resort to the Court of Appeals was required every time the Board excluded evidence which the offering party thought should have been admitted."[98]

Courts of appeals treated the issue raised by *Consolidated Edison* in conflicting ways[99] until Judge Burger, as he then was, for a majority of the court of appeals in *Texaco, Inc. v. FPC*,[100] elaborately re-examined the issue and construed the *Consolidated Edison* holding in accordance with its probably intended meaning. This requires, under the kind of statute involved, that an application for leave to introduce evidence which was rejected or refused by an agency be made to the court of appeals on review of an eventual final order, so as to secure consideration of this issue, but not that the rejection or refusal be taken immediately to court. The decision in the case rejected an immediate resort to court under the Natural Gas Act as premature. At length, then, the *Consolidated Edison* holding appears to have received an adequately supported, workable intrepretation.[101]

Despite the normal nonreviewability of interlocutory procedural

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[98] *Id.* at 122.

[99] Statements which echoed the *Consolidated Edison* opinion without imparting greater clarity to it appeared in NLRB v. National Laundry Co., 138 F.2d 589, 590 (D.C. Cir. 1943), and Swift & Co. v. NLRB, 106 F.2d 87, 91 (10th Cir. 1939), both involving final orders. The view that under the Federal Trade Commission Act an immediate application should be made to a Court of Appeals for leave to produce wrongly rejected evidence appears to have been taken in California Lumbermen's Council v. FTC, 115 F.2d 178, 183 (9th Cir. 1940), on review of a final order, and was more clearly expressed as to the National Labor Relations Act in NLRB v. Fairchild Engine & Airplane Corp., 145 F.2d 214, 215 (4th Cir. 1944), and Wilson & Co. v. NLRB, 103 F.2d 243, 245 (8th Cir. 1939). Such was also the holding of the court of appeals in Communist Party v. Subversive Activities Control Board which later came before the Supreme Court, 254 F.2d 314 (D.C. Cir. 1958), *aff'd on rehearing*, 277 F.2d 78 (D.C. Cir. 1958), *aff'd* 367 U.S. 1 (1961).

In Texaco, Inc. v. FTC, 301 F.2d 667 (5th Cir. 1962), *cert. denied* 371 U.S. 822 (1962), the court, without discussing the problem of interpretation surrounding the *Consolidated Edison* holding, rejected as premature an immediate challenge to the Federal Trade Commission's rejection of proffered testimony. The view that improper exclusion of evidence may, under the kind of statute here involved, be corrected on review of final orders was acted upon in NLRB v. Adhesive Prods. Co., 258 F.2d 403, 406 (2d Cir. 1958), and Mississippi Valley Structural Steel Co. v. NLRB, 145 F.2d 664, 667 (8th Cir. 1944). In the latter case the court considered the petition for review to include an implied request for leave to adduce the additional evidence.

[100] 329 F.2d 223 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 941 (1963). An appendix to the opinion enumerates federal statutes containing substantially similar provisions. The Commission's refusal in the case was later reviewed and upheld in Sunray DX Oil Co. v. FPC, 370 F.2d 181, 186-87 (10th Cir. 1966).

[101] *See* Sperry & Hutchinson Co. v. FTC, 256 F. Supp. 136, 140 (S.D.N.Y. 1966); R.H. Macy & Co. v. Tinley, 249 F. Supp. 778, 781-82 (D.D.C. 1966).

orders, some orders of this nature, which to a large extent dispose of interests with practical finality, may be immediately reviewable by statutory processes. Hence, for example, an agency ruling or order that would result in the disclosure of trade secrets or other confidential information demanded by the agency may be reviewed;[102] and even the withholding or delay of an agency hearing or decision with resulting serious injury to an interest protected by statute may become an "order" subject to statutory review.[103] Denials of intervention in proceedings or consolidation of proceedings present special problems which are discussed below.[104] In addition, the public importance of particular procedural issues determined by interlocutory orders or directives may be so great as to bring these actions without delay under statutory provisions for review of "orders" which for this purpose possess sufficient finality or ripeness to render them immediately reviewable.[105]

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[102] *See, e.g.*, American Sumatra Tobacco Corp. v. SEC, 93 F.2d 236 (D.C. Cir. 1937).

[103] *See* Greene County Planning Bd. v. FPC, 455 F.2d 412, 425-26 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972) distinguished in Citizens for a Safe Environment v. AEC, 489 F.2d 1018, 1020-21 (3d Cir. 1974) (postponement of consideration of allowance of attorneys' fees which were allegedly authorized by law and were needed immediately); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), where, however, the impact of the order was not merely procedural, but suspended the sale of a product; Black United Front v. Washington Metropolitan Area Transit Comm'n, 436 F.2d 227 (D.C. Cir. 1970) (refusal to receive petition for rehearing, with consequent loss of petitioners' statutory right to suspension of prior order). In Utah Agencies v. CAB, 504 F.2d 1232 (10th Cir. 1974), the court sustained the denial of a motion for an expedited hearing in an important proceeding, without discussing the question of whether the matter was ripe for statutory review. *See also* Harvey Radio Laboratories, Inc. v. United States, 289 F.2d 458 (D.C. Cir. 1961).

The statement in International Ass'n of Machinists & Aerospace Workers v. National Mediation Board, 425 F.2d 527, 535 n.3 (D.C. Cir. 1970), that the "claim of unlawful or unreasonable delay establishes court jurisdiction even though there has been no final agency order," *citing* Kessler v. FCC, 326 F.2d 673, 684 (D.C. Cir. 1963), and Harvey Radio Laboratories v. United States, 289 F.2d 458 (D.C. Cir. 1961), is highly questionable. It seems to rest in reality on the provision of § 706(1) of the APA, 5 U.S.C. § 706(1) (1970), that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." This provision prescribes the scope of review when review takes place, not a basis of jurisdiction in the first instance.

[104] *See* text accompanying notes 139-56 *infra*.

[105] *See* Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972) (review accorded, without discussion of ripeness point, to failure to follow critical procedural steps required by Environmental Policy Act); Citizens Gas & Coke Util. v. Sloan, 136 Ind. App. 297, 196 N.E.2d 290 (1964) (assertion of jurisdiction by state commission over municipally-owned utility).

In Phillips Petroleum Co. v. FPC, 475 F.2d 842, 851 (10th Cir. 1973), the procedural order which was challenged, although interlocutory as applied to pending proceedings, was viewed by the court as in effect a general regulation fixing procedures, ripe as such for review by the statutory process. *See also* Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), distinguishing in n.28 of the opinion Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524 (D.C. Cir. 1970).

The Atomic Energy Act provided explicitly that orders containing regulations should be reviewable by the statutory review process and by that process alone. *See* Izaak Walton

General-Jurisdiction Review of Interlocutory Procedural Actions

When immediate judicial review of an interlocutory procedural ruling of an agency is sought under the general jurisdiction of the courts, the question of ripeness turns initially on whether the ruling generates a case or controversy, and on whether other prerequisites of ripeness, sometimes including requirements which attach specially to the kind of action brought, are present in the case. In relation to the frequently invoked injunction suit, these additional specific requirements are principally whether an actual or immediately threatened injury is sufficiently made to appear and whether an adequate alternative remedy could be had.[106] If a remedy after additional agency action is provided by statute but is available only later, the question arises whether the statute impliedly excludes immediate review of interlocutory action by means of the general jurisdiction.[107] In addition the courts' possession of a residuary discretion to withhold declaratory, mandamus, or injunctive relief for policy reasons, even when authority to entertain the proceeding is present, gives rise to questions surrounding the exercise of that discretion which are difficult to separate from the issue of whether the review proceeding should be entertained in the first instance.[108]

League v. Schlesinger, 337 F. Supp. 287, 290-91 (D.D.C. 1971). In Harlem Valley Trans. Ass'n v. Stafford, 500 F.2d 328 (2d Cir. 1974), the court, construing the *Greene County* decision, above, as upholding immediate statutory review of AEC regulations prescribing interlocutory procedures, sustained the immediate reviewability of similar ICC regulations under the district court's mandamus jurisdiction, but held that these regulations were not the kind of "order" covered by the three-judge-court process for "restraining the enforcement, operation, or execution," of orders of the Commission, prescribed in 28 U.S.C. § 2325 (1970).

[106] *Cf.* A.O. Smith Corp. v. FTC, 530 F.2d 515 (3d Cir. 1976); Sperry & Hutchinson Co. v. FTC, 256 F. Supp. 136 (S.D.N.Y. 1966); R.H. Macy & Co. v. Tinley, 249 F. Supp. 778 (D.D.C. 1966).

[107] *See* A.O. Smith Corp. v. FTC, 530 F.2d 515 (3d Cir. 1976); Sperry & Hutchinson Co. v. FTC, 256 F. Supp. 136 (S.D.N.Y. 1966). For a further discussion of this aspect of the method and timing of judicial review, *see* text accompanying notes 134-38 *infra*. With reference to review of agency action not otherwise made reviewable by statute, the Federal Administrative Procedure Act provides only for review of "final agency action," and for review at the same time of "preliminary, procedural, or intermediate agency action or ruling not directly reviewable." 5 U.S.C. § 704 (1970). The direct reviewability of some interlocutory action, which is contemplated, depends on law outside the Act. The APA, however, does bestow procedural rights which can be enforced in an allowable review proceeding. *See* Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961), involving the right to have the agency, "within a reasonable time, . . . proceed to conclude a matter presented to it," as bestowed by 5 U.S.C. § 555(c) (1970).

[108] In Schlesinger v. Councilman, 420 U.S. 738 (1975), the Court held (1) that there was subject matter jurisdiction in the District Court to entertain an injunction suit to halt a court-martial proceeding because a substantial question as to the jurisdiction of the court-martial itself had been raised, but that the District Court erroneously employed its resulting

The recognized applicable principle is that the general jurisdiction of the courts is not available for immediate judicial review of the interlocutory procedural orders or rulings of agencies. Exceptions arise most often when: (1) violations of due process are sufficiently alleged and may fundamentally affect the agency proceeding as a whole; (2) other alleged excess of authority or violations of duty by an agency raise the issue of agency jurisdiction or power to commence or go on with its proceeding; (3) or challenged agency action or inaction involves an issue which is important to the public and calls for immediate resolution or is not resolvable otherwise.

The general principle that judicial review of interlocutory procedural action is not immediately available has been followed easily when inconvenience or litigation costs to participants in additional agency proceedings are the principal hardships alleged,[109] or even when procedural handicaps that are not irreparable may be imposed. The principle has been applied to: an asserted want of agency authority in relation to merely some of the issues involved in a proceeding;[110] an agency's omission of allegedly mandatory pre-complaint processes;[111] an agency's denial of discovery[112] or of subpoenas or their

"equitable jurisdiction" to "exercise its remedial powers." *Id.* at 754. It should, rather, have given the court-martial the opportunity to decide in the first instance the particular kind of question which had been raised concerning its own jurisdiction.

[109] *See, e.g.*, Holland Furnace Co. v. Purcell, 125 F. Supp. 74 (W.D. Mich. 1954); Pax Co. of Utah v. United States, 454 F.2d 93 (10th Cir. 1972); M. G. Davis Co. v. Cohen, 369 F.2d 360 (2d Cir. 1966). Perhaps the leading pronouncement on this point in relation to the timing of judicial review of agency action is that of Mr. Justice Brandeis in Myers v. Bethlehem Shipbldg. Corp., 303 U.S. 41, 51-52 (1938). The point is often reiterated, as it was in Schlesinger v. Councilman, 420 U.S. 738, 756 (1975).

[110] Power Authority v. Dep't of Environmental Conservation, 379 F. Supp. 243 (N.D.N.Y. 1974). *See also* Ecology Action v. AEC, 492 F.2d 998 (2d Cir. 1974) (order limiting issues *held* not ripe for immediate statutory review).

[111] Borden, Inc. v. FTC, 495 F.2d 785 (7th Cir. 1974), in which the opinion speaks in terms of exhaustion of administrative remedies.

[112] Nader v. Volpe, 466 F.2d 261 (D.C. Cir. 1972); Maremont Corp. v. FTC, 431 F.2d 124 (7th Cir. 1970); Vapor Blast Mfg. Co. v. Madden, 280 F.2d 205 (7th Cir. 1960), *cert. denied*, 364 U.S. 910 (1960); Barnes v. Chatterton, 515 F.2d 916, 921 (3d Cir. 1975); Intertype Co. v. Penello, 269 F. Supp. 573 (W.D. Va. 1967); Sperry & Hutchinson Co. v. FTC, 256 F. Supp. 136 (S.D.N.Y. 1966); Indiana & Michigan Elec. Co. v. FPC, 224 F. Supp. 166 (N.D. Ind. 1963). The contrary has been held with respect to a statutorily-based action under the Freedom of Information Act to compel discovery of information by an agency to a party before it. *See* Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1 (1974). The remedy, however, does not extend to an injunction against continuance of a negotiatory main proceeding pending a requisite disclosure; for the opposing view see the dissenting opinion of Justice Douglas joined by Justices Stewart, Marshall and Powell. *Id.* at 26. *See also* United Tel. Co. v. FCC, 375 F. Supp. 992 (N.D. Pa. 1974); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970) (action to secure information for use in rule-making proceeding); Sterling Drug Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971), in which the district court in a Freedom of Information Act proceeding to compel disclosures to Sterling as a respondent before the Commission was held to be empowered

equivalent by an agency;[113] an agency demand for information, without attempted enforcement;[114] refusal by an agency to join allegedly indispensable parties respondent, at least when a valid final order may still result;[115] alleged violations of rules of practice by an agency's interim steps in a proceeding;[116] the exclusion of proffered evidence;[117] and even the denial of procedural rights claimed by virtue of constitutional provisions,[118] have been denied review prior to final agency action.

The first exception enumerated above, involving alleged violations of due process which appear on the record before the court, fundamentally affecting the agency proceeding as a whole, includes such situations as alleged bias or conflicts of interest on the part of an official actively participating in the proceedings, which threaten unfairness at many points.[119] Also within the exception are decisions reviewing on constitutional grounds interlocutory agency actions which do not involve a threat of pervasive unfairness but still detract seriously

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to decide issues under that Act but not questions as to whether the challenged withholding of information violated fair-hearing requirements. Exhaustion of agency processes for consideration of disclosure requests is also an applicable prerequisite. *Cf.* Diapulse Corp. of America v. Food & Drug Admin., 500 F.2d 75 (2d Cir. 1974).

[113] Bristol Myers Co. v. FTC, 469 F.2d 1116 (2d Cir. 1972) (subpoena sought during informal pre-complaint negotiation); Papercraft Corp. v. FTC, 307 F. Supp. 1401, 1404 (W.D. Pa. 1970); R.H. Macy & Co. v. Tinley, 249 F. Supp. 778 (D.D.C. 1966). *Compare* Union Bag-Camp Paper Corp. v. FTC, 233 F. Supp. 660 (S.D.N.Y. 1964), distinguished in *R.H. Macy*, 249 F. Supp. at 783.

[114] Fontaine v. SEC, 259 F. Supp. 880 (D.P.R. 1966). Statutory proceedings to enforce agency subpoenas, similar in this respect to proceedings under the Freedom of Information Act, 5 U.S.C. § 552 (1970 & Supp. V 1975), when used to compel discovery by an agency, provide a means to secure immediate judicial review of interlocutory agency demands which take the subpoena form; but the scope of review is extremely limited. *Cf.* Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946); NLRB v. Daniel Constr. Co., 418 F.2d 790 (4th Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). *Compare* A.O. Smith Corp. v. FTC, 530 F.2d 515 (3rd Cir. 1976), where the court looked upon the agency's order as one imposing a rule of regular reporting of information, rather than as a demand for information as a prerequisite for further agency proceedings, and held it to be subject to immediate review in an injunction suit.

[115] Seven-Up Co. v. FTC, 478 F.2d 755 (8th Cir. 1973); Coca Cola Co. v. FTC, 475 F.2d 299 (5th Cir. 1973), *cert. denied*, 414 U.S. 877 (1973); Pepsi Co., Inc. v. FTC, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973).

[116] Sears, Roebuck & Co. v. FTC, 210 F. Supp. 67 (D.D.C. 1962) (decision largely based on exclusiveness of statutory review of final order, but basic principle seems broader).

[117] *Cf.* Herald Co. v. Vincent, 392 F.2d 354, 357-58 (2d Cir. 1968).

[118] Delzer Constr. Co. v. United States, 487 F.2d 908 (8th Cir. 1973); J.C. Penney Co. v. United States Treasury Dep't, 439 F.2d 63, 68 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Jackson v. Colorado, 294 F. Supp. 1065, 1071 (D. Colo. 1968) ("[a]bsent a *serious* constitutional threat") (emphasis added).

[119] *See* Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962), narrowly interpreted in Wolf Corp. v. SEC, 317 F.2d 139, 143 (D.C. Cir. 1963). The case is distinguished in, among other cases, Maremont Corp. v. FTC, 431 F.2d 124, 128 (7th Cir. 1970) (facts as to alleged prejudice required elaboration); San Francisco Mining Exch. v. SEC, 378 F.2d

from the entire proceeding, as does a want of due initial notice,[120] agency resort to rulemaking instead of adjudication,[121] adherence to private rather than public proceedings,[122] or failure to accord statutory procedural rights embodying constitutional due process,[123] possibly including the right to use a legally qualified hearing examiner.[124] In these instances, however, a court on later review of final agency action could actually counteract the alleged fault by remand or decree requiring correction. Hence, the ultimate injury would be only the expense and other handicaps of the additional procedures involved. Important decisions have therefore denied immediate general-jurisdiction review in similar situations.[125] Arguably such review should be accorded if, in addition, serious injury to a business or reputation would result from delay until after final agency action.[126]

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162 (9th Cir. 1967) (same); SEC v. R.A. Holman Co., 323 F.2d 284 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 943 (1963) (same). *See also* National Lawyers Guild v. Brownell, 225 F.2d 552 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956); Lehigh Portland Cement Co. v. FTC, 291 F. Supp. 628 (E.D. Va. 1968), *aff'd* 416 F.2d 971 (4th Cir. 1969); Chamber of Commerce v. FTC, 280 F. 45 (8th Cir. 1922) (attempted original action in the court of appeals). In FTC v. Weingarten, Inc., 336 F.2d 687 (5th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965), the court chose, 336 F.2d at 691, to review for alleged prejudicial purpose the Commission's order remanding the proceeding to a hearing examiner, with the conclusion that prejudice was not shown, rather than to decide whether the district court had jurisdiction to review. *See also* United States v. Litton Indus., Inc., 462 F.2d 14 (9th Cir. 1972), where, in a proceeding to enforce an agency order to supply information, the court held that the respondent could not seek review as to alleged agency bias resulting from a parallel investigation. See further, as to review of alleged bias in a statutory proceeding seeking review of an interim agency order, Associated Press v. FCC, 448 F.2d 1095, 1106-07 (D.C. Cir. 1971).

120 *See, e.g.*, Kalman v. Walsh, 355 Ill. 341, 189 N.E. 315 (1934).

121 *See, e.g.*, Anaconda Company v. Ruckelshaus, 482 F.2d 1301, 1305 (10th Cir. 1973) (constitutional issue as to validity of proceeding decided, although statutory issues not ripe for review).

122 *See, e.g.*, Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972).

123 *See, e.g.*, Leyden v. FAA, 315 F. Supp. 1398 (E.D.N.Y. 1970); Holmes v. N.Y. City Housing Auth., 398 F.2d 262 (2d Cir. 1968). In *Holmes* the procedural rights which were withheld derived most immediately from a regulation that purported to accord them; but their denial, incident to the informal handling of applications for admission to public housing facilities, pervaded the entire administration in a manner violative of due process.

124 *See, e.g.*, Yanish v. Barber, 181 F.2d 492 (9th Cir. 1950), impliedly affirming Yanish v. Wixon, 81 F. Supp. 499 (N.D. Cal. 1948), as to ripeness, but reversing as to the merits; Davis v. Secretary of HEW, 386 F.2d 429 (4th Cir. 1967) (the government did not appeal on the ripeness issue and decision is on the merits, "assuming [ripeness] without deciding" that issue). Riss & Co. v. ICC, 179 F.2d 810 (D.C. Cir. 1950), is to the contrary. In United States v. L.A. Tucker Truck Lines, 344 U.S. 33 (1952), the exhaustion principle barred a challenge in court because the issue of hearing officer qualifications had not been raised before the agency.

125 *See, e.g.*, Beard v. Stahr, 370 U.S. 41 (1962) (denial of claimed due process rights in an Army discharge proceeding); Crawford v. Davis, 249 F. Supp. 943 (E.D. Pa. 1966), *cert. denied*, 383 U.S. 921 (1966); Vitelli v. Warden, 247 F. Supp. 993 (S.D. Cal. 1965), and cases cited note 118 *supra*.

126 In Beard v. Stahr, 370 U.S. 41 (1962), Justices Douglas and Black dissented forcefully on the ground of irreparable damage to the reputation of the military officer involved

Similarily under the second exception, when the statutory (even though not the constitutional) foundation for an agency proceeding or its conformity as a whole to statutory requirements may be resolved on the record at the stage of interlocutory action, as distinguished from the legality of a single aspect such as is involved in a ruling on evidence or on the scope of issues to be considered, the evidence or on the scope of issues to be considered, the contention that further steps in the proceeding can be enjoined, or procedural rights be judicially declared, is sometimes made successfully.[127] On this basis the alleged inadequacy of an initial notice or basis of complaint under the governing statute,[128] or an alleged failure to take essential intermediate steps,[129] has been held immediately reviewable. However,

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if due process were not assured in advance. In Wolf Corp. v. SEC, 317 F.2d 139, 141 (D.C. Cir. 1963), the court sustained judicial jurisdiction to decide the issue of statutory authority of the agency to continue a proceeding damaging to the reputation of a business, emphasizing at the same time the highly limited availability of injunctions in such cases. Review as to a similar issue took place in a statutory proceeding by the Commission to enforce a subpoena, in Jones v. SEC, 298 U.S. 1 (1936). *See also* E. Griffiths Hughes, Inc., v. FTC, 63 F.2d 362 (D.C. Cir. 1933) (injunction suit against the Commission); Knoll Associates v. Dixon, 232 F. Supp. 283 (S.D.N.Y. 1964) (review of agency's use of allegedly tainted evidence).

[127] *See, e.g.,* Sampson v. Murray, 415 U.S. 61 (1974) (issue of continuing failure to accord interim procedural safeguards required by regulations having statutory force; plaintiff loses on this issue, however); Harlem Valley Transp. Ass'n v. Stafford, 500 F.2d 328 (2d Cir. 1974) (review of failure to fulfill statutory prerequisite of environmental impact statement); Farmer v. United Elec. Radio & Mach. Workers, 211 F.2d 36 (D.C. Cir. 1953), *cert. denied,* 347 U.S. 943 (1954) (review of jurisdiction of NLRB to initiate an inquiry with constitutionally questionable consequences); City of Rye v. Schuler, 355 F. Supp. 17 (S.D.N.Y. 1973) (review of omission of prerequisite early steps in highway location proceedings). In International Waste Controls, Inc. v. SEC, 362 F. Supp. 117 (S.D.N.Y. 1973), the issue of agency authority to proceed, which was held not ripe for review, turned on questions of fact that were not resolvable from the record.

[128] *Cf.* Pharmaceutical Mfr's. Ass'n v. Gardner, 381 F.2d 271, 279 (D.C. Cir. 1967) (review of asserted deficiency in original statutory notice); Illinois Cent. R.R. v. Whitehouse, 212 F.2d 22 (7th Cir. 1964), and Townsend v. National R.R. Adjustment Bd., 117 F. Supp. 654 (N.D. Ill. 1954) (challenges to agency refusal to notify and permit participation by third persons in proceedings, where statute allegedly made notice and opportunity to participate a prerequisite to agency jurisdiction.

In Elmo Division of Drive-X Co. v. Dixon, 348 F.2d 342 (D.C. Cir. 1965), review was had of alleged legal error in using complaint process in place of reopening an earlier proceeding. Nevertheless, the decision in *Elmo Division* seems wrong because plaintiff's only threatened loss was the costs of a possibly erroneous proceeding. So, for the same reason, does the holding as to immediate reviewability of a single Commissioner's alleged error of law in voting to issue the complaint in Jewel Co. v. FTC, 432 F.2d 1155 (7th Cir. 1970). As to the insufficiency of troublesome procedures, allegedly erroneously imposed, as a basis for overcoming the ripeness principle, *see* M.G. Davis Co. v. Cohen, 369 F.2d 360 (2d Cir. 1966).

[129] *See, e.g.,* Sampson v. Murray, 415 U.S. 61 (1974); Boston v. Stevens, 395 F. Supp. 1000 (S.D. Ohio 1975) (unconscionable agency delay, imposing serious hardship on the plaintiff, held immediately reviewable); City of Rye v. Schuler, 355 F. Supp. 17 (S.D.N.Y. 1973).

challenges raising issues of this nature have more often been rejected.[130] Reliable criteria for decision as to ripeness in this type of situation have not arisen. Answers turn on judicial evaluation of a host of factors relating to the public and private interests at stake in particular cases, including the need to conserve judicial resources, the relevance of agency expertise to the issues raised, and the immediacy and seriousness of threatened injury to the challenger.

More explicitly qualitative than the exceptions involving the constitutional or statutory authority of agencies to proceed, is the exception based on the possible need to resolve promptly an issue important to the public, or to determine such an issue when it cannot be settled otherwise. Seemingly because of this exception, agency slowness to initiate steps, allegedly required by statute, to protect a strong public interest which suffers in the meanwhile has been held subject to immediate review.[131] In *Order of Railway Conductors v. Swan*[132] the Supreme Court held a total refusal to exercise jurisdiction over a statutorily resolvable issue, resulting from a deadlock between two branches of the same agency, to be immediately reviewable in a declaratory judgment action.[133]

As noted above,[134] statutory review of "orders" or "final orders", available under many federal statutes, extends to immediate review

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[130] *See, e.g.*, FPC v. Arkansas Power & Light Co., 330 U.S. 802 (1947), *rev'd per curiam* 156 F.2d 821 (D.C. Cir. 1946) (statutory jurisdiction of the agency); American Gen. Ins. Co. v. FTC, 496 F.2d 197 (5th Cir. 1974) (same); Dow Chem. Co. v. Ruckelshaus, 477 F.2d 1317 (8th Cir. 1973) (alleged statutory prerequisite of statement of reasons for commencement of proceedings); Frito-Lay, Inc. v. FTC, 380 F.2d 8 (5th Cir. 1967) (jurisdiction of agency to conduct the proceedings); Lever Bros. Co. v. FTC, 325 F. Supp. 371 (D. Me. 1971) (authority of agency to proceed by rulemaking as to subject matter); McDevitt v. Gunn, 182 F. Supp. 335 (E.D. Pa. 1960) (statutory jurisdiction of the agency); Thomas v. Ramberg, 240 Minn. 1, 60 N.W.2d 18 (1953) (alleged want of agency authority because of composition of required advisory board). The issue of whether the agency proceeding was barred by res judicata might be reviewable upon a challenge to interlocutory action in a later proceeding, if the absence of new facts were clear; but the issue has arisen when the existence of additional facts remained in dispute; hence the issue was not ripe. *See* Sterling Drug, Inc. v. Weinberger, 384 F. Supp. 557 (S.D.N.Y. 1974), and cases cited therein.

[131] *See, e.g.*, Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973), *aff'g*, 356 F. Supp. 92 (1973) (review of failure to institute enforcement proceedings against ascertained racial discrimination violative of statute). *Cf. also* Harlem Valley Transp. Ass'n v. Stafford, 500 F.2d 328 (2d Cir. 1974), and City of Rye v. Schuler, 355 F. Supp. 17 (S.D.N.Y. 1973).

[132] 329 U.S. 520 (1947).

[133] In United States v. Christensen, 207 F.2d 757 (10th Cir. 1953), by contrast, the Veterans Administration's refusal to proceed with adjudicating a war risk insurance claim was not final but only pending a report from the Navy; hence, judicial intervention could not be had. *See also* Int'l Ass'n of Machinists, etc. v. National Mediation Bd., 425 F.2d 527, 536 (D.C. Cir. 1970) (Board's interim refusal to offer arbitration held reviewable because of importance of scrutinizing agency inactivity which prolonged a statutory suspension of fundamentally important rights to strike and engage in peaceful picketing).

[134] *See* text accompanying notes 102-105 *supra*.

of certain interlocutory procedural actions. When it does, general-jurisdiction review is, by inference, correspondingly precluded.[135] When statutory review of interlocutory actions is not available immediately and either becomes useless thereafter or is available only less effectively as an incident to later review of final actions, the question arises whether the statute nevertheless precludes immediate review which the general jurisdiction would otherwise afford. Under the National Labor Relations Act there is such a statutory preclusion as respects Board actions in representation proceedings, with severely limited exceptions.[136] The terms of the statute and its legislative history establish that review can take place, if at all, only after ensuing unfair labor practice proceedings have resulted in orders which are statutorily reviewable in the courts of appeals, with accompanying review of preliminary matters that remain consequential. These matters include interlocutory procedural orders in unfair labor practice proceedings which are also affected by a specific legislative policy of postponement of review,[137] as well as orders in such related representation proceedings as may have preceded. These two policies, relating specifically to the Board, augment but do not alter the policy applicable to general-jurisdiction review of interlocutory procedural orders of agencies generally.[138]

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[135] *Cf.* Floersheim v. Engman, 494 F.2d 949, 954 (D.C. Cir. 1974) (preclusion of district court declaratory judgment and injunction proceeding by narrow ancillary authority of court of appeals under statutory review power, to entertain objections to agency rejection of plaintiff's compliance with prior cease-and-desist order which court of appeals had sustained). *Compare* Robertson v. FTC, 415 F.2d 49, 55 (4th Cir. 1969) (district court action not precluded in case to which statutory review does not apply); North American Van Lines, Inc. v. ICC, 386 F. Supp. 665, 681 (N.D. Ind. 1974) (statutory three-judge court review excludes single-judge jurisdiction in mandamus, in relation to orders reopening proceedings).

[136] This preclusion relates most often to orders which terminate the representation proceedings by designating a collective bargaining unit and identifying a representative of the employees there. The dominant question is whether additional Board proceedings pursuant to an unfair labor practice complaint, which often can be invoked in the same ongoing labor relations situation, must be exhausted before judicial review can be had; but as to interlocutory orders there is the additional question of ripeness.

[137] A comparison of the applications of these two facets of Congressional policy to interlocutory procedural steps in labor relations proceedings is made in Bokat v. Tidewater Equip. Co., 363 F.2d 667 (5th Cir. 1966), and Chicago Automobile Trade Ass'n v. Madden, 328 F.2d 766 (7th Cir. 1964), *cert. denied*, 377 U.S. 979 (1969). *See also* Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961), where a close relation between the two is assumed.

[138] The fountain-head case concerning the unavailability of immediate general-jurisdiction review of Board action initiating allegedly unauthorized proceedings, Myers v. Bethlehem Shipbldg. Corp., 303 U.S. 41 (1938), regularly cited in relation to all areas of administration, relies both (1) on the National Labor Relations Act's specific provision that the authority of the Board and of a court of appeals exercising statutory reviewing power "shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise," 29

Review of Action Refusing Intervention or Consolidation

Special problems of ripeness are presented when immediate review is sought of orders denying intervention by would-be parties to agency proceedings or refusing consolidation of proceedings that are under way. Many aspects of the pending proceedings may turn on the interlocutory actions, yet constitutional questions or issues of agency jurisdiction are rarely involved[139] and the procedural rights at stake are seldom of outstanding public importance. However, adequate later relief, incident to review of any resulting final orders,[140] is often difficult. Hence immediate review in statutory review proceedings or under the general jurisdiction is likely to be accorded when it is sought with respect to denials of intervention,[141] and it is

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U.S.C. § 160(a) (1970), 303 U.S. at 48, and (2) on the sufficiency of the statutory process to provide "adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." 303 U.S. at 48. The exclusionary terms of the quoted statutory provision apply only in NLRB cases, whereas the principle of exclusiveness of an adequate statutory means of redress against unauthorized agency action applies to any such statutory process. This two-fold aspect of *Bethlehem Shipbuilding* and the specialized Labor Board aspect of the decisions as to ripeness in Board representation cases is, nevertheless, sometimes not mentioned in decisions as to the ripeness for review of orders of other agencies. *See, e.g.*, Sterling Drug Co. v. Weinberger, 509 F.2d 1236, 1239 (2d Cir. 1975). *Compare* Cheng Fan Kwok v. INS, 392 U.S. 206 (1968), in which the Court held that statutory review of deportation orders and of interlocutory orders preceding them did not extend to later interlocutory orders denying stays pending discretionary relief from deportation, but stated also that general-jurisdiction review could be had, even though the legislative policy of rendering the statutory remedy exclusive had previously, in Foti v. INS, 375 U.S. 217 (1963), and Giova v. Rosenberg, 379 U.S. 18 (1964), been held to be specific and strong. *See also* Yan Wo Cheng v. Rinaldi, 389 F. Supp. 585 (D.N.J. 1975).

[139] *But see* Ill. Cent. R.R. v. Whitehouse, 212 F.2d 22 (7th Cir. 1964), and Townsend v. National R.R. Adjustment Bd., 117 F. Supp. 654 (N.D. Ill. 1954) (jurisdiction of agency depended by statute on notice to third persons and opportunity for them to participate).

[140] As to this remedy in relation to denials of intervention, *see* FCC v. WJR, 337 U.S. 265, 284-85 (1949); FCC v. National Broadcasting Co. (KOA), 319 U.S. 239 (1943); Juarez Gas Co. v. FPC, 375 F.2d 595 (D.C. Cir. 1967); Lynchberg Gas Co. v. FPC, 284 F.2d 756 (3d Cir. 1960).

[141] *See, e.g.*, National Welfare Rights Organization v. Finch, 429 F.2d 725 (D.C. Cir. 1970); Palisades Citizens Ass'n v. CAB, 420 F.2d 188 (D.C. Cir. 1969); Spanish Int'l Broadcasting Co. v. FCC, 385 F.2d 615 (D.C. Cir. 1967); WFTL Broadcasting Co. v. FCC, 376 F.2d 782 (D.C. Cir. 1967) (review for failure to exercise agency discretion where intervention not a matter of right); City of Houston v. CAB, 317 F.2d 158 (D.C. Cir. 1963); American Communications Ass'n v. United States, 298 F.2d 648 (2d Cir. 1962); Interstate Broadcasting Corp. v. United States, 286 F.2d 539 (D.C. Cir. 1960); Seaboard & Western Airlines v. CAB, 181 F.2d 777, 779 (D.C. Cir. 1949), superseding a contrary indication in Sykes v. Jenny Wren Co., 78 F.2d 729 (D.C. Cir. 1935), *cert. denied*, 296 U.S. 624 (1935). *Cf.* Frank v. State Sanitary Water Bd., 33 Ill. App. 1, 178 N.E.2d 415 (1961).

In Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963), rejection by the Commission of applications which could later be refiled but which could be foreclosed if not considered in conjunction with other pending applications was held reviewable in statutory proceedings. *See also* Cook, Inc. v. United States, 394 F.2d 84 (7th Cir. 1968). The statements in some cases such as Alston Coal Co. v. FPC, 137 F.2d 740 (10th Cir. 1943), that an order

even more urgently required in relation to denials of consolidation, if a later remedy might require large scale repitition of agency proceedings.

If only a "party" to an agency proceeding is entitled by statute to seek review of a final order, a denial of intervention which the would-be intervenor desired to challenge might be rendered immune from his attack at the ultimate review stage because he would not then be a party. This consideration provides a practical reason for holding the order denying intervention to be subject to immediate review.[142] In *Public Service Commission v. Federal Power Commission*,[143] the court, clarifying an earlier holding,[144] determined that the would-be intervenor should be considered a "party" for the purpose of securing immediate review of an interlocutory order denying intervention, which should then be regarded as ripe for review, but that this status would not continue so as to confer standing at the later final-order stage. If review of a final order terminating a proceeding is available by statute to a person "adversely affected or aggrieved," the person previously denied intervention, if he alleges sufficient interest, will qualify.[145] Even so, relief with respect to intervention, after an order on the merits has issued, is often unsatisfactory as already suggested. If the court then holds that intervention should have been granted, the proceeding must go back to the agency for a wasteful reopening, even to the extent of providing a complete rehearing.[146] If the consequent proceedings are supplementary rather than a complete repetition of what went before, they are not likely to secure to

denying intervention which is a matter of right is reviewable whereas one denying intervention that lies in agency discretion is not, seem unsound because the agency's exercise of discretion is subject to review for abuse, except in particular instances where all review is precluded.

142 *See* Public Serv. Comm'n v. FPC, 284 F.2d 200 (D.C. Cir. 1960); National Coal Ass'n v. FPC, 191 F.2d 462, 466-67 (D.C. Cir. 1954); *cf.* Easton Util. Comm'n v. AEC, 424 F.2d 847 (3d Cir. 1970); Virginia Petroleum Jobbers Ass'n v. FPC, 265 F.2d 364 (D.C. Cir. 1959). *See also* Tenn. Gas Transmission Co. v. FPC, 322 F.2d 1006 (D.C. Cir. 1968).

143 284 F.2d 200 (D.C. Cir. 1960).

144 Virginia Petroleum Jobbers Ass'n v. FPC, 265 F.2d 364 (D.C. Cir. 1959). *See also* Frontier Broadcasting Co. v. United States, 265 F.2d 353 (D.C. Cir. 1959).

145 *See, e.g.*, Interstate Broadcasting Corp. v. United States, 286 F.2d 539, 543 (D.C. Cir. 1960).

146 Elm City Broadcasting Corp. v. United States, 235 F.2d 811 (D.C. Cir. 1956). The remand may, of course, provide for supplementary, rather than completely reopened, proceedings. *Cf.* Juarez Gas Co. v. FPC, 375 F.2d 595 (D.C. Cir. 1967), which led to the proceedings in Southern Union Gas Co., 38 FPC 493 (1967). In Phillips Petroleum Co. v. Brenner, 383 F.2d 514 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968), contrary to reasoning that a remand after a challenge to a final order provides an unsatisfactory remedy, the court held the availability of such a remedy precludes immediate district court review of action by a Patent Office examiner denying participation to one of three parties to an interference proceeding with respect to issues involving the relative merits of the applications of the other two parties.

the intervenor the same rights of confrontation, cross-examination, and timely argument as would have been secured initially. Hence a denial of intervention should be reviewable immediately if fully effective participation in the agency proceedings, including opportunity to shape the record for ultimate judicial review, is to be afforded in proper cases.[147] A mandatory stay of the agency proceedings will rarely be issued on review of an interlocutory order; but the review need not consume much time and, as has been suggested,[148] the agency may in some instances find it expedient to defer its hearing for the sake of orderliness and economy if leave to intervene should be required. The importance to the parties and perhaps to others of an issue sought to be raised by one denied intervention militates in favor of immediate review of the denial.[149]

The opposite situation of immediate challenge in court to an agency-prescribed enlargement of proceedings rarely arises, because, in general, the only ground of objection would be the insufficient one of added complexity and expense of the proceeding. In *Klein v. Commissioner of Patents*,[150] however, a patentee sought and was held not entitled to immediate review of the subjection of his patent to an interference proceeding precipitated by a new, possibly conflicting patent application. The court concluded that the further factor of a cloud on the existing patent, resulting from the proceeding, was not a sufficient reason for review of the commissioner's denial of a motion to dissolve the interference.

Immediate review of interlocutory agency orders refusing or limiting the consolidation of separate proceedings is sometimes sought when the consolidation would be a means of providing effectively the hearing rights secured by the so-called *Ashbacker* doctrine.[151]

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147 Conway Corp. v. FPC, 510 F.2d 1264, 1267-69 (D.C. Cir. 1975); National Welfare Rights Organization v. Finch, 429 F.2d 725, 737 (D.C. Cir. 1970). *See* American Communications Ass'n v. United States, 298 F.2d 648 (2d Cir. 1962); COMMITTEE ON LICENSES AND AUTHORIZATIONS, REPORT ON LICENSING OF DOMESTIC AIR TRANSPORTATION BY THE C.A.B., in SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. Doc. No. 24, 88th Cong., 1st Sess., 397, 399 (1962).

148 Interstate Broadcasting Corp. v. United States, 286 F.2d 539, 543 (D.C. Cir. 1960).

149 *See* Conway Corp. v. FPC, 510 F.2d 1264, 1267-69 (D.C. Cir. 1975).

150 474 F.2d 821 (4th Cir. 1973).

151 Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). The *Ashbacker* case involved a challenge by one of two applicants for the use of a single radio frequency to the issuance of a permit to the other without a hearing. The applications were mutually exclusive because both could not be granted without producing intolerable electrical interference. By statute, each applicant was entitled to a hearing upon his application before its denial; yet the challenger here had not been accorded such a hearing before the grant of the rival application, which he contended was tantamount to a denial of his. The Court agreed, holding that neither applicant could be given a permit "without a hearing to both."

Typically, however, *Ashbacker* rights have been claimed in cases, especially in the aviation industry, where the impairment was by no means as clear as that in *Ashbacker*. In that case, the grant of one radio broadcasting license was made in the absence of a hearing on a competing application for the use of the same radio frequency. Threatened electrical interference made the grant of both applications a physical impossibility; hence a hearing on the second application became relatively useless. In the later cases the conflict among rival applicants for, say, certificates to provide transportaton service between the same points did not involve the same mutual exclusiveness, since several applications could be granted without producing more than economic competition among the certificate holders. Nevertheless, the need for additional service would be diminished by each award that might result, which, accordingly, would lessen the likelihood that the hearing to a remaining applicant would have a favorable outcome. In a consolidated hearing before any award, on the other hand, each applicant would be on the same footing as the others. Arguably, therefore, a denial of consolidation in such a situation threatens injury which is not remediable later if, in consequence, a single application is granted before others are acted on. Immediate judicial review of the denial should, therefore, arguably be available. However, the difficulty connected with granting it is that the rival applications often have dissimilar aspects, such as different routes between the terminal points proposed or different proposals for continued service beyond those points, which need to be considered in the hearings but the consideration of which in a consolidated hearing would greatly complicate the proceedings. In addition, partial consolidations of proceedings may be possible, whereby evidence as to the conflicting portions of the several applications would be received, leaving the evidence as to other portions for separate presentation. Thus, the question for a court in which review of a denial or partial grant of consolidation is sought becomes whether it or the agency should appraise the consequences of a consolidation and any parallel proceedings and determine whether effective hearing rights would be preserved under the various alternatives. The court's undertaking this task often involves a deep invasion of the agency's management of its own processess, whereas the court's abstention may leave one or more parties with the shadow but not the substance of a hearing over rights already lost.

In determining its course, the court, following the agency and on

the basis of the record it has provided, must deal with the nature of the substantive and the procedural issues presented—the extent, for example, to which the applications, realistically viewed, are mutually exclusive[152]—and with the bearing of the available evidence on each portion of the case. In performing its task the court must ordinarily defer to agency judgment but still accord review to action which amounts to a denial of a meaningful hearing.[153] As in *Ashbacker*, the grant of one of several mutually exclusive applications which precludes an effective hearing on the other applications can be set aside;[154] but the mere refusal of a consolidation at a particular time, leaving future action open, is within agency discretion.[155] In either case the court effectively reviews what the agency has done[156] even when it declines "jurisdiction."

Review of Formally Final Action Deciding Certain Issues but Deferring Others

Agency action may terminate a proceeding by enabling specified conduct to take place, but reserve particular relevant issues for possible determination later in other proceedings if need be. These issues might have been determined initially, but are wholly or partially put aside, to be determined in an altered context if the occasion arises. The agency action is neither interlocutory, because the proceedings are terminated, nor temporary, because no time-limit is put upon its

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[152] Delta Air Lines v. CAB, 228 F.2d 17 (D.C. Cir. 1955); Seaboard & Western Airlines v. CAB, 181 F.2d 777 (D.C. Cir. 1949) (mutual exclusiveness not present).

[153] National Airlines v. CAB, 392 F.2d 504 (D.C. Cir. 1968); Frontier Airlines v. CAB, 349 F.2d 587 (10th Cir. 1965); Eastern Air Lines v. CAB, 243 F.2d 607 (D.C. Cir. 1957).

[154] Delta Air Lines v. CAB, 275 F.2d 632 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 969 (1960); Northwest Airlines v. CAB, 194 F.2d 339 (D.C. Cir. 1952). *Compare* Western Air Lines v. CAB, 184 F.2d 545, 552 (9th Cir. 1950) (no *Ashbacker* issue until agency action effectively denies a right); Pauley v. FCC, 181 F.2d 292 (D.C. Cir. 1950) (same).

[155] National Airlines v. CAB, 249 F.2d 13 (D.C. Cir. 1957).

[156] *See* United Air Lines v. CAB, 228 F.2d 13 (D.C. Cir. 1955), in which the court concluded that the order partially denying a consolidation of proceedings was "interlocutory and not appealable," but did so only after it had "most carefully weighed and . . . extensively explored all claims in the thought that a comparative hearing . . . might be required under the *Ashbacker* rule." *Compare* Pan-American-Grace Airways v. CAB, 342 F.2d 905 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 934 (1965) (court lacked jurisdiction because the issues presented by the allegedly competing applications were not sufficiently in conflict to give rise to a right under the *Ashbacker* doctrine); Midwestern Gas Transmission Co. v. FPC, 258 F.2d 660 (D.C. Cir. 1958), *vacated as moot*, 358 U.S. 280 (1959) (orders partially denying comparative hearing set aside because they withheld an *Ashbacker* right).

effectiveness; yet some of the same reasons for allowing or not allowing immediate judicial review to take place may be applicable. Further agency action may alter the problem presented, and the injury inflicted on the interests of would-be challengers may be mainly contingent on further developments; yet the action is formally final in the same way as a regulation which ends a rulemaking proceeding but requires enforcement. In each case the interim consequences may be considerable.

The problem involved was elaborately considered by the Supreme Court recently in *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures* (SCRAP).[157] Environmental groups sought to challenge an Interstate Commerce Commission order which terminated a general freight-rate proceeding by permitting across-the-board increases to be filed, after the Commission had given attention to the consequences for the recycling of waste products and drain on new raw materials. The resulting rates on specific commodities were not affirmatively approved as reasonable, however, and could still be tested in new Commission proceedings directed to them. Also, the environmental effects of the entire rate structure were still under investigation in a parallel proceeding which might result in future changes. The Court held that the order was final in a sense which rendered it ripe for review as to the adequacy and procedural correctness of the consideration of environmental factors by the Commission, pursuant to the Environmental Policy Act. This issue related to the general determination that had been made; the fact that later determinations might alter the ultimate substantive outcome was irrelevant. The Court did not decide whether the same would be true with regard to the reasonableness under the Interstate Commerce Act of the body of rates conditionally permitted by the order. Such a decision might go either way in the light of earlier cases, including affirmance of two lower-court decisions by an evenly-divided Supreme Court in 1970. As strongly urged by Judge Wright, dissenting, in *Alabama Power Co. v. United States*,[158] such an order is effectively final as to many aspects of the rate situation and should be open to prompt review under the Interstate Commerce Act, with respect to the determinations actually made. The further, pin-pointed

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[157] 422 U.S. 289 (1975).

[158] 316 F. Supp. 337 (D.D.C. 1969), *aff'd by an equally divided Court*, 400 U.S. 78 (1970). *See also* Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 317 (1975).

determination of consequent specific rates must, however, await the exhaustion of available new proceedings in the Commission, to challenge those rates that give rise to objection.[159]

SUMMARY

Ripeness, then, is that quality of agency action which consists of sufficient legal force or produces sufficient practical consequences to justify a judicial judgment upon the action at the stage of the relevant governmental process which has been reached. Entering into the ascertainment of whether ripeness is present are (1) whether a case or controversy has arisen, (2) the statutory or traditional requirements for the availability of the particular judicial remedies that are sought, (3) the presence or threat of sufficient injury by the action in question to interests that, at some stage, are entitled to judicial consideration and (4) the existence and adequacy of later alternative ways to correct the action in question if it is erroneous in the respects alleged. Some of these same factors are involved in determinations of whether judicial relief is to be withheld because an administrative remedy should be or should have been invoked and whether standing to resort to court is present on the part of a challenger to agency action. To these related issues we now turn.

PART II: EXHAUSTION OF ADMINISTRATIVE REMEDIES

Nature and Scope of the Exhaustion Doctrine

Exhaustion is the prerequisite to judicial review of administrative agency action which requires that, subject to certain qualifications and exceptions, the available corrective steps at the administrative level, whether preventive or remedial, have been pursued. The exhaustion doctrine typically bars review even when other prerequisites for review have been satisfied, *i.e.*, an otherwise judicially determinable controversy is presented; the agency has taken definitive, if not ultimate, action;[1]

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[159] *See* Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 310-316 (1975), and lower-court cases cited, especially Electronic Indus. Ass'n v. United States, 310 F. Supp. 1286 (D.D.C. 1970), *aff'd per curiam*, 401 U.S. 967 (1971).

[1] Sometimes the courts speak of exhaustion of administrative remedies when the agency action from which relief is sought consists only of initial steps, such as the filing of a complaint or launching of an investigation, which lead normally to further proceedings. *See, e.g.*, Borden, Inc. v. FTC, 495 F.2d 725 (7th Cir. 1974); Miles Laboratories, Inc. v.

and the person seeking review has standing. The main reasons for requiring the invocation of available agency processes prior to court action are that otherwise the "efficiency" of having the statutorily prescribed procedures utilized without interruption or curtailment is lost; the legislative purpose of securing the most considered agency determination of the matters involved is thwarted; and the statutory scheme providing for such determination is weakened.[2]

The "remedies" to which the exhaustion prerequisite relates are of two principal kinds: (1) opportunities during agency proceedings to urge particular matters, such as the admission of desired items of evidence or the consideration of specified legal issues which may be involved in later challenges to final agency action, and (2) additional agency proceedings whereby otherwise final agency action may be reviewed by supervisory or appellate authorities or by way of reconsideration. Omission or failure to complete the former may preclude review with respect to the particular issues that were not raised; failure to resort to over-all administrative appeals or reconsideration may prevent judicial review of entire proceedings. Since challenges to the outcome of entire proceedings always rest on particular grounds, however, the practical effect of applying the doctrine of exhaustion in both situations is to bar judicial consideration of specific issues that remain disputed. The justification for applying the doctrine or for departing from it may, however, differ in the two situations.

Often quoted as expressive of reasons for exhaustion of the first kind of remedy is the statement in *United States v. L. A. Tucker Truck Lines* that

> orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts

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FTC, 140 F.2d 683 (D.C. Cir. 1944), *cert. denied,* 322 U.S. 752 (1944); Leyden v. FAA, 315 F. Supp. 1398 (E.D.N.Y. 1970); United Ins. Co. v. Maloney, 127 Cal. App. 2d 155, 273 P.2d 579 (1954). Whether such proceedings can be forestalled by immediate resort to court involves problems of ripeness of agency action for review, rather than of exhaustion of administrative remedies (so long as these remain separate prerequisites, as to which see INTRODUCTION *supra;* but the applicable considerations are the same under both headings and are usually stated in terms of the exhaustion requirement.

[2] McKart v. United States, 395 U.S. 185, 194-95 (1969). *See also* Brawner Bldg. v. Sheyhn, 442 F.2d 847 (D.C. Cir. 1971) (reasons for requiring exhaustion of zoning procedures prior to judicial review).

> should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.[3]

The requirement of exhaustion of administrative remedies became part of American administrative law largely as an application of common sense relating to the use of prescribed procedures of the second kind in preference to judicial remedies, in disposing of challenges to tax administration[4] and challenges to the exclusion and deportation of aliens.[5] From these matters it spread to other administrative fields, notably public utility regulation.[6] The requirement arose simultaneously in the state[7] and federal[8] domains and in the sphere of federal judicial

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[3] 344 U.S. 33, 37 (1952). *See* Unemployment Compensation Comm'n v. Rinaldi, 329 U.S. 143, 155 (1946). The same policy is implicit in the denial of relief in Goldsmith v. Board of Tax Appeals, 207 U.S. 117, 123 (1926). *See also* NLRB v. Newton-New Haven Co., 506 F.2d 1035 (2d Cir. 1974); Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583 (D.N.J. 1975); Beaufort Transfer Co. v. United States, 379 F. Supp. 99 (E.D. Mo. 1974).

[4] Pittsburgh & C. Ry. v. Board of Pub. Works, 172 U.S. 32 (1898); Dalton Adding Mach. Co. v. State Corp. Comm'n, 236 U.S. 699 (1915); First Nat'l Bank v. Weld County, 264 U.S. 450 (1924); Gorham Mfg. Co. v. State Tax Comm'n, 266 U.S. 265 (1924); Dundee Mortgage Trust Inv. Co. v. Charlton, 32 F. 192 (D. Ore. 1887); Northern Pac. R.R. v. Patterson, 10 Mont. 90, 24 Pac. 704 (1890); Florenzie v. City of East Orange, 88 N.J.L. 438, 97 Atl. 260 (1916), and early cases cited; Rio Grande R. Co. v. Scanlan, 44 Tex. 649 (1876). As to many tax determinations a rule of finality of administrative assessments prevailed, precluding resort to judicial remedies to prevent collection, State R.R. Tax Cases, 92 U.S. 575 (1875), if not, as later suggested, Stanley v. Supervisors of Albany, 121 U.S. 535, 550 (1887), to actions to recover taxes paid under duress. The *Weld County* and *Gorham* cases, taken together, applied the doctrine of exhaustion to both kinds of remedies. *See generally* Stason, *Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies*, 28 MICH. L. REV. 637 (1930). As to suits in equity to enjoin the collection of taxes, the requirement of resort to administrative remedies is aided by regarding these as remedies at law which must be preferred. Wilson v. Green, 135 N.C. 343, 47 S.E. 469 (1904).

[5] United States v. Sing Tuck, 194 U.S. 161 (1904). Earlier, a requirement that claims of federal employees against the government be submitted initially to the department concerned, which could consider them, was looked upon as self-evident. United States v. MacDaniel, 32 U.S. (7 Pet.) 1 (1833). *See generally* Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981 (1939).

[6] *Compare* Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908), *with* Bacon v. Rutland R. Co., 234 U.S. 134 (1914). *See* Henderson Water Co. v. Corporation Comm'n of North Carolina, 269 U.S. 278 (1925); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929); Porter v. Investors Syndicate, 286 U.S. 461, *aff'd on rehearing*, 287 U.S. 346 (1932) (securities regulation); United States v. Illinois Central R.R., 291 U.S. 457 (1934). *See also* McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973) (exhaustion of intra-Army informal appeals to higher commands); Ogden v. Department of Transp., 430 F.2d 660 (6th Cir. 1970) (appeals of federal employee discharges); Wilmington Chem. Corp. v. Celebrezze, 229 F. Supp. 168 (N.D. Ill. 1964) (exhaustion of informal negotiations with reference to labeling requirement for dangerous product); Lutz v. Kaltenbach, 101 N.J.L. 316, 128 Atl. 421 (1925) (exhaustion of zoning appeals).

[7] Northern Pacific R. Co. v. Patterson, 10 Mont. 90, 24 Pac. 704 (1890); Rio Grande R. Co. v. Scanlan, 44 Tex. 649 (1876); Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P.2d 942 (1941); Hayes v. Joseph E. Seagram & Co., 222 Ind. 130, 52 N.E.2d 356 (1944); State *ex rel.* Jones v. City of Nashville, 198 Tenn. 280, 279 S.W.2d 267 (1955).

[8] United States v. Sing Tuck, 194 U.S. 161 (1964).

review of state agency action.[9] In relation to this federal-state aspect of the exhaustion requirement, emphasis on comity toward a coordinate jurisdiction is involved.[10] Whether comity can also be said to apply to the relation between courts and administrative authorities in the same government, such as courts martial, which are subject to only limited collateral review by the regular federal courts and which constitute an essentially separate system, is a matter of dispute that involves largely the proper use of a term. Judicial reluctance to supplant the proceedings of agencies is likely to be proportional to the means of self-correction that exist in the agencies' structures and processes, with the consequence that the exhaustion rule will be applied more readily to some proceedings than to others.[11]

Sometimes the doctrine of exhaustion is closely linked to that of primary jurisdiction which applies when an unresolved issue, arising initially in a court proceeding, is also capable of determination by an agency, and the question is whether the issue should go to the agency for initial determination or be resolved by the court without such a reference. If the plaintiff seeks a modification in a completed prior agency action which is not challenged as a whole—for example, a change in a specific freight rate established by a general rate order—the proceeding has some of the aspects of a re-examination of the agency's general order and may be thought of as a partial review of that prior action, subject to the doctrine of exhaustion. Alternatively, the court proceeding may be looked upon as one to secure a new, more limited order, normally obtainable from the agency, to which the principle of primary jurisdiction applies. The applicable considerations under both alternatives are largely the same.[12]

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[9] *See* notes 4 and 6 *supra.*

[10] Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937); Prentis v. Atlantic Coast Line, 211 U.S. 210, 229 (1908).

[11] *See* as to courts martial, Schlesinger v. Councilman, 420 U.S. 738, 756-760 (1975); Parisi v. Davidson, 405 U.S. 34, 37-40 (1972); Noyd v. Bond, 395 U.S. 683, 698 (1969); Gosa v. Mayden, 413 U.S. 665, 693 (1973) (dissenting opinion); Dooley v. Ploger, 491 F.2d 608 (4th Cir. 1974); Sedivy v. Richardson, 485 F.2d 1115 (3d Cir. 1973); Brown v. United States, 365 F. Supp. 328, 332, 338-40 (E.D. Pa. 1973). *See also* Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972) (comity between courts and the legislative branch), and, as to Indian tribal courts, United States *ex rel.* Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974), *cert. denied,* 421 U.S. 999 (1975).

[12] *Cf.* Electronic Indus. Ass'n v. United States, 310 F. Supp. 1286 (D.D.C. 1970), *aff'd,* 401 U.S. 967 (1971); Hegeman Farms Corp. v. Baldwin, 293 U.S. 163 (1934); Turkel v. Food & Drug Administration, 334 F.2d 844 (6th Cir. 1964); FPC v. Union Producing Co., 230 F.2d 36 (D.C. Cir. 1956); Sayers v. Montpelier & Wells River R. Co., 90 Vt. 201, 97 Atl. 660 (1916).

The exhaustion requirement is often put forward as a broad prerequisite to judicial review, applicable whenever disputed issues could have been or could still be presented to the agency and decided by it through established processes, but have not been.[18] Even in the Supreme Court's early formulations it was recognized, nevertheless, that when the question presented is that of agency power to act at all,[14] or involves a pure question of law, the issue may sometimes be considered by a court even though it has not been presented to the agency.[15] The

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[18] *Cf.* Parisi v. Davidson, note 11 *supra*, 405 U.S. at 38; Soyka v. Alldredge, 481 F.2d 303 (3d Cir. 1973); United States v. Elof Hansson, Inc., 48 C.C.P.A. (Cust.) 91, 296 F.2d 779 (1960), *cert. denied*, 368 U.S. 899 (1961); Red River Broadcasting Co. v. FCC, 98 F.2d 282 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 625 (1938); Abelleira v. District Court of Appeals, 17 Cal. 2d 280, 109 P.2d 942 (1941); Heron v. City of Denver, 131 Colo. 501, 283 P.2d 647 (1955); Leffler v. Browning, 14 Ill. 2d 225, 151 N.E.2d 342 (1958). *Compare* Okla. Pub. Welfare Comm'n v. State *ex rel.* Thompson, 187 Okla. 654, 105 P.2d 547 (1940) (administrative remedy still available but plainly inadequate).

[14] Prentis v. Atlantic Coast Line, note 6 *supra*, 211 U.S. at 231. Skinner & Eddy Corp. v. United States, 249 U.S. 557 (1919), is often quoted: "Where the contention is that the [Interstate Commerce] Commission has exceeded its statutory powers, . . . the courts have jurisdiction to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission." 249 U.S. at 562. See also the distinction which is stated in the *Tucker* case, 344 U.S. 33 (1952), note 3 *supra*, between the issue there and "one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." 344 U.S. at 38. Even before the *Sing Tuck* case, 194 U.S. 161 (1904), n.5 *supra*, the Court held in Gonzales v. Williams, 192 U.S. 1 (1904), that a person seeking admission to the United States need not, as a condition of bringing a habeas corpus proceeding against detention at the port, have resorted to agency appeal proceedings when under conceded facts the only issue was whether the person was an alien subject to exclusion under the governing statute. *Sing Tuck* also involved a claim of citizenship and, therefore, of want of agency jurisdiction to exclude; but there the issue turned on facts concerning the places where the aliens seeking admission were born, and the Court applied the exhaustion rule. As to the effects of this distinction between two kinds of jurisdictional issues see text accompanying notes 143-149 *infra*.

For recent instances of inapplicability of the exhaustion doctrine to the issue of want of agency authority to act, *see* Chesapeake & Ohio R. Co. v. United States, 392 F. Supp. 358 (E.D. Va. 1975); Ashland Oil Co. v. Fed. Energy Admin., 389 F. Supp. 1119 (N.D. Cal. 1975).

[15] *See, e.g.*, American Nursing Home Ass'n v. Cost of Living Council, 497 F.2d 909 (Em. App. 1974), where, as in other decisions to similar effect, the workability of the law-fact distinction is necessarily relied upon. A leading instance in which exhaustion was dispensed with as to questions of law is Hormel v. Helvering, 312 U.S. 552 (1941), which upheld the decision of the court of appeals which decided an income tax case on the basis of a statutory provision which had not been relied on by the government in the Board of Tax Appeals. The Court's opinion, however, is cast in terms relating to roles of trial and appellate courts rather than of agencies and judicial review. The decision was aided by a statutory injunction that courts reviewing Board decisions should decide "as justice may require." Both the statute and the Supreme Court's holding applied only to cases in which there had been a Board proceeding.

balance of efficiency and convenience may then swing against the exhaustion requirement, because proceedings in an agency with doubtful authority might be wasteful for all concerned, or because the agency might be unable to contribute significantly to resolving an issue which in the last analysis would be for a court to determine.

The foregoing two exceptions to the exhaustion requirement have been augmented by others and are accompanied by enlarging qualifications to the doctrine as a whole. The consequence is that the requirement, especially in the federal system, has in many instances become a flexible means of allocating responsibility between agencies and courts, rather than a rule that operates mechanically or by way of limiting judicial "jurisdiction." As so developed, the doctrine is clearly "not an absolute bar to judicial consideration and where justification for invoking the doctrine is absent, application is unwarranted."[16] The ramifications of this view are discussed below.

Reinforcements of the Doctrine

Statutes may expressly or impliedly limit judicial review of a particular agency's actions to court proceedings after additional agency processes have been completed. To the extent that they do and are valid, such statutes bind the courts and will defeat attempts to secure review at an earlier stage, before the prescribed processes have run their course, whether or not the actions would otherwise be ripe for review. An important example involves the National Labor Relations Act, under which it has been established by interpretation that Board determinations with respect to employees' collective bargaining representation are typically not open to immediate judicial review, but are subject to challenge in statutory proceedings to review later Board orders that may, after further proceedings in the Board, deal with unfair labor practices in the same bargaining situations.[17] Under other statutes the prescribed agency

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[16] Ecology Center v. Coleman, 515 F.2d 860 (5th Cir. 1975); Downen v. Warner, 481 F.2d 642 (9th Cir. 1973). *See also* United States v. Harvey, 131 F. Supp. 493, 496 (N.D. Tex. 1954). *Compare*: ". . . the rule requiring exhaustion of administrative remedies before resort to the courts is not a matter of judicial discretion but is a fundamental rule of procedure." State *ex rel.* Scott v. Scearce, 303 S.W.2d 175 (Mo. App. 1957), quoting Clark v. State Personnel Bd., 61 Cal. App. 2d 800, 144 P.2d 84 (1943). Even when the exhaustion requirement is enforced, it is often stated to be a flexible one, subject to the adequacy of the available administrative remedy. *See, e.g.*, Anderson v. Dunlop, 485 F.2d 666 (Em. App. 1973).

[17] The determinations in question are either designations of collective bargaining representatives (inherently reviewable, apart from the statute) or interim actions in representation proceedings, which might not, in any event, be ripe for review. *Cf.* A.F. of L. v. NLRB, 308 U.S. 401 (1940); Surprenant Mfg. Co. v. Alpert 318 F.2d 396 (1st Cir. 1963) (order in-

proceedings leading to opportunity for judicial review may consist initially of a reopening, wholly or in part, of an original determination by the same agency or of review by an appellate administrative body, which may be had as of right.[18] Application for discretionary agency reconsideration is sometimes a statutory prerequisite to judicial review in each case,[19] but ordinarily such an application is not a condition of judicial review unless expressly made so. The Federal Administrative Procedure Act contains an explicit provision which dispenses with the exhaustion requirement as to reconsideration and administrative appeals whether they can be obtained as of right or remain optional with the agency, except when a statute or regulation provides that one or the other shall be a prerequisite.[20]

A different prescription for exhaustion of agency processes arises when an agency and a party seeking review of its action have provided by a valid contract for a specific type of agency proceeding to precede such a resort to court. "Disputes clauses" of varying breadth in federal government contracts, or other clauses making special provisions for adjustments, commonly require resort by the contractor to administrative determinations in order to secure extra compensation or a relaxation of requirements, or sometimes to establish a breach of obligation by the Government. The full use of these provisions, leading to judicial review which is now regulated by statute, is exclusive of any other resort to court for the same causes, unless the case is exceptional.[21]

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validating election because of substantive factors). For further discussion of the rule applicable to actions of the NLRB in representation proceedings, see text accompanying notes 74-98, *infra*.

[18] *See* text accompanying notes 57-73, *infra*. *See also* Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937) (exclusiveness of statutory method of recovering taxes previously paid and allegedly not owed, as to which refund has been refused, commencing with petition for administrative hearing); Hughes v. City of Woodward, 457 P.2d 787 (Okla. 1969) (exclusiveness of statutory procedure to review public-works wage scale, commencing with agency reconsideration); Smith v. Highway Bd., 117 Vt. 343, 91 A.2d 805 (1952) (exclusiveness of statutory method of review of dismissal from state service).

[19] 15 U.S.C. § 717r(a) (1970) (Natural Gas Act); 16 U.S.C. § 825*l*(a) (1970) (Federal Power Act); 47 U.S.C. § 405 (1970) (Communications Act as to previous non-parties and as to presentation of questions not previously before the Commission). *See* Wisconsin v. FPC, 373 U.S. 294, 307 (1963); FPC v. Colorado Interstate Gas Co., 348 U.S. 492, 498 (1955); Utah Power & Light Co. v. FPC, 339 F.2d 436 (10th Cir. 1964); Southwestern Publishing Co. v. FCC, 243 F.2d 829, 833 (D.C. Cir. 1957); DuPage Util. Co. v. Illinois Commerce Comm'n, 47 Ill. 2d 550, 267 N.E.2d 662 (1971); Scherer Freight Lines, Inc. v. Illinois Commerce Comm'n, 24 Ill. 2d 354, 101 N.E.2d 134 (1962); Alton R. Co. v. Illinois Commerce Comm'n, 407 Ill. 202, 95 N.E.2d 76 (1950).

[20] *See* text accompanying notes 46-50, *infra*.

[21] United States v. Anthony Grace & Sons, Inc., 384 U.S. 424, 429-30 (1966); United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966); United States v. Joseph A. Holpuch Co., 328 U.S. 234, 239-40 (1946); Patton Wrecking & Demolition Co. v. TVA, 465 F.2d 1073 (5th Cir. 1972).

Traditional doctrines, more flexible in operation, relating to particular judicial remedies, may support the exhaustion principle when these remedies are invoked against agency action. In this way, mandamus or injunction proceedings may be excluded because available agency proceedings which could be invoked are considered remedies "in the ordinary course of the law" or "adequate remedies at law," foreclosing the desired action by a court.[22]

Practical reasons for applying the exhaustion requirement are strengthened when technical expertness not possessed by the courts enters into agency determinations; for obviously this expertness should be drawn upon prior to judicial review.[23] Especially with respect to this element in agency determinations, the creating of an adequate record of agency proceedings is important to a reviewing court and furnishes an added reason for requiring that agency processes have been fully utilized.[24] In the federal system, also, uniformity in the application of agency-administered laws is aided when agency processes are carried to completion in each instance before review takes place in any of the numerous district courts or courts of appeals, where review may be had under most statutes.[25]

Statutes often contain explicit provisions that the reception of additional evidence may be authorized by a reviewing court only if reasonable grounds are shown for failure to present the evidence previously to the agency.[26] Statutes may also provide that objections to agency action,

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22 *Cf.* Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 310-11 (1937); Dalton Adding Mach. Co. v. State Corp. Comm'n, 236 U.S. 699 (1915); Atlas Life Ins. Co. v. Leedom, 284 F.2d 231 (D.C. Cir. 1960); Towers Management Corp. v. Thatcher, 271 N.Y. 94, 2 N.E.2d 273 (1936); Wilson v. Green, 135 N.C. 343, 47 S.E. 469 (1904); State *ex rel.* Ronald, Inc. v. City of Willoughby, 170 Ohio St. 39, 161 N.E.2d 890 (1959); State *ex rel.* Gooden v. Bonar, 183 S.E.2d 697 (W. Va. 1971). As to the flexibility which results, *see* Smith v. United States, 199 F.2d 377 (1st Cir. 1952).

23 *See, e.g.*, McKart v. United States, 395 U.S. 185, 198 (1969); American Nursing Home Ass'n v. Cost of Living Council, 497 F.2d 909, 913 (Emer. Ct. App. 1974); Bradley v. Weinberger, 438 F.2d 410, 415 (1st Cir. 1973); Towers Management Corp. v. Thatcher, 271 N.Y. 94, 2 N.E.2d 273 (1936).

24 American Nursing Home Ass'n v. Cost of Living Council, 497 F.2d 909, 913 (Emer. Ct. App. 1974); Bradley v. Weinberger, 438 F.2d 410, 415 (1st Cir. 1973); Board of Selectmen v. Outdoor Advertising Board, 346 Mass. 754, 196 N.E.2d 218 (1964).

25 Most fully articulated in the development of the doctrine of primary jurisdiction (*see, e.g.*, Weinberger v. Bentex Pharmaceuticals, Inc. 412 U.S. 645, 653-54 (1973)); this factor is present whenever determinations under a federal statute are required and the question of dispensing with agency consideration prior to judicial consideration is raised.

26 *See. e.g.*, 15 U.S.C. § 21(c) (1970) (FTC Act); 15 U.S.C. § 77*i* (1970), 15 U.S.C. § 78*y* (1970) and 15 U.S.C. § 79*x* (1970) (Review of SEC orders); 15 U.S.C. § 717*r*(b) (1970) (Natural Gas Act); 16 U.S.C. § 825*l*(b) (1970) (Federal Power Act); 15 U.S.C.

not presented to the agency when they might have been, may not be made to a reviewing court.[27] Such statutes typically provide for exceptions under some circumstances. How much rigor, if any, the statutes add to the nonstatutory exhaustion requirement depends in part on the wording of these provisions[28] and in part on the courts' conceptions of the nonstatutory requirement.[29] At the least, they provide a convenient reference to support application of the requirement in particular instances.[30] The wording of such a statute may also contribute to deter-

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§ 1394 (1970) (review of automobile safety standards); 29 U.S.C. §§ 160(e) and (f) (1970) (National Labor Relations Act). *See also* 28 U.S.C. § 2346(c) (1970) (Review Act provision as incorporated in Judicial Code). The MODEL STATE ADMINISTRATIVE PROCEDURE ACT, § 12(5), 9C ULA 184 (1946) and REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, § 15(e), 9C ULA 158 (Supp. 1967) [hereinafter cited as REVISED MODEL ACT], contain provisions to the same effect.

[27] *See, e.g.*, SEC statutes, Natural Gas Act provision, Federal Power Act provision, and National Labor Relations Act provision, cited n.26 *supra*. *See also* Federal Aviation Act, 49 U.S.C. § 1486(e) (1970); 30 U.S.C. § 816(a) (1970) (Court of Appeals shall not "consider" a petition for review under the Federal Coal Mine Health and Safety Act unless the petitioner "has exhausted the administrative remedies available. . . ."); 8 U.S.C. § 1105a(c) (1970) (same as to exclusion and deportation of aliens when remedies available "as of right"). The Communications Act, 47 U.S.C. § 405 (1970), achieves the same general effect by conditioning judicial review on a prior petition to the FCC for a rehearing if the challenging party "relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." As to the effects of failure to use procedural opportunities before making application for reconsideration, with and without a statute relating to such applications as prerequisite, *see* Easton Util. Comm'n v. AEC, 424 F.2d 847 (D.C. Cir. 1970). *See also* the local statutory and interstate compact provisions cited, respectively, in Unemployment Comp. Comm'n v. Aragon, 329 U.S. 143, 155 (1946), and D.C. Transit System v. Washington Metropolitan Area Transit Comm'n, 466 F.2d 394, 413 (D.C. Cir. 1972). The REVISED MODEL ACT § 15(a), limits review of final decisions in contested cases to actions instituted by aggrieved persons who have "exhausted all administrative remedies available within the agency," except for review of interlocutory action if review of the final decision would not provide an adequate remedy. For applications of some of the foregoing provisions see Marshall Field & Co. v. NLRB, 318 U.S. 253 (1943); Gearhart & Otis, Inc. v. SEC, 348 F.2d 398, 800 (D.C. Cir. 1965); Lile v. SEC, 324 F.2d 772 (9th Cir. 1963); Siaba-Fernandez v. Rosenberg, 302 F.2d 139 (9th Cir. 1962) (deportation).

[28] The National Labor Relations Act provision contains an exception for "extraordinary circumstances." *See* NLRB v. Ochoa Fertilizer Corp., 358 U.S. 318, 322 (1961); NLRB v. Jan Power, Inc., 421 F.2d 1058 (9th Cir. 1970). Some of the other cited statutes provide for exceptions based on "reasonable grounds" for failure to comply.

[29] For the view that the nonstatutory exhaustion requirement is as rigorous as the statutes, *see* Cotherman v. FTC, 417 F.2d 587, 594 (5th Cir. 1969); for reliance on such a statute as an addition to the strength of the exhaustion requirement, *see* Presque Isle Tv. Co. v. United States, 387 F.2d 502, 506 (1st Cir. 1967). The court in D.C. Transit System v. Washington Metropolitan Area Transit Comm'n, 466 F.2d 394 (D.C. Cir. 1972), reserved the question whether the Compact requirement relied on, which contained no provision for exceptions, may yield to "exceptional circumstances." 466 F.2d at 414 n.144.

[30] Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 157 (1960); Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 911 (D.C. Cir. 1972); NLRB v. Tennessee Packers, Inc., 344 F.2d 948 (6th Cir. 1965); Street v. FPC, 277 F.2d 357 (D.C. Cir. 1960); Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959); Holland v. Edwards, 307 N.Y. 38, 119 N.E.2d 581, 584 (1954).

mining the kind of presentation at the agency level which will constitute compliance. Hence it has been held, although with questionable soundness, that a previously cited provision of the National Labor Relations Act,[31] which limits objections on judicial review to such as have been "urged before the Board, its members, agent, or agency" except in "extraordinary circumstances," is not satisfied by objections made only to a hearing examiner, who is not considered an "agent" for this purpose.[32]

Neither a statutory exhaustion provision nor the nonstatutory exhaustion prerequisite is satisfied by a presentation in agency proceedings which does not comply substantially with procedural requirements.[33] Hence, for example, an offer of evidence or a legal contention at one stage in a proceeding may be ineffective unless also made earlier or repeated at a later stage, if procedural rules or appropriate standards as to diligence so require;[34] a generalized or vague objection to a document relied on or intermediate report in a proceeding may not suffice to state a specific objection;[35] or formal errors may be fatal to attempts at ex-

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[31] *See* note 27, *supra.*

[32] *Compare* NLRB v. Int'l Union of Operating Engineers, 357 F.2d 841 (3d Cir. 1966) *with* NLRB v. Red Spot Elec. Co., 191 F.2d 697, 698 n.3 (9th Cir. 1951). Failure to repeat the objection to the Board at a later stage would have been a sufficient additional ground for holding that the exhaustion requirement was not satisfied. *See* Cotherman v. FTC, 417 F.2d 587, 590 (5th Cir. 1969); Building Material Teamsters Local v. NLRB, 275 F.2d 909, 911-12 (2d Cir. 1960).

[33] Such requirements ought not to be made into a trap by hypertechnical interpretation, of course; it should suffice if contentions are effectively presented to the agency at the required procedural stages, whether or not in precisely the manner specified. *Compare* Lemoge v. United States, 378 F. Supp. 288 (N.D. Cal. 1974) *with* First Nat'l Bank v. Board of Governors, 509 F.2d 1004 (8th Cir. 1975), in which the alleged agency error consisted of failure to take account of a legal issue which the petitioner for review had failed to state to the agency with sufficient clarity.

[34] Keco Indus. v. NLRB, 458 F.2d 1356 (6th Cir. 1972); Sears, Roebuck & Co. v. Solien, 450 F.2d 353 (8th Cir. 1971); NLRB v. Rod Ric Corp., 428 F.2d 848 (5th Cir. 1970); NLRB v. Thompson Trans. Co., 406 F.2d 698 (10th Cir. 1969); NLRB v. Rexall Chem. Co., 370 F.2d 363 (1st Cir. 1964); Adams v. Witmer, 271 F.2d 29, 36 (9th Cir. 1959); Hayes v. Joseph E. Seagram & Co., 202 Ind. 130, 52 N.E.2d 356 (1944). Even without reference to a specific rule of practice, exhaustion requires that a matter be "effectively presented" to the agency at the proper time. Reese Sales Co. v. Hardin, 458 F.2d 183 (9th Cir. 1972). *See* Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 767 (1947), where the Court held that the exhaustion principle requires "not . . . merely the initiation of prescribed administrative procedures," but "exhausting them, that is, . . . pursuing them to their appropriate conclusion," quoted with approval in Spanish Int'l Broadcasting Co. v. FCC, 385 F.2d 615, 625 (D.C. Cir. 1967).

[35] NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 350 (1953); Singer Co. v. NLRB, 429 F.2d 172 (8th Cir. 1970); Dallas Gen. Drivers, etc., Local 745 v. NLRB, 389 F.2d 553 (D.C. Cir. 1968); NLRB v. Gustina Bros. Lumber Co., 253 F.2d 371, 374 (9th Cir. 1958); Gruber v. United States, 158 F. Supp. 510 (D. Ore. 1958). *Cf.* People v. FPC, 353 F.2d 16 (9th Cir. 1965) (grounds of objection were sufficiently specified in petition for

haustion.[36] Since procedural requirements, including requirements of due diligence, are binding, failure to comply with them may be a sufficient ground for decision against persons not in compliance, without reference to failure to exhaust available procedures before invoking judicial review;[37] but the exhaustion requirement provides an overriding basis, on which a court may choose to rely, for excluding judicial review of issues that were not properly raised and preserved at the agency level.

Finality of Failures to Exhaust

Failure to comply with the exhaustion requirement gives rise to sharply differing effects in two types of situations that are distinguished by the timing of the administrative remedies referred to. The first situation involves remedies which lie wholly in the past and were not used, such as the opportunity to make procedural objections during a hearing that has ended, or the opportunity to invoke higher administrative authority within a limited time which has expired. The other situation involves agency processes that remain available, such as appeals or petitions for rehearing that have not been barred. In the first situation, the person concerned goes remediless and may be subject to enforcement proceedings; in the second circumstance, the individual in search of a remedy may still pursue one through administrative channels and, often, return to court later to seek review of the resulting agency action. Some of the clearest expressions of reasons for requiring exhaustion occur in the first kind of case,[38] but counter-considerations of fairness to the

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rehearing); Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968) (same as to objection to a workmen's compensation award); NLRB v. Capital Bakers, Inc., 351 F.2d 45 (3d Cir. 1965) (objection to unit determination was sufficiently made by a succession of relevant procedural moves).

[36] Lam Tat Sin v. Esperdy, 227 F. Supp. 482 (S.D.N.Y. 1964) (prescribed form not used to apply for stay of deportation); Marshall v. Comm'r of Motor Vehicles, 324 Mass. 468, 87 N.E.2d 7 (1949) (administrative appeal not taken to a "Department" but to its "Commissioner").

[37] *Compare* Richardson v. Perales, 402 U.S. 389, 404-05 (1971) (want of diligence in asserting right to cross-examination) *with* Williams v. Zuckert, 372 U.S. 765 (1963) (compliance depends on circumstances); Charles v. Blount, 430 F.2d 665 (7th Cir. 1970); NLRB v. Mooney Aircraft, Inc., 310 F.2d 565 (5th Cir. 1962) (rule requiring written exceptions is not satisfied by exceptions stated orally).

[38] FPC v. Colorado Interstate Gas Co., 348 U.S. 492, 501 (1955); NLRB v. Cheney California Lumber Co., 327 U.S. 385 (1946); Spanish Int'l Broadcasting Co. v. FCC, 385 F.2d 615 (D.C. Cir. 1967); United States v. Jeffcoat, 272 F.2d 266 (4th Cir. 1959); Democrat Printing Co. v. FCC, 202 F.2d 298 (D.C. Cir. 1952); Red River Broadcasting Co. v. FCC, 98 F.2d 282 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 625 (1938); Elbow Lake Cooperative Grain Co. v. Commodity Credit Corp., 144 F. Supp. 54 (D. Minn. 1956), *aff'd* 251 F.2d 633 (8th Cir. 1958). *Cf.* Dupree v. Byrd, 123 F. Supp. 656 (E.D. Pa. 1954). For a routine application of the exhaustion doctrine in this kind of situation, *see* Mann v. Klassen, 480 F.2d 159, 161 (5th Cir. 1973).

individual affected also operate strongly in other cases of this sort and lead to a judicial balancing of interests in determining whether the exhaustion rule should be applied.[39]

In the *Tucker* case quoted above[40] a motor carrier was precluded from pursuing an objection to an order of the Interstate Commerce Commission granting a certificate of convenience and necessity to a competitor, because it had not made this particular contention before the Commission. Its objection turned on the asserted illegality of the method of appointment and supervision of the hearing examiner who conducted the evidentiary hearing in the case—a deficiency which arguably deprived the Commission of authority to proceed further in the way it did, although not of basic "jurisdiction." The Supreme Court, while basing its decision on the carrier's failure to object at the proper time, saw fit to point out also that no actual injury to the interest of the objector, in the shape of inadequacy or unfairness in the examiner's performance of his functions, was even claimed.[41] The failure was actually excusable because the particular ground of objection urged in court became known only after the administrative hearing, in the Supreme Court's decision of another case.[42] If in these circumstances actual injury had been made to appear, the Court might have found reason to avoid strict application of the doctrine of exhaustion, as it could have by virtue of the flexibility to which, as will appear more fully, the doctrine had become subject by the time of the *Tucker* decision. That flexibility has increased in subsequent years. The Court might now say, for example, that to have attempted to urge the objection before the Commission would clearly have been futile and was not required. Nevertheless, by reason of the strict view often taken, past failure to exhaust an available remedy may defeat otherwise just claims.[43]

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[39] United States v. Shapiro, 396 F. Supp. 1058 (S.D.N.Y. 1975), which relies heavily on McKart v. United States, 395 U.S. 185 (1969). Both are Selective Service cases, as to which *see* text accompanying notes 173-208, *infra*.

[40] 344 U.S. 33 (1952). *See* text accompanying note 3, *supra*.

[41] *Id.* at 35.

[42] The decision of the Court in *Tucker* was doubtless influenced by reluctance to give retroactive effect, such as would have resulted from a contrary decision, to its unexpected per curiam holding in Riss & Co. v. United States, 341 U.S. 907 (1951), that the use of hearing examiners appointed pursuant to § 11 of the Administrative Procedure Act, 60 Stat. 224 (codified as 5 U.S.C. §§ 3105, 7521, 5362, 3344, 1305 (1970)), was mandatory in motor carrier certification hearings.

[43] C.F. & I. Steel Corp. v. Morton, 516 F.2d 868 (10th Cir. 1975); Baskin v. TVA, 382 F. Supp. 641 (M.D. Tenn. 1974).

Exhaustion of Optional Remedies

Some administrative remedies are primarily for the accommodation of persons who may wish to invoke them rather than means for achieving the governmental purposes for which the doctrine of exhaustion was created. Such optional remedies may consist of opportunities for nonparticipants in pending proceedings to seek entry in order to present their contentions or, after definitive agency action, of administrative review proceedings which previous participants can invoke. Sometimes the agency has the option whether to allow a particular accommodative remedy, as is usually the case with petitions for participation or for rehearing or reconsideration; sometimes the remedy, such as review by a board which can correct injustice when called upon, can be had as of right, but still provides only a possibility of relief to the person who invokes it. Unless conservation of judicial time was among the reasons for providing such a remedy, public policy reasons for requiring resort to it as a prerequisite to judicial review are not strong; the objector to agency action may pursue the remedy or not, as he chooses, without effect upon his right to judicial review.[44]

Such is the dominant view concerning petitions for reconsideration of otherwise final agency action, when the filing of such petitions is neither prescribed by statute or regulation as a prerequisite to judicial review nor designed to require "critical administrative review" of prior administrative action in the normal case.[45] The Federal Administrative

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[44] Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 875 (D.C. Cir. 1970). *Cf.* Chicago Junction case, 264 U.S. 258, 268-69 (1924); Smithmeyer v. United States, 147 U.S. 342, 357-58 (1893) (specially enacted administrative remedy was not prerequisite to suit in the Court of Claims); District of Columbia v. Brady, 288 F.2d 108 (D.C. Cir. 1960) (resort to local administrative Tax Court was not a prerequisite to action in judicial court to recover taxes paid under protest). *See also* Girault v. United States, 135 F. Supp. 521, 526 (Ct. Cl. 1955) (statute of limitations runs from time of original, definitive agency action because resort to board of review is optional). *But see* note 45 *infra;* Mathis v. United States, 391 F.2d 938 (Ct. Cl. 1968). In Brinker v. Weinberger, 522 F.2d 13 (8th Cir. 1975), the failure of a social security claimant to seek reconsideration of his claim, specifically made available by statute, was held not to defeat his right to file a statutory petition to reopen a prior claim that was disallowed or to foreclose judicial review of the agency's rejection of such a petition.

[45] Levers v. Anderson, 326 U.S. 219, 222 (1945); Prendergast v. New York Telephone Co., 262 U.S. 43, 48-49 (1923); Chicago Ry. v. Illinois Commerce Comm'n., 277 F. 970 (N.D. Ill. 1922); Petition of Village Board, 77 N.D. 194, 219-20, 42 N.W.2d 321, 336 (1950). *See also* Alabama Pub. Serv. Comm'n. v. Higginbotham, 256 Ala. 621, 56 So. 2d 401 (1952). *Contra,* Alexander v. State Personnel Bd., 22 Cal. 2d 198, 137 P.2d 433 (1943); State *ex rel.* Scott v. Scearce, 303 S.W.2d 175 (Mo. App. 1957). As to statutorily prerequisite petitions for rehearing, *see* text accompanying note 19 *supra.*

Procedure Act[46] and the administrative procedure acts of several states[47] adopt an even broader view as to petitions for reconsideration, dispensing with them as prerequisite to judicial review (unless explicitly required elsewhere) regardless of the kind of re-examination of the prior action to which they might be expected to lead. The provision contained in the Federal Act also abolishes the need for resort to administrative appeals which are not made prerequisites by statute, unless the agency rule renders them prerequisite and also provides that the agency action appealed from shall be "inoperative" during the appeal. As respects most administrative appeals, which can be had as of right and lead to a "critical," or substantial, re-examination of the prior action, this provision is contrary to the doctrine of exhaustion as previously understood, and it has been overlooked at times.[48] While its application seems unwise in most situations to which it applies, it must, nevertheless, be followed when insisted upon, although it may be overcome by suitable agency regulations.[49] The provision dispenses only with the prerequisite of resort to administrative appeals and reconsideration after otherwise final action, not with the requirement that issues sought to be raised

[46] ". . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of [judicial review] whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704 (1970).

[47] *E.g.*, ALAS. STAT. (1962) § 44.62.560; CAL. GOV'T CODE (West, 1966) § 11523. *Compare* OKLA. STAT. ANNO. (West 1965) § 75-318, *with* Hughes v. City, 457 P.2d 787 (Okla. 1969). The provision of REVISED MODEL ACT § 15(a) that "all administrative remedies available within the agency" must have been exhausted before judicial review can be had requires interpretation to determine whether "agency" includes administrative appellate bodies and whether petitions for discretionary reconsideration are "remedies".

[48] Davis v. Nelson, 329 F.2d 840, 847 (9th Cir. 1964) (public land proceedings); Coy v. Folsom, 228 F.2d 276, 280 (3d Cir. 1955) (Old Age & Survivors Insurance benefit claim); Batista v. Nicolls, 213 F.2d 20 (1st Cir. 1954) (deportation). The present provision of the deportation statute, *see supra* note 27, requires resort to the Board of Immigration Appeals prior to judicial review, consistently with the Administrative Procedure Act provision. Rodriguez-DeLeon v. Immigration & Naturalization Serv., 324 F.2d 311 (9th Cir. 1963). The Social Security Act, 42 U.S.C. § 405(g) (1970), provides for judicial review of final decisions of the Secretary of Health, Education and Welfare "made after a hearing," but imposes no other prerequisite. The Secretary, as authorized, 42 U.S.C. § 405(b) (1970), has provided opportunities for claimants to seek further consideration, including hearings, by an Appeals Council. *See* 20 C.F.R. (1975) §§ 404.940-404.950. Decisions at each stage become final "unless further considered." The intention obviously is to bind the parties by them if further consideration is not sought, but additional steps following the first decision after a hearing are not expressly made prerequisite to judicial review. Exhaustion of these steps has nevertheless been required. Coy v. Folsom *supra*; Burge v. Richardson, 321 F. Supp. 646 (N.D. Ga. 1970); Haubner v. Ribicoff, 207 F. Supp. 430 (E.D. Ky. 1962); Smith v. Ribicoff, 206 F. Supp. 133 (S.D.W.Va. 1962); Harris v. Ribicoff, 200 F. Supp. 318 (N.D.W.Va. 1961).

[49] *See* Rawls v. Secretary of the Interior, 460 F.2d 1200 (9th Cir. 1972), *distinguishing* United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971); Mount Sinai Hosp. v. Weinberger, 376 F. Supp. 1099, 1124-25 (S.D. Fla. 1974).

in court have been presented properly at some stage of the agency proceedings that took place.[50]

Reconsideration serves a further purpose when it is sought to enable a party or would-be party to present evidence or urge a contention which for sufficient reason was not offered in the prior agency proceedings. In this situation the agency should have an opportunity to take the material into account prior to judicial review. Unless a statute provides otherwise, a petition for reconsideration for this reason becomes a prerequisite to judicial review as to the admissibility of evidence or argument.[51]

It is not always easy to determine whether a statute or regulation which provides opportunity for reconsideration or some other kind of supplementary review of otherwise final agency action does so to afford an optional mode of relief to persons concerned or to provide the agency with an additional means of accomplishing its task. Relatively early in the development of the exhaustion doctrine the Supreme Court held that failure of a party seeking judicial review to have invoked an Interstate Commerce Act provision for petitions for "rehearing" of divisional orders by the full Commission did not deprive the reviewing court of "jurisdiction" to review the divisional order, but did enable it, if it saw fit to do so in the exercise of a judicial discretion, to deny relief until a petition for rehearing had been presented and acted upon.[52] Later the United States Court of Appeals for the District of Columbia in a declaratory judgment action decided to stand on the same "middle ground" in relation to exhaustion of proceedings before armed services military records correction boards, which it characterized as not part

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[50] United States v. Consolidated Mines & Smelting Co., 455 F.2d 423, 451-53 (9th Cir. 1971), adopting the view of Davis, ADMINISTRATIVE LAW TREATISE § 20.06 (1958).

[51] Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 801 (D.C. Cir. 1965) (party to prior proceeding, seeking to raise new point); Red River Broadcasting Co. v. FCC, 98 F.2d 282 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 625 (1938) (non-party with knowledge of agency proceeding). At the time of the *Red River* decision, the Communications Act had not been amended, as it was in 1952, 66 STAT. 720, to render a petition for rehearing an expressly required prelude to judicial review in this kind of situation. *See* notes 19 and 27, *supra*.

[52] United States v. Abilene & S. R. Co., 265 U.S. 274, 282 (1924). As to further statutory and decisional developments concerning exhaustion of Interstate Commerce Commission review of divisional decisions *see* National Trailer Convoy, Inc. v. ICC, 352 F. Supp. 945 (N.D. Cal. 1972) (review of order while petition for reconsideration by the Commission was still pending; exhaustion issue not discussed); Meat Packers Express, Inc. v. United States, 244 F. Supp. 642 (D. Neb. 1965); Malone Freight Lines v. United States, 204 F. Supp. 745 (N.D. Ala. 1962). By contrast, the Court of Appeals for the Second Circuit has held that a federal employee's opportunity to challenge before the Civil Service Commission the Commission's classification of his and other identical positions in prior open proceedings constitutes a meaningful remedy by "appeal," which must be invoked before judicial review of the classification can be obtained. Marrone v. Immigration & Naturalization Serv., 500 F.2d 418 (2d Cir. 1974).

of the "administrative process itself" but "of a different and subsequent procedure."[53] In this view a district court in such a case may either afford review or refuse review of the prior service actions, as the interests of justice may require, even though the decision of a correction board has not been sought. The correction boards, on petition, re-examine actions affecting service personnel, sometimes long afterward, and may authoritatively recommend corrective action to the military department heads. Although their advice is not always followed, a failure to follow it is subject to review for arbitrariness.[54] Consequently, some decisions since *Ogden v. Zuckert* have been based on the view that the exhaustion principle applies to the use of available correction board proceedings.[55]

Optional "remedies" for nonparticipants who are seeking participation in ongoing agency proceedings are often unaccompanied by any clear indication of whether the opportunity is only for accommodation or exists also to serve a public purpose to achieve full agency consideration of all relevant aspects of a pending matter. The openness of most rulemaking and licensing proceedings provides examples under a variety of circumstances. Notice of the proceedings may be disseminated or become available in various ways; actual knowledge on the part of particular interested persons may or may not arise. Once the agency has acted, the public interest and that of beneficiaries of the action in avoiding new obstacles to prompt effectuation of the resulting rule or deci-

[53] Ogden v. Zuckert, 298 F.2d 312 (D.C. Cir. 1961), limited in Sohn v. Fowler, 365 F.2d 915 (D.C. Cir. 1966), where the court held that the district court should suspend its proceedings until the correction board had reached a decision, and discussed further in Hayes v. Secretary of Defense, 515 F.2d 668 (D.C. Cir. 1975). *See also* Nelson v. Miller, 373 F.2d 474, 479 (3d Cir. 1967); Turner v. Callaway, 371 F. Supp. 188 (D.D.C. 1974); Williams v. Froehlke, 356 F. Supp. 591 (S.D.N.Y. 1973), *aff'd* 490 F.2d 998 (2d Cir. 1974).

In mandamus proceedings to compel action to correct the consequences of allegedly invalid court martial convictions, and in other collateral attacks on such convictions, the principle of *Ogden v. Zuckert* also appears to apply. Brown v. United States, 365 F. Supp. 328, 342 (E.D. Pa. 1973). *See also* Betonie v. Sizemore, 496 F.2d 1001, 1004 (5th Cir. 1974). As to the absence of a requirement that alternative relief in another agency be sought *see* Elton Orchards, Inc. v. Brennan, 508 F.2d 493 (1st Cir. 1974).

[54] Horn v. Schlesinger, 514 F.2d 549, 553 (8th Cir. 1975); Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974); Hodges v. Callaway, 499 F.2d 417, 423 (5th Cir. 1974); Weiss v. United States, 408 F.2d 416, 418 (Ct. Cl. 1969); Nelson v. Miller, 373 F.2d 474, 478-79 (3d Cir. 1967).

[55] Seepe v. Department of the Navy, 518 F.2d 760 (9th Cir. 1975); Horn v. Schlesinger, 514 F.2d 549, 553 (8th Cir. 1975); Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974); Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961). However, in habeas corpus proceedings to challenge denials of release from an armed service on account of conscientious objection, exhaustion of remedies before correction boards is not required, but consideration by such a board may be ordered by a reviewing court prior to its action. Parisi v. Davidson, 405 U.S. 34, 37 n.3 (1972); Ludlum v. Resor, 507 F.2d 398 (1st Cir. 1974); Pitcher v. Laird, 421 F.2d 1272, 1276 (5th Cir. 1970); United States *ex rel.* Brooks v. Clifford, 409 F.2d 700, 412 F.2d 1137 (4th Cir. 1969), with which compare Krieger v. Terry, 413 F.2d 73 (9th Cir. 1969). *But see* Aukee v. Carlson, 365 F. Supp. 624 (D. Alaska 1973).

sion may vary. All of these factors enter into the determination of whether exhaustion by a nonparticipant of available opportunities to seek entry into particular agency proceedings which are open in nature is prerequisite to judicial review of the resulting agency action at his instance.[56]

Administrative Remedies Linked to Exclusive Judicial Review Proceedings

At the opposite end of the exhaustion spectrum from the optional remedies is the administrative review proceeding which is no longer available but which a statute renders prerequisite to an exclusive, prescribed method of judicial review of agency action. The landmark decisions of the Supreme Court in *Yakus v. United States*[57] and *Bowles v. Willingham*[58] sustained as valid, and gave drastic effect to, a provision of this kind in the original Emergency Price Control Act of World War II which denied judicial review of price and rent regulations, schedules, and orders, except through specified administrative review proceedings available for a limited time, followed by judicial review in the Emergency Court of Appeals established for this purpose. The statute specified that no other court, except the Supreme Court when it reviewed Emergency Court judgments, should "have jurisdiction or

[56] Nader v. Nuclear Regulatory Comm'n, 513 F.2d 1045 (D.C. Cir. 1975), and Gage v. AEC, 479 F.2d 1214 (D.C. Cir. 1973) (participation in prior rulemaking proceedings *held* prerequisite to challenge of resulting regulations). *Cf.* Red River Broadcasting Co. v. FCC, 98 F.2d 282 (D.C. Cir. 1938), *cert. denied,* 305 U.S. 625 (1938) (exhaustion doctrine applied to objector to radio license issued to another, where objector had knowledge of the licensing proceedings but did not seek to participate); Spanish Int'l Broadcasting Co. v. FCC, 385 F.2d 615 (D.C. Cir. 1967) (same ruling, but statute and regulations construed to require attempts to enter the licensing proceedings); Sierra Club v. Hardin, 325 F. Supp. 99, 115-17, 127-28 (D. Alaska 1971) (environmental groups and persons interested in Forest Service authorization of timber project denied judicial review because of laches and failure to participate in pre-authorization proceedings). *Compare* Metropolitan Life Ins. Co. v. Metropolitan Ins. Co., 277 F.2d 896 (7th Cir. 1960) (objector held not to have been obliged to seek participation in ex parte proceeding authorizing competitor's use of a trade name, of which the objector did not have notice); Dobbs v. Train, 409 F. Supp. 432 (N.D. Ga. 1975) (nonparticipation in rulemaking proceeding *held* not to bar review of the regulation in a later challenge to a denial of benefits under it).

As to the justification for a statutory prerequisite of participation in response to published notice, *see* People v. Francis, 40 Ill. 2d 204, 210, 239 N.E.2d 129, 133 (1968). *See also* United States v. Elof Hansson, Inc., 48 C.C.P.A.(Cust.) 91, 296 F.2d 779 (1960), *cert. denied,* 368 U.S. 899 (1961) (actual participant in rulemaking proceeding cannot secure judicial consideration of issue he did not raise there); Lyons Savings & Loan Ass'n v. Federal Home Loan Bank Bd., 377 F. Supp. 11 (N.D. Ill. 1974) (same as to proceeding to authorize competitors' branch operations and prior proceeding to establish applicable policy). *Compare* National Broiler Council v. Federal Labor Relations Council, 382 F. Supp. 322, 326 (E.D. Va. 1974), and Izaac Walton League v. Schlesinger, 337 F. Supp. 287, 292 (D.D.C. 1971) (failures to participate in available open proceedings adequately explained).

[57] 321 U.S. 414 (1944).

[58] 321 U.S. 503 (1944).

power to consider the validity of any such regulation, order, or price schedule. . . ." This provision was held in the *Willingham* case to exclude the power of a United States district court to consider a challenge to the validity of a rent regulation in a civil enforcement suit by the Price Administrator against a landlord;[59] in *Yakus* the court sustained the prescribed procedure in all respects and held, over dissent by Mr. Justice Rutledge joined by Mr. Justice Murphy,[60] that a district court was similarly powerless in a criminal prosecution for violation of a price regulation which had not previously been reviewed, even though some of the grounds of attack on the regulation related to its constitutional validity. The dissent was based on the asserted constitutional scope of the judicial power in criminal cases. The Court did, however, consider and sustain the validity of the statute as a whole, including the review provisions.[61]

One can only speculate whether there could have been exceptions of any kind to the exclusiveness of the statutory mode of review of administrative action under the Price Control Act. Mr. Justice Rutledge, concurring in *Willingham*, entered a reservation as to regulations and orders challenged as invalid on their face.[62] Those involved in *Yakus* and *Willingham* were not so challenged; rather, the objections to them turned on economic and cost factors difficult to appraise. Even in wartime when policy considerations pulled strongly in the direction of unimpeded administrative action, challenges to agency measures on the ground that on their face they inflicted invidious racial or religious discrimination might have been entertained without exhaustion of the statutory review proceedings, at least in defense of enforcement actions.[63] With or without this possible relaxation, the exhaustion and exclusive-method-of-review provision of the Emergency Price Control Act, construed in the

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[59] Previously, in Lockerty v. Phillips, 319 U.S. 182 (1943), the Court held that the same provision validly prevented a district court from entertaining a suit to enjoin the enforcement of an allegedly invalid price regulation. As to later application of the *Willingham* rule *see* Applewhite v. Jones, 207 F.2d 701 (7th Cir. 1953).

[60] Mr. Justice Roberts dissented in both cases on the ground that the Act unconstitutionally delegated legislative power and that the procedure for review of regulations, price schedules and orders violated due process. 321 U.S. at 448; 321 U.S. at 529.

[61] The statute did not purport to exclude consideration of these issues. For further discussion of the operation of the review provisions in price and subsidy cases, *see* Riverview Packing Co. v. Reconstruction Fin. Corp., 207 F.2d 415 (Emer. Ct. App. 1953).

[62] 321 U.S. at 526. *See also* the view of the court of appeals in the *Yakus* case, entitled Rottenberg v. United States, 137 F.2d 850, 857 (1st Cir. 1943).

[63] *Cf.* Rutledge, J., dissenting, in Yakus v. United States, 321 U.S. at 470, 484. The latter passage couples invidious discrimination in enforcement, which would not appear on the face of any document and would require proof, with facial invalidity as properly subject to review in a criminal enforcement proceeding. The majority opinion did not deal with such possible exceptions to its view.

Yakus and *Willingham* decisions, was a harsh one toward the extremely numerous small enterprises which might be affected and, realistically, might not have had an opportunity to invoke the prescribed remedies. Shortly after those cases were decided, Congress amended the Act to afford relief by providing that for good cause shown the district court in any civil or criminal enforcement proceeding might suspend the case pending decision by the Emergency Court of Appeals on a complaint by the defendant in the enforcement action, challenging the validity of the regulation, order, or price schedule involved. The Emergency Court might order evidence to be introduced before itself or before the Administrator, when needed to decide the issues.[64] In this manner, an opportunity was afforded to employ a remedy which supplemented the administrative-judicial remedy originally available.

Under the Agricultural Marketing Agreement Act[65] civil enforcement of the obligations of commodity handlers under agency orders can take place without a review of those orders, not only when prescribed means of administrative review have not been invoked, but even when they were previously invoked in timely fashion by a defendant but had not yet led to a conclusion[66]—although the enforcement court probably could stay its hand pending completion of the review proceeding.[67] The statute itself provides for the suspension of penal enforcement proceedings if statutory review proceedings have been instituted in good faith by a defendant.[68] The handlers subject to the Act are for the most part knowledgeable and not likely to be caught by surprise. Even more so are the carriers who under the Interstate Commerce Act

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[64] 58 Stat. 639 (1944). For the history of the *Yakus* case and this legislative sequel, *see* Nathanson, *The Emergency Court of Appeals*, in OFFICE OF TEMPORARY CONTROLS, O.P.A., PROBLEMS IN PRICE CONTROL: LEGAL PHASES (1947), 1-4; H. MANSFIELD, A SHORT HISTORY OF OPA 276-79 (1947).

[65] 7 U.S.C. §§ 601 *et seq.*, 608a(6), 608c(15) (1970).

[66] United States v. Ruzicka, 329 U.S. 287 (1946); United States v. Lamar's Dairy, Inc., 500 F.2d 84 (7th Cir. 1974); United States v. Yadkin Valley Dairy Coop., 209 F. Supp. 634 (M.D.N.C. 1962), *aff'd*, 315 F.2d 867 (4th Cir. 1963). As to enforcement of an order when no attempt has been made to secure review of it by statutory means, *see* United States v. Country Lad Foods, Inc., 327 F. Supp. 395 (N.D. Ga. 1971); United States v. Sanitary Dairy Prod., Inc., 211 F. Supp. 185 (W.D. La. 1962). As to the unavailability to handlers of a remedy by injunction against enforcement of an order for which statutory review has not been sought, *see* Rasmussen v. Hardin, 461 F.2d 595 (9th Cir. 1972), *cert. denied*, Kresse v. Butz, 409 U.S. 933 (1972); Willow Farms Dairy, Inc. v. Benson, 270 F.2d 856 (4th Cir. 1960).

[67] United States v. Brown, 331 F.2d 362 (10th Cir. 1964) (preliminary injunction denied to the Government because of pendency of statutory administrative review proceedings); United States v. Titusville Dairy Prod. Co., 63 F. Supp. 104 (W.D. Pa. 1945). *Cf.* United States v. Sunny Ayr Farms Dairy, Inc., 323 F. Supp. 825 (E.D. Pa. 1971); United States v. Abbotts Dairies, 315 F. Supp. 571 (E.D. Pa. 1970); United States v. Farm Dairy Coop., Inc., 298 F. Supp. 769 (N.D.W. Va. 1969).

[68] 7 U.S.C. § 608c(14) (1970).

may find themselves subject to penal proceedings to enforce Interstate Commerce Commission regulations, without opportunity to challenge the validity of the regulations because of failure to invoke available administrative-judicial review proceedings that have been made exclusive by statute.[69]

The World War II Renegotiation Act[70] provided for agency determinations of excess profits repayable by contractors to the Government. These could under 1944 amendments to the Act be redetermined in appeal proceedings by the Tax Court, whose "determination shall not be reviewed or redetermined by any court or agency."[71] The Tax Court remedy was itself administrative, and its exhaustion became prerequisite to any attempt to secure judicial review in an Article III court,[72] except that in some instances collateral review of original agency determinations might take place in private actions by subcontractors against prime contractors in which it might be contended that agency decisions adverse to the subcontractors were not valid.[73]

Administrative remedies for National Labor Relations Board actions in proceedings to determine the collective bargaining representation of employees in designated employment units consist of further Board proceedings which must go forward and produce final orders as to re-

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[69] United States v. Southern R. Co., 364 F.2d 86 (5th Cir. 1966), *cert. denied*, 386 U.S. 1031 (1967).

[70] Currently codified at 50 U.S.C. APP. § 1191 (1970).

[71] *Cf.* Lichter v. United States, 334 U.S. 742, 790 (1948). The statutory finality of Tax Court decisions in renegotiation cases did not extend to issues as to the coverage of contracts by the Acts. Determinations of coverage could be reviewed by the courts of appeals. United States v. California Eastern Line, Inc., 348 U.S. 351 (1955). Similarly, Tax Court decisions of constitutional issues could also be reviewed. Metallurgical, Inc. v. Renegotiation Bd., 382 F.2d 843 (8th Cir. 1967); Consolidated-Hammer Dry Plate & Film Co. v. Renegotiation Board, 375 F.2d 591 (7th Cir. 1967). The Renegotiation Act of 1951, 50 U.S.C. APP. §§ 1211, 1218, 1218a (1970), excluded certain new coverage issues from determination by that Court. Litton Indus. of Md. v. Renegotiation Board, 298 F.2d 156 (4th Cir. 1962). That Act also broadened the scope of review of Tax Court decisions and finally supplanted Tax Court review of agency decisions by proceedings in the Court of Claims. *See* 50 U.S.C. APP. §§ 1211, 1218, 1218a (Supp. IV, 1974).

[72] Lichter v. United States, 334 U.S. 742 (1948) (completion of Tax Court remedies is prerequisite to defense of enforcement suits brought by the United States to recover excess profits as determined by agencies); Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752 (1947) (same as to attempted injunction and declaratory judgment action to halt enforcement of liability); Macauley v. Waterman S.S. Corp., 327 U.S. 540 (1946) (same as to action brought while agency proceedings were pending). As to judicial determination in such cases of the constitutionality of the governing statutes, *see* text accompanying notes 99-108, *infra*.

[73] Aircraft & Diesel Corp. v. Hirsch, 331 U.S. at 761, 775 (1947). Suspension of the collateral proceedings instead of actual review there, pending the outcome of statutory review proceedings, might often be appropriate. *Id.* at 775 n.39.

lated unfair labor practices before statutory judicial review can be had.[74] These remedies differ from those which must precede judicial review under other statutes because they are not always available at the option of persons seeking to make use of them. An employer confronted by a union certified by the Board as the representative of the employees in a bargaining unit can refuse to negotiate with it, thereby inviting an unfair labor practice proceeding on account of the refusal, but cannot be sure that such a proceeding will actually be instituted.[75] A union wishing to challenge the certification of a rival union with which the employer then bargains can only picket the employer's business in order to invite proceedings against itself which may never eventuate.[76] If unfair labor practice proceedings do not take place in these situations, the objectionable prior actions of the Board become unreviewable for all practical purposes.[77] Nevertheless the legislative policy of not permitting judicial interruption of the total administrative process of monitoring collective bargaining according to the statute has consistently been held—with very limited exceptions—to restrict review to that which can be had as an incident to review of unfair labor practice orders.[78]

[74] *See* text accompanying note 17, *supra*. Board actions which are thus immune from immediate review include not only those certifying or refusing to certify a union, but also interlocutory orders, such as one ordering an election, which arguably could not be reviewed in any event until additional proceedings had taken place. *See* International Union of Operating Engineers, Local 148 v. International Union of Operating Engineers, Local 2, 173 F.2d 557 (8th Cir. 1949).

[75] *Cf.* Herald Co. v. Vincent, 392 F.2d 354, 356 n.3 (2d Cir. 1968); Atlantic Metallic Casket Co. v. United Paperworkers of America, 87 F. Supp. 718 (N.D. Ga. 1949).

[76] *Cf.* United Fed. of College Teachers v. Miller, 479 F.2d 1074, 1078-79 (2d Cir. 1973); Lawrence Typographical Union v. McCulloch, 379 F.2d 704, 708 (D.C. Cir. 1965) (Bazelon, Ch. J., concurring). This means of challenging a certification results from a 1959 amendment to the National Labor Relations Act, 73 Stat. 544, which is codified at 29 U.S.C. § 158(b)(7)(B) (1970).

[77] *Cf.* Local 1545, United Bhd. of Carpenters v. Vincent, 286 F.2d 127, 133 (2d Cir. 1960); Office & Professional Employees Int'l Union v. Miller, 357 F. Supp. 220 (S.D.N.Y. 1973). An attempt to forestall other possible proceedings or to anticipate the possible absence thereof by suing the beneficiary of an allegedly invalid Board certification order failed in Atlanta Metallic Casket Co. v. United Paperworkers of America, 87 F. Supp. 718 (N.D. Ga. 1949). As to the availability and efficacy of unfair labor practice proceedings as a means of challenging Board actions in representation proceedings *see* Goldberg, *District Court Review of NLRB Representation Proceedings*, 42 IND. L.J. 455, 490-509 (1967).

[78] Application of this policy by the Supreme Court began with Myers v. Bethlehem Shipbldg. Corp., 303 U.S. 41 (1938), in which there had been no Board order and the question was whether the administrative proceedings could be halted in their incipiency on the ground that the plaintiff's enterprise was not subject to the Board's authority. The policy was carried forward in A.F. of L. v. NLRB, 308 U.S. 401 (1940), where it was held to preclude immediate review of a certification order by the statutory process in the Courts of Appeals, which is reserved for unfair labor practice orders, *see* note 17 *supra*.

Injunction suits in the District Courts, aimed at such orders or others which determine the outcome in representation proceedings have been equally futile, apart from limited exceptions. Inland Empire Dist. Council v. Millis, 325 U.S. 697 (1945) (allegations insufficient to bring the case within any possible exception); Boire v. Greyhound Corp., 376 U.S. 473 (1964), *see* note 92 *infra* & text accompanying. The same policy prevails under some

Exceptions to the foregoing restriction have arisen in several situations in which courts have held that injunction or declaratory judgment suits will lie to challenge particular kinds of Board actions in representation proceedings. The Supreme Court anticipated the possibility of such suits under "some portion of the original jurisdiction" of the district courts in its *A. F. of L.* opinion denying immediate statutory review of representation orders, but did not define the circumstances in which they might be brought.[79] In the later *Inland Empire* case the Court again contemplated a possible exception by way of suit in a district court, if there was a sufficient showing of unlawful action by the Board;[80] but the pleadings which were before the court failed to set forth actions violative of due process or of statutory right, such as were claimed.[81] Later, as will appear, sufficient allegations of constitutional violation or violation of a clear statutory right by the Board were recognized as bases for immediate district court review of actions in representation proceedings. To them the Supreme Court added a circumstance in which the Board, by conducting a representation proceeding covering the crews of an American-owned, foreign-flag shipping concern, had precipitated "public questions particularly high in the scale of our national interest because of their international complexion,"[82] which warranted immediate judicial review of the Board's action, even though the case turned on a difficult question of statutory interpretation normally reviewable only after full agency proceedings.

In *Fay v. Douds*[83] the Court of Appeals for the Second Circuit gave effect to the constitutional issue basis for district court review of Board action in representation proceedings. Even before proceedings looking to the decertification of a union had been completed, the union's claims of violations of procedural due process, which were not "transparently

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state labor relations acts. Jordan Marsh Co. v. Labor Relations Comm'n, 312 Mass. 597, 45 N.E.2d 925 (1942); *see* Wallach's, Inc. v. Boland, 277 N.Y. 345, 14 N.E.2d 381 (1938); Southeast Furniture Co. v. Industrial Comm'n, 100 Utah 154, 111 P.2d 153 (1941); *but see* N.Y. Post Corp. v. Kelley, 296 N.Y. 178, 71 N.E.2d 456 (1947), note 144 *infra*. *Compare*, under different statutory provisions, Pennsylvania Labor Relations Bd. v. Butz, 411 Pa. 360, 192 A.2d 707 (1963); Milwaukee Dist. Council, Amer. Fed. of State, County & Municipal Employees v. Wis. Employment Relations Bd., 23 Wis. 2d 303, 127 N.W.2d 59 (1964).

[79] A.F. of L. v. NLRB, 308 U.S. 401, 412 (1940).

[80] Inland Empire Dist. Council v. Millis, 325 U.S. 697, 700 (1945).

[81] The Court did review the allegations of procedural shortcomings, made in the complaint, and found that there was no illegality. If there had been illegality alleged, the question of reviewability of the merits would have been raised.

[82] McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10, 17 (1963).

[83] 172 F.2d 720 (2d Cir. 1949).

frivolous," sufficed to establish district court jurisdiction.[84] In later cases, claims of procedural or substantive unconstitutionality of Board action in representation proceedings have nevertheless fared badly on the whole as a ground for judicial review before related unfair labor practice proceedings have run their course.[85] The reason lies partly in the purely statutory origin of the rights involved in controversies over collective bargaining, which renders the statute rather than the Constitution the measure of their scope.[86] Doubt has arisen concerning the continued validity of the theory of jurisdiction enunciated in *Fay v. Douds*;[87] but allegations of discriminatory administration of the statute have recently given rise to colorable claims that the principle of equal protection of the laws has been violated. District court review of Board action in representation proceedings has been undertaken on this basis.[88]

The second leading exception to the requirement that review of NLRB actions in representation proceedings await the outcome of related unfair labor practice proceedings was initially defined and applied by the Supreme Court in *Leedom v. Kyne*.[89] In that case the Board had designated a collective bargaining unit and certified a union to represent the employees in that unit, without complying with a provision of the National Labor Relations Act that the Board "shall not . . . decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional . . . unless a majority of such professional employees vote for inclusion in such unit."[90] The Board's action, said the Court, "was an attempted exercise of power that had been specifically withheld," thereby depriving "the professional em-

[84] The decision on the merits was in favor of the Board. *See also* Leedom v. Int'l Bhd. of Elec. Workers, 278 F.2d 237 (D.C. Cir. 1960), as to the issue of constitutionality of a collective agreement. *Compare* Herald Co. v. Vincent, 392 F.2d 354 (2d Cir. 1968), where allegations of procedural unconstitutionality were held to be frivolous.

[85] United Fed'n of College Teachers v. Miller, 479 F.2d 1074 (2d Cir. 1973); Lawrence Typographical Union v. McCulloch, 349 F.2d 704 (D.C. Cir. 1965); Local 130, Int'l Union of Elec. R. & M. Workers v. McCulloch, 345 F.2d 90 (D.C. Cir. 1965); Eastern Greyhound Lines v. Fusco, 323 F.2d 477 (6th Cir. 1963); Department & Specialty Store Employees Union v. Brown, 284 F.2d 619 (9th Cir. 1961); Catalytic Indus. Maintenance Co. v. Compton, 333 F. Supp. 533 (D.P.R. 1971).

[86] *Cf.* McLeod v. Local 476, United Bhd. of Indus. Workers, 288 F.2d 198 (2d Cir. 1961); Local 1545, United Bhd. of Carpenters v. Vincent, 286 F.2d 127 (2d Cir. 1960); Goldberg, *District Court Review of NLRB Representation Proceedings*, 42 IND. L.J. 455, 467-68 (1967).

[87] Herald Co. v. Vincent, 392 F.2d 354, 359 (2d Cir. 1968), and cases cited, especially Greensboro Hosiery Mills, Inc. v. Johnston, 377 F.2d 28 (4th Cir. 1967), and Boire v. Miami Herald Publishing Co., 343 F.2d 17, 21 n.7 (5th Cir. 1965), *cert. denied*, 382 U.S. 824 (1965).

[88] Council 19, Am. Fed'n of State & Munic. Employees v. NLRB, 296 F. Supp. 1100 (N.D. Ill. 1968).

[89] 358 U.S. 184 (1958).

[90] 29 U.S.C. § 159(b)(1) (1970).

ployees of a 'right' assured to them by Congress."[91] The narrowness of this basis for immediate review of an action of the Board in a representation proceeding was emphasized in *Boire v. Greyhound Corp.*,[92] where the Board had allegedly erred in designating a collective bargaining unit based on a determination that the employees in the unit were employees of Greyhound within the meaning of the Act, as well as of a contractor with Greyhound who had engaged their services. The issue turned, according to the Court, on an "assessment of the particular facts," leading to a Board conclusion which allegedly did "not comport with the law." Hence the issue did not depend "solely upon construction of the statute," as had been the case in *Leedom v. Kyne*. "The *Kyne* exception," the court emphasized, "is a narrow one. . . ."[93]

Application of the criteria of immediate reviewability laid down in *Kyne* and *Greyhound Corp.* has been predictably difficult. The lower federal courts have heeded the admonition in *Greyhound* that the *Kyne* exception is narrow, in preference to adopting the view that any issue depending "solely upon the construction of the statute" comes within the exception.[94] The question must at least involve either a claimed violation of a "specific prohibition in the Act" or the asserted "obliteration of a right" bestowed by Congress, both of which were involved in *Kyne*. Either should suffice;[95] but decision under the second criterion has been difficult. Under it a mere right to have the statute correctly interpreted and applied after the facts have been established is not sufficient;[96] there must be disobedience to the statute rather than mere failure to follow it. Two circumstances additional to that in *Kyne* have been held by some courts to provide a statutory basis for immediate district court review of Board action in a representation proceeding under this rubric: disregard of the right of a union to be certified on the basis of a valid

[91] 358 U.S. at 189.

[92] 376 U.S. 473 (1964).

[93] *Id.* at 481.

[94] McCulloch v. Liby-Owens-Ford Glass Co., 403 F.2d 916 (1968), *cert. denied*, 393 U.S. 1016 (1969) (involvement of question of statutory interpretation does not result in district court jurisdiction to review action in a representation proceeding unless the action appears plainly beyond the bounds of the statute); Firestone Tire & Rubber Co. v. Samoff, 365 F.2d 625 (3d Cir. 1966); Local 1545, United Bhd. of Carpenters v. Vincent, 280 F.2d 127 (2d Cir. 1960). *Cf.* Boire v. Miami Herald Publishing Co., 343 F.2d 17, 21 (5th Cir. 1965), *cert. denied*, 382 U.S. 824 (1965); National Maritime Union of America v. NLRB, 267 F. Supp. 117 (S.D.N.Y. 1967); and see the thorough discussion in National Maritime Union v. NLRB, 375 F. Supp. 421 (E.D. Pa. 1974).

[95] Violation of a statutory prohibition may in itself "obliterate a right" that depends on the prohibition. In some contexts the absence of a prohibition may mean that there is no clear right, as the court indicated in Potter v. Castle Constr. Co., 355 F.2d 212, 217 (5th Cir. 1966); but a right may also be unambiguously conferred in affirmative terms.

[96] Local 130, Int'l Union of Elec., R. & M. Workers v. McCulloch, 345 F.2d 90 (D.C. Cir. 1965).

election which it has won[97] and denial of the right of proponents of the decertification of an established union to a decertification proceeding for which they have properly petitioned.[98]

Exhaustion Concerning Constitutional Issues

Constitutional issues in judicial review of agency action may concern either the validity of the governing statute on its face or the alleged violation of constitutional rights by an agency in interpreting or applying the statute. Judicial determination of the former kind of issue may ordinarily be had by persons possessing standing, without prior resort to available administrative review processes.[99] In some such instances, however, the doctrine of exhaustion of administrative remedies has been applied to justify judicial deferment or avoidance of delicate constitutional questions; for if injury to the challenger's interest should be obviated by favorable agency action on other grounds, the issue of constitutionality could be avoided.[100] Judicial opinions concerning this application of the exhaustion requirement disclose a number of pertinent considerations but yield no decisive principle. Decisions rest predominantly

[97] Miami Newspaper Printing Pressmen's Union v. McCulloch, 322 F.2d 993 (D.C. Cir. 1963); United Auto, A. & A.I. Workers v. NLRB, 462 F.2d 298 (D.C. Cir. 1972) (jurisdiction not contested on appeal). *Compare* Midway Clover Farms Mkt., Inc. v. NLRB, 318 F. Supp. 375 (D.D.C. 1969) (employer plaintiff; election found invalid by Board).

[98] Surratt v. NLRB, 463 F.2d 378 (5th Cir. 1972); Templeton v. Dixie Color Printing Co., 444 F.2d 1064 (5th Cir. 1971). *Contra*: National Maritime Union v. NLRB, 375 F. Supp. 421 (E.D. Pa. 1974).

[99] Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Lichter v. United States, 334 U.S. 742 (1941) (authority of the Court to decide the constitutional issue not challenged, *see id.* at 774); Yakus v. United States, 321 U.S. 414 (1944); N.Y. State Broadcasters Ass'n v. United States, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1969); Johnson v. Robinson, 296 F. Supp. 1165 (S.D. Ill. 1967), *aff'd per curiam*, 394 U.S. 847 (1969); City of Miami Beach v. Perell, 52 So. 2d 906 (Fla. 1957) (zoning ordinance); Pierce v. Carpentier, 20 Ill. 2d 526, 169 N.E.2d 747 (1960) (motor vehicle act driver's license provision); Levitt v. Division Against Discrimination, 31 N.J. 514, 523, 158 A.2d 177, 181 (1964) (housing act provision against discrimination); Scarsdale Supply Co. v. Village of Scarsdale, 8 N.Y.2d 325, 170 N.E.2d 198 (1960) (zoning ordinance); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (zoning ordinance). *See also* Reed v. Franke, 297 F.2d 17 (4th Cir. 1961) (constitutionality of challenged procedures sustained; other issues rejected until administrative process exhausted).

[100] Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1947); Tyler v. Judges of Court of Registration, 179 U.S. 405 (1900); *see also* Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954) (except that the Court, without requiring exhaustion, determined one of several constitutional and statutory issues posed—whether the challenged administrative authority had actually and validly been bestowed and continued in effect. Other issues were rejected because of the exhaustion rule. 347 U.S. at 553. *Compare* Franklin v. Jonco Aircraft Corp., 346 U.S. 868 (1953), relying broadly on the exhaustion rule as a basis for reversing the lower court decision in a similar case. *See also* Christian v. N.Y. Dep't of Labor, 414 U.S. 614 (1974) (judicial consideration of objections to agency procedure on constitutional grounds should await resort to that procedure because a "favorable agency decision on the merits . . . may moot the objection to the procedure employed").

on a balance between, on the one hand, judicial reluctance to risk upsetting important legislative measures quickly and, on the other hand, willingness of the courts to pass judgment promptly on legislative abridgment of preferred constitutional rights[101] or on state interference with federal authority.[102]

Decisions not to apply the exhaustion rule in this kind of situation sometimes stress that the province of agencies does not extend to entertaining questions about the validity of the statutes under which they operate, unless special authorization is given.[103] At best, an agency might by its action shed light on the operation of the statute it administers, thereby aiding a later decision as to its validity—a consideration which sometimes contributes to decisions to require exhaustion of agency processes.[104] Because of the prevalent limitation on agency competence in this regard, past failure in agency proceedings to raise an issue of constitutionality of the governing statute should not be considered a failure to exhaust an available administrative remedy.[105]

Sometimes the challenge to a statute or to agency action relates to the validity of the very agency proceedings which would be available to fulfill the exhaustion requirement. In such a case the question is in effect the validity of the exhaustion requirement itself under the circumstances. It should ordinarily be answered before the requirement is enforced.[106] Also relevant to determining the application of the exhaustion

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101 Freedman v. Maryland, 380 U.S. 51 (1965).

102 Public Util. Comm'n of Cal. v. United States, 355 U.S. 554 (1958).

103 Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Oestereich v. Selective Serv. Bd. No. 11, 393 U.S. 233, 242 (1968); Finnerty v. Cowen, 508 F.2d 979, 982 (2d Cir. 1974); Panitz v. District of Columbia, 112 F.2d 39 (D.C. Cir. 1970) (validity of tax statute's coverage of particular type of business); Kroeger v. Stahl, 148 F. Supp. 403 (D.N.J. 1957), *aff'd*, 248 F.2d 121 (3d Cir. 1957) (validity of zoning ordinance provision); Long v. City of Highland Park, 329 Mich. 140, 45 N.W.2d 10 (validity of zoning ordinance terms applicable to plaintiff's property). As to the general absence of powers of agencies in this regard, *see* Engineers Pub. Serv. Co. v. SEC, 138 F.2d 936, 961-63 (D.C. Cir. 1943), *judgment vacated as moot*, 332 U.S. 788 (1947).

104 In Robinson v. Dow, 522 F.2d 855 (6th Cir. 1975), the court gives effect to this point, quoting from W.E.B. DuBois Clubs of America v. Clark, 389 U.S. 309, 312 (1967), the view that "important and difficult constitutional issues would be decided devoid of factual content . . ." in situations where determinations of constitutionality require the development of factual applications of the statutory provisions in question and judicial review came too early. *See also* Jordan v. United States, 522 F.2d 1128, 1132 (8th Cir. 1975).

105 United States *ex rel.* Guagliardo v. McElroy, 259 F.2d 927 (D.C. Cir. 1958), *aff'd*, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (exhaustion of court martial remedies not required as to a constitutional issue involving the validity of a statutory bestowal of jurisdiction).

106 "[W]here the only question is whether it is constitutional to fasten the administrative procedure onto a litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right." Public Util. Comm'n v. United States, 355 U.S. 534, 540 (1958), *see* note 102 *supra*. The actual

requirement when a statute is challenged may be the ultimate availability or unavailability of adequate alternative means to secure judicial determination of the constitutional issue presented. If such a means exists, there is less reason to omit intervening agency proceedings than if an immediate judicial decision provides the only adequate opportunity to resolve the problem,[107] as may be the case if delay would add irremediably to the injury suffered by the challenger.[108]

In contrast to the validity of a statute on its face, alleged violation of constitutional rights by an agency in interpreting or applying a statute that leaves alternatives open involves issues which are subject to agency determination in the first instance. Therefore the exhaustion requirement should be applied, unless there are reasons to the contrary other than the mere presence of a constitutional issue.[109]

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challenge in that case was aimed, however, more at the substantive than the procedural aspects of the state statute. *See also* Freedman v. Maryland, 380 U.S. 51 (1965). In *Freedman* the challenge was to statutory procedures which, the Court held, did not need to be invoked before their constitutionality could be litigated; Fuentes v. Roher, 519 F.2d 379 (2d Cir. 1975); Finnerty v. Cowen, 508 F.2d 979, 982-83 (2d Cir. 1974); Huntley v. Board of Education, 493 F.2d 1016 (4th Cir. 1974); Stokes v. INS, 393 F. Supp. 24 (S.D.N.Y. 1975); Frost v. Weinberger, 375 F. Supp. 1312 (E.D.N.Y. 1974); Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972); Jeffries v. Swank, 337 F. Supp. 1062, 1066 (N.D. Ill. 1971). *See also* National Lawyers Guild v. Brownell, 225 F.2d 552 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956), where the court applied the exhaustion doctrine with respect to substantive issues concerning the constitutionality of the governing Executive Order, but determined that the administrative procedures which would have to be exhausted were constitutionally valid.

The decision in Gibson v. Berryhill, 411 U.S. 564 (1973), holds similarly that in a proceeding under a Civil Rights Act, 42 U.S.C. § 1983 (1970), even assuming that the doctrine of exhaustion may apply in such a case (*see* notes 110-137 *infra* & text accompanying), the court should decide a question relating to the constitutional fairness of the available administrative process without requiring exhaustion of that process prior to judicial decision. *See also* Beattie v. Roberts, 436 F.2d 747 (1st Cir. 1971). This reasoning may at times call upon the court to require resort to an allegedly constitutionally deficient procedure, if still open, because it may result favorably to the challenger on the merits and thereby obviate the constitutional objection. *See* Christian v. Department of Labor, 414 U.S. 614 (1974) (case remanded for retention by District Court, subject to suspension pending resort to administrative remedy if open); Smith v. Duldner, 175 F.2d 629 (6th Cir. 1944). *Compare* Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954), where exhaustion was required with respect to a similar procedural issue, as well as others, at the same time as the statutory and constitutional issue of whether the agency's authority had been validly bestowed was decided without reference to exhaustion.

[107] Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947), stresses this point at 331 U.S. 774-81, *see* note 100 *supra*.

[108] *See* Part I at note 103.

[109] Association of Civilian Technicians v. Young, 514 F.2d 1165 (9th Cir. 1975); Rigby v. Rasmussen, 275 F.2d 861 (10th Cir. 1960); Ogletree v. McNamara, 448 F.2d 93, 99 (6th Cir. 1971) (exhaustion rule applied with relation to determining validity of alleged racial discrimination by agency); Allegheny Airlines v. Fowler, 261 F. Supp. 508 (S.D.N.Y. 1966) (same as to agency interpretation of state statute which might or might not invade the federal sphere or impair the objector's asserted rights); United States v. Brown, 211 F. Supp. 953 (D. Colo. 1962); Brader v. City of Chicago, 39 Ill. 2d 152, 185 N.E.2d 848 (1962);

Claims of unconstitutional action by state officers arise frequently in proceedings pursuant to the Civil Rights Acts, notably under Section 1983 of Title 42 of the United States Code, derived from the Act of 1871,[110] whereby, in effect, any person alleging that any other person has under color of state law deprived him of his rights, privileges, or immunities, secured by the Constitution and laws, may seek redress at law, in equity, or in other proper proceedings in a United States district court.[111] The extent to which, if at all, such a proceeding is subject to the prerequisite of prior resort to any available administrative remedies for the same deprivation presents a special problem. The answer to it depends on several interacting factors.

The most fundamental factor was enunciated by the Supreme Court in *United States v. Raines*,[112] after it had emerged in lower-court decisions.[113] That case involved the Voting Rights Act of 1957;[114] but its

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N.H. Lyons & Co. v. Corsi, 3 N.Y.2d 60, 143 N.E.2d 392 (1957). *But see* Wills v. United States, 384 F.2d 943 (9th Cir. 1967) (added reason for not applying exhaustion rule stated to be that, in any event, challenge was to an alleged denial of constitutional right by the agency in its application of the law).

[110] 17 Stat. 13 (1871).

[111] The implementing jurisdictional provision is 28 U.S.C. § 1343(3) (1970) which limits the statutory rights that may be vindicated to such as are bestowed as "equal rights of citizens or of all persons. . . ."

Section 1981 of 42 U.S.C. (1970) implemented by 28 U.S.C. § 1343(4) (1970), added in 1957, 71 Stat. 637, as well as by 28 U.S.C. § 1331 (1970), seemingly extends to federal agencies' racial discrimination, including that in federal employment. Courts have differed both over whether it does (*see* Cozed v. Johnson, 397 F. Supp. 1235 (W.D. Okla. 1975)), and if so, whether the exhaustion prerequisite applies to actions invoking this section. *See* Penn v. Schlesinger, 497 F.2d 970 (5th Cir. 1974), holding that the exhaustion prerequisite applies, and Kurylas v. U.S. Department of Agriculture, 373 F. Supp. 1072 (D.D.C. 1974), *aff'd without opinion*, 514 F.2d 894 (1975), holding that exhaustion of administrative remedies is not required in relation to § 1981. Ficklin v. Sabatini, 383 F. Supp. 1147 (E.D. Pa. 1974), rejects the *Kurylas* view and accords with the decision in Penn v. Schlesinger. More specifically applicable to federal employment is 42 U.S.C. § 2000e-16 (Supp. II 1972) of the Civil Rights Act of 1964, as added in 1972, 86 Stat. 111, which may have superseded § 1981 in this area and which includes explicit provisions for initial resort to administrative remedies. These provisions also have given rise to a conflict of decisions over the exhaustion requirement. The Fifth Circuit in Parks v. Dunlop, 517 F.2d 785 (5th Cir. 1975), held that the exhaustion requirement does not apply under this legislation; but the *Kurylas* case and Spencer v. Schlesinger, 374 F. Supp. 840 (D.D.C. 1974), held to the contrary, as does Ettinger v. Johnson, 518 F.2d 648 (3d Cir. 1975). 42 U.S.C. § 2000e-5 (1964), mainly if not exclusively applicable to private and local governmental employment, also contains specific provisions for invoking administrative action initially. A large body of law, relating to the prerequisites to action against private and local government employers, has arisen under this section.

[112] 362 U.S. 17 (1960).

[113] Carter v. School Bd., 182 F.2d 530, 536 (4th Cir. 1950): "Nor can it be said that a scholar who is deprived of his due must apply to the administrative authorities and not to the courts for relief. An injured person must of course show that the state has denied him advantages accorded to others in like situation, but when this is established, his right of access to the courts is absolute and complete"; Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957). Other lower court cases, *e.g.*, Cook v. Davis, 178 F.2d 595 (5th Cir. 1950), *cert. denied*, 340 U.S. 811 (1950), without differentiating Civil Rights Act cases from

theory is applicable to other Civil Rights legislation as well. It is that a deprivation at which the federal statute is aimed is complete when state officials at any level commit a violation, without reference to whether further action in the matter under state law could end the violation or change its impact.[115] Since the violation is complete, the federal statutory remedy can then be invoked.

A second factor, which also tends to eliminate the exhaustion requirement from Civil Rights cases, is that the federal remedy is independent of ("supplementary to") state judicial or administrative remedies and in no sense conditioned on their inadequacy or failure in particular instances.[116] It was, indeed, the general failure of state remedies for the evils at which the 1871 civil rights legislation was aimed that led to its enactment.[117] Hence it would be strange if the availability of such local remedies, whether judicial or administrative, were to impede relief in the federal courts.

An alternative analysis, which interprets the legislative purpose in enacting the 1871 Act as merely to fill a void when state remedies are actually absent or inadequate,[118] has not met with favor,[119] and the basic view remains that federal court relief under 42 U.S.C. § 1983 is not

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others, applied the doctrine of exhaustion to them. *See* the summary in the opinion of Judge Motley in Sostre v. Rockefeller, 312 F. Supp. 863, 881 n.13 (1970), *modified as to other issues*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972). *See also* Evers v. Jackson Municipal Separate School District, 328 F.2d 408 (5th Cir. 1964); Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959), *cert. denied*, 361 U.S. 840 (1959). *Cf. Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565, 570 (1975).

[114] 71 Stat. 637 (1957), 42 U.S.C. § 1971 (1970).

[115] 362 U.S. at 25.

[116] Monroe v. Pape, 365 U.S. 167 (1961). This point was elaborated further in McNeese v. Board of Educ., 373 U.S. 668 (1963), which has become the leading authority for the inapplicability of the exhaustion principle to Civil Rights Act cases. In the situation presented, however, inadequacy of the available state administrative remedies, to which the Court pointed, was a sufficient basis for the immediate availability of federal court relief. As to the effect of the *McNeese* and later decisions, *see* Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537 (1974); Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969); Comment, *Exhaustion of State Remedies under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968).

[117] Monroe v. Pape, 365 U.S. 167, 174-80 (1961).

[118] Schwartz v. Galveston Independent School Dist., 309 F. Supp. 1034 (S.D. Tex. 1970). As to reconciliation of this view with the opinion in Monroe v. Pape, note 116 *supra*, *see also* Potwora v. Dillon, 386 F.2d 74, 77 (2d Cir. 1967), asserting that the Supreme Court "surely had no intention to abrogate in civil rights cases the historic rule . . . that suits in equity shall not be entertained in courts of the United States 'in any case where a plain, adequate and complete remedy may be had at law.'"

[119] This analysis was criticized and repudiated in Hall v. Garson, 430 F.2d 430, 434-36 (5th Cir. 1970), Moreno v. Henckel, 431 F.2d 1299 (5th Cir. 1970), and Hobbs v. Thompson, 448 F.2d 456, 461 (5th Cir. 1971), but was again defended by the same judge in Eigner v. Texas City Independent School Dist., 338 F. Supp. 931 (S.D. Tex. 1972).

conditioned on fulfillment of the doctrine of exhaustion. However, policy considerations in situations that have developed relatively recently, in which the increased reach of the fourteenth amendment provides protection to a wide range of interests, can pull strongly in the direction of a requirement that state administrative proceedings be exhausted before resort to a federal court. These situations involve the interests, sometimes weighty, sometimes petty, of prison inmates, welfare recipients, public school pupils, university students, local government employees, and persons subject to license requirements, who may allege injury through violations of due process or denials of equal protection of the laws in the treatment meted out to them.[120] Where invidious discrimination or serious personal hardship is not involved, there may be superior reasons for requiring that redress be sought through safeguarded state administrative channels before judicial relief, including federal Civil Rights Act relief, can be had.

In the analogous matter of habeas corpus relief on federal grounds from imprisonment imposed by state court action, the Habeas Corpus Act, in order to afford the states opportunities to correct their own transgressions and for the purpose of minimizing the burden on the federal courts, requires the exhaustion of state remedies before federal habeas corpus relief can be secured.[121] In relation to prison conditions and penal treatment, habeas corpus and Civil Rights Act proceedings often are interchangeable; but the Supreme Court held in *Preiser v. Rodriguez* that in so far as the continuance or duration of imprisonment is in issue the proceeding must be treated as habeas corpus; yet in relation to recovery of damages, which cannot be awarded in habeas corpus, Civil Rights Act principles of exhaustion apply.[122] The Court did not distinguish for Civil Rights Act purposes between exhaustion of judicial and of administrative remedies, both of which are covered by the Habeas Corpus Act requirement. The decision creates the anomaly[123] that Civil Rights Act proceedings in which the conditions of confinement but not the continuance or duration of imprisonment are challenged, and which are not to be treated as habeas corpus cases, remain free of the Habeas

[120] As to whether there is a limitation on the reach of 42 U.S.C. § 1983 turning on the relation of the rights violated to those at which the 1871 Civil Rights Act was aimed, *see* Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970). As that opinion brings out, even if there is such a limitation it leaves room for a large array of administrative determinations to be challenged under the Act.

[121] 28 U.S.C. § 2254(b), (c) (1966).

[122] Preiser v. Rodriguez, 411 U.S. 475, 498-99 (1973). As to Civil Rights Act damage actions *see also* Ray v. Fritz, 468 F.2d 586 (2d Cir. 1972); Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974).

[123] *See* 411 U.S. at 506-08 (Brennan, J. dissenting).

Corpus Act exhaustion rule, whereas that rule continues to apply to duration cases of at least equal gravity. As to Civil Rights actions, earlier indications by the Court that exhaustion of state remedies in prisoner cases is not a prerequisite still stand.[124] Later dicta in other kinds of Section 1983 cases have repeated with apparent deliberateness prior statements that "[e]xhaustion of state judicial *or administrative* remedies" (emphasis added) is not required in any such actions.[125] These earlier decisions, however, did not deal fully with the possible reasons for holding to the contrary in relation to administrative remedies.[126] Some federal district courts, in consequence, continue to adhere to the view that in Civil Rights Act cases involving state prisoners the exhaustion rule should be applied as respects state administrative remedies which are available and adequate;[127] but the courts of appeals have re-

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[124] *See* Wilwording v. Swenson, 404 U.S. 249 (1971); Padilla v. Ackerman, 460 F.2d 477 (9th Cir. 1972); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

[125] Ellis v. Dyson, 421 U.S. 426, 432-33 (1975), repeating Steffel v. Thompson, 415 U.S. 452, 472-73 (1974).

[126] Houghton v. Shafer, 392 U.S. 639 (1968), held in a brief per curiam opinion that administrative remedies at the hands of state penal authorities need not be exhausted, but those which were available in the case had been partially invoked with results that caused the Court to characterize the remainder as clearly futile. In Wilwording v. Swenson, 404 U.S. 249 (1971), the Court expressly construed *Houghton* to mean that resort to effective as well as ineffective state administrative remedies is unnecessary, although *Wilwording* itself involved state judicial remedies. In Preiser v. Rodriguez, 411 U.S. 475 (1973), the Court appeared to assume throughout a full opinion that in Civil Rights Act cases generally neither state judicial nor state administrative remedies need be exhausted before federal relief is sought.

Damico v. California, 389 U.S. 416 (1967), cited in *Houghton*, was a welfare case decided in a brief per curiam opinion, which enunciated broadly the rule that in Civil Rights Act cases state administrative remedies need not have been sought. *See also* Carter v. Stanton, 405 U.S. 669 (1972). However, in King v. Smith, 392 U.S. 309, 312 n.4 (1968), also a welfare case, the statement was that exhaustion of state administrative remedies in such cases is not required "where the constitutional challenge is sufficiently substantial, as here, to require the summoning of a three-judge court." The challenge in the case was to a substantive regulation. The statement appears to narrow the Civil Rights exhaustion-rule exception to one which applies only to issues (involving the validity of a statute) which the agency could not decide or which (in a case involving the validity of a regulation) it would be unlikely to decide in the particular case. As to the former situation *see* Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973) (broader rule dispensing with exhaustion in civil rights cases also espoused); School Bd. v. Atkins, 246 F.2d 325 (4th Cir. 1957); *cert. denied*, 355 U.S. 855 (1957); Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973); Johnson v. Robinson, 296 F. Supp. 1165 (N.D. Ill. 1967), *cert. denied*, 394 U.S. 847 (1969). *See also* note 99 *supra* and text accompanying. As to difficulties in applying the *King v. Smith* distinction *see* Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971), *vacated and remanded*, 406 U.S. 914 (1972), especially the dissenting opinion of Reynolds, D.J.

[127] *See* Washington v. Boslow, 375 F. Supp. 1298 (D. Md. 1974), and McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973), both *rev'd*, 516 F.2d 357 (4th Cir. 1974). *Compare* Borror v. White, 377 F. Supp. 181 (W.D. Va. 1974); Jones v. Superintendent, 370 F. Supp. 488 (W.D. Va. 1974).

versed their decisions.[128] Legislation is needed to resolve the problem satisfactorily,[129] especially in the light of application of the exhaustion requirement in federal prisoner cases.[130]

Similar practical considerations apply to a possible requirement of exhaustion of state administrative remedies in other areas of administration mentioned above, involving constitutionally protected personal interests. In these areas some decisions have applied the over-all rule based on *Raines* and *Monroe v. Pape*,[131] that exhaustion of administrative remedies is not required under the Civil Rights Acts,[132] while other decisions have stated the contrary or carved out various exceptions and qualifications.[133]

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128 Hiney v. Wilson, 520 F.2d 589 (2d Cir. 1975) (brief per curiam opinion; reversal possibly occasioned by presence of damage claim); Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975) (a damage case); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1974) (damage claims included).

129 The Maryland statutory procedure described in the *McCray* opinion appears to be generally of a high order. Federal legislation conditioning an exhaustion requirement on the availability of adequate state procedures could stimulate the enactment of more such statutes and, increasingly, reduce the necessity for civil rights litigation brought by state prisoners in the federal courts. An act of Congress providing a federal administratvie remedy for both state and federal prisoner complaints is also possible. *See* ADMINISTRATIVE OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 12-14 (1972).

130 Waddell v. Alldredge, 480 F.2d 1078 (3d Cir. 1973); Pace v. Clark, 453 F.2d 411 (5th Cir. 1972); Kochie v. Norton, 343 F. Supp. 956 (D. Conn. 1972).

131 *See* notes 112 & 116, *supra*.

132 Gillette v. McNichols, 517 F.2d 888 (10th Cir. 1975); Hayes v. Board of Regents of Ky. State University, 495 F.2d 1326 (6th Cir. 1974); Raper v. Lucey, 488 F.2d 748, 751 n.3 (1st Cir. 1973) (court adheres newly to this principle in a case involving refusal of a motor vehicle operator's license, subject to a requirement of ripeness of agency action suffiicient to give rise to a § 1983 cause of action in the first place); Gilliam v. City of Omaha, 459 F.2d 63 (8th Cir. 1972); Powell v. Workmen's Comp. Bd., 327 F.2d 131 (2d Cir. 1964) (noting earlier authority to the contrary); Carrera v. Municipality of Rayamon, 370 F. Supp. 859, 867 (D. Puerto Rico 1974); Davis v. Barr, 373 F. Supp. 740 (E.D. Tenn. 1973); Alabama Educ. Ass'n v. Wallace, 362 F. Supp. 682 (M.D. Ala. 1973); Buggs v. City of Minneapolis, 358 F. Supp. 1340 (D. Minn. 1973); Cook v. Edwards, 341 F. Supp. 307, 310 (D.N.H. 1972). As to Second Circuit decisions, *see* Gonzales v. Shanker, 533 F.2d 832 (2d Cir. 1976).

133 Fuentes v. Roher, 519 F.2d 379, 386 (2d Cir. 1975) and Plano v. Baker, 504 F.2d 595 (2d Cir. 1974) (exhaustion not required in these particular cases, however); Canton v. Spokane School Dist. No. 81, 498 F.2d 840 (9th Cir. 1974) (exhaustion rule applies, but not when remedy inadequate because Civil Rights injury has already been inflicted); Drown v. Portsmouth School Dist., 435 F.2d 1182, 1186 n.2 (1st Cir. 1970) (dictum in school teacher nonretention case, that "[w]e . . . normally require resort to an available hearing prior to initiation of a section 1983 action"); Stevenson v. Board of Educ. of Wheeler County, 426 F.2d 1155 (5th Cir. 1970), *cert. denied*, 400 U.S. 957 (1970) (students excluded from school because of violation of hair grooming regulations—*see* the District Court opinion, 306 F. Supp. 97, 101—*held* not to have suffered final injury until administrative appeal exhausted or shown to be ineffective); Salvate v. Dale, 364 F. Supp. 691 (W.D. Pa. 1973) (license application case); Becker v. Oswald, 360 F. Supp. 1131 (M.D. Pa. 1973) (student expulsion case); Boyd v. Smith, 353 F. Supp. 844 (N.D. Ind. 1973) (same); Press v. Pasadena Independent School Dist., 326 F. Supp. 550 (S.D. Tex. 1971) (case similar to *Stevenson, supra*).

In matters close to the concerns which gave rise to the Civil Rights Acts, involving race discrimination and abuse of law enforcement powers, the proposition that exhaustion of state remedies is not a prerequisite to federal Civil Rights Acts actions has been a convenient means of dispensing with case-by-case determination of whether on other grounds resort to state administrative remedies should be required in circumstances involving persistent violations.[134] It would be possible to enact statutory authorization for this practice of dispensing with case-by-case decision in relation to a historically-based category of cases, leaving others to be governed by a flexible exhaustion rule. The American Law Institute makes such a distinction in its solution to the related problem of federal-court stay of proceedings when there is a plain, speedy, and efficient judicial remedy in the courts of the state. The Institute's draft of new federal legislation to govern the division of jurisdiction between state and federal courts would authorize a stay of district court proceedings in favor of state jurisdiction under specified conditions, including availability of the requisite kind of state remedy, but not the stay of "actions to redress the denial, under color of any State law, statute, ordinance, regulation, custom, or usage, of the right to vote or of the equal protection of the laws, if such denial is alleged to be on the basis of race, creed, color, or national origin."[135] No such exception can with complete accuracy state the area of greatest current need for unconditional protection at the hands of federal authorities; at best a reasonable approximation must serve, responsive to the need for conservation of federal judicial resources and respect for state administrative opportunity to rectify wrongs at the local level, as well as for safeguarding the interests requiring maximum protection. Infliction of physical suffering under color of state law might, for example, be included as a kind

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134 McNeese v. Board of Educ., 373 U.S. 668 (1961), note 116 *supra*, illustrates this point. *See also* Armstrong v. Board of Educ., 323 F.2d 333, 336-337 (5th Cir. 1963). In other decisions both after and before *Armstrong*, the Fifth Circuit has relied instead on the futility of attempts to exhaust administrative remedies in the actual situations presented, because of fixed policies applied by the agency involved, as a basis for not requiring resort to those remedies. *See* Evers v. Jackson Municipal Separate School Dist., 328 F.2d 408 (1964); Potts v. Flax, 313 F.2d 284, 290 (1963); Orleans Parish School Bd. v. Rush, 242 F.2d 156, 162 (1957); Bruce v. Stilwell, 206 F.2d 554 (1953). *See also* Farley v. Turner, 281 F.2d 131 (4th Cir. 1960); School Bd. v. Allen, 240 F.2d 59 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957). *Compare* Parham v. Dove, 271 F.2d 132 (8th Cir. 1959).

135 ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) and Commentary at 297-98 (1969). A more comprehensive proposal for federal legislation to deal with same problem is made in Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 L. & SOC. ORDER 557, 577-78.

of action giving rise to the right to seek redress in the federal courts, for which exhaustion of state administrative remedies would not be a prerequisite.

A related problem surrounds the determination of whether the action that allegedly deprives someone of a constitutional right has actually become effective. If the action is merely a recommendation to higher authority, it has not inflicted a deprivation which is reached by 42 U.S.C. § 1983.[186] Even action which purports to be definitive may be so subject to easy appeal, without adverse effect in the interim, as not to be subject to imediate Civil Rights Act review.[187] The issue involved is really one of ripeness. Nevertheless the federal remedy should not be withheld during successive stages of agency proceedings accompanied by protracted deprivation of the federally secured right. Neither the conception of official action which precipitates the right to federal relief nor the doctrine of exhaustion so far as it may apply should cause deferment of that relief while such aggravated deprivation continues.

Exhaustion in Relation to Agency Power to Act

It has already been stated that from the inception of the exhaustion rule the courts have recognized an exception which dispenses with the exhaustion requirement in relation to the question of agency power to act in the matter presented.[188] The exception has continued to be recog-

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[186] *See* Gibson v. Berryhill, 411 U.S. 564, 574 (1973), with reference to whether the exhaustion rule applies in a Civil Rights Act case "where the individual charged is to be deprived of nothing until the completion of [the administrative] proceeding." *See also* Blanton v. State Univ. of N.Y., 489 F.2d 377, 383 (2d Cir. 1973) (absent special circumstances, a student whose suspension has been recommended suffers no injury before adverse action is taken); Hall v. Garson, 430 F.2d 430, 436 n.11 (5th Cir. 1970), note 119 *supra*; Chaney v. State Bar of Cal., 386 F.2d 962 (9th Cir. 1967), *cert. denied,* 390 U.S. 1011 (1968); Depperman v. Univ. of Ky., 371 F. Supp. 73 (E.D. Ky. 1974). *Compare* Smith v. Board of Commissioners of the D.C., 380 F.2d 632 (D.C. Cir. 1967), where the relief sought was only against allegedly threatened future violations of civil rights under the aegis of agency heads whose sanction of past infringements by subordinates was not shown. *See also* Stevenson v. Board of Educ., 426 F.2d 1155 (5th Cir. 1970), *cert. denied,* 400 U.S. 957 (1970), note 133 *supra.*

[187] Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972), *cert. denied,* 409 U.S. 1130 (1973). *See also* Whitmer v. Davis, 410 F.2d 24 (9th Cir. 1969), relied on in *Toney*, and Stevenson v. Board of Educ., 426 F.2d 1154 (5th Cir. 1970). A variant arose in Suckle v. Madison General Hospital, 499 F.2d 1364 (7th Cir. 1974), where the only claimed civil right was opportunity for a formal, procedurally safeguarded hearing which had not been expressly demanded and was held not to have been impliedly refused by the offer of an informal appearance before the deciding agency.

[188] *See* note 14 *supra* & text accompanying.

nized with some frequency.[139] It was limited or negated, however, in *Myers v. Bethlehem Shipbuilding Corporation*,[140] a leading case, which applied the exhaustion requirement in a district court suit to enjoin the National Labor Relations Board from continuing a complaint proceeding against Bethlehem on the ground that the Board's authority did not extend under the statute to Bethlehem's operation because it was not related to interstate commerce. The National Labor Relations Act itself was held to require clearly, by its bestowal of "exclusive power" on the Board and on reviewing courts of appeals, that the issue of Board authority, along with other issues, be determined by the Board in the first instance[141]—a sufficient ground for the decision that the district court should have dismissed the complaints of the corporation and of a local union. The Court, however, also invoked without qualification "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted," which the Court said "has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter."[142]

Reconciliation of the view stated in the *Bethlehem Shipbuilding* case, that the exhaustion rule applies even when agency power over the subject matter is challenged, with the oft-stated exception embracing questions of agency power, depends on whether the decisions in the two

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[139] *Cf.* Manual Enterprises v. Day, 370 U.S. 478, 499 n.5 (1962) (concurring opinion). In Gosa v. Mayden, 413 U.S. 665 (1973), the Justices seemed to agree that an issue of court martial jurisdiction would not be waived by failure to raise it in the court martial proceedings, but divided on the question of whether the challenge there was to jurisdiction or to the observance of applicable due process and related constitutional safeguards. *See also* Walker Bank & Trust Co. v. Taylor, 15 Utah 2d 234, 390 P.2d 592 (1964); Horan v. Foley, 39 Ill. App. 2d 458, 188 N.E.2d 877 (1963); and, as to the exception embodied in one provision of the Illinois Review Act, Skokie Fed. Savings & Loan Ass'n v. Savings & Loan Bd., 88 Ill. App. 2d 373, 382, 232 N.E.2d 167, 172 (1967). As to interaction between the exception and the traditional availability of the remedy of prohibition to test the jurisdiction of an inferior tribunal, *see* People *ex rel.* Hurley v. Graber, 405 Ill. 331, 90 N.E.2d 763 (1950); Willamette Valley Lumber Co. v. Ellis, 226 Ore. 543, 359 P.2d 98 (1961).

[140] 303 U.S. 44 (1938). For a discussion of the dimensions of the exception in the wake of the *Bethlehem Shipbuilding* decision, *see* Schwartz, *Jurisdiction to Determine Jurisdiction in Federal Administrative Law*, 38 GEO. L.J. 368 (1950).

[141] 303 U.S. at 48-50.

[142] *Id.* at 50-51. Of the cases cited by the Court in support of this statement, all but two involve ripeness primarily and are dealt with in note 148 *infra*. Of these two, FTC v. Claire Furnace Co., 274 U.S. 160 (1927), involved alternative judicial remedies rather than further resort to the administrative agency sought to be enjoined; and the other, Western & Atlantic R. Co. v. Georgia Pub. Serv. Comm'n, 267 U.S. 493 (1925), involved the primary jurisdiction of the Interstate Commerce Commission with respect to the impact on interstate commerce of a final order of the defendant state commission.

lines of cases can be distinguished on a consistent basis. They can be if agency authority in one line involves undisputed fact situations in which agency power depends wholly on how statutory terms or constitutional provisions apply[143] and in the other line turns also on the ascertainment of facts. Such fact ascertainment will be aided by an agency record and findings, which should justify the expense and delay of securing them. Hence the exhaustion rule should apply.[144] The situation in the *Bethlehem Shipbuilding Corporation* case was of this second variety; for at the time of the decision, although the National Labor Relations Act's coverage of a steelmaking enterprise that drew to a large extent on interstate commerce for raw materials and shipped much of its product into such commerce had been established,[145] the relation of even such large enterprises to the interstate flow of goods was not looked upon as self-evident and was still regarded as determinable case by case after the facts were developed.[146] In *Allen v. Grand Central Aircraft Company,* on the other hand, where the Supreme Court decided the question of agency authority without requiring exhaustion of agency processes,[147] the question turned not at all on the facts of the situation presented but entirely on the meaning of statutory terms, the applicable legislative history, and the constitutional context of the authority bestowed. Other decisions concerning the exhaustion requirement in rela-

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[143] This formulation of the kind of question of power which is not subject to the exhaustion requirement seems preferable to one that speaks of whether the agency "has patently traveled outside the orbit of its authority," NLRB v. Cheney Cal. Lumber Co., 327 U.S. 385, 388 (1946). This alternative supplies no criterion of when an issue of "patent" excess of authority is presented, or else it assumes the answer to the question which needs decision.

[144] *See* the cogent analysis in the dissenting opinion of Judge Desmond in New York Post Corp. v. Kelley, 296 N.Y. 178, 71 N.E.2d 456 (1947), in which the majority held that a Special Term of the Supreme Court had discretion to entertain a declaratory judgment action, challenging the jurisdiction of the state Labor Relations Board before representation proceedings had run their course, when the challenge involved factual as well as legal issues.

[145] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[146] The *Jones & Laughlin* decision, although it set the pattern of future decisions on this point, was limited in terms to the particular employer's business. The Court said: "Whether or not . . . particular [conduct] . . . does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to be within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise." 301 U.S. at 32. Macauley v. Waterman S.S. Corp., 327 U.S. 540 (1946), note 72 *supra,* which specifically relies on the *Bethlehem Shipbuilding* case, cannot be explained in the same way, for the challenged authority of the Renegotiation Board turned on the statute in relation to undisputed facts. The Court stressed, however, not the general principle of exhaustion, but the "exclusive [statutory] jurisdiction" of the Tax Court "to decide questions of fact and law" before an Article III court's authority could be invoked. *Id.* at 544.

[147] 347 U.S. 535 (1954).

tion to the issue of agency power conform on the whole to this law-fact distinction.[148]

The difference between the two lines of cases can be expressed by formulating the exception to the exhaustion requirement as one which applies when agency power to act in a defined kind of situation is challenged, but not when the challenge relates to agency power under circumstances that remain to be ascertained. In the former instance the court may decide the question of power to act without need for prior agency determinations; in the latter the circumstances need to be developed, preferably through agency processes initially, as part of the ascer-

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[148] *See* Gonzales v. Williams, 192 U.S. 1 (1904), and United States v. Sing Tuck, 194 U.S. 161 (1904), as compared in note 14 *supra*; Dooley v. Ploger, 491 F.2d 608 (4th Cir. 1974) (exhaustion rule applied to issue of court martial jurisdiction because of need to determine impact of accused serviceman's alleged offense on operation of armed forces; excellent discussion by court of agency-power exception to exhaustion rule in relation to two kinds of jurisdictional issues); Lone Star Cement Corp. v. FTC, 339 F.2d 505 (9th Cir. 1964) (agency power turning on facts relating to involvement of local cement business with interstate commerce; exhaustion doctrine applied); Oil Shale Corp. v. Udall, 235 F. Supp. 606 (D. Colo. 1964) (authority of agency turning on direct Supreme Court precedent; exception to exhaustion rule applied; decision on merits, 261 F. Supp. 954 (D. Colo. 1966), *aff'd* 406 F.2d 759 (10th Cir. 1969), *rev'd*, Hickel v. Oil Shale Corp., 400 U.S. 48 (1970)); Blake v. Public Util. Comm'n, 120 Cal. App. 2d 671, 261 P.2d 773 (1953) (validity of the agency decision did not become a question of jurisdiction because of alleged total absence of supporting evidence; exhaustion was required). *See also* Allegheny Ludlum Steel Corp. v. Kelley, 296 N.Y. 178, 71 N.E.2d 456 (1947), declining to follow the *Bethlehem Shipbuilding* view in a case where the state labor relations board's authority with respect to a category of workers turned partially on facts to be determined; Schwebel v. Orrick, 251 F.2d 919 (D.C. Cir. 1958), *cert. denied*, 356 U.S. 927 (1958), and Camp v. Herzog, 190 F.2d 605 (D.C. Cir. 1951), in which the court held the exhaustion rule applicable to the issue of implied authority of agencies to regulate practice before them, perhaps because of agency expertise concerning the actual need for such regulation. The Supreme Court's departure from the *Bethlehem Shipbuilding* exhaustion doctrine in Leedom v. Kyne, 358 U.S. 184 (1958), note 89 *supra*, conforms to the distinction here drawn. In addition to the issue of denial of a specific statutory right, which justified immediate judicial review of a certification order of the NLRB without further proceedings before the Board, the Court referred also to the agency's action "in excess of its delegated power" under the statute as written. 358 U.S. at 188. *See also* Oestereich v. Selective Serv. Local Bd., 392 U.S. 233 (1968).

As to the related question of need for agency determinations before issues of agency power to act are ripe for judicial consideration, *see* Part I at notes 54-55, *supra*. In such cases exhaustion principles apply. *See* note 1 *supra*. The following cases of this nature, in which judicial intervention was held to be premature, involved situations where facts, still to be ascertained, bore on the question of agency power: St. Louis-San Francisco R.R. v. Public Serv. Comm'n, 279 U.S. 560 (1929); Lawrence v. St. Louis-San Francisco R.R., 274 U.S. 588 (1927); Dalton Adding Mach. Co. v. Virginia, 236 U.S. 699 (1915); American Gen. Ins. Co. v. FTC, 496 F.2d 197 (5th Cir. 1974); Allegheny Airlines, Inc. v. Fowler, 261 F. Supp. 508 (S.D.N.Y. 1966).

The Court in Illinois Commerce Comm'n v. Thomson, 318 U.S. 675 (1943), before holding that a railroad's attack on a Commission rate proceeding on various grounds was premature, decided the question of Commission jurisdiction over the subject matter, which also was raised, on the basis of its interpretation of the effect of an Interstate Commerce Commission order which had a bearing (accepting for this purpose the ICC's own interpretation). As to this question, no development of facts was necessary. 318 U.S. at 685-86.

tainment of agency authority. A problem remains, however, of determining whether a challenge is to agency power, i.e., "jurisdiction," or merely to the legality of actions within the general range of agency authority.[149] In the latter event the agency-power exception to the exhaustion rule does not come into play, but a closely related question, of whether the exhaustion rule requires initial presentation of issues of law to the agency involved, is raised instead.

Exhaustion in Relation to Questions of Law

The view which has been taken from time to time, that the exhaustion requirement does not apply when the challenge is only to a determination of law involved in an agency's action, seems to be based largely on the practical reasons for prompt judicial decision of questions of law without awaiting prior agency decision of the same questions. This view must yield, nevertheless, to statutory provisions that objections not raised before an agency may not be relied on in court; and it is suspect when technical considerations within an agency's special competence affect the constitutional or statutory interpretations in question. The exception, accordingly, is often stated as a qualified one, dependent on the nature of the legal issue presented. It may relate either to substantive issues or to questions of agency procedure.

New Jersey cases have been especially influential in developing the issue-of-law exception to the exhaustion rule. The earliest New Jersey decisions that gave effect to it stated the exception broadly, on the ground that the courts rather than the local zoning boards involved in the cases were the proper tribunals to determine issues of law.[150] After the federal exhaustion rule had developed, Chief Justice Vanderbilt in *Ward v. Keenan*[151] and *Nolan v. Fitzpatrick*,[152] shortly after World War II, articulated the practical reasons for an inclusive view as to issues of law.

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[149] *Cf.* Dragna v. Landon, 209 F.2d 20 (9th Cir. 1953) (whether defects in a resident alien's entry from Mexico on return from a visit there could be the basis of deportation proceedings); Public Util. Dist. No. 1 v. FPC, 242 F.2d 672 (9th Cir. 1957), in which the court treated as jurisdictional, and therefore as not subject to the exhaustion requirement, an issue concerning a procedural defect which consisted of the denial of a hearing that was required by law; Cotherman v. FTC, 417 F.2d 587 (5th Cir. 1969), in which the issue of whether the Commission's authority over unfair methods of competition and unfair practices in commerce extended to conduct in the loan business was held to be nonjurisdictional and to have been waived by the party later seeking to raise it. *Compare* United States v. L.A. Tucker Truck Lines, 344 U.S. 33 (1952), note 40 *supra* & text accompanying.

[150] Losick v. Binda, 102 N.J.L. 157, 130 A. 537 (1925); Conaway v. Atlantic City, 107 N.J.L. 404, 154 A. 6 (1931); Lane v. Bigelow, 135 N.J.L. 195, 50 A.2d 638 (1947).

[151] 3 N.J. 298, 70 A.2d 77 (1949).

[152] 9 N.J. 477, 89 A.2d 13 (1962).

He stated the exception broadly in the latter case, to embrace all issues of law, as a counterweight to the strict federal exhaustion rule which had been stated in the *Bethlehem Shipbuilding Corporation* case.[153] The two New Jersey cases were proceedings in lieu of prerogative writs, challenging agency determinations[154] that were still subject to administrative review. In this context the Chief Justice was able to ascribe to the exception strong historical roots in the shape of prior enlargement of the scope of the prerogative writs. These had come to be used not only to test the jurisdiction, narrowly conceived, of inferior tribunals or officials prior to their decisions, but also to check the exercise of allegedly "merely colorable" jurisdiction in cases in which these tribunals were acting on a basis that was "palpably defective" for legal reasons.[155] A constitutionally authorized New Jersey rule of court applicable to writ proceedings, which required exhaustion of administrative remedies "[e]xcept where it is manifest that the interests of justice require otherwise," was held to call for an exception when a court could, by deciding a dispositive question of law without a prior agency decision, dispense with the need for continued agency proceedings.[156]

Shortly before these New Jersey decisions the United States Court of Appeals for the First Circuit decided *Wettre v. Hague*,[157] in which a similar view was stated without a corresponding articulation of reasons for it. The court held that the district court properly entertained a suit to enjoin the Commandant of the Boston Navy Yard from dispensing with the services of the plaintiffs, employees at the Yard, through a reduction in force in alleged violation of statutory veterans' preference rights of the plaintiffs, under facts which were not in dispute. The essential question was whether the statute relied upon for job protection had been impliedly limited by a later one. The plaintiffs had not availed themselves of administrative appeal proceedings, but the court declared

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153 *See* notes 140 & 142 *supra*.

154 *Ward v. Keenan* involved a challenge to agency proceedings against an employee for conduct while he was on leave of absence, over which the agency allegedly had no authority; *Nolan v. Fitzpatrick* involved a contention that the defendant members of a county board of freeholders were under a legal duty to honor a requisition for funds from the plaintiff Boulevard Commissioners.

155 Ward v. Keenan, 3 N.J. at 308, 70 A.2d at 82.

156 Nolan v. Fitzpatrick, 9 N.J. at 484, 89 A.2d at 16. *See also* Hormel v. Helvering, 312 U.S. 552 (1941), where a corresponding result was based on a similar provision governing statutory review of decisions of the Board of Tax Appeals.

157 168 F.2d 825 (1st Cir. 1948), followed in Farrell v. Moomau, 85 F. Supp. 125 (N.D. Cal. 1949), Reeber v. Rossell, 91 F. Supp. 108 (S.D.N.Y. 1950), and Group v. Finletter, 101 F. Supp. 327 (D.D.C. 1952). *See also* Hardy v. Rossell, 135 F. Supp. 260 (S.D.N.Y. 1955), where, after trenchant criticism of the *Wettre* rule, the court applied it in deference to the Court of Appeals.

that in view of the pure question of law presented, "there is no . . . occasion for the requirement that they exhaust whatever administrative remedies they may have before seeking to vindicate their rights in court. . . ." The court relied in part on *Order of Railway Conductors v. Pitney*,[158] a case which applied the primary jurisdiction doctrine by holding that a private dispute should have been presented initially to an administrative agency which could entertain it, but, at the same time, recognized that where "a sacrifice or obliteration of a right which Congress . . . created" is obvious, a court of equity can, "in a proper case," intervene.[159]

Wettre met with a mixed reception in other government personnel cases. The force of its recognition of the issue-of-law exception to the exhaustion requirement was diminished because after the argument, but before the decision in the Court of Appeals, the Supreme Court in another case had settled the question of law involved[160] and had thereby eliminated any practical need to apply the exhaustion principle in this instance. Other courts disagreed with the opinion's statement of the exception to the exhaustion rule and declined to follow it in similar but not identical situations.[161] The First Circuit itself in *Fitzpatrick v. Snyder*[162] limited *Wettre* to the precise situation presented, emphasizing that the exception applies only when a clear violation of statutory right has occured. This narrower formulation was derived in *Fitzpatrick* from *Breiner v. Wallin*,[163] a case decided before *Wettre* and similar in its facts, in which, however, the issue-of-law exception to the exhaustion rule was held not to apply because the legal answer was not clear. As authority for the narrow exception, *Breiner* adduced decisions which awarded specific relief by mandamus or injunction against administrative action based on a clear error of law. In each instance the agency's action was administratively final,[164] and the question at issue was whether that

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158 326 U.S. 561 (1946).

159 *Id.* at 566.

160 Hilton v. Sullivan, 334 U.S. 323 (1948).

161 Young v. Higley, 220 F.2d 487 (D.C. App. 1955); Hills v. Eisenhart, 256 F.2d 609 (9th Cir. 1958).

162 220 F.2d 522 (1st Cir. 1955). *See also* May v. Glore, 132 F. Supp. 327 (E.D.N.Y. 1955); American Fed'n of Gov't Employees v. Resor, 442 F.2d 993 (3d Cir. 1971).

163 79 F. Supp. 506 (E.D. Pa. 1947).

164 In one of the cases cited, Waite v. Macey, 246 U.S. 606 (1918), further administrative proceedings could have been had, but the disputed issue was the validity of a controlling regulation which would not be questioned in those proceedings. In Hammond v. Hull, 131 F.2d 23 (1942), *cert. denied*, 318 U.S. 777 (1943), also cited, the challenge was by a foreign service officer to an efficiency rating of "unsatisfactory," assigned to him by an official action which was final as a record even though it would have no specific effects unless made the basis of further action. The opinion of the Court of Appeals relied upon both mandamus and exhaustion-of-remedies precedents.

action was subject to control at all by means of the particular remedies sought, not whether otherwise appropriate judicial review was precluded because an administrative remedy was available. The grossness of an alleged agency error of law could be relevant to both of these issues; but the sufficiency of legal error to warrant judicial scrutiny of final agency action may differ from its sufficiency to justify judicial intervention when there are, or were, unused opportunities for the agency to correct its error.

The suitability for the latter purpose of defining the issue-of-law exception to the exhaustion rule as relating to clear agency violations of law is open to serious question, partly because it may be difficult to decide whether a particular illegality is a clear one.[165] As stated, moreover, the exception operates in one direction only; clear error of law on the part of the agency dispenses with the exhaustion rule, but a challenge to an obviously correct agency determination, offered without exhaustion of an available administrative remedy, may lead, not to a judgment on the merits, but to dismissal for failure to exhaust.[166] The court under this formulation must examine the merits and go on to decide them when there is clear error, in the name of determining whether to assume the reviewing function. It would be preferable to say, instead, that the exhaustion rule will be followed when issues of law are presented which involve technical or specialized historical or policy considerations,[167] but not when legal answers turn on the interpretation of ordinary words used in statutes. In the former situation the rule would operate to secure the benefit of specialized agency knowledge;[168] in the latter the court would decide without this benefit because

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[165] *See* the opinion of Judge Ryan in Hardy v. Russell, 135 F. Supp. 260 (S.D.N.Y. 1955), note 157 *supra*.

[166] *See* May v. Maurer, 185 F.2d 475 (10th Cir. 1950) (challenge to an obviously correct agency decision of an issue of law raised a "substantial" question requiring exhaustion. *Compare* Zerillo v. Local Bd. No. 102, 440 F.2d 136 (8th Cir. 1971), where the court, which in its view was required to examine preliminarily the merits of the issue of law presented, in order to determine the jurisdiction of the district court, went ahead to decide the issue adversely to the challenger, so as to dispense with the need for additional, wasteful litigation, even though in that case the merits were not obvious.

[167] *See* the comment of Mr. Justice Harlan, concurring in Breen v. Selective Serv. Local Bd., 396 U.S. 460, 468 (1970), that it is preferable to have the availability of judicial review turn, "not on what amounts to an advance decision on the merits, but rather on the nature of the challenge being made." *Cf.* Johnson v. War Assets Administration, 171 F.2d 556 (7th Cir. 1949) (question of whether statutory veterans preference for retention in government positions extended to non-permanent incumbents as against permanent-status nonveteran personnel); *Wettre*, note 157 *supra*, distinguished; People v. Carpentier, 17 Ill. 2d 303, 161 N.E.2d 97 (1959) ("interpretation of policy" in classification of motor vehicle operating companies for the assessment of fees).

[168] *Cf.* Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973) (drug regulation).

it would be at least as well qualified as the agency involved to determine the issue, even when problems of interrelating several statutory provisions were presented.[169]

Such a formulation provides no easy touchstone, because ordinary words in a statute may be used in a context that includes the complex history of a specialized subject. In such a situation the court would have to choose which aspect of the problem to emphasize in deciding whether to apply the exhaustion rule.[170] In this way, the court would at least be considering factors relevant to the satisfactoriness of alternative routes for a resolution of the legal issues presented, instead of having partially to judge the merits of those issues in the process of deciding whether to entertain them.

*Selective Service Cases**

As the law relating to the exhaustion of administrative remedies as a prerequisite to judicial review in Selective Service cases has evolved, issues relating to agency authority and to determinations of law have

[169] Consumers Union v. Cost of Living Council, 491 F.2d 1390 (Em. App. 1974), in which the court, assuming that additional administrative remedies were available to the plaintiffs, who were seeking public disclosure of business information filed with the Council but withheld by Council regulations, decided that, nevertheless, a judicial determination of the validity of the regulations should be had, because the regulations were clear and the court could determine the only issue presented, namely the meaning of the interrelated statutory provisions involved. The Supreme Court impliedly took this view in Hilton v. Sullivan, 334 U.S. 323 (1948), in which the exhaustion issue was not raised, doubtless because the challenge was to the statutory interpretation embodied in Civil Service Commission regulations which governed the plaintiff's case before the agency and, arguably, would have rendered the administrative remedy futile. *See* Waite v. Macey, 246 U.S. 606 (1918), note 164 *supra*. *See also* Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653 (1974), involving an issue of statutory construction, in which the court of appeals in, United States *ex rel.* Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656, 659 (3d Cir. 1973), had held that the exhaustion rule need not be followed because the question was only one of law not calling for the exercise of agency expertise.

[170] In Hilton v. Sullivan, *see* note 169 *supra*, the Court, in determining the merits, confidently construed the statutory language involved with reference to legislative history but not to administrative practice. The court of appeals in Hilton v. Forrestal, 165 F.2d 251 (D.C. App. 1947), reaching a contrary conclusion, had looked upon agency discretion as operative and important. The same divergence of approach would apply to the question of need for exhaustion of administrative remedies. *See, e.g.*, Parker v. United States, 448 F.2d 793, 798 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), and McCurdy v. Steele, 353 F. Supp. 629, 639-40 (D. Utah 1973), in each of which the court held the exhaustion rule not to apply because a purely legal question of statutory construction was involved, even though the issue could easily have been regarded as one that could best be resolved with the aid of specialized knowledge. *See also* Brennan v. Occupational Safety & Health Review Comm'n, 511 F.2d 1139 (9th Cir. 1975) (failure of Secretary of Labor to raise an important question of statutory interpretation before a statutory tribunal sitting in judgment on his actions did not bar his doing so before a reviewing court).

* Although the suspension of Selective Service by Proclamation no. 4360, 40 Fed. Reg. 14567 (1975), eliminates the current impact of this topic, the discussion of it here is retained because past development in the law of exhaustion of remedies, arising in Selective Service administration, continues to be significant.

frequently been the basis, together with other grounds which will be specified, for exceptions to the exhaustion rule. That rule as elaborated in the Selective Service context gives effect to principles of ripeness as well as to the usual aspects of exhaustion, by requiring a registrant, as a condition of judicial review, not only to have exhausted all available administrative recourse against a classification which he wishes to challenge, but also to have submitted to the very last phase of the selection and induction process in which a determination affecting his liability to serve could be made.[171] After that the registrant can either submit and seek his subsequent release[172] or refuse to take the final formal step and defend a prosecution for the refusal on the ground of invalidity in the proceedings.[173]

Despite the rigor of this two-fold exhaustion requirement and limitation of remedies, the lower federal courts in several cases of apparent administrative neglect or unfairness entertained injunction suits against future enforcement of service, because of alleged illegality in the previous draft classification process.[174] In *Wolff v. Selective Service Local Board*,[175] the Court of Appeals for the Second Circuit, in a case in which available administrative appeals had not been taken, held that review should be allowed in such a suit with respect to an alleged usurpation of authority by the Selective Service Administrator which resulted in the

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[171] United States v. Matson, 262 F.2d 914 (7th Cir. 1959); Mason v. United States, 218 F.2d 375 (9th Cir. 1955). Under the regulations which were applicable in Estep v. United States, 327 U.S. 114 (1946), this step was submission to a physical examination at the time of induction, and was followed by the purely formal step of taking the oath. Refusal to take the latter step would follow exhaustion of administrative "remedies," and prosecution for it could be defended on the ground of invalidity in the prior proceedings. The regulations were later changed to provide for pre-induction physical examinations in the localities, leaving the whole process of reporting for induction a formal one which need not be undertaken as a prerequisite to defending, on the ground of prior invalidity in the proceedings, a prosecution for noncompliance. *See* Gibson v. United States, 329 U.S. 338 (1946), involving a refusal to report to civilian work camp pursuant to conscientious objector classification, because of a claim of ministerial exemption.

[172] Release might follow either a successful habeas corpus action challenging continued detention in the armed forces or the successful defense of a prosecution for disobedience to an aspect of civilian service as a conscientious objector on the ground that the duty to serve was not validly imposed. As to the former remedy *see* Estep v. United States, at 327 U.S. at 124, *see* note 171 *supra*; Eagles v. Samuels, 329 U.S. 304 (1946); Witmer v. United States, 348 U.S. 375, 377 (1955); Oestereich v. Selective Service Bd., 393 U.S. 233, 235 (1968). As to the latter remedy *see* Cox v. United States, 332 U.S. 442 (1947).

[173] Estep v. United States, 327 U.S. 114 (1956). As to the previous view based on Falbo v. United States, 320 U.S. 549 (1944), that submission to induction was mandatory and habeas corpus the sole remedy, see Mr. Justice Frankfurter's dissenting opinion in *Estep, supra.*

[174] Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956); *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952) (habeas corpus supplemented by injunctive relief); Diamond v. Berman, 95 F. Supp. 179 (E.D. Pa. 1952).

[175] 372 F.2d 817 (3d Cir. 1967).

punitive I-A classification of the plaintiffs, rendering them subject to immediate induction orders, because of their participation in student demonstrations against the Vietnam war. The reclassification was held illegal. Since it deterred registrants from engaging in the exercise of First Amendment rights to demonstrate peacefully, the justification for an immediate judicial remedy was great. At the same time, since the reclassifications were the result of a national Selective Service policy, which the administrative appeal tribunals would have had no authority to overrule, resort to appeals would have been futile.

Largely because of this decision the Congress, aroused by a likelihood of frequent litigious interference with allegedly invalid Selective Service proceedings that had not run their full course, amended the Selective Service Act by an express provision that "[n]o judicial review shall be made of the classification or processing of any registrant" except in a criminal prosecution for disobedience "after the registrant has responded either affirmatively or negatively to an order to report for induction or for civilian work. . . ."[176] The statute, however, almost immediately proved ineffective to prevent review prior to an induction order that might result from the punitive revocation of a registrant's statutory exemption. *Oestereich v. Selective Service Local Board*,[177] in which a suit was brought to enjoin induction, involved reclassification of a divinity school student, revoking his ministerial-student exemption bestowed by statute, because he had returned his Selective Service registration card as a protest against the Vietnam war, thereby engaging in disobedience, punishable in itself, to a regulation which required registrants to keep such cards in their possession. The arbitrary and illegal reclassification, the Court held in effect, was not actually a "classification or processing" of a registrant, to which the 1967 statutory restriction would apply. It was, rather, "basically" and "blatantly lawless, without authority, and a clear departure . . . from the statutory mandate,"[178] rendering an immediate remedy appropriate.

In *Oestereich* the registrant had exhausted his administrative appeals from the reclassification; but in *Breen v. Selective Service Local Board*, where the *Oestereich* holding was extended to include a challenge to the punitive withdrawal of a student deferment which was authorized but not required by statute, the suit had been brought before an ad-

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[176] 81 Stat. 104 (1967), 50 U.S.C. § 460(b)(4) (1970). By common consent, the amendment was not intended to exclude and did not rule out relief through habeas corpus after induction. Oestereich v. Selective Service Local Bd., 393 U.S. 233, 235, 248 (1968).

[177] 393 U.S. 233 (1968).

[178] *Id.*, 238.

ministrative appeal proceeding was completed.[179] In *Clark v. Gabriel*,[180] decided at the same time as *Oestereich*, the statute was held applicable to prevent judicial review after administrative appeals had been exhausted but prior to completion of the selection process. The challenge was to the withholding of a conscientious objector classification, which allegedly resulted from hostility on the part of the Selective Service local board and "misapplied the statutory definition of conscientious objector." "Here," the Court stated, "there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment."[181]

In *McKart v. United States*[182] the 1967 statutory provision did not exclude review because the case was a prosecution for refusal to report for induction. The district court excluded review of the registrant's classification because he had not taken an administrative appeal from it and had, indeed, repudiated the Selective Service System after the initial stage and failed to report for a preinduction physical examination when ordered to do so. The question involved in his classification was whether, following the death of his mother, the registrant was entitled to retain a previous statutory draft exemption as the "sole surviving son" in a "family" in which the father had been killed while serving in the armed forces, when there were no other children. As to this question, which was "solely one of statutory interpretation," it was not necessary, the Supreme Court held, to resort to administrative appeals, because the decision "[did] not require any particular expertise on the part of the appeal board" or require an exercise of discretion.[183] In this respect it was unlike the issues raised by claims of conscientious objection or claims for deferment on account of civilian activities deemed "necessary for the maintenance of the national health, safety, or interest;" judicial review would not have been "significantly aided" by further administrative consideration. The registrant had presented the facts initially to the local board.[184] His failure to report for a pre-induction physical examination, although punishable in itself, was superseded by the subsequent

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[179] 396 U.S. 460 (1970). In Gutknecht v. United States, 396 U.S. 295 (1970), where the *Oestereich* holding was extended to a punitive acceleration of the plaintiff's order of call for induction, no administrative appeal was available. *See* 396 U.S. at 299-301. Shea v. Mitchell, 421 F.2d 1162 (D.C. Cir. 1970), in which *Oestereich*, *Gutknecht*, and *Breen* were followed, involved both a reclassification, from which no appeal was taken, and an accelerated order of call.

[180] 393 U.S. 256 (1968).

[181] *Id.*, 258.

[182] 395 U.S. 185 (1969).

[183] *Id.*, 198.

[184] *Id.* at 198 n.15.

order to report for induction, which was issued in spite of the failure and was the last significant step in the selection-induction process.[185] Mr. Justice White, concurring in the result, disagreed with the Court's "apparent conclusion that petitioner's failure to exhaust appellate remedies within the system can be disregarded on the . . . ground that only a question of law is involved."[186]

In *McGee v. United States*,[187] where the registrant's opposition to the Selective Service system led him to refuse either to seek a personal appearance before the local board or to prosecute an appeal from rejection of his conscientious objector claim, the registrant's failure to exhaust his administrative remedies was held to have thwarted "the purpose of ensuring that the Selective Service system have full opportunity to 'make a factual record' and 'apply its expertise' in relation" to the claim. In the face of these consequences of the registrant's failure, he could not raise his objections by way of defense to a prosecution for refusal to report for induction.

The question arises whether the asserted violations of law by Selective Service agencies that will overcome the barrier to pre-induction review under the 1967 Act and those that will dispense with the exhaustion requirement are essentially the same or whether "lawlessness" for the former purpose is a narrower concept. In relation to the statute several courts at first held rather technical errors of law to be sufficient,[188] but the Supreme Court held sharply, although far from clearly, to the contrary as to both substantive and procedural illegality. In *Boyd v. Clark*[189] the Supreme Court affirmed per curiam, on the scarcely applicable authority of *Clark v. Gabriel*,[190] a three-judge court decision denying review of a claim in a pre-induction suit by non-students that the statutory foundation for student deferments was unconstitutional. In *Fein v. Selective Service System Local Board*[191] the Court, under the 1967 statute, denied review of a claim that the procedures which had

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185 *Id.* at 201-03.

186 *Id.* at 205.

187 402 U.S. 479 (1971). *See also* United States v. Alford, 471 F.2d 718 (9th Cir. 1973), *cert. denied*, 411 U.S. 939 (1973); United States v. McDuffie, 443 F.2d 1163 (5th Cir. 1971), *cert. denied*, 404 U.S. 859 (1971); United States v. Houston, 433 F.2d 939 (2d Cir. 1970), *cert. denied*, 403 U.S. 910 (1971).

188 Naskiewicz v. Lawver, 456 F.2d 1166 (2d Cir. 1972); Nestor v. Hershey, 425 F.2d 504 (D.C. Cir. 1969); Piercy v. Tarr, 343 F. Supp. 1120 (N.D. Cal. 1972). *Contra*, Gregory v. Tarr, 436 F.2d 513 (6th Cir. 1971); Morrisania Community v. Tarr, 329 F. Supp. 1261, 1266-1267 (S.D.N.Y. 1971); Thomas v. Tarr, 328 F. Supp. 37 (E.D. La. 1971). *Cf.* Murray v. Blatchford, 307 F. Supp. 1038 (D.R.I. 1969).

189 393 U.S. 316 (1969).

190 *See* note 180 *supra*.

191 405 U.S. 365 (1972).

been accorded in Selective Service consideration of a conscientious objector claim failed to satisfy the Constitution and the governing statute. The case, according to the Court, did not present the "unusual circumstances" envisaged in *Oestereich*, in which the administrative authorities could be charged with flouting the law. The opinion of the Court was ambigious, however, in that it rested the decision mainly on the ground that the registrant claimed conscientious objection, requiring the exercise of administrative judgment and discretion, rather than on the nature of the procedural questions at issue.

The lower federal courts have since continued to struggle with the concept of "lawless" action, relative to the 1967 statute. The Third Circuit in *Morgan v. Melcher*,[192] which had been remanded by the Supreme Court at the same time as *Fein* was decided, adhered to the *Fein* view as to a procedural issue. The Fifth Circuit did likewise in relation to the interpretation of regulations governing the sequence of designations for induction into the armed forces,[193] as did the Ninth Circuit in relation to the interpretation of statutes and regulations determining the bestowal of fatherhood deferments.[194] In that case Judge Ely, dissenting, subscribed to the view espoused in the Fifth Circuit case by Chief Judge Brown, concurring, and by Mr. Justice Marshall, dissenting in *Fein*, that an interpretation of a statute can be the subject of pre-induction review, whereas an interpretation of a regulation cannot. The Second Circuit, in the meanwhile, has adhered to the view it previously advanced, that any substantial issue of law, whether arising under the Constitution, the statutes, or regulations, is subject to pre-induction review despite the 1967 statute.[195]

When the 1967 statute does not present a barrier to review in Selective Service cases, the decisions tend to permit review despite any failure to exhaust available administrative appeals, if an error of law falling within a rather broad range of such errors is alleged. The concurring opinion of Mr. Justice Douglas in *McKart* took cognizance in a foot-

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192 487 F.2d 133 (3d Cir. 1972).

193 Crowley v. Pierce, 461 F.2d 614 (5th Cir. 1972).

194 Porter v. Richardson, 483 F.2d 1338 (9th Cir. 1973). *See also* Eldridge v. Tarr, 462 F.2d 1009 (9th Cir. 1972) (interpretation of procedural regulation); McCarthy v. Director of Selective Service, 460 F.2d 1089 (7th Cir. 1972) (alleged unconstitutionality of procedure accorded to registrant).

195 Horey v. Tarr, 470 F.2d 775 (2d Cir. 1972); Levine v. Selective Serv. Local Bd., 458 F.2d 1281 (2d Cir. 1972). The court in these opinions did not distinguish Fein v. Selective Serv. System Local Bd., 430 F.2d 370 (2d Cir. 1970), which the Supreme Court affirmed in its *Fein* decision, *see* note 189 *supra*, nor did the court in *Naskiewicz v. Lawver*, *see* note 188 *supra*. It did, however, in the former two cases distinguish the Supreme Court's *Fein* decision on the ground of the presence there of a conscientious objector determination, dependent partially on the judgment of the evidence by the Selective Service authorities.

note of the caveat entered by Mr. Justice White[196] that the involvement of an error of law does not always dispense with the exhaustion requirement, by pointing out that, unlike the regulatory agencies whose statutory interpretations are entitled to deference, Selective Service boards "have no claim to that kind of expertise."[197] Hence, a requirement that such issues be raised before them prior to a judicial determination often lacks the justification that agency expertise should have been invoked. Partly for this reason, the Selective Service court opinions have tended to state that all determinations of law, including those involving statutory or due process procedural rights,[198] statutory interpretation,[199] and interpretation of regulations,[200] may be challenged without exhaustion of administrative appeals.

Selective Service cases typically involve additional factors which tend to produce a somewhat relaxed application of the exhaustion requirement. Many registrants are untutored and not aware of procedural rights. If a registrant has been misled or allowed to remain uninformed of the issues in his case or of the means of appeal supposedly open to him, his failure to exhaust administrative remedies, caused by his ignorance, may be excused by a reviewing court.[201] Furthermore, at the stage

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196 Text at note 186 *supra.*

197 395 U.S. at 204. The opinion of the Court, at 198-99, recognizes the expertise of Selective Service boards in matters of policy requiring the exercise of discretion and the absence of this factor in the matter of interpretation involved in *McKart,* but does not deal expressly with other kinds of issues of law or of statutory interpretation involved in Selective Service administration. It appears that, in general, there may be expertise involved in the interpretation of statutes or regulations governing such technical matters as determining the order of call of registrants whose liability to serve has been determined, but that most problems of interpretation in Selective Service administration involve the meaning of ordinary terms or of larger concepts such as religion or religious ministry.

198 United States v. Nelson, 476 F.2d 254 (9th Cir. 1972); United States v. Collins, 339 F. Supp. 767 (W.D. Mich. 1972); United States v. Weaver, 336 F. Supp. 558 (E.D. Pa. 1972).

199 United States v. Eades, 430 F.2d 1300 (4th Cir. 1970); United States v. Davila, 429 F.2d 481 (4th Cir. 1970).

200 United States v. Bender, 469 F.2d 235 (8th Cir. 1972).

201 United States v. Newmann, 478 F.2d 829 (8th Cir. 1973); United States v. Taranowski, 467 F.2d 1027 (7th Cir. 1972); United States v. Rabe, 466 F.2d 783 (7th Cir. 1972); United States v. Davis, 413 F.2d 148 (4th Cir. 1969); United States v. Wilson, 345 F. Supp. 894 (S.D.N.Y. 1972); Powers v. Powers, 400 F.2d 438 (5th Cir. 1968). *Compare* United States v. Sanders, 470 F.2d 937 (9th Cir. 1972) (failure of registrant to complete conscientious objector claim because of administrative failure to give evidently needed advice), *with* United States v. Hunter, 482 F.2d 623 (3rd Cir. 1973). It has been held that when there is nothing in the record to overcome a registrant's prima facie case for an exemption or deferred classification and it appears that he submitted himself in good faith to Selective Service processes, the burden is on the Government to establish that he "knowingly and intelligently" failed to invoke an available appeal. United States v. Boston, 334 F. Supp. 971, 975 (W.D. Mo. 1971). *See* Glover v. United States, 286 F.2d 84 (8th Cir. 1961). As to the obligation to follow procedural requirements in good faith

when judicial review becomes possible in Selective Service cases, no administrative remedies remain open and the hardship of criminal punishment or continued military or civilian service becomes inevitable in the absense of ability to present a possibly meritorious claim to a court.

The foregoing factors are stressed or are implicit in the opinion in *McKart*,[202] where counter-considerations are also set forth. These are generally the same in Selective Service cases as in others;[203] but the volume of such cases renders the need to discourage premature disobedience particularly important in them, except in some rather rare cases like *McKart* itself.[204]

In Selective Service administration the local board is especially significant,[205] because it is composed of local persons whose judgment is desired and because, until 1972 when the regulations were amended,[206] it alone offered opportunity for the registrant to appear before deciding officials. The appeal tribunals newly classify the registrant and do not remand for correction of procedural errors. Until personal appearances before them were permitted there was no way to counteract the weight which local board conclusions reflecting demeanor and credibility necessarily received or to undo procedural errors which might have affected or obscured these conclusions. Hence a registrant's resort to an appeal board in relation to several varieties of alleged local board errors might be ineffective and could then be omitted without loss of the right to judicial review.[207] By the same token, because of the importance of local board consideration and the ease of requesting it, failure of the registrant to seek it was more likely to be regarded as failure to satisfy a prerequisite to review.[208]

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and with reasonable diligence, which rests upon a registrant, *see* United States v. Sweet, 499 F.2d 259 (1st Cir. 1974); United States v. Kincaid, 476 F.2d 657 (9th Cir. 1973); United States v. Palmer, 223 F.2d 893 (3rd Cir. 1955), *cert. denied*, 350 U.S. 873 (1955); United States v. Quattrucci, 329 F. Supp. 612 (D. Me. 1971). As to mitigation of this obligation by circumstances other than draft board failure or fault *see* Donato v. United States, 302 F.2d 468 (9th Cir. 1968); Moon v. United States, 220 F.2d 730 (5th Cir. 1955).

[202] 395 U.S. 185, 197, 199 (1969), note 182 *supra*.

[203] *See* note 2 *supra* & text accompanying, citing the *McKart* case.

[204] 395 U.S. at 200.

[205] McKart v. United States, 395 U.S. 185, 195 (1969); United States v. Wainscott, 496 F.2d 356 (6th Cir. 1974); United States v. Polites, 448 F.2d 1321 (3d Cir. 1971); United States v. Prescott, 301 F. Supp. 1116 (D.N.H. 1969).

[206] 37 FED. REG. 5123 (1972) *as amended*, 32 C.F.R. § 1626.4 (1973). The earlier regulation is at 13 FED. REG. 4874 (1948) *as amended*, 32 C.F.R. §§ 1626.21-1626.26 (1972).

[207] United States v. Weaver, 474 F.2d 936 (7th Cir. 1973); United States v. Rabe, 466 F.2d 783, 786-87 (7th Cir. 1972), Mintz v. Howlett, 207 F.2d 758, 762 (2d Cir. 1953); United States v. Godfrey, 346 F. Supp. 671 (D. Minn. 1972).

[208] McKart v. United States, 395 U.S. at 198 n.15. *See also* United States v. Kincaid, 476 F.2d 657, 658 n.1 (9th Cir. 1973); United States v. Lopez, 448 F.2d 758 (9th Cir. 1971).

In United States v. Shapiro, 396 F. Supp. 1058 (S.D.N.Y. 1975), the registrant's full

Factors Leading to Case-by-Case Flexibility of the Exhaustion Doctrine

A variety of factors, including those which have just been summarized in relation to Selective Service administration, frequently have the effect in many subject-matter areas of rendering the exhaustion requirement a relatively flexible one, leading to discretionary court determination case-by-case of whether challengers to agency action are barred because the requirement has not been met. Some of these factors are embraced in the frequent statement that the doctrine requires exhaustion of only "adequate" or "effective" administrative remedies.[209] This qualification relates to such differing aspects of the remedies as the extent of the authority of the tribunal, its prior commitment (if any) with regard to controverted issues, its methods of operation, and the effect on the challenger's interest of resorting to the administrative remedy which is or was available.

If the issue raised by the challenger of agency action, such as the validity of an established law, regulation, or policy which has led to the action complained of, would be beyond the purview of the available agency proceedings, those proceedings would be futile as to the issue and in most instances need not have been undertaken in order to satisfy the exhaustion rule.[210] Similarly, under varying circumstances, an ad-

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presentation of his contention to the local board, coupled with a less-than-adequate communication to him of the appeal procedures available, was held sufficient to dispense with exhaustion of these procedures as a prerequisite to judicial review.

[209] "It is axiomatic that plaintiffs are not required to exhaust an administrative remedy which is inadequate." Holmes v. Danner, 191 F. Supp. 394, 401 (M.D. Ga. 1961). *See also* R.A. Holman & Co. v. SEC, 299 F.2d 127, 130-31 (D.C. Cir. 1962) (partial administrative remedy would be inadequate and need not be exhausted); Blackwell College of Business v. Attorney General, 454 F.2d 928, 935 (D.C. Cir. 1972) (remedy by administrative review was too informal to be prerequisite to resort to court); A Quaker Action Group v. Morton, 460 F.2d 854, 862 (D.C. Cir. 1971) (informal agency proceeding held inferior to judicial trial in relation to constitutional issue).

[210] United States v. Fargnoli, 458 F.2d 1237 (1st Cir. 1972) (agency was bound, adversely to challenger, by prevailing interpretation of statute, which was later changed by Supreme Court); Hayes v. Boslow, 336 F.2d 31 (4th Cir. 1964) (state agency bound by adverse state court decisions to decide adversely to challenger); Mohr v. Jordan, 370 F. Supp. 1149 (D. Md. 1974) (same); Hammond v. Lenfest, 398 F.2d 705, 713 (2d Cir. 1968) (the "remedy" in question, defense of a possible court martial proceeding, probably would not reach the question of petitioner's claimed conscientious objection); Morin v. Grade, 301 F. Supp. 614 (W.D. Wis. 1969) (same); Russi v. Weinberger, 373 F. Supp. 1349, 1355 (E.D. Va. 1974) (administrative appeal would not have reached the issue of the validity of procedural regulations); United States v. Branigan, 299 F. Supp. 225, 235-36 (S.D.N.Y. 1969); Holmes v. Danner, 191 F. Supp. 394 (M.D. Ga. 1961). *Cf.* Mr. Justice White, concurring, in McKart v. United States, 395 U.S. 185, 206-07 (1969). *See also* Rosado v. Wyman, 397 U.S. 397, 405-07 (1970) (alleged administrative remedy nonexistent); Barrera v. Wheeler, 491 F.2d 795 (8th Cir. 1971) (same); U.S. Alkali Export Ass'n v. United States, 325 U.S. 196 (1945) (agency proceeding would have been advisory only); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 34 (1934). *Note,* however,

ministrative remedy need not be exhausted if the agency, although legally empowered to consider the challenger's contention, has become rigidly precommitted against it.[211] Notable examples have arisen in civil rights racial desegregation cases.[212] Whether the agency's precommitment is actually beyond change often is difficult to determine, however, and the usual purpose of available proceedings, to provide case-by-case determination of the issue being urged, is not easily cast aside merely because success from the standpoint of the challenger appears unlikely.[213] Even short of futility of an administrative remedy, an absence of need for it because other parties to the same agency proceeding have invoked it,[214] or impairment of the remedy by procedural shortcomings on the part of the agency,[215] may excuse resort to it in the particular instance.

Another factor which introduces discretionary considerations into decisions about exhaustion relates to the fairness to a challenging party of applying the exhaustion requirement when there are exculpatory

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that as to the issue of constitutionality of a statute the court may decide to postpone consideration because, if administrative remedies are exhausted, the case may be decided on another ground. *See* notes 99-105 *supra* & text accompanying. Also, the omitted remedy may by statute have been made a prerequisite to judicial review. *See* notes 17-20, 57-98 *supra* & text accompanying.

[211] Houghton v. Scranton, 392 U.S. 639 (1968) (Civil Rights Act case); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973) (agency attitude clear from action in related matter); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (agency attitude clear from previous action in same matter); United States v. Bautista, 497 F.2d 1196 (9th Cir. 1974) (same); Beaty v. Kenan, 420 F.2d 55 (9th Cir. 1970) (same); Koepke v. Fontecchio, 177 F.2d 125 (9th Cir. 1949) (agency would not have changed previously-announced policy); United Black Fund, Inc. v. Hampton, 352 F. Supp. 898 (D.D.C. 1972) (previous agency actions established its policy adversely to challenger); United States v. Marietta Mfg. Co., 268 F. Supp. 176 (S.D.W. Va. 1967) (same as to issue of liability); State *ex rel.* Killeen Realty Co. v. City of East Cleveland, 169 Ohio St. 375, 160 N.E.2d 1 (1959) (same as to zoning of land); Herman v. Village of Hillside, 15 Ill. 2d 396, 408, 155 N.E.2d 47, 53 (1959). The court might easily have held to similar effect, instead of to the opposite effect in Marrone v. United States, 500 F.2d 418 (2d Cir. 1974).

[212] United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 864 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (5th Cir. 1967), *cert. denied,* 389 U.S. 840 (1967); Marsh v. County School Bd., 305 F.2d 94, 99-100 (4th Cir. 1962); Gibson v. Board of Pub. Instruction, 246 F.2d 913 (5th Cir. 1957); Holmes v. Danner, 191 F. Supp. 394, 401 (M.D. Ga. 1961); Bush v. Orleans Parish School Bd., 138 F. Supp. 337 (E.D. La. 1956).

[213] Ensey v. Richardson, 469 F.2d 664 (9th Cir. 1972); Ogden v. Department of Transp., 430 F.2d 660 (6th Cir. 1970); Bank of Lyons v. County of Cook, 13 Ill. 2d 493, 150 N.E.2d 97 (1958); United Ins. Co. v. Maloney, 127 Cal. App. 2d 155, 163, 273 P.2d 579, 583-84 (1954), *cert. denied,* 348 U.S. 937 (1955) (extensive discussion, emphasizing need for exhaustion, in a situation involving in reality a ripeness issue).

[214] Wilson & Co. v. United States, 335 F.2d 788, 794 (7th Cir. 1964); Hennesey v. SEC, 285 F.2d 511 (3d Cir. 1961); City of Pittsburgh v. FPC, 237 F.2d 741, 749 (D.C. Cir. 1961).

[215] Deep South Broadcasting Co. v. FCC, 347 F.2d 459 (D.C. Cir. 1964) (party not required to raise particular objection at agency level when need and effectiveness of doing so were obscured by agency's handling of issue); Vistamar, Inc. v. Vazquez, 337 F. Supp. 375 (D.P.R. 1971); United States v. Harvey, 131 F. Supp. 493 (N.D. Tex. 1954); *cf.* United States v. Heaton, 195 F. Supp. 742, 746-47 (D. Neb. 1961).

reasons why an available remedy has not been invoked, especially ignorance or stress to which the agency may have contributed.[216] The public importance of prompt final decisions of certain issues, which at times weighs in favor of relaxing the exhaustion rule, may also be taken into account.[217] So may any especially serious effects on a challenging party of applying the rule, whether because an administrative remedy is no longer available and the case would be closed, perhaps with resulting civil or criminal liability,[218] or because excessive hardship would result from delaying a final decision until additional agency proceedings, not accompanied by a stay, had taken place.[219] Excessiveness is necessarily a matter of judgment which requires weighing the hardship involved against a public interest to be served, as may be the case when a license is withdrawn during an appeal from its suspension or revocation.[220] The issue may be couched in terms of whether injury is "irreparable" in the sense of the traditional justification for injunctive relief.[221]

That aspect of the exhaustion doctrine which requires a participant to offer in agency proceedings all the evidence and contentions he may

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216 Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970); Hagarty v. United States, 449 F.2d 352, 355 (Ct. Cl. 1971); Piccone v. United States, 407 F.2d 866, 869-70 (Ct. Cl. 1969); Universal Sportswear, Inc. v. United States, 180 F. Supp. 391 (Ct. Cl. 1959); Elliott v. Weinberger, 371 F. Supp. 960 (D. Hawaii 1974); Nickles v. Richardson, 326 F. Supp. 777 (D.S.C. 1971); Lewes Dairy, Inc. v. Hardin, 29 Agr. Dec. 121 (D. Del. 1970). Exculpation seems to have been carried too far, in the absence of facts showing excusable misunderstanding, in Spalsbury v. Richardson, 347 F. Supp. 785 (W.D. Mich. 1972).

217 Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1073-76 (5th Cir. 1969); A Quaker Action Group v. Morton, 460 F.2d 854, 862 (D.C. Cir. 1971). Relaxation of the exhaustion rule for this reason is related to the rule concerning mandamus, that the writ may be sought without prior demand upon the respondent if the purpose is to vindicate a public right. *See, e.g.,* People *ex rel.* Meyer v. Kerner, 35 Ill. 2d 33, 219 N.E.2d 617 (1966); Dresser v. Inspector of Buildings, 348 Mass. 729, 205 N.E.2d 724 (1965).

218 In McKart v. United States, 395 U.S. 185 (1969), the fact that criminal conviction and punishment would result from application of the exhaustion rule is stressed. *See also* Smith v. United States, 199 F.2d 377, 381 (1st Cir. 1952) (civil liability for rent overcharges violating applicable order not previously challenged). *Compare* United States v. Ulvedal, 372 F.2d 31 (8th Cir. 1967), applying the exhaustion rule to a government contractor sued for liquidated damages, with consequent liability, distinguishing Smith v. United States by the "equitable nature" of the liability there involved.

219 Sims v. Fox, 492 F.2d 1088 (5th Cir. 1974); Whitfield v. Hanges, 222 Fed. 745 (8th Cir. 1915); Lyons v. Weinberger, 376 F. Supp. 248, 257 (S.D.N.Y. 1974); Pacific Inland Tariff Bureau v. United States, 129 F. Supp. 472, 478 (D. Ore. 1955), *aff'd on rehearing,* 134 F. Supp. 210 (1955) (injury to business pending further agency action).

220 Stay of the suspension of a personal driver's license after a hearing was, for example, not considered requisite to the adequacy of an administrative appeal in Ulliam v. Registrar of Motor Vehicles, 325 Mass. 197, 89 N.E.2d 780 (1950).

221 *See* the different views as to irreparability of injury inflicted by an employee's dismissal with right of review, expressed in the majority opinion and dissenting opinions in Sampson v. Murray, 415 U.S. 61 (1974), where the question arose with relation to the justification for a judicial stay of agency action pending agency review proceedings. *See also* Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923); Emma v. Armstrong, 473 F.2d 656 (1st Cir. 1970); Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1955).

know of or be chargeable with knowing, as a prerequisite to offering them later on judicial review,[222] may conflict in a de novo judicial review proceeding[223] with the court's normal openness to evidence or with its obligation to re-examine the merits of the issues decided. The court's duty to proceed de novo may rest on a statute or be implied by the nature of the action in which review is had, sometimes combined with specific judicial responsibility for an especially sensitive interest at stake.[224] The duty of the court is nevertheless tempered by the fact that the case is not fresh and that a specialized agency's action is under review. The matter calls for the exercise of a refined judicial judgment which effectuates the court's responsibility but does not disregard the agency's role and contributions.[225] Such a case is really a special instance of the exercise of judicial discretion in applying the exhaustion doctrine, which has come to prevail in numerous situations.[226]

PART III: STANDING TO SECURE JUDICIAL REVIEW

Criteria and Sources of Standing

Standing to challenge agency action in court is the eligibility of persons, by reason of interests they possess, to contest the validity of

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222 *See* notes 2, 13-15, 38-39 *supra* & text accompanying.

223 There are various meanings of the term "de novo". Here it signifies a proceeding in which the reviewing court is able to receive evidence for itself and is empowered to reach conclusions of fact without giving more than prima facie weight to agency findings, as well as reach conclusions of law that accord only a merited deference to specialized agency interpretations.

224 *See* United States v. First National City Bank, 386 U.S. 361, 368 (1967). The decision did not involve application of the exhaustion doctrine, but the opinion stressed the duty of the courts to "inquire de novo" in antitrust trials in which bank mergers approved by federal bank regulatory agencies are challenged and statutory "review" of the prior approvals is had. It seems highly unlikely that in such a case the defendants would be restricted to evidence and contentions that had been offered before the regulatory agency.

225 *See* Brown v. United States, 396 F.2d 989 (Ct. Cl. 1968); Sierra Club v. Hardin, 325 F. Supp. 999, 1114 (D. Alaska 1971); Nolen v. Schlesinger, 492 F.2d 787 (5th Cir. 1974). The Supreme Court has emphasized that, absent special factors which enlarge judicial responsibility, the district courts should avoid an ample interpretation of de novo review which would result in ready reception of evidence and free re-evaluation of the merits of agency conclusions. Camp v. Pitts, 411 U.S. 138 (1973). The same considerations militate in favor of enforcement of the exhaustion requirement in the face of judicial opportunity to override it. As to district court review of Patent Office determinations in proceedings to secure patent rights, *see* California Research Corp. v. Ladd, 356 F.2d 813, 820-21 (D.C. Cir. 1966); Globe Union, Inc. v. Chicago Tele. Supply Co., 103 F.2d 722 (7th Cir. 1939) (*held*, new material can be received in court, but should not be if the party offering it was blameworthy in failing to do so before the Patent Office). As to the same problem in judicial review by mandamus when an administrative record is available, *see* Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 136 P.2d 304 (1943).

226 *Cf.* the opinion of the court in A Quaker Action Group v. Morton, 460 F.2d 854, 860-62 (D.C. Cir. 1971).

an action on grounds which they are entitled to present. Such a challenge may be in a suit brought for that purpose, in defense of a proceeding to effectuate the action, or collaterally in other litigation. In determining standing the focus is on the interest presented, but it must be considered in relation to the injury allegedly suffered which must be both actual and legally cognizable.

Standing in the federal courts is conditioned by the constitutional provision which defines the judicial power in terms of cases in law and in equity and certain other cases and controversies.[1] This definition is understood to require that there be genuinely adversary parties to the issues in litigation. Many state constitutional provisions for judicial jurisdiction embody the same conception, conferring jurisdiction "in law and equity" or over "cases" variously designated.[2] Hence standing to challenge agency action in court proceedings requires as one element an adequate allegation that the interest of the person lodging the challenge is involved and is adversely affected by the action, with the consequent likelihood that a sufficient presentation in support of the challenge will be made in court. In addition, the interest must be one which the court is legally empowered to consider in relation to the issues raised; to confer standing it must, in the prevailing view, have been recognized constitutionally, under the common law, or by statute.[3] The effect of the agency action upon the interest asserted must also not

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[1] U.S. CONST., Art. III, § 2.

[2] *See* COLUMBIA UNIV. LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS (1959 and Supplements), 239, 241-43, for a compilation of the pertinent provisions.

[3] Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) (lack of standing to challenge a general regulation merely because it curtails eligibility to contract with the government); Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938) ("legal right" is required for standing); International Placement Serv. v. Shultz, 461 F.2d 222 (3d Cir. 1972); Rasmussen v. Hardin, 461 F.2d 595 (9th Cir. 1972) (consumer economic interest, impliedly placed by statute beyond protection through review of agency action adverse to it); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) and Gravel v. Laird, 347 F. Supp. 7 (D.D.C. 1972) (lack of standing of citizens and taxpayers to challenge constitutionality of undeclared war) *but see* Atlee v. Laird, 339 F. Supp. 1347 (E.D. Pa. 1972); Fugazy Travel Bureau v. CAB, 350 F.2d 733 (D.C. Cir. 1965) (absence, under statute, of cognizable interest in freedom from business handicap imposed on travel agent by Board approval of arrangement among air carriers); Berry v. Housing & Home Fin. Agency, 340 F.2d 939 (2d Cir. 1965); Duba v. Schuetzle, 303 F.2d 570 (8th Cir. 1962); American Lecithin Co. v. McNutt, 155 F.2d 784 (2d Cir. 1946), *cert. denied*, 329 U.S. 763 (1946) (absence, under statute, of cognizable interest permitting the maker of a product to challenge a regulation which failed to secure mention of the product on labels of food processors who used it). *Compare* Dayao v. Staley, 303 F. Supp. 16 (S.D. Tex. 1969), *aff'd on other grounds*, 424 F.2d 1131 (5th Cir. 1970), *with In re* Robert J. Amoury, 307 F. Supp. 213 (S.D.N.Y. 1969) and Enciso-Cardozo v. INS, 504 F.2d 1252 (2d Cir. 1974). The analysis in Board of Regents v. Roth, 408 U.S. 564 (1972), whereby

be too slight or remote;[4] and if the interest consists of qualifying for a benefit or of a legal privilege such as running for office, travelling, entering a business or employment, or engaging in a pleasurable pursuit, its possessor must have taken significant steps toward enjoying or exercising it, often including application for a permit or other agency action required by statute, before standing to challenge withholding or limitation of the privilege can arise.[5]

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an independently derived right of liberty or property is prerequisite to fourteenth amendment procedural protection, implies that a serious allegation of such a right is prerequisite to standing to claim such protection.

[4] Edward Hines Trustees v. United States, 263 U.S. 143 (1923); Hotzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (as to standing of military service personnel to challenge presidential combat mission); Finley v. Hampton, 473 F.2d 180 (D.C. Cir. 1972); Martin-Trigona v. FCC, 432 F.2d 682 (D.C. Cir. 1970) (member of television viewing public lacks standing under statute to challenge license renewal of stations, if he is beyond their range, because of assertedly poor programming which affects programs he views on other stations); Talmanson v. United States, 386 F.2d 811 (1st Cir. 1967); Association for Fair Competitive Practices in Air Conditioning v. Public Serv. Comm'n., 372 F.2d 934 (D.C. Cir. 1967); Wirtz v. Baldor Elec. Co., 337 F.2d 518, 531-33 (D.C. Cir. 1964); United States Cane Sugar Refiners Ass'n v. McNutt, 138 F.2d 116 (2d Cir. 1943), *compare with* Land O'Lakes Creameries v. McNutt, 132 F.2d 116 (8th Cir. 1943); Lampkin v. Connor, 239 F. Supp. 757 (D.D.C. 1965) National Broadcasting Co. v. FCC, 132 F.2d 545, 548 (D.C. Cir. 1942), *aff'd*, FCC v. National Broadcasting Co. (KOA), 319 U.S. 239 (1943); Atchison, Topeka & S.F.R. Co. v. United States, 130 F. Supp. 76 (E.D. Mo. 1955), *aff'd per curiam*, 350 U.S. 892 (1955) (carriers lack standing as "parties in interest" to challenge agency approval of merger of other carriers who compete with them); Interstate Elec., Inc. v. FPC, 164 F.2d 485 (9th Cir. 1947) (same issue as to electrical utilities under "party aggrieved" provision); W.H. Smith Lbr. Co. v. Alabama Pub. Serv. Comm'n, 3 Div. 438, 439, 24 So. 2d 409 (Ala. 1946) (absence of standing of customer of power company to challenge rate reduction to others); Keystone Raceway Corp. v. State Harness Racing Comm'n, 405 Pa. 1, 173 A.2d 97 (1961) (absence of standing of license applicant to challenge grant of license to another which merely reduces chances of similar grant to it). *Cf.* Iacope v. FCC, 451 F.2d 1142 (9th Cir. 1971) (strong doubt as to standing of minority shareholder to challenge an order which merely changes the identity of the majority shareholders of the corporation). *Compare* California v. FPC, 353 F.2d 16, 19 (9th Cir. 1965) (standing based on slight market consequences of price allowed to gas producer). It is difficult to distinguish quantitative slightness of injury from remoteness in a sense which leads to an inference of want of relevance to the purpose of the governing statute (*e.g.*, injury to the producer of a product because a competing product is not excluded from a market) or to the conclusion that there is an insufficient showing of causal connection between the action complained of and the injury on which the claim of standing is based. *See* Evans v. Lynn, 376 F. Supp. 327 (S.D.N.Y. 1974); First Nat'l Bank v. Watson, 363 F. Supp. 466 (D.D.C. 1973). Either deficiency or both may be present in the foregoing examples. *See also* text accompanying notes 292-99 *infra*.

[5] Warth v. Seldin, 422 U.S. 490, 509-10 (1975); California Bankers Ass'n v. Shultz, 416 U.S. 21, 67-68, 73, 76 (1974); Steffel v. Thompson, 415 U.S. 452, 458-60 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (as to challenge to regulation requiring denial of membership in organization); New York v. Illinois, 274 U.S. 488 (1927); McCabe v. Atchison, Topeka & S.F.R. Co., 235 U.S. 151, 162-64 (1914); League of United Latin American Citizens v. Hampton, 501 F.2d 843 (D.C. Cir. 1974) (challengers of allegedly discriminatory federal hiring practices held to lack standing in the absence of a claim that any of them had sought employment); Danville Tobacco Ass'n v. Freeman, 351 F.2d 832

According to a variant view,[6] the issue of standing should be limited to the constitutional, clearly jurisdictional, case or controversy aspect, leaving the question of legal recognition of the relevant interest to be gauged as an aspect of the court's authority to afford relief. This view is, of course, supportable; yet the presence of a case or controversy and legal cognizance of the interest presented in a particular context may both turn in part on the substance of the interest in question, its relevance to the issues sought to be raised, and the adequacy of the connection between the challenged action and the injury alleged. Both

(D.C. Cir. 1965); Democratic State Cent. Comm. v. Andolsek, 249 F. Supp. 1009 (D. Md. 1966); Washington State Apple Advertising Comm'n v. Federal Security Adm'r, 156 F.2d 589 (9th Cir. 1946) (apple growers challenging an order limiting the amount of pesticide residue on fruit lack standing when they do not allege that they produce apples having the residue); Player v. Alabama Dep't of Pensions & Security, 400 F. Supp. 249 (M.D. Ala. 1975); Jackson v. Sargent, 394 F. Supp. 162 (D. Mass. 1975); Hockett v. Administrator of Veterans Affairs, 385 F. Supp. 1106 (N.D. Ohio 1974); George Benz & Sons v. Hardin, 342 F. Supp. 88 (D. Minn. 1970) (milk handler lacks standing to challenge an order applicable to a market in which he does not yet participate). *But see* Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974), *appeal dismissed*, 419 U.S. 891 (1974) (physicians have standing to challenge rule limiting future performance of abortions); Singleton v. Wulff, 96 S. Ct. 2868, 2871 (1976), and Planned Parenthood of Missouri v. Danforth, 96 S. Ct. 2831 (1976) (same as to statutory provisions); Marine Space Enclosure, Inc. v. FMC, 420 F.2d 577, 590-92 (D.C. Cir. 1969) (bona fide corporate enterprise with plans but no other arrangements for constructing a marine terminal has standing to challenge the validity of an order approving an agreement for a municipal terminal that would foreclose its access to future business, where antitrust grounds are alleged); Harney, Inc. v. Contractors' State Licensing Bd., 39 Cal.2d 561, 247 P.2d 913 (1952). In International Longshoremen's & Warehousemen's Union v. Boyd, 347 U.S. 222 (1954), the decision as to standing to challenge a threatened interpretation of a statute which would deny benefits to the plaintiffs seems wrong for reasons stated in the dissenting opinion. As to steps required before standing arises to bring an action challenging the validity of a statute on its face because of its prohibition or curtailment of voluntary conduct or conditioning such conduct on official permission, *see* Bailey v. Patterson, 369 U.S. 31 (1962), and same case on appeal after remand, 323 F.2d 201 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964); Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 85-86 (1960); Evers v. Dwyer, 358 U.S. 202 (1958); Chicago v. Atchison, Topeka & S.F.R. Co., 357 U.S. 77, 89, 92 (dissenting opinion) (1958); Adler v. Board of Educ., 342 U.S. 485, 503-05 (1952) (Frankfurter, J., dissenting); United Pub. Workers v. Mitchell, 330 U.S. 75, 86-94 (1947); Smith v. Cahoon, 283 U.S. 553 (1931); Lion Mfg. Co. v. Kennedy, 330 F.2d 833, 839-40 (D.C. Cir. 1964); Law Students Civil Rights Research Council v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969), *aff'd*, 401 U.S. 154 (1971) (review of bar admission rules because of alleged inhibitory effects on first amendment freedoms of law students). *See also* O'Shea v. Littleton, 414 U.S. 488 (1974), in which official harassment, but not a statute, was challenged and the plaintiffs, in the eyes of a majority of the Court, failed to allege that they planned to engage in conduct which would precipitate the illegal law enforcement activities they complained of. *See also* Laird v. Tatum, 408 U.S. 1 (1972); Donohoe v. Duling, 465 F.2d 196 (4th Cir. 1972). *Cf.* Socialist Workers Party v. Attorney General, 419 U.S. 1314 (1974) (Marshall, J., in chambers).

[6] *See* Brennan and White, JJ., concurring and dissenting, 397 U.S. at 167, in Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970). *See also* text accompanying notes 183-89 *infra*.

questions relate to whether the court should consider the issue of the validity of the agency's action. The second threshold question can be held in reserve under either view until the first has been answered; but little would seemingly be gained by their doctrinal separation and a merger of part of the presently initial issue of standing into the controversy on the merits. It is true that then the statutory issue could be decided on the basis of a fuller record; but a trial would be required unless the complaint were subject to dismissal anyway, for failure to state a cause of action upon which relief could be granted, or unless summary judgment could be had.

Interests recognized at common law,[7] by constitutional provision,[8] or by a combination of the two[9] are legion. Litigable statutory interests,

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[7] *Cf.* Rockville Reminder v. United States Postal Serv., 350 F. Supp. 590 (D. Conn. 1972), *aff'd*, 480 F.2d 4 (2d Cir. 1973) (use of physical property and legal privilege to contract are the apparent basis of standing, not challenged or discussed, to secure review of a restrictive postal regulation); Stadnik v. Shell's City, Inc., 140 So. 2d 871 (Fla. 1962) (right to engage in a business, as constitutionally protected).

[8] First amendment rights, the right to be free of bills of attainder or ex post facto laws, and the like, rest on constitutional provisions which require no reference back to other legal sources. As to the equal protection clause of the fourteenth amendment, *see* Baker v. Carr, 369 U.S. 186 (1962); Hamm v. Virginia Bd. of Elections, 230 F. Supp. 158 (E.D. Va. 1964), *aff'd*, 379 U.S. 19 (1964); Bryant v. State Bd. of Assessment, 293 F. Supp. 1379 (E.D.N.C. 1968).

[9] Many traditional common law rights are self-evidently embraced by the "liberty" or "property" which is protected by the fifth and fourteenth amendments and are therefore assumed to be the basis of standing to challenge agency action which allegedly invades them. *Cf.* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64-65 n.6 (1963) (constitutional protection to the right to publish books covers the common law right to maintain advantageous business relations with distributors of them). When an interest comes less evidently within constitutional protection, its recognition at common law may still be a factor which aids in bringing it within a zone of protection and of standing under the general jurisdiction without reference to any statute except, in some instances, a statute that refers to pre-existing "legal rights." Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 157-60 (1951) (Frankfurter, J., concurring) (right not to have reputation impaired by official pronouncement made without prior hearing, in alleged violation of due process); *cf.* Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952) (standing assumed, because reputation is damaged by exclusion from government employment on account of refusal to subscribe to an allegedly unconstitutional disclaimer oath). In Harmon v. Brucker, 355 U.S. 579 (1958), a right with common-law overtones, not to have one's reputation impaired without justification, underlay the Court's recognition of the standing of a former member of the Army to challenge his less-than-honorable discharge on harmful as well as allegedly irrelevant grounds. The same interest underlay the assumed standing to challenge invidious exclusions from employment by allegedly unauthorized procedures in Peters v. Hobby, 349 U.S. 331 (1955), Greene v. McElroy, 360 U.S. 474 (1959), and Cafeteria Workers Union v. McElroy, 367 U.S. 886 (1961), and in Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965). Recognition of emerging interests, such as the right to marital privacy, as against governmental impairment, may draw support from common-law analogies. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting). It may also stem from more recent policies which also enlarge the scope of constitutional provisions or other enactments. Griswold v. Connecticut, 381 U.S. 479 (1965). *Cf.* Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) (contractor has standing to challenge debarment from government business because of misconduct). Protection of a contract right to a given level of transportation fares was the basis of statutory standing in United States v. Hubbard, 266 U.S.

sometimes confirming or altering common law rights, are at least as abundant under modern legislation and take many forms.[10] Statutory

474 (1925), explained in Alexander Sprunt & Son v. United States, 281 U.S. 249, 257 n.5 (1930).

[10] As to standing based on interests created or endowed with essential recognition by statute, *see, e.g.*, Alleghany Corp. v. Breswick & Co., 353 U.S. 151 (1957) (standing based on minority stockholder's interest in preventing dilution in value, made possible by agency order); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) (state's statutory right to federal funds, if conditions are fulfilled, confers standing to challenge validity of a particular condition); Stark v. Wickard, 321 U.S. 288 (1944). *See also* Zuber v. Allen, 396 U.S. 168 (1969) (standing of milk producers to challenge actions affecting a statutory fund maintained for their benefit); Chicago Junction Case, 264 U.S. 258, 267 (1924); Skinner & Eddy Corp. v. United States, 249 U.S. 557 (1919), *explained in* Alexander Sprunt & Son v. United States, 281 U.S. 249, 257 n.5 (1930); Constructores Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972) (interest of foreign firm as participant in the economy of its country, sought to be aided by Congress); Citizens Ass'n of Georgetown v. Simonson, 403 F.2d 175 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 975 (1969) (statutory recognition of interest of neighboring property owners concerning proposed renewal of tavern license); Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968) (economic interest of persons in area affected by highway location); Green v. United States, 349 F.2d 203 (D.C. Cir. 1965) (interest of public hospital patient in continued treatment there); Atchison, Topeka & S.F.R. Co. v. Summerfield, 229 F.2d 777 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 926 (1956) (interest of railroads in continued opportunity to use property they were required by statute to acquire); Farmer v. United Elec., Radio & Mach. Workers of America, 211 F.2d 36 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 943 (1954) (interest of unions in eligibility for collective bargaining representation under National Labor Relations Act); West Coast Constr. Co. v. Oceano Sanitary Dist., 311 F. Supp. 378 (N.D. Cal. 1970); Standard Fruit & Steamship Co. v. Midwest Stock Exch., 178 F. Supp. 669, 675 (N.D. Ill. 1959) (interest of corporation in kind of market in which its securities are traded); Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal. 2d 321, 109 P.2d 935 (1941) (interest of experience-rated employer in unemployment compensation fund as basis of standing to secure review of an award from the fund); State *ex rel.* West Flager Amusement Co. v. Rose, 165 So. 60 (Fla. 1935) (right of dog track licensee to equal treatment); Collins v. Industrial Comm'n, 12 Ill. 2d 200, 145 N.E.2d 622 (1957) (interest of counsel in fee from workmen's compensation claimant, as basis of standing to review amount allowed in award); Bay State Horse Racing & Breeding Ass'n v. State Racing Comm'n, 342 Mass. 694, 175 N.E.2d 244 (1961) (statutory right of one of two license applicants to joint consideration of its application with that of the other applicant, where the two were in part mutually exclusive); Senior Citizens League v. Department of Social Security, 38 Wash. 142, 228 P.2d 478 (1951) (interest in statutory public assistance). The effect of Perkins v. Lukens Steel Co., note 3 *supra*, was overcome by express statutory bestowal of standing on manufacturers or dealers adversely affected or aggrieved by action conditioning their opportunities to contract with the government. 41 U.S.C. § 43a (1970); George v. Mitchell, 282 F.2d 486 (D.C. Cir. 1960). As to the relation of common law to statutory rights of shippers by common carrier *see* McLean Lumber Co. v. United States, 237 Fed. 460, 464-67 (E.D. Tenn. 1916). The standing of shippers to challenge orders on the ground that they prescribe rates which are allegedly too high and hence violative of statutory standards is well established. Utah Citizens Rate Ass'n v. United States, 192 F. Supp. 12, 15 (D. Utah 1961), *aff'd per curiam*, 365 U.S. 649 (1961). As to the standing of users of the postal service to challenge allegedly arbitrary, discriminatory rates, *see* Doehla Greeting Cards, Inc. v. Summerfield, 116 F. Supp. 68 (D.D.C. 1953); as to the interest of public office-holders in retaining their positions *see* Board of Educ. v. Allen, 392 U.S. 236, 241 (1968); McKee v. Board of Elections, 173 Tenn. 276, 287-88, 116 S.W.2d 1033, 1037 (1938). Treaty obligations benefiting challengers of alleged violations may be a basis of the challengers' standing. People of Saipan v. United States Dep't of the Interior, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

franchises or other grants bestowing rights to protection of the market position of those on whom they are conferred become the basis of standing to challenge agency action that allegedly impairs the resulting interests.[11] Protection may be accorded in consideration of the grantee's investment, often accompanied by his assumption of an obligation to serve all members of the public on request;[12] but the statutory requirement that those seeking permission to enter a business make a showing that their admission will serve the public convenience or necessity need not by itself imply any right to protection of those who are admitted, as against the entry of others,[13] despite the great value that often attaches to the resulting market positions.[14] The ensuing problem of interpretation is sometimes a difficult one.[15]

The effective recognition of interests for purposes of standing is

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[11] Frost v. Corporation Comm'n, 278 U.S. 515 (1929); Chicago Junction Case, 264 U.S. 258 (1924); Public Serv. Co. of Indiana v. Hamil, 416 F.2d 648 (7th Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970); Keating v. State *ex rel.* Ausebel, 173 So. 2d 673 (Fla. 1965); People *ex rel.* N.Y. Edison Co. v. Willcox, 207 N.Y. 86, 100 N.E. 705 (1912); Brazosport Sav. & Loan Ass'n v. American Sav. & Loan Ass'n, 342 S.W.2d 747 (Tex. 1961); Reynolds Taxi Co. v. Hudson, 103 W. Va. 173, 136 S.E. 833 (1927). *Cf.* State Chartered Banks v. Peoples Nat'l Bank, 291 F. Supp. 180, 184 (W.D. Wash. 1966). The extension of procedural protections to persons claiming rights to governmentally-provided opportunities and services results in enlarged standing of business enterprises to secure these protections through court action, even though the advantage which is sought is authorized for the benefit of other persons, not for the sake of the claimant. *See* W.G. Cosby Transfer & Co. v. Froehlke, 480 F.2d 498 (4th Cir. 1973), involving a possible exclusion from doing business in a military installation.

[12] Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 565 and (Story, J., dissenting) 639 (1837); New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885); People's Transit Co. v. Henshaw, 20 F.2d 87 (8th Cir. 1927).

[13] Tennessee Power Co. v. TVA, 306 U.S. 118, 137-41 (1939).

[14] The values based on liquor licenses in the states and radio and television broadcasting licenses under the Federal Communications Act, by reason simply of expectations of renewal and of limitations on competition which are founded on statutory provisions and consequent agency policies, are well known. *Cf.* Keating v. State *ex rel.* Ausebel, 173 So. 2d 673 (Fla. 1963), basing procedural rights of liquor licensees and their lessors partly on the values created by restrictive licensing policies. The Communications Act contains an explicit provision that "no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301 (1970).

[15] Brandeis, Stone, and Holmes, JJ., dissenting in *Frost*, 278 U.S. at 528 (1929), thought that no protective "franchise" was involved there. The proposition (State v. Woodmanse, 1 N.D. 246, 46 N.W. 970 (1890)), or a stipulation (Wisconsin Bankers Ass'n v. Robertson, 190 F. Supp. 90 (D.D.C. 1960)), *aff'd as to the substantive issue*, 294 F.2d 714 (1960), *cert. denied*, 368 U.S. 938 (1961) that only authorized enterprises are privileged to engage in a given line of business hardly suffices to establish the conclusion that these enterprises have rights to the restriction of competition with them, conferring standing to challenge agency action that admits others. Nevertheless, the conclusion has been reached that state banks, chartered under statutes that bestow no specific protections, have standing to challenge in their own interest the authorization of new institutions that would compete with them. Webster Groves Trust Co. v. Saxon, 370 F.2d 381 (8th Cir. 1966); *cf.* Association of Data Processing Serv. Organizations v. Camp, 406 F.2d 837, 840 (8th Cir. 1969), *rev'd as to other issues*, 397 U.S. 150 (1970). *See also* the author's suggested extension of standing to cover these situations, in the text accompanying note 242 *infra*.

by the court in which review proceedings take place, even though the recognition, when explained, is attributed to prior legal sources and often does actually rest upon them. In significant instances the courts, including the Supreme Court, have not identified these prior sources.[16] There is strong reason to believe that in these instances and in some others in which explanation is offered, standing is in reality determined by whether the interests that are presented seem to the courts to possess sufficient importance in current ideology to justify litigation over agency action that affects them. When standing is held to be absent, the requirement which has not been met, that the interest presented be a "legal right," has often been stated;[17] but this term can embrace any interest which, on whatever legal basis, has become entitled to protection. The statement therefore embodies a conclusion as to these instances, rather

[16] Thus in International Ry. Co. v. Davidson, 257 U.S. 506, 515 (1922), the proprietors of an international toll bridge were held entitled to challenge the allegedly unlawful withholding of weekend customs inspection service from patrons of the bridge entering from Canada, the absence of which would discourage much travel, simply because "it is clear that the instructions given [to withhold the service] threaten vital interests of the bridge company to which a court of equity should afford protection." The interest protected was that of a business in continued government service, upon which patronage depended, and is somewhat analogous to the similar interest in avoiding physical obstruction of access by customers over a street, as to which *see* text accompanying note 56 *infra*, or over the navigable waters as in Pennsylvania v. Wheeling Bridge Co., 54 U.S. (13 How.) 518 (1851), and Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1863), where the obstruction is a public nuisance if not authorized. Prohibition of patronage or use of a product, for regulatory reasons, without enforcement against the seller, did not traditionally give rise to standing on the part of the seller to challenge the restriction, Ex-Cell-O Corp. v. City of Chicago, 115 F.2d 627 (7th Cir. 1940); Arrow Lakes Dairy, Inc. v. Gill, 200 F. Supp. 729 (D. Conn. 1961), but this view has been largely superseded, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Independent Broker-Dealers Trade Ass'n v. SEC, 442 F.2d 132, 140 n.10 (D.C. Cir. 1971); Sperry & Hutchinson Co. v. California Bd. of Pharmacy, 50 Cal. Rptr. 489 (Cal. Ct. App. 1966); American Can Co. v. Milk Control Bd., 313 Mass. 156, 46 N.E.2d 542 (1943); Al Walker, Inc. v. Borough of Stanhope, 23 N.J. 657, 132 A.2d 372 (1957). Standing has also been held to arise under varying circumstances, to challenge a variety of governmental regulatory or proprietary acts which have reduced the business opportunities of the challengers (other than acts merely strengthening competitors, as to which *see* text accompanying notes 203-231 *infra*). City of Chicago v. Atchison, Topeka & S.F.R. Co., 357 U.S. 77, 83 (1958); Overseas Media Corp. v. McNamara, 385 F.2d 308 (D.C. Cir. 1967); Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955); Patton v. Administrator of Civil Aeronautics, 217 F.2d 395 (9th Cir. 1954); Los Angeles Customs & Freight Brokers Ass'n v. Johnson, 277 F. Supp. 525 (C.D. Cal. 1967). As to standing based on business uses of federal government lands, as against government action curtailing or reducing the benefit from those uses, *see* Chapman v. Sheridan-Wyoming Co., 338 U.S. 621 (1960); LaRue v. Udall, 324 F.2d 428 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 907 (1964); McNeil v. Seaton, 281 F.2d 931 (D.C. Cir. 1960); Canyon Sheep Co. v. Ickes, 98 F.2d 308 (D.C. Cir. 1938); C. MCFARLAND, ADMINISTRATIVE PROCEDURE AND THE PUBLIC LANDS 185-86 (1969).

[17] Alabama Power Co. v. Ickes, 302 U.S. 464, 479-83 (1938); Alexander Sprunt & Son v. United States, 281 U.S. 249 (1930) (no "legal wrong" to any "independent right" of the person asserting standing); Duba v. Schuetzle, 303 F.2d 570 (8th Cir. 1962), *see* note 3 *supra*. The Supreme Court repudiated this requirement as essential to the existence of a case or controversy in the constitutional sense or of standing under the Federal Administrative Procedure Act, in Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970).

than a reason for the result reached. The real question is whether there must always be a reference back to prior law to support the interest and establish the right, or whether de novo recognition of the interest can suffice. The desirability of furtherance of current economic and social needs as seen by the courts supports the latter alternative; the need to avoid unpredictability or laxity in court decisions and the volume of litigation which these adjudicatory flaws can encourage tends to support the former. It is also true, however, that the courts' discovery, under the first alternative, that interests have previously become legal rights which those who possess them have standing to assert in court as against agency action, is in some instances an unpredictable consequence of ideas about desirable policies rather than a genuine discovery that common law, constitutional, or statutory support exists for the conclusions reached. The tendency to base decisions about standing on policy views which are read into the prior law has been displayed for a long time.[18]

Rather frequent statements are made that a person has standing when unlawful agency action actually has inflicted or significantly threatens to inflict injury to his legally recognized interest. As pointed out by Thornberry, J., concurring separately in *Saxon v. Georgia Association of Independent Insurance Agents*,[19] where the opinion of the court took this view, such statements "imply that standing . . . may depend on the way in which the merits of the case are decided. This simply cannot be right." As the Supreme Court has clearly held, standing exists or not on the basis of adequately pleaded allegations, sometimes buttressed by preliminary proof, as a precondition to a court proceeding on the merits.[20] The provision of the Federal Administrative

[18] *See* the discussion of Supreme Court decisions concerning the standing of shippers to challenge rate orders of the Interstate Commerce Commission, in Goldman, *Standing to Challenge Orders of the I.C.C.*, 9 GEO. WASH. L. REV. 648 (1941), where it appears that certain decisions, otherwise seemingly inconsistent, fall into place under a judicial policy of assisting shippers to achieve or maintain competitive equality with others, but not to gain or retain competitive advantages. In Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577, 590-92 (D.C. Cir. 1969), note 5 *supra*, this policy, evidenced elsewhere in the law, becomes explicit in relation to standing.

[19] 399 F.2d 1010, 1020 (5th Cir. 1968). *See also* the comment of the court in Association of Data Processing Serv. Organizations v. Camp, 406 F.2d 837, 842 (8th Cir. 1969), *rev'd*, 397 U.S. 150 (1970), and *see* Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 323 F.2d 290, 299 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965); Chicago v. Atchison, Topeka & S.F.R. Co., 357 U.S. 77, 83-84 (1958), note 16 *supra;* Baker v. Carr, 369 U.S. 186, 208 (1962): "It would not be necessary to decide whether appellants' allegations . . . will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it;" Warth v. Seldin, 422 U.S. 490, 500 (1975): "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal. . . ."

[20] United States v. SCRAP, 412 U.S. 669 (1973); Baker v. Carr, 369 U.S. 186 (1962).

Procedure Act that "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof"[21] means of necessity, in relation to standing, that a person who sufficiently indicates injury to a legally relevant interest may secure a decision on the merits in a review proceeding, not that an unfavorable outcome somehow deletes the proceeding. Equally, statements in judicial opinions that surely standing must exist to challenge unlawful agency action are shorthand ways of stating that agency action must be challengeable when a question as to its legality is sufficiently raised.[22]

Statutes often specifically confer a right to secure review of agency action on persons possessing designated interests adversely affected by that action, such as persons denied licenses or other statutory benefits,[23] or regulated persons or enterprises with respect to rules or cease-and-desist orders affecting them.[24] The constitutional aspects of the standing requirement are fulfilled in these proceedings because clear interests are adversely affected and genuine controversies involving these interests are presented.[25] More broadly, much modern legislation bestows standing to secure judicial review of agency action by providing in general

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[21] 5 U.S.C. § 702 (1970); *cf.* Utility Users League v. FPC, 394 F.2d 16 (7th Cir. 1968). *Compare* the provision of the Model State Administrative Procedure Act, quoted at note 47 *infra*, that review of a rule may be had "if it is alleged that" it impairs a legal right or privilege.

[22] *Cf.* Baker v. Carr, 369 U.S. 186, 208 (1962). Arkansas-Missouri Power Co. v. City of Kenneth, 78 F.2d 911 (8th Cir. 1935), is, however, an explicit holding that standing to challenge agency action which creates business competition with the challenger depends on the lawfulness of the competition (1962). The statement in Alabama Power Co. v. Ickes, 302 U.S. 464, 484-85 (1938), that the plaintiff power company lacked standing to complain of a federal loan to a municipal competitor because competition by the municipality was "entirely lawful" seems beside the point, for the legality of the loan, not of the competition, was complained of. The remoteness of the injury to the plaintiff from the challenged transactions was probably the factor the Court was alluding to. It could be argued, as also was held in *Arkansas-Missouri Power Co. v. City of Kennett*, that as a matter of degree, an enterprise should have standing to challenge agency action which authorizes or initiates competition with it, but not action which facilitates or assists competition that is authorized to continue in any event. The decision in Tennessee Power Co. v. TVA, 306 U.S. 118 (1939), although it involves a challenge based on constitutional grounds, stands in the way of such a differentiation.

[23] 52 Stat. 1370 (1939) *as amended*, 42 U.S.C. § 405(g) (1970) (parties to Social Security Act claim proceedings); Illinois Packing Co. v. Snyder, 151 F.2d 337 (Em. App. 1945) (claimant of subsidy under Emergency Price Control Act). *Cf.* Allen v. State Bd. of Elections, 393 U.S. 544, 554-55 (1969), discussing the issue of standing for persons denied voting rights under new state election laws, pending federal review of those laws under the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 (1970), *as amended* (Supp. IV. 1974).

[24] 38 Stat. 719, 734 (1914) *as amended*, 15 U.S.C. §§ 21(c), 45(c) (1970) (persons subject to FTC cease and desist orders under the Clayton and Federal Trade Commission acts). *See* Ted Bates & Co. v. FTC, 515 F.2d 367 (D.C. Cir. 1975).

[25] *Cf.* ICC v. Brimson, 154 U.S. 447, 155 U.S. 1 (1894), holding that the assertion by an agency and denial by an individual that he is under a duty to testify or produce documents before the agency presents a controversy which Congress can require a court to decide in an enforcement proceeding. More broadly, so can an assertion of an agency's

terms that persons "aggrieved" or whose interests are adversely affected or "parties in interest" may institute review proceedings.[26] These terms bestow standing or confirm pre-existing standing on the basis of interests that exist in fact, whether or not they constitute "legal rights" in some traditional or larger sense, provided they are significantly affected and other reasons precluding review do not arise.[27] Under such provisions, for example, customers or patrons of regulated enterprises may become entitled to challenge agency action that affects the rates or prices they are required to pay or the service they receive;[28] persons who will be disadvantaged by a general regulation may be able to challenge its validity;[29] persons whose business or other interests will be affected by

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authority to take a particular action or impose a particular requirement or prohibition, opposed in a review proceeding by a person whose interest is affected. *See* FPC v. Pacific Power & Light Co., 307 U.S. 156 (1939).

[26] *See, e.g.*, the Communications Act with relation to specified orders in broadcasting proceedings, 47 U.S.C. § 402(b)(6) (1970) ("person who is aggrieved or whose interests are adversely affected"); Federal Power Act, 16 U.S.C. § 825m(b) (1970), and Natural Gas Act, 15 U.S.C. § 717r(b) (1970) ("party to a proceeding . . . aggrieved by an order in such proceeding"); Aviation Act, 49 U.S.C. § 1486(a) (1970) ("any person disclosing a substantial interest in . . . [an] order"); Securities Act, 15 U.S.C.A. § 77i (1970), and Securities Exchange Act, 15 U.S.C. § 78y (1970) ("any person aggrieved"); Bank Holding Company Act, *as amended*, 12 U.S.C. § 1848 (1970) ("[a]ny party aggrieved"); Food, Drug, and Cosmetic Act, 21 U.S.C. § 371(f) (1970), ("[i]n a case of actual controversy as to the validity of any order" containing specified regulations, "any person who will be adversely affected"). Review proceedings in the Court of Appeals with respect to the orders of several agencies, for which the Review Act provides, may be instituted by "[a]ny party aggrieved." 28 U.S.C. § 2344 (1970); *see* Easton Util. Comm'n v. AEC, 424 F.2d 847 (3d Cir. 1970).

[27] Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Utility Users League v. FPC, 394 F.2d 16 (7th Cir. 1968), *cert. denied*, 393 U.S. 953 (1968) (requisite showing of effect not made); National Broadcasting Co. v. FCC, 132 F.2d 545, 547-49 (D.C. Cir. 1942), *aff'd*, FCC v. National Broadcasting Co., 319 U.S. 237 (1943); Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 86 N.E.2d 920 (1949) (*cf.* Cord Meyer Development Co. v. Bell Bay Drugs, Inc., 20 N.Y.2d 211, 229 N.E.2d 44 (1967)); Nebraska Power Co. v. Omaha Ice & Cold Storage, Inc., 147 Neb. 324, 23 N.W.2d 312 (1946).

[28] Citizens for Allegan County v. FPC, 414 F.2d 1125 (D.C. Cir. 1968); Lynchburg Gas Co. v. FPC, 336 F.2d 942 (D.C. Cir. 1964); Bebcheck v. Public Util. Comm'n, 287 F.2d 337 (D.C. Cir. 1961); Mondakota Gas Co. v. FPC, 232 F.2d 358 (D.C. Cir. 1956); Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953); Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir. 1943), remanded for further proceedings, 320 U.S. 707 (1943); Federation of Homemakers v. Hardin, 328 F. Supp. 181 (D.D.C. 1971); Nader v. Volpe, 320 F. Supp. 266 (D.D.C. 1970), *aff'd*, 475 F.2d 916, 917 (D.C. Cir. 1973); Utah Citizens Rate Ass'n v. United States, 192 F. Supp. 12 (D. Utah 1960), *aff'd*, 365 U.S. 649 (1961); Premier Peat Moss Corp. v. United States, 147 F. Supp. 169 (S.D.N.Y. 1956); Gardiner v. Kennelly, 79 R.I. 367, 89 A.2d 184 (1952). *Cf.* Joseph v. FCC, 404 F.2d 207 (D.C. Cir. 1968).

[29] Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); Columbia Broadcasting Sys. v. United States, 316 U.S. 407 (1942); Lafayette Radio Elec. Corp. v. United States, 345 F.2d 278 (2d Cir. 1965); Air Line Pilots Ass'n v. Quesada, 276 F.2d 892 (2d Cir. 1960); A.E. Staley Mfg. Co. v. Secretary of Agriculture, 120 F.2d 258 (7th Cir. 1941). *Cf.* Southwestern Elec. Power Co. v. FPC, 304 F.2d 29, 41 (5th Cir. 1962) (standing of numerous utility concerns to challenge an order directing them to follow accounting rules that might affect future rate orders adversely to them).

the commencement, continuance, or expansion of others' enterprises, whether carriers, taverns, or something else, may be able to secure review of orders authorizing these others to enter or remain in business or to expand;[80] and persons suffering injury to various other interests from a variety of agency actions may challenge those actions.[81]

Statutes which limit standing to "parties,"[82] usually have reference

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[80] American Trucking Ass'ns v. United States, 364 U.S. 1, 17-18 (1960); Alton R. Co. v. United States, 315 U.S. 15 (1942), and Claiborne-Annapolis Ferry Co. v. United States, 285 U.S. 382 (1932) (carriers have standing as parties "in interest" to challenge orders authorizing competitors to enlarge their operations); Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577, 590-92 (D.C. Cir. 1969), note 5 *supra*; Brooks Gas Corp. v. FPC, 383 F.2d 503 (D.C. Cir. 1967); Mid-America Pipeline v. FPC, 330 F.2d 226 (D.C. Cir. 1964); Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959) (advertiser over broadcasting stations, allegedly discriminated against as such in favor of a competitor affiliated with the stations, may secure review, as a "person who is aggrieved or whose interests are adversely affected," by an order rejecting its protest to the agency, available to a "party in interest," against renewal of the station's licenses); City of Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956) (transporters of oil by barge have standing as parties "aggrieved," to challenge an order enabling a pipeline operator to convert it to the transportation of petroleum products between the same terminal points); Clarksburg Publishing Co. v. FCC, 225 F.2d 511, 514 n.8 (D.C. Cir. 1955) (newspaper publisher has standing with respect to licensing of a television station in the paper's area of circulation); National Coal Ass'n v. FPC, 191 F.2d 462 (D.C. Cir. 1951) (same holding as to an association of members of the coal industry, a union of their employees, and an organization representing railroads, with respect to an order granting a certificate of convenience and necessity for a new natural gas pipeline, because of threatened effects on the demand for coal and for its transportation); North Fed. Savings & Loan Ass'n v. Becker, 24 Ill. 2d 514, 182 N.E.2d 155 (1962); A.B. & C. Motor Transp. Co. v. Dep't of Pub. Util., 327 Mass. 550, 100 N.E.2d 560 (1951). *But see* L. Singer & Sons v. Union Pac. R. Co., 311 U.S. 295 (1940) (shippers by a railroad do not have standing as parties "in interest" under the terms of the statute involved in the *Alton* and *Claiborne-Annapolis* cases, *supra* (*cf.* Frankfurter, J., concurring) to challenge allegedy unauthorized construction by another railroad, beneficial to shippers over its line who compete with the plaintiffs); Hubbard Broadcasting, Inc. v. City of Albuquerque, 82 N.M. 164, 477 P.2d 602 (1970) (broadcaster is not "interested party" under a declaratory judgment statute, entitled as such to challenge an ordinance permitting a competing cablecasting service); and Shaker Communuity, Inc. v. State Racing Comm'n, 346 Mass. 213, 190 N.E.2d 897 (1936) (landowners near a race track lack standing as persons "aggrieved" to challenge licensing of races there). *See also* text accompanying notes 59-71, *infra*, where it appears that in some of the cases just cited the governing statutes do not permit the challenging party to urge the interest which results in standing, but only relevant public interests, on the court.

[81] Lodge 1858, Amer. Fed. of Gov't Employees v. Paine, 436 F.2d 882 (D.C. Cir. 1970) (government employees' interest in their jobs); Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970), *cert. dismissed*, 401 U.S. 950 (1971) (statutory preference in securing government contracts); Peoples v. Department of Agriculture, 427 F.2d 561 (D.C. Cir. 1970); Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969); Vainas v. Board of Appeals, 337 Mass. 591, 150 N.E.2d 721 (1958) (interest of property owner as a basis for challenging a zoning variance for other property in the same zoning area); Holmes v. Miller, 71 S.D. 258, 23 N.W.2d 794 (1946) (interest of lessee of public property, subject to its sale, as a basis for challenging the legality of a particular sale transaction).

[82] Federal Power Act, Natural Gas Act, and Review Act, note 26 *supra*. The Communications Act requires non-parties to commission proceedings to petition for rehearing as a prerequisite to seeking judicial review. 47 U.S.C. § 405 (1970). *See* Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 46 (D.C. Cir. 1974); Joseph v. FCC, 404 F.2d 207 (D.C. Cir. 1968); Southwestern Publishing Co. v. FCC, 243 F.2d 829 (D.C. Cir. 1957).

to parties to the prior agency proceedings,[33] although the word is used at times in the same sense as "person."[34] Under such statutes, prior participation as a party in agency proceedings is commonly a prerequisite to standing to secure judicial review.[35] Even in relation to informal agency proceedings which do not have "parties" in a strict sense, but which result in action that is subject to statutory review at the behest of "parties," standing has been held to depend on participation before the agency when contributions to an agency record underlying the action would have facilitated judicial review.[36] Generally speaking, the connection between eligibility to participate before the agency and standing to secure review of a resulting agency action turns on the interrelation of the purposes for which these capacities are, respectively, considered to exist.[37]

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[33] Public Serv. Comm'n of N.Y. v. FPC, 284 F.2d 200 (D.C. Cir. 1960); Memphis Gas & Water Div. v. FPC, 243 F.2d 628 (D.C. Cir. 1957); Southwestern Publishing Co. v. FCC, 243 F.2d 829 (D.C. Cir. 1957); Wallach v. SEC, 206 F.2d 486 (D.C. Cir. 1953) Wilmington v. Department of Pub. Util., 340 Mass. 493, 165 N.E.2d 99 (1960); Arsenal Bd. of Trade v. Pennsylvania Pub. Util. Comm'n, 166 Pa. Super. 548, 72 A.2d 612 (1950).

[34] As interpreted, § 1(20) of the Interstate Commerce Act, 49 U.S.C. § 1(20) (1970), affords a remedy in court to "parties in interest" against the construction of unauthorized railroad extensions, whether or not prior proceedings before the Commission have taken place. Texas & Pac. R. Co. v. Gulf, Colo. & S.F.R. Co., 270 U.S. 266, 273 (1926); Western Pac. R. Co. v. Southern Pac. Co., 284 U.S. 47 (1931). That provision is said to have been "incorporated by reference" in § 205 of the Motor Carrier Act, 49 U.S.C. § 305(g) (1970), *as amended,* (Supp. IV, 1974), which authorizes "any party in interest" to seek review of an Interstate Commerce Commission authorization of new motor carrier service. Alton R. Co. v. United States, 315 U.S. 15, 19 (1942); American Trucking Ass'ns v. United States, 364 U.S. 1, 18 (1960). In these cases, however, the persons seeking review had actually been participants in prior Commission proceedings. In Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (2d Cir. 1965), the action of the Federal Communications Commission which was challenged was a general regulation issued after informal rulemaking proceedings. Such proceedings have participants rather than "parties." Without referring to possible participation by the petitioner in such proceedings, the court held "status as a [citizens band radio] licensee" rendered the petitioner a "party aggrieved" under the Review Act, note 24 *supra. See also* Christian v. United States, 152 F. Supp. 561, 569 (D. Md. 1957). *Compare* Guam v. FMC, 329 F.2d 251 (D.C. Cir. 1964); Whitney Nat'l Bank v. Bank of New Orleans, 379 U.S. 411, 422 (1965), and Kirsch v. Board of Governors of the Fed. Reserve Sys., 353 F.2d 353 (6th Cir. 1965) (under the Bank Holding Co. Act, note 26 *supra.*

[35] Lake County Contractors Ass'n v. Pollution Control Bd., 54 Ill. 2d 16, 294 N.E.2d 259 (1973); Southwestern Publishing Co. v. FCC, 243 F.2d 829, 833 (D.C. Cir. 1957); Memphis Light, Gas & Water Div. v. FPC, 243 F.2d 628 (D.C. Cir. 1957); *cf.* Kirkby v. Michigan Pub. Serv. Comm'n, 320 Mich. 608, 32 N.W.2d 1 (1948).

[36] Gage v. AEC, 479 F.2d 1214, 1218-20 (D.C. Cir. 1973).

[37] *See* FCC v. National Broadcasting Co. (KOA), 319 U.S. 239, 246-47 (1943); Chicago Junction Case, 264 U.S. 258, 266-67 (1924), *modified by* Pittsburgh & West Va. R. Co. v. United States, 281 U.S. 479, 486 (1930); National Welfare Rights Organization v. Finch, 429 F.2d 725, 732-33, 736-37 (D.C. Cir. 1970); Utility Users League v. FPC, 394 F.2d 16 (7th Cir. 1968), *cert. denied,* 393 U.S. 953 (1968), note 27 *supra;* Interstate Investors, Inc. v. United States, 287 F. Supp. 374, 392 (1968), *aff'd,* 393 U.S. 479 (1969); E. Brooke Matlack, Inc. v. United States, 195 F. Supp. 399 (S.D. Pa. 1961); Jersey City v. United States, 101 F. Supp. 702 (S.D.N.Y. 1950); Seatrain Lines v. United States, 152 F. Supp. 619, 622 (D. Del. 1957), *aff'd,* 355 U.S. 181 (1957); Temescal Water Co. v. Department

The Federal Administrative Procedure Act deals with standing to challenge federal agency action in the Act's general provision that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," is entitled to judicial review of that action.[38] The terms "adversely affected or aggrieved" may have been intended to include only persons coming under a statute which incorporates this or a similar phrase in an express authorization of judicial review;[39] but the provision has been construed to apply also, with relation to statutes having no similar provision, to persons whose interests, even though they fall short of "legal right" in some previously established sense, become sufficient because a statute takes cognizance of them in an identifiable manner.[40] Such a recognition may appear in statutory statements or other indications of purpose,[41] in directives to an agency to take a par-

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of Pub. Works, 44 Cal. 2d 90, 280 P.2d 1 (1955); Bodinson Mfg. Co. v. Cal. Employment Comm'n, 17 Cal. 2d 321, 330, 109 P.2d 935, 941 (1941); Castleman v. Civil Serv. Comm'n, 58 Ill. App. 2d 25, 206 N.E.2d 514 (1965); Insurance Comm'r of Indiana v. Mutual Medical Ins. Inc., 251 Ind. 296, 241 N.E.2d 56 (1968); State *ex rel.* Rouveyrol v. Donnelly, 365 Mo. 686, 285 S.W.2d 669 (1956); Public Serv. Coordinated Transp. v. State, 5 N.J. 196, 210, 74 A.2d 580, 587 (1950) (participants in agency proceedings as of right, but only as nonparties, probably have standing to secure review). *Cf.* Independent Investor Protective League v. SEC, 495 F.2d 311 (2d Cir. 1974) (difference between "interested" person, allowed to participate in agency proceedings, and "person aggrieved" having standing to secure review of order).

[38] 5 U.S.C. § 702 (1970). The wording of this section as codified is identical to that of the original subsection 10(a) except for the substitution of "a" for "any" in both places where "a" now occurs.

[39] *E.g.*, the Federal Aviation Act which, at 49 U.S.C. § 1486(a) (1970), provides for judicial review at the instance of "any person disclosing a substantial interest . . . ." *See* Airline Pilots Ass'n v. CAB, 515 F.2d 1010 (D.C. Cir. 1975).

[40] Davis v. Romney, 490 F.2d 1360 (3d Cir. 1974); Lodge 1858, American Fed'n of Gov't Employees v. Paine, 436 F.2d 882 (D.C. Cir. 1970); Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137 (D.C. Cir. 1970); Gart v. Cole, 263 F.2d 244 (2d Cir. 1959), *cert. denied*, 359 U.S. 978 (1959); Lloyd Wood Construction Co. v. Sandoval, 318 F. Supp. 1167, 1171 (N.D. Ala. 1970), *rev'd on other grounds*, Allen M. Campbell Co. v. Lloyd Wood Constr. Co., 446 F.2d 261 (5th Cir. 1971). *See also* Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961). The Attorney General's *Manual on the Administrative Procedure Act* (1947), at 96, notes that various earlier statutes designate persons who may obtain judicial review in language similar to that of the Administrative Procedure Act; but the legislative history is silent on the question whether, in the absence of such language, other indications of legislative concern with particular interests may suffice.

[41] *See* International Ass'n of Machinists v. Hodgson, 515 F.2d 373 (D.C. Cir. 1975); Apter v. Richardson, 510 F.2d 351 (7th Cir. 1975) (violations of constitutional rights also claimed); Barrera v. Wheeler, 441 F.2d 795, 798-99 (8th Cir. 1971); Peoples v. United States Dep't of Agriculture, 427 F.2d 561 (D.C. Cir. 1970). In Diggs v. Shultz, 470 F.2d 461 (1972), *cert. denied*, 411 U.S. 931 (1973), the court upheld the standing of individuals to sue to secure agency observance of a treaty on the ground that the purpose of the treaty included pressure on a foreign government to cease practices inimical to the interests of persons such as the plaintiffs, from which the plaintiffs and others had suffered and continued to suffer.

ticular interest into account,[42] or even in legislative history standing alone.[43] If the modifying phrase in the Administrative Procedure Act provision, "by agency action within the meaning of any relevant statute," were considered to limit only "persons . . . aggrieved" and not those "adversely affected," the latter would become entitled to seek review by virtue of the Administrative Procedure Act alone, without reference to any other law. Adverse effect in fact, whatever the nature or source of the interest involved or the presence or absence of prior legal recognition of it, would suffice to bestow standing.[44] The structure of the provision tends to contradict this interpretation, however, and there is no indication that the Act was actually intended to enact such a broadening of standing without reference to other legislation.[45] Never-

[42] Barlow v. Collins, 397 U.S. 159 (1970); Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968); Shannon v. Dept. of Housing & Urban Dev., 436 F.2d 809 (3d Cir. 1970); Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968); The Bootery, Inc. v. Washington Metro. Area Transit Auth., 326 F. Supp. 794 (D.D.C. 1971); Coalition for United Community Action v. Romney, 316 F. Supp. 742 (N.D. Ill. 1970); Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238 (N.D. Pa. 1970), *aff'd*, 454 F.2d 613 (3d Cir. 1971); Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968), *vacated on other grounds*, 320 F. Supp. 308 (N.D. Cal. 1969); Powelton Civic Home Owners Ass'n v. Department of Housing & Urban Dev., 284 F. Supp. 809 (E.D. Pa. 1968); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967). *Cf.* Van Hoven Co. v. Stans, 326 F. Supp. 827 (D. Minn. 1971) (standing assumed without discussion, on basis of statutory provision); Citizens Ass'n of Georgetown v. Simonson, 403 F.2d 175 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 975, note 10 *supra* (District of Columbia statutory provisions).

[43] *Cf.* Wingate Corp. v. Industrial Nat'l Bank, 408 F.2d 1147, 1152-53 (1st Cir. 1969), *cited by the Supreme Court in* Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 155-56 (1970).

[44] This view has been stated in Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 619-23 (1968); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 465-68 (1970), and was made a basis of decision in Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 872 (D.C. Cir. 1970). *See also* National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971); Keco Indus. v. United States, 428 F.2d 1233 (Ct. Cl. 1970); Southern Christian Leadership Conference v. Connolly, 331 F. Supp. 940 (E.D. Mich. 1971); Simpson Elec. Co. v. Seamans, 317 F. Supp. 684 (D.D.C. 1970); *but see* American Fed'n of Gov't Employees v. Paine, 436 F.2d 882, 887-92 (D.C. Cir. 1970); Pullman Inc. v. Volpe, 327 F. Supp. 432, 439-40 (E.D. Pa. 1971). In Rudolph F. Matzer & Associates v. Warner, 348 F. Supp. 991 (M.D. Fla. 1972), *Scanwell* is followed but is interpreted as resting on the Administrative Procedure Act in conjunction with the Walsh-Healey Government Contracts Act. Mulrey v. Driver, 366 F.2d 644 (9th Cir. 1966), appears to have accepted the broader view stated in *Scanwell*, the pros and cons of which were not discussed, as did Hom Sin v. Esperdy, 239 F. Supp. 903 (E.D.N.Y. 1965), where the court asserts, but does not demonstrate, that Congress was concerned in the Immigration and Nationality Act with the interest of aliens whose admission to the country for certain kinds of employment was authorized. American President Lines v. FMB, 112 F. Supp. 346 (D.D.C. 1953), seemingly took the same position, but relied also on recognition of the plaintiff's interest by the Merchant Marine Act. *See also* Pacific Inland Tariff Bureau v. United States, 129 F. Supp. 472 (D. Ore. 1955).

[45] *See* Rasmussen v. United States, 421 F.2d 776, 779 (8th Cir. 1970); Los Angeles Customs & Brokers Ass'n v. Johnson, 277 F. Supp. 525, 535 (C.D. Cal. 1967); Sapp v. Hardy, 204 F. Supp. 602 (D. Del. 1962). The bills which originally were introduced in each house of Congress would have had the broad effect suggested, by providing that

theless, as appears later in this article, the Supreme Court and other federal courts which have not adopted the broadened interpretation are reaching a result not far short of it by concluding in particular cases, on the basis of very slight indications, that other statutes do indeed contain recognition of actual, existing interests in some manner which in conjunction with the APA confers standing on those who possess them.

The Revised Model State Administrative Procedure Act contains separate formulas with respect to standing to secure judicial review of rules on the one hand and of final decisions in contested cases on the other hand. As to the former, review may be had in a declaratory judgment action "if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff."[46] Review of decisions in contested cases may be had in proceedings which the Act itself establishes, brought by persons "aggrieved"; but other, existing means of judicial review are expressly preserved.[47] The original Model Act provided that judicial review of rules could be had in declaratory judgment proceedings brought by "any interested persons."[48] State administrative procedure legislation for the most part follows these provisions, with occasional variations. This legislation consequently establishes new bases of standing, but also preserves the requirements of standing which attach to the pre-existing modes of review that are retained.

"(a)ny person adversely affected by any agency action shall be entitled to judicial review thereof . . . ." ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, 79th Cong., 1st Sess., S. Doc. No. 248 at 160 (*see* p. 11 with regard to the identity of the two bills). In the Senate committee the provision became at one point that "(a)ny person suffering legal wrong because of any agency action shall be entitled to judicial review." *Id.* at 36. Thereafter the final wording appeared in the drafts considered in both houses. *Id.* 222, 240. Each chamber's committee report included a curtailed text by way of "summary" of the provision, which omitted the words "or aggrieved," thereby causing the phrase "within the meaning of any statute" to attach directly to "adversely affected," and then explained that "any person adversely affected in fact by agency action or aggrieved within the meaning of any statute" would have the right of review. It seems fair to say that the editing of the reports was defective as to this point and that the text is valueless as an indication of the committees' intentions. The interpretation of the Attorney General, accepted by Senator McCarran, the chief Senatorial sponsor of the bill, was that the provision "reflects existing law." *Id.* at 230, 413, 309-10. Senator McCarran's own explanation at one point was that "any person suffering legal wrong because of any agency action, or adversely affected within the meaning of any statute, is entitled to judicial review." *Id.* at 323.

The related question of whether the A.P.A. is an independent source of federal court jurisdiction at the instance of persons having standing, on which the lower courts have divided, is not considered here.

[46] REV. MODEL STATE A.P.A. § 7 (1970), 9C ULA 181 (1946).

[47] *Id.* § 15(a).

[48] MODEL STATE A.P.A. § 15(a) (1946). 9C ULA 174 (1946).

Standing of Private Persons to Vindicate the Public Interest

At common law, recognition that particular interests might form the basis of standing to challenge official acts depended, as it still does in England and to some extent in the United States, on criteria which may vary according to the remedies invoked. The prerogative proceedings or extraordinary legal remedies in theory implement the Crown's concern or, in the United States, the constitutional or statutory concern with requiring administrative officials to perform their duty and to remain within the limits of their authority. In some contexts, especially in relation to the actions of local authorities, the standing of members of the public as such to bring mandamus, certiorari, prohibition, or other proceedings to check excesses of authority or compel legally mandated action has been recognized in judicial decisions and opinions.[49] This reasoning has not been applied to habeas corpus,[50] however, and the persons whose standing as members of the public has been recognized

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[49] Union Pac. R. Co. v. Hall, 91 U.S. 343, 354-55 (1875), citing English and state cases (statutory mandamus to a railroad company); Brewster v. Sherman, 195 Mass. 222, 80 N.E. 821 (1907) (mandamus), *quoting from* J. HIGH, EXTRAORDINARY LEGAL REMEDIES (3d ed. 1896); People *ex rel.* Stonebraker v. Wood, 90 Colo. 566, 10 P.2d 331 (1932); Baker v. State *ex rel.* Hi Hat Liquors, Inc., 159 Fla. 286, 31 So. 2d 275 (1947); State *ex rel.* Davis v. Atlantic Coast Line R. Co., 95 Fla. 14, 116 So. 48 (1928); Stephens v. Moran, 221 Ga. 4, 142 S.E.2d 845 (1965); People *ex rel.* Newdelman v. Swank, 263 Ill. App. 2d 599, 264 N.E.2d 794 (1970) (mandamus and declaratory judgment); Zoercher v. Agler, 202 Ind. 214, 222, 172 N.E. 186, 189 (1930) (declaratory judgment); *compare* Nickols v. Commissioners of Middlesex County, 341 Mass. 13, 166 N.E.2d 911 (1962) (mandamus) *with* O'Donnell v. Board of Appeals of Billerica, 349 Mass. 324, 207 N.E.2d 877 (1965) (certiorari); Sears v. Treasurer and Receiver General, 327 Mass. 310, 98 N.E. 2d 621 (1951) (mandamus); Driscoll v. Burlington County Bridge Comm'n, 8 N.J. 433, 476, 86 A.2d 201, 222 (1952) (remedies in general), *cert. denied*, 344 U.S. 838 (1952); State *ex rel.* Burg v. City of Albuquerque, 31 N.M. 576, 249 Pac. 242 (1926) (mandamus); Whitt v. Cook, 255 N.E.2d 587 (Ohio C.P. 1970), citing earlier cases (injunction); Lien v. Northwestern Eng'r Co., 74 S.D. 476, 54 N.W.2d 472 (1952); Taxpayers Ass'n of Cape May v. City of Cape May, 2 N.J. Super. 27, 64 A.2d 453 (1949) (taxpayer access to city records); Clement v. Graham, 78 Vt. 290, 319-21, 63 Atl. 146, 155 (1906) ("citizen and taxpayer" seeking access to state records of expenditures); *compare* State *ex rel.* Lemon v. Langlie, 45 Wash. 2d 82, 273 P.2d 464 (1954) (citizens and taxpayers of State have standing to bring mandamus to compel location of state agency offices in state capital), *with* Duba v. Schuetzle, 303 F.2d 570 (8th Cir. 1962), under the Federal Administrative Procedure Act.

Compare Parks v. Simpson, 242 Miss. 894, 137 So. 2d 136 (1962) ("resident citizen and taxpayer" held, without discussion, to have standing to seek injunction against allegedly illegal sale of state property), *with* Texas Oyster Growers Ass'n v. Odom, 385 S.W.2d 899 (Tex. Civ. App. 1965). *See also* Warner v. Mayor of Taunton, 253 Mass. 116, 148 N.E. 177 (1925) (resident of a city lacks standing to bring mandamus to compel removal of an allegedly illegal street obstruction).

In Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970), where there were overtones suggesting citizen standing to challenge alleged violations of the Establishment Clause, standing was based more particularly on the right of persons able to reach a public park to enjoy it without annoyance by the violation allegedly perpetrated there. *See* note 56 *infra* & text accompanying.

[50] S.A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 428 (2d ed. 1968).

in relation to the other writs have in fact often had more limited economic or non-economic interests of their own to protect, on which their standing was or could have been grounded.[51] There are also numerous statements and decisions which deny standing based simply on the general interest.[52] It cannot be said that any such standing, available generally as a basis for judicial review of governmental action, had come to be recognized[53] before the Supreme Court decisively rejected it again in 1974.[54]

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[51] Frequently the citizen interest as a basis of standing is accompanied by a taxpayer interest in the finances of the governmental unit involved. In cases involving local action, the inhabitants of a municipality who bring suit may be considered for historical reasons to have a fictional special interest as members of the municipal corporation, instead of merely the general interest of persons in relation to government. *See* 1 J. DILLON, MUNICIPAL CORPORATIONS § 60 (5th ed. 1911); 4 J. DILLON § 1580 (5th ed. 1911); State *ex rel.* Wellford v. Williams, 110 Tenn. 549, 75 S.W. 948 (1903). The interest of members of an electorate may also be more specific than that which stems from residency or citizenship. *See* State *ex rel.* Shaw v. Harmon, 23 N.D. 513, 137 N.W. 427 (1912). In Union Pac. R. Co. v. Hall, note 49 *supra*, the petitioners were shippers by the respondent railroad, seeking to compel action that would enhance the quality of service to them. The actual presence of specific interests of the plaintiffs in more recent cases which contain broad statements as to standing under the Administrative Procedure Act was recognized by the Supreme Court in Sierra Club v. Morton, note 74 *infra*. As to the broad statement in Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965), often cited as the fountainhead of recognition of the standing of environmental groups to challenge allegedly harmful agency action, and the holding which followed it in Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), *see* note 57 *infra* and notes 263-284 *infra* and text accompanying.

[52] Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940); *Ex parte* Levitt, 302 U.S. 633 (1937); Frothingham v. Mellon, 262 U.S. 447, 488 (1923); Fairchild v. Hughes, 258 U.S. 126, 129 (1922); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973); Mottola v. Nixon, 464 F.2d 178 (9th Cir. 1972); Pietsch v. President of the United States, 434 F.2d 861 (2d Cir. 1970), *cert. denied*, 403 U.S. 920 (1971); Pauling v. McElroy, 278 F.2d 252 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 835 (1960); People *ex rel.* Naughton v. Swank, 58 Ill. 2d 95, 317 N.E.2d 499 (1974); Topeka Bldg. & Constr. Co. v. Leahy, 187 Kan. 112, 353 P.2d 641 (1960); Glen Burnie Improvement Ass'n v. State Appeal Bd., 213 Md. 407, 132 A.2d 451 (1957); Fiske v. Board of Selectmen of Hopkinton, 354 Mass. 269, 237 N.E.2d 15 (1968); Donohue v. Cornelius, 17 N.Y.2d 390, 218 N.E.2d 285 (1966); Hidley v. Rockefeller, 28 N.Y.2d 439, 271 N.E.2d 520 (1971); Cole v. Langford, 221 Tenn. 458, 437 S.W.2d 562 (1968). *Cf.* Dombrowski v. City of Philadelphia, 431 Pa. 199, 245 A.2d 238 (1968); Dupre v. Doris, 68 R.I. 67, 26 A.2d 623 (1942); Yett v. Cook, 115 Tex. 205, 281 S.W. 837 (1926).

[53] *Ex parte* Levitt, 302 U.S. 633 (1937); S.A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, 426-32 (2d ed. 1968); Garner, *Locus Standi in Action for a Declaration*, 16 MOD. L. REV. 512 (1968); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 462-69 (1965); K. DAVIS, ADMINISTRATIVE LAW TREATISE, 749-53, 756-59 (1970 Supp). *Cf.* Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L. J. 816 (1969). *See* Fairchild v. Hughes, 258 U.S. 126 (1922).

Even in jurisdictions where a broad right of citizens to bring mandamus actions in the general public interest has been enunciated, qualifications may be enlarged or new ones attached in later decisions. *See, e.g.*, Heghinian v. Ford, 209 Md. 113, 120 A.2d 339 (1956). Earlier Maryland cases, notably Levering v. Williams, 134 Md. 48, 106 A. 176 (1919), often correctly cited in support of citizen mandamus actions, had stated as an exception that such actions would not lie to enforce public duties owed "to the government as such." In *Heghinian* an alleged statutory duty of police officials to appoint both male and female physicians to examine women prisoners on magistrates' orders was said

A distinction needs to be drawn between the public interest in the fullest sense of the term, which resides inherently in all citizens or inhabitants, as does the interest in honest, competent government or in maintenance of the public peace, and a variety of more specific interests which are sufficiently broadly shared to be regarded as "public" in a different sense.[55] Such broadly shared interests may consist, for example, of the rights of members of an electorate to exercise the franchise; of taxpayers to have government funds conserved; or of persons within reach of specific common facilities or resources such as highways, public recreational areas, wild game, or public waters, to have the benefit of their use. Similarly, neighborhood immunities from the adverse effects of such official acts as the authorization of new structures or the licensing of deleterious enterprises may be claimed. Such interests, shared by many but not by all citizens or inhabitants, may or may not suffice to bestow standing, according to legislative intent and the courts' appraisal of particular situations.[56] Where statutory standing is involved and the case or controversy requirement is met, interpretation of the governing statute lies at the base of standing to vindicate public or widely shared,

to be owed "to the magistrate or state's attorney," hence to the government, and not to the public. Consequently a citizen could not bring a mandamus proceeding to enforce this duty.

Possible citizen standing to secure judicial enforcement of particular provisions of the United States Constitution which were claimed to be impliedly for the benefit of each citizen in a special sense, was rejected in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974), but was favored by Justices Douglas and Marshall, dissenting in that case, and by Justices Stewart and Marshall, dissenting in United States v. Richardson, 418 U.S. 166 (1974), and by Justice Brennan as to Richardson in his dissenting opinion in both cases. This issue was not considered by the majority in *Richardson*. As to these two cases in relation to taxpayer standing *see* note 148, *infra* & text accompanying. As to their relation to citizen standing to challenge agency action or inaction on statutory grounds, *see* Korioth v. Briscoe, 523 F. Supp. 1271 (5th Cir. 1975); Stanton v. Ash, 384 F. Supp. 625 (S.D. Ind. 1974).

[54] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

[55] Drawing on language in earlier opinions, the Court in *Reservists Committee* distinguished between "injury in the abstract," including "the generalized interest of all citizens in constitutional governance," and "concrete injury," creating a more direct "personal stake" in correcting governmental performance. Standing may be based on the latter but not on the former.

[56] Ill. Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 402 (D.C. Cir. 1975) (interest of persons in access to material sought to be broadcast); Joseph v. FCC, 404 F.2d 207 (D.C. Cir. 1968) (radio listener's interest in relation to change of ownership of broadcasting station); State *ex rel.* St. Louis, S.F.R. Co. v. Boyett, 183 Okla. 49, 80 P.2d 201 (1938) (taxpayer interest bestows standing to compel officials to collect taxes from all who owe them). *Cf.* Allen v. Board of Educ., 398 U.S. 544 (1969), Baker v. Carr, 369 U.S. 186, 204-08 (1962), and Brooks v. State, 162 Ind. 568, 577, 70 N.E. 980, 983 (1904) (voter standing to challenge statutes affecting the franchise or its value in relation to legislative representation); Tax Analysts & Advocates v. Shultz, 376 F. Supp. 889 (D.D.C. 1974), and Nader v. Kleinschmidt, 375 F. Supp. 1138 (D.D.C. 1973) (same as to non-enforcement of legislation combating undesirable influences in elections); District 65, Wholesale Union v. Nixon, 341 F. Supp. 1193 (S.D.N.Y. 1972) (workers assumed, without discussion, to have standing to challenge the advocacy of the unemployment percentage

as well as other, interests.[57] Whether common statutory terms, such as "persons adversely affected" or "aggrieved," should be construed with maximum breadth to confer standing on persons, however numerous, who sustain adverse consequences only as taxpayers, citizens, or members of the total community is an important question which is discussed below.[58]

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goal in the 1971 Economic Report of the President made pursuant to the Employment Act of 1946).

With respect to consequences in a vicinity, produced by structures, offensive conditions, or deleterious conduct carried on or sanctioned officially, the law relating to public nuisances resulting from private action provides an analogy. Under that law, "special damage" to a plaintiff, or "harm of a kind different from that suffered by other members of the public exercising public right," is required for standing to sue. *See* RESTATEMENT (SECOND), OF TORTS § 8210 (Tent. Draft No. 16, 1970). Under varying circumstances, official action having consequences in the nature of a nuisance may be challenged in suits brought by persons sufficiently affected against parties claiming valid governmental authorization, Pennsylvania v. Wheeling Bridge Co., 54 U.S. (13 How.) 518 (1851) (*see also* Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865)), or against officials who have taken the action, Levingston Shipbuilding Co. v. Ailes, 239 F. Supp. 775 (E.D. Tex. 1965). Standing to challenge adjustments or changes in the zoning of another's property, allegedly injurious to that of the challenger, turns on similar considerations under a variety of review authorizations. *See, e.g.*, Kramer v. Government of the Virgin Islands, 453 F.2d 1246 (3d Cir. 1971); Dalton v. City of Honolulu, 51 Haw. 400, 462 P.2d 199 (1971) (standing upheld); Township of River Vale v. Orangetown, 403 F.2d 684 (2d Cir. 1968) (standing of adjoining local government unit in another state upheld); Bryniarski v. Montgomery County Bd. of Appeals, 247 Md. 137, 230 A.2d 289 (1967) (statutory standing upheld after full discussion); State *ex rel.* Housing Authority of St. Louis County v. Wind, 337 S.W. 2d 554 (Mo. App. 1960) (standing upheld); Appley v. Township Comm. of Bernards, 128 N.J.L. 195, 24 A.2d 805 (1942), *aff'd*, 129 N.J.L. 73, 28 A.2d 177 (1942) (standing upheld), and three cases entitled 222 E. Chestnut St. Corp. v. Board of Appeals of Chicago, 10 Ill. 2d 130, 139 N.E.2d 221 (1957), 10 Ill. 2d 132, 139 N.E.2d 218 (1957) and 14 Ill. 2d 190, 152 N.E.2d 465 (1958) (standing denied). Standing has been based in some cases on sufficiently definite manifestations of interest in engaging in activities open to the public without formal prerequisites. *See* Schiaffo v. Heltoski, 492 F.2d 413 (3d Cir. 1974) (standing to challenge congressman's alleged abuse of postal franking privilege held to exist in defeated candidate for the congressional seat, because statute is intended to protect all in a position to be injured); Gates v. Schlesinger, 366 F. Supp. 797 (D.D.C. 1973) (desire to attend agency advisory committee meetings, manifested by bringing action, confers standing to seek review of failure to hold open meetings required by statute); New York Coalition for Community Health v. Lindsay, 262 F. Supp. 434 (S.D.N.Y. 1973) (desire of persons previously active in relevant capacities to be considered for agency advisory council membership confers standing to seek review of failure to establish councils as allegedly required).

[57] The holding and opinion in Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), note 51 *supra*, rest on § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), which provides for judicial review at the instance of "any party . . . aggrieved." *Cf.* Maurice v. London County Council, [1964] 2 Q.B. 362 (C.A.). Many federal cases now involve interpretation of the language of the Administrative Procedure Act, *see* note 38 *supra* & text accompanying. The Illinois and Missouri provisions for judicial review of agency action in effect refer to other sources of "legal rights, duties or privileges" in providing for standing. Winston v. Zoning Bd. of Appeals, 407 Ill. 588, 95 N.E.2d 864 (1950); Mast v. Deters, 357 S.W.2d 919 (Mo. 1962). The Federal Consumer Products Safety Act provides for judicial review of any product safety standard at the instance of any person "adversely affected" or "any consumer or consumer organization." 15 U.S.C. § 2060(a) (1973 Supp).

[58] *See* notes 71-75, 151-52 *infra* & text accompanying.

Statutory provisions that confer standing to secure judicial review of agency action on persons adversely affected or aggrieved or on parties in interest became significant in relation to public interest representation when they were held to bestow standing on persons who have a distinct private interest that cannot itself be asserted, so that they might urge considerations relevant to the public interest. The position of broadcasters under the Federal Communications Act is illustrative. The Act does not authorize the Federal Communications Commission to protect or advance the economic interests, per se, of licensed broadcasters or of applicants for licenses; their welfare is of concern only in so far as it enters into the capacity of the broadcasters in a given market to render adequate broadcasting service.[59] Nevertheless broadcasting enterprises, pursuing private gain, may seek authority from the Commission to engage in broadcasting and may, before the Commission, oppose grants to others who would exclude or be in competition with them. The statute expressly provides that they may bring review proceedings to challenge denials of licenses to themselves.[60] The same statute also authorizes persons "aggrieved or whose interests are adversely affected" to challenge licensing orders. The question arises whether broadcasters challenging the licensing of other broadcasters in the same listening areas come within this provision. It has been held that, being persons adversely affected or aggrieved in fact, they do come within it, not to secure protection for their self-interest as such, but to urge other, relevant grounds for challenging Commission action, including failure of the Commission to take adequate account of the public interest in the maintenance of financially viable broadcasting enterprises.[61] "[T]hese private litigants have standing only as representatives of the public interest"[62] and serve as "private attorneys general" for this purpose.[63] The same theory may be applied under other statutes, both when the private interest which forms the basis of standing is economic[64] and when it is non-economic,

[59] FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958); Broadcast Enterprises, Inc. v. FCC, 390 F.2d 483 (D.C. Cir. 1968).

[60] 47 U.S.C. § 402(b) (1970).

[61] FCC v. Sanders Bros. Radio Station, note 59 *supra*; Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942).

[62] Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942).

[63] Associated Indus. of N.Y. State v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), note 28 *supra*.

[64] *Id.*; National Coal Ass'n v. FPC, 191 F.2d 462 (D.C. Cir. 1951), *vacated as moot*, 320 U.S. 707 (1943); City of Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956); Fuels Research Council v. FPC, 374 F.2d 842, 853-54 (7th Cir. 1967); Juarez Gas Co. v. FPC, 375 F.2d 585 (D.C. Cir. 1967); Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577, 590-92 (D.C. Cir. 1969), note 30 *supra*; Constructores Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972). In Seatrain Lines v. United States, 152 F. Supp.

such as an interest in health or in the enjoyment of recreational opportunities or beauty in the environment.[65] The private interest serves as the basis of standing; furtherance of a distinct public interest becomes the objective.[66] Compatibility, at least, between the two interests may be required.[67]

When an individual interest which is advanced as a basis of standing is itself entitled to consideration under the governing legislation, the private attorney general theory is not needed to supply a purpose for the standing. It has, nevertheless, been carried into some of the cases brought by persons whose own interests were entitled to be considered, when those interests were also part of a wider "public" interest. The former would suffice as both the basis of standing and the object of

619 (D. Del. 1957), *aff'd per curiam*, 355 U.S. 181 (1957), the court reasoned that the private attorney general theory was applicable even though the statute which provided for judicial review, § 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9) (1970), and the Judicial Code sections to which it refers, 28 U.S.C. §§ 1336, 1321-1325 (1970), did not authorize review at the instance of persons adversely affected or aggrieved or of parties in interest. The Administrative Procedure Act (*see* note 38 *supra* & text accompanying), which was not cited, was applicable, however, and the competitive interest of plaintiff Seatrain Lines arguably rendered it a "person adversely affected or aggrieved within the meaning" of the governing Water Carrier Act, since that Act made direct provision for equal treatment of competitors. In Pacific Inland Tariff Bureau v. United States, 129 F. Supp. 472 (D. Ore. 1955), under the same statutory provisions for review, the court rested the plaintiffs' standing as competing carriers in a rate case, seemingly in the capacity of private attorneys general, partially on the APA provision, without stopping to relate the plaintiffs' interest specifically to the governing Interstate Commerce Act. *Cf.* note 44 *supra*. The *Scanwell Laboratories* opinion, cited there, regards the disappointed bidder on a public contract, whose standing to challenge the contract award was recognized, as a private attorney general in behalf of the public interest at least in part. 424 F.2d 859, 864 (D.C. Cir. 1970). The same view was taken in National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971), also cited in note 44 *supra*, except that the court found it "unnecessary to designate the contractors [specifically] as private attorneys general," but treated their contentions as those of persons occupying that status. In contrast, competing shippers who used transportation facilities entirely different from those directly involved in a rate proceeding were held to be without standing in Freeport Sulphur Co. v. United States, 199 F. Supp. 913 (S.D.N.Y. 1961).

[65] Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1096-97 (D.C. Cir. 1970); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615-16 (2d Cir. 1965) (through citation of cases which developed the theory); Office of Communications of United Church of Christ v. FCC, 359 F.2d 994, 998-1006 (D.C. Cir. 1966); Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953) (family consumer interest in healthfulness of product); Littleton v. Fritz, 65 Iowa 488, 22 N.W. 641 (1885) (statutory standing of citizens to attack illegal operation of a saloon is analogous to that of the attorney general proceeding in behalf of the public).

[66] Sierra Club v. Morton, 405 U.S. 727, 736-41 (1972); Rudolph F. Matzer & Associates v. Warner, 348 F. Supp. 991 (M.D. Fla. 1972).

[67] In National Helium Corp. v. Morton, 455 F.2d at 655 (10th Cir. 1971), the court discussed this aspect of the matter and found sufficient compatibility in a situation that was "passing strange." In National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 205 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), the court put aside doubts on this score and decided the case on the merits. *See also*, Note, *The New Law of Threshold Standing: The Effect of Sierra Club on Jus Tertii and on Government Contracts*, 1973 DUKE L.J. 219, 227-34.

concern; but characterization of the plaintiffs as private attorneys general calls attention to the breadth and importance of the interests which are served. The theory has been invoked in this way when competitive economic interest, including that of a franchise holder as against new enterprise, itself entitled to consideration, has also entered into the public convenience and necessity or other statutory standard governing agency action,[68] and when legally recognized individual interests in social benefits or in preservation of the environment have been shared with many other people.[69] In other cases of the same nature standing has been recognized without specific reference to a theory of representation of the wider interests involved.[70]

Some decisions and judicial opinions have held or stated that under the formula of the Federal Administrative Procedure Act, whereby "persons adversely affected or aggrieved within the meaning of a relevant statute" have standing to challenge agency action, or under other similar federal or state statutes, the requisite aggrievement or effect arises by reason of injury to a specific interest which is shared by all persons in the community.[71] The role of private attorney general is in-

[68] The opinions in the cases cited in note 64 *supra*, in which standing was recognized, except National Helium Corp. v. Morton, indicate that the interests which were made the basis of standing, unlike the competitive interests of broadcasters, were themselves entitled to consideration under the governing statutes, alongside the public interests which could be represented by the same persons.

[69] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (housing project tenants, challenging racial exclusion from the project, have standing as "persons aggrieved," "not only on their own behalf" because of denial of interracial contracts, "but also as 'private attorneys general in vindicating a policy that Congress considered to be of the highest priority'"); Ely v. Velde, 321 F. Supp. 1088 (E.D. Va. 1971), and cases cited in note 65 *supra*.

[70] *Compare* American Trucking Ass'ns v. United States, 364 U.S. 1, 17-18 (1960), *with* E. Brooke Matlock, Inc. v. United States, 195 F. Supp. 399 (E.D. Pa. 1961); Upper Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1971); Alameda Conservation Ass'n v. California, 437 F.2d 1087 (9th Cir. 1971), *cert. denied*, 402 U.S. 908 (1971); Ward v. Ackroyd, 344 F. Supp. 1211 (D. Md. 1972); Conservation Soc'y of Southern Vermont v. Volpe, 343 F. Supp. 761 (D. Vt. 1972), *aff'd*, 508 F.2d 927 (2d Cir. 1974), *vacated* 96 S.Ct. 19 (1975); Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970), *aff'd*, 454 F.2d 613, 625 (3d Cir. 1971); Atchison, Topeka & S.F.R. Co. v. United States, 209 F. Supp. 35 (N.D. Ill. 1962). *Cf.* People *ex rel.* N.Y. Edison Co. v. Willcox, 207 N.Y. 86, 100 N.E. 705 (1912).

[71] In Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970), note 65 *supra*, the health interest asserted by the plaintiffs was one they shared with all others who live in the natural environment. In Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1970), the court, referring to earlier judicial pronouncements, stated that "the public interest in the environment," shared by the plaintiffs, was "a legally protected interest affording" standing to them "as responsible representatives of the public." *See also* Natural Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1971); Crowther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970). Mr. Justice Blackmun, dissenting in Sierra Club v. Morton, 405 U.S. 727 (1970), would have been willing to adopt this view, limited to organizations displaying

herent in standing that rests on this kind of interest.[72] The prevalent earlier interpretation of similar statutory language was less expansive, however;[73] and the Supreme Court later adhered to it in *Sierra Club v. Morton*, holding that persons challenging actions allegedly damaging to the environment must, in order to establish standing under the APA, show some direct, personal interest in an aspect or portion of the environment which is affected.[74] The precise scope of the limiting principle underlying that decision is doubtful, since the Court viewed as controversial the environmental policy on which the plaintiff, Sierra Club, based its contention, which therefore turned on "value preferences" and not on an interest common to all, such as, for example, the interest in the purity of the nation's ambient atmosphere. The Court excluded public interest suits of a more traditional variety under the Act by declaring that an organization's "mere 'interest in a problem,' no matter how outstanding the interest, . . . is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA."[75]

The *Sierra Club* opinion recognized that within the limits imposed by the case or controversy requirement of the Constitution, Congress may by statute create standing to seek review of agency action in the public interest; but what the limits may be has not become clear. In all of the instances referred to in the opinion, standing was based on individual

adequate credentials or, possibly, any person "who has a probable, sincere, dedicated, and established status" relative to an environmental concern. 405 U.S. at 757-58. *See also* Cape May County Chapter, Izaak Walton League v. Macchia, 329 F. Supp. 504 (D.N.J. 1971); Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952) (any preson may, as one "aggrieved" and "directly affected," assert a statutory interest of the public in continued enjoyment of the scenic beauty of streams); Parker v. Brown, 195 S.C. 35, 44-45, 58-59, 10 S.E.2d 625, 628-29, 635 (1940) (citizen may be a person "aggrieved" by failure by county treasurer to issue execution against another for the collection of taxes); Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970) (court entertained statutory review proceeding, brought by concerned congressmen, to challenge CAB rate order on procedural grounds involving exclusion of the public from proceedings).

[72] *Cf.* Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809, 814 (D.C. Cir. 1975) (citizen suit authorized by statute).

[73] U.S. Cane Sugar Refiners Ass'n v. McNutt, 138 F.2d 116 (2d Cir. 1943); Tyler v. Board of Zoning Appeals, 145 Conn. 655, 145 A.2d 832 (1958); Padilla v. Franklin, 70 N.M. 243, 372 P.2d 820 (1962); State *ex rel.* Skilton v. Miller, 164 Ohio St. 163, 128 N.E.2d 47 (1955) (citizen is not a "party beneficially interested," under a statute relating to mandamus, in the enforcement of a Sunday closing law); Tri-State Milling Co. v. Board of County Comm'rs, 75 S.D. 466, 68 N.W.2d 104 (1955) (disappointed bidder on a public contract, in common with citizens and taxpayers, is not a "person aggrieved" by an allegedly illegal award to another); Startup v. Harmon, 59 Utah 191, 203 P.2d 637 (1923) (same in relation to payment of statutory mother's benefits).

[74] Sierra Club v. Morton, 405 U.S. 727, 735 (1970). The same limitation on the scope of standing by virtue of the APA is applied in Tax Analysts and Advocates v. Simon, 390 F. Supp. 927 (D.D.C. 1975), and Stanton v. Ash, 384 F. Supp. 625 (S.D. Ind. 1974).

[75] 405 U.S. at 739. *See also* Independent Investor Protective League v. SEC, 495 F.2d 311 (2d Cir. 1974); Natural Resources Defense Council v. EPA, 481 F.2d 116 (10th Cir. 1973).

interests in fact, other than a share in the public interest which the plaintiffs also sought to vindicate.[76] Supreme Court decisions in which standing to vindicate a general public interest had previously been held to be absent had not involved standing created by statute.[77] There also are instances in which legislative provisions for suits to challenge statutes or official action have been held invalid because of the absence of a case or controversy; but the reason has been the essentially advisory nature of the judgments sought, rather than the absence of standing.[78]

Statutes sometimes authorize judicial review at the instance of members of the public, as such, in behalf of completely public interests which the statutes are designed to secure.[79] The basis of standing under these statutes is not different from the basis for invoking some of the more traditional remedies, such as mandamus, on similar grounds in situations in which these remedies can be applied.[80] Against this background of previous recognition of public interest suits, the statutes establishing standing on a similar basis for reasons thought by the legis-

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[76] 405 U.S. at 736-40.

[77] Massachusetts v. Mellon and Frothingham v. Mellon, 262 U.S. 447 (1923); Doremus v. Board of Educ., 342 U.S. 429 (1952). Taxpayers' interests primarily, rather than policy concerns of the individual plaintiffs, were formally at issue in the *Frothingham* and *Doremus* cases; but policy considerations constituted the motivating force for the suits. The interests asserted by the State in Massachusetts v. Mellon were both economic and social.

[78] Muskrat v. United States, 219 U.S. 346 (1906), and cases cited. The opinion in *Muskrat* notes that injunction suits by the same plaintiffs raising the same issues, the justiciability of which was not questioned, were pending at the time Congress invalidly attempted to authorize the essentially advisory actions which were before the Court.

[79] 42 U.S.C. § 1857h-2 (Clean Air Act) (1970) and 42 U.S.C. § 4911 (Noise Control Act) (1970), authorizing suits by "any person" against private and governmental violators and against federal administering agencies with respect to nondiscretionary acts and duties, subject to 60-day notice requirements; IND. CODE § 13-6-1-1 (Burns 1973); MASS. ANN. LAWS, ch. 732, § 2, (supp. 1972) § 30A-10A; MICH. PUB. ACTS 1970, p. 390, Comp. L. (supp. 1972) § 691.1201 *et seq.* The Water Pollution Prevention and Control Act provision, 33 U.S.C. § 1365 (Supp. IV. 1974), bestows similar authority on "any citizen" but defines "citizen" to mean "a person or persons having an interest which is or may be adversely affected." As to the limiting effect of this definition *see* Montgomery Environmental Comm'n v. Fri, 366 F. Supp. 261 (D.D.C. 1973).

Some state statutes authorize suits primarily against alleged polluters, including public agencies, but under their terms may extend to review of agency action which may authorize pollution by others. *E.g.*, MINN. L. 1971, pp. 2013, 2017, MINN. STAT. ANN. § 116B.03 (1972-73 supp.) (actions for "relief . . ., for the protection of" the environment). As to legislation having similar effect, applicable to radically different subject matter, *see* State Bd. of Architecture v. Kirkham, Michael & Associates, 179 N.W.2d 409 (N.D. 1970); Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 173 P.2d 545 (1946) (standing to challenge continuance of a liquor license, derived from statutory authorization of complaint by "any person" to licensing agency); Littleton v. Fritz, 65 Iowa 488, 22 N.W. 641 (1885); Barrows v. Furnum's Stage Lines, 254 Mass. 240, 150 N.E. 206 (1926).

[80] *See* note 49 *supra* & text accompanying.

lature to be sufficient are difficult to question.[81] Statutes authorizing *qui tam* actions, which are recognized as valid,[82] also supply analogies, especially when coupled with the common law antecedents of such remedies.[83] It is true that under these statutes the financial stake of the plaintiffs, normally fashioned out of whole cloth by the legislature, provides an independent foundation for adverseness in the controversies brought to court. More often than not the defendants are private parties who are alleged to have broken a law; but the legislative purpose in relation to such suits is to vindicate public interests in the laws which are being enforced. In some instances the defendants may be incumbent or former public officials whose actions as such are questioned.[84] It would be odd to regard the controversies which are brought to court in this way as more substantial or worthy of litigation than pure public interest suits authorized by statute,[85] merely because a financial interest had been injected into them. Nevertheless, there probably are de minimis constitutional limits to justiciability, applicable to statutory public interest suits. Perhaps a resident of New York could not be authorized, merely because of an interest in the legality of agency action affecting a national asset, to challenge an allegedly unauthorized but otherwise innocuous mineral lease on federal lands in Wyoming that had not been dedicated to some specific use by the public. Such a question, however, is not likely to arise, because statutes authorizing such challenges are not likely to be enacted and, if any were, suits of this kind under them would probably not be brought.

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[81] Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969), note 53 *supra*. *Cf.* Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), suggesting that the private attorney general theory may be extended by statute to situations in which the basis of standing consists only of a share in the general public interest in preventing "action by an officer in violation of his statutory powers;" Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953). *See also* Mr. Justice Powell, concurring, in United States v. Richardson, 418 U.S. 166, 180, at 193 (1974).

[82] U.S. *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Comment, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 NW. U.L. REV. 446 (1972).

[83] Note, *The History and Development of Qui Tam*, 1972 WASH. U.L.Q. 81. Taxpayers' suits in which the taxpayer economic interest is secondary to policy issues are also analogous. *See* note 125 *infra* & text accompanying.

[84] *Cf.* 31 U.S.C. § 155 (1970) (informer's share in penalty prescribed for Treasurer's violation of conflict-of-interest provision). *See also* 31 U.S.C. § 163 (1970).

[85] By way of differentiation from the case before the Court, Mr. Justice Harlan, dissenting in Flast v. Cohen, 392 U.S. 83, 120, 131-32 (1968), stated effectively the reasons why public interest suits authorized by statute should be regarded as constitutionally permissible. *See also* Warth v. Seldin, 422 U.S. 490, 514 (1975); Blair v. Pritchess, 5 Cal. 3d 258, 486 P.2d 1242, 1249-50 (1971).

Standing of Officers and Agencies to Vindicate the Public Interest Through Judicial Review of Agency Action

Public interests of many kinds are, of course, constantly represented in litigation by officers and agencies charged with vindicating them. To the extent this function is well performed by this means, the need and the justification for private persons to engage in litigation for the same purpose is reduced. There are limitations on official standing to secure judicial review of agency action, some of which involve the same basic considerations as the standing of private persons. These relate to the requirement that genuine controversies be presented to the courts, to whether the interest possessed or represented by an officer or agency seeking standing is legally recognized, to whether the agency is an appropriate proponent of the interest, and to the need for the judiciary to avoid unnecessary interference with the affairs of the executive branch.[86]

Under some statutes an agency is not recognized as having or representing an interest which entitles it to become a party to review proceedings involving its own action; rather, the proceedings are ex parte appeals or may be brought against beneficiaries of the action, such as a property owner who has been granted a zoning variance, a utility which has been authorized to issue securities or increase its rates, or opponents of an application who have been successful before the agency.[87] If an agency is a participant in such a review proceeding, it may be so merely for the purpose of presenting the pertinent record, without an interest entitling it to become a proponent of its action or to appeal from an adverse decision of the initially reviewing court.[88] Decisions which deny standing to agencies are often based on the view that a particular agency

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[86] *See* F. Davis, *The Standing of a Public Official to Challenge Agency Decisions: A Unique Problem of State Administrative Law*, 16 AD. L. REV. 163 (1964); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 537-43 (1965). As to the increasingly important question of standing of legislators to challenge allegedly illegal nullification of their enactments or impairment of their authority by executive or agency action or inaction *see* Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973); Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973); *see further* Williams v. Phillips, 482 F.2d 669 (D.C. Cir. 1973). Such standing on the part of legislators does not extend to challenging the interpretation or application of statutes by agencies. Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975); Public Citizen v. Sampson, 379 F. Supp. 662 (D.D.C. 1974), *aff'd without opinion*, 515 F.2d 1018 (D.C. Cir. 1975).

[87] Miles v. McKinney, 174 Md. 551, 199 A. 540 (1938) (board of zoning appeals); *In re* Northwestern Indiana Tel. Co., 201 Ind. 667, 675, 171 N.E. 65, 68 (1930) (Public Service Commission); Petition of Pub. Serv. Coordinated Transp., 5 N.J. 196, 74 A.2d 580 (1950) (same).

[88] Miles v. McKinney, 175 Md. 551, 199 A. 540 (1938); Corn v. Board of Liquor Control, 160 Ohio St. 9, 113 N.E.2d 360 (1953).

has acted "judicially" or "quasi-judicially," with no more reason to defend its action than a court has with respect to its decision on appeal.[89] This conceptual test produces variable results, however,[90] and a better criterion would be whether the agency is charged with furthering statutory policy or a specified public interest to a degree that would enable it to contribute usefully to the review process and to the attainment of statutory purposes.[91] Some statutes are explicit in providing that a review proceeding shall be against the agency as defendant.[92] In the absence of such a statutory provision, recognition that an agency has standing to defend its decisions or to appeal from an adverse court decision may be based on practical or common-sense grounds[93] or, when an appeal from a lower-court decision in a statutory review proceeding, upsetting the agency's action, is involved, on the conclusion that the agency

[89] Board of Adjustment of Denver v. Kuehn, 132 Colo. 348, 290 P.2d 1114 (1956) (local zoning board functions judicially and cannot appeal a reversal of its decision denying an exception); State *ex rel.* Bringhurst v. Zoning Bd. of Appeal, 198 La. 758, 4 So. 2d 820 (1941); Miles v. McKinney, 175 Md. 551, 199 A. 540 (1938); *In re* Getsug, 290 Minn. 110, 186 N.W.2d 686 (1971) (professional licensing board functions judicially in revoking a license for misconduct); Minnesota Water Resources Bd. v. County of Traverse, 287 Minn. 130, 177 N.W.2d 44 (1970) (same as to board determining controversies over the establishment and boundaries of local improvement districts); Public Serv. Interstate Transp. Co. v. Board of Pub. Util. Comm'rs, 129 N.J.L. 94, 28 A.2d 199 (1942) (same as to the Board of Commissioners in deciding whether a municipality validly revoked a bus line permit); People *ex rel.* Steward v. Board of R.R. Comm'rs, 160 N.Y. 202, 54 N.E. 697 (1899) (early view that the determination of applications for certificates of convenience and necessity is a "judicial" function; hence the Board has no standing to defend its award on review); Miller v. Bureau of Unemployment Comp., 100 Ohio St. 561, 117 N.E.2d 427 (1954) (Administrator of Unemployment Compensation could appeal from reversal of decision of Board of Review, but the Board could not).

[90] *Compare* Rommell v. Walsh, 127 Conn. 16, 15 A.2d 6 (1940), reviewing practice and authorities and recognizing conflict among jurisdictions with respect to boards of zoning appeals *with* Minnesota Water Resources Bd. v. County of Traverse, 287 Minn. 130, 177 N.W.2d 44 (1970). In Koehn v. State Bd. of Equalization, 50 Cal. 2d 432, 326 P.2d 502 (1958), an appeal board which exercised a limited reviewing function similar to judicial review was held to possess standing to appeal as a "party aggrieved" from a judgment in mandamus ordering it to set aside its reversal of an initial agency action.

[91] Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974); Associated Gen. Contractors, Okla. Chapter v. Laborers Int'l Union, 476 F.2d 1388 (Em. App. 1973); Rommell v. Walsh, 127 Conn. 16, 15 A.2d 6 (1940); Borough of Hasbrouck Heights v. Division of Tax Appeals, 48 N.J. Super. 328, 137 A.2d 585 (1958); *In re* Taylor, 172 Ohio St. 394, 176 N.E.2d 214 (1961) (mayor as appellant from a decree invalidating his removal of a police chief). As to the role of the agency in relation to that of other parties *see* Minnesota Water Resources Bd. v. County of Traverse, 287 Minn. 130, 177 N.W.2d 44 (1970); DiCillo & Sons v. Chester Zoning Bd. of Appeals, 158 Ohio St. 302, 109 N.E.2d 8 (1952).

[92] *See, e.g.*, Indianapolis Water Co. v. Moynahan Properties Co., 209 Ind. 453, 198 N.E. 312 (1935).

[93] Borough of Hasbrouck Heights v. Division of Tax Appeals, 49 N.J. Super. 328, 137 A.2d 585 (1958). The Supreme Court commented in FTC v. Dean Milk Co., 384 U.S. 597, 607 (1966), that, although "[t]here is no explicit statutory authority for the Commission to appear in judicial review proceedings, . . . no one has contended it cannot appear in the courts of appeals to defend its orders." *See also* Coleman v. Miller, 307 U.S. 433, 442 (opinion of the Court), 466 (separate opinion) (1939).

is a statutory "person or party aggrieved" or "party in interest," expressly or impliedly authorized by the statute to appeal.[94]

If an agency's action has been superseded by the action of a reviewing administrative authority charged with serving the same ends, the officer or agency that took the initial action is likely to be without standing in court either to challenge or to support the decision on review.[95] If, by contrast, the initial and reviewing authorities are considered to be differently oriented and are not in the relation of subordinate to superior, a statutory basis for standing by the initial authority to seek review and prosecute appeals may well exist.[96] If an officer or agency serves primarily as an advocate before another agency, standing to seek judicial review of an adverse decision would seemingly follow,

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[94] ICC v. Oregon-Washington Ry. & Nav. Co., 288 U.S. 14, 24 (1933); Zoning Bd. of Adjustment v. Bragon Run Terrace, Inc. 59 Del. 175, 216 A.2d 146 (1965); Boyd & Usher Transp. v. Southern Tank Lines, Inc., 326 S.W.2d 120 (Ky. 1959) (Dep't of Motor Transportation); Workmen's Comp. Bd. v. Abbott, 212 Ky. 123, 278 S.W. 533 (1925); Mississippi Real Estate Comm'n v. Ryan, 241 So. 2d 667 (Miss. 1970); Katz v. Dept. of Liquor Control, 166 Ohio St. 229, 141 N.E.2d 294 (1957) (standing limited by statute to specified issues); *cf. also* Mentor Marinas, Inc. v. Board of Liquor Control, 1 Ohio App.2d 219, 204 N.E.2d 404 (1964); Public Serv. Comm'n v. Baltimore & Ohio R. Co., 260 Pa. 323, 103 A. 724 (1918).

[95] Fadell v. Kovacik, 242 Ind. 610, 181 N.E.2d 228 (1962) (local tax assessor in relation to an assessment which a state board lowered); *In re* Proposed Assessment of County Treasurer, 219 Iowa 1099, 260 N.W. 538 (1935) (same); Sprague Oil Serv., Inc. v. Fadely, 189 Kan. 23, 367 P.2d 56 (1961) (Director of Revenue in relation to Board of Tax Appeals); State *ex rel.* Rouveyard v. Donnelly, 365 Mo. 686, 285 S.W.2d 669 (Mo. 1956) (state Commissioner of Finance whose decision refusing a bank charter had been reversed by the Board of Review, under a statute which expressly conferred standing to seek judicial review on applicants for charters); Scearce v. Simons, 294 S.W.2d 673 (Mo. App. 1956) (Director of Personnel in relation to decision of Civil Service Commission); State *ex rel.* Overton v. New Mexico State Tax Comm'n, 81 N.M. 28, 462 P.2d 613 (1970) (local tax assessor in relation to State Tax Commission); State *ex rel.* Broadway Petroleum Corp. v. City of Elyria, 18 Ohio St.2d 23, 247 N.E.2d 471 (1969) (local building inspector in relation to board of zoning appeals); Dept. of Labor & Indus. v. Unemployment Comp. Bd. of Review, 362 Pa. 342, 67 A.2d 114 (1949); State *ex rel.* Bates v. Board of Indus. Ins. Appeals, 51 Wash. 2d 125, 316 P.2d 467 (1957) (workmen's compensation director in relation to board of appeals).

[96] Town of Natick v. Massachusetts Dep't of Pub. Welfare, 341 Mass. 618, 171 N.E.2d 273 (1961) (town and its board of public welfare in relation to a state departmental order requiring added payments to a welfare recipient); State Bd. of Retirement v. Contributory Retirement Appeal Bd., 342 Mass. 58, 172 N.E.2d 234 (1961) (board administering a retirement fund in relation to a review board's decision requiring a payment from the fund); Kingsley v. Division of Tax Appeals, 76 N.J. Super. 531, 185 A.2d 42 (1962) (Director of Division of Taxation in relation to tax appeal body); *In re* Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963) (state commissioner of revenue in relation to tax review board); Gold Coast Realty, Inc. v. Board of Zoning Appeals, 26 Ohio St. 2d 37, 268 N.E.2d 280 (1971) (building inspector whose action was sustained by a Board of Zoning Appeals is a necessary party to review proceedings, entitled as such, by statute, to appeal to a higher court; as to the inspector's standing to seek review of adverse board action, *see* Bailes v. Martino, 2 Ohio App. 2d 197, 207 N.E.2d 385 (1963)); State v. Hix, 132 W.Va. 516, 54 S.E.2d 108 (1949) (Director of Unemployment Compensation in relation to Board of Review).

but may be excluded by the governing statute.[97] The People's Counsel or official bearing a similar title, who is charged by statute in several of the states with representing the consumer interest before a public utility commission, may have independent authority to bring judicial review proceedings with respect to commission orders only if standing is specifically conferred by statute.[98] Developing consumer legislation is likely to confer standing to challenge agency action on officials having similar functions who operate government-wide.[99]

Judicial decision of controversies among agencies may seem anomalous because the agencies are subject to some degree of common executive control which, rather than the courts, should arguably be the means of resolving policy conflicts among them. With respect to policy conflicts in litigation, the attorney general or, on the appellate level in the federal system, the Solicitor General, whose representational functions are government-wide, might be considered the proper instrumentality to effect an accomodation among agencies. Traditionally the government's chief law officer represents its interest and the general public interest in the courts.[100] In his own person or through his staff, he often represents agencies in proceedings to review their actions and, in particular situ-

[97] Lee v. CAB, 225 F.2d 950 (D.C. Cir. 1955) (Administrator of Civil Aeronautics lacks standing to seek review of Board dismissal of his complaint for suspension of air pilots' licenses). The General Counsel of the National Labor Relations Board performs an analogous role in some respects; but his responsibilities merge with the superior responsibilities of the Board, once he has issued a complaint. *Cf.* Leeds & Northrup Co. v. NLRB, 357 F.2d 527 (3d Cir. 1966). The Secretary of Labor is specifically given authority by statute to seek judicial review of decisions of the Occupational Safety and Health Board overruling his actions. 29 U.S.C. § 660(b) (1970). *See* Brennan v. Southern Contractors Serv., 492 F.2d 498 (5th Cir. 1974).

[98] Bosley v. Driver, 191 Md. 229, 60 A.2d 691 (1948); *cf.* Martin v. Indianapolis Water Co., 130 Ind. App. 416, 162 N.E.2d 709 (1959); *compare* Md. Acts 1955, c. 441 p. 750, Anno. Code (Michie 1969), art. 78, § 15; IND. CODE (Burns Supp. 1971) 8-1-1-4, by which the authority is bestowed.

[99] The consumer protection legislation which was passed by both houses of the 94th Congress but died in conference committee would have authorized the administrator of the consumer protection agency it created to initiate or intervene in federal court proceedings for review of federal agency action, to the extent that any person, if aggrieved by the action, could do so, when the administrator determined that the action might substantially affect an interest of consumers. The Senate and House versions differed somewhat in their details. See § 6(c) of S. 200 as passed by the Senate, 121 Cong. Rec. S.8423-24 (daily ed. May 15, 1975) and § 6(d) of the same bill as passed by the House with the text of H. 7575 substituted, 121 Cong. Rec. H. 10749-50 (daily ed. Nov. 6, 1975).

[100] Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 426 (1925); United States v. San Jacinto Tin Co., 125 U.S. 273, 279-87 (1888); Florida v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976); Illinois v. Associated Milk Producers, 351 F. Supp. 436 (N.D. Ill. 1972); United States v. Ira S. Bushey & Sons, Inc., 346 F. Supp. 145 (D. Vt. 1972); State *ex rel.* Olsen v. Public Serv. Comm'n, 129 Mont. 108, 283 P.2d 594 (1955); Petition of Pub. Serv. Coordinated Transp., 5 N.J. 196, 208, 74 A.2d 580, 586 (1950) (Attorney General and Governor); Muench v. Public Serv. Comm'n, 261 Wis. 492, 513, 53 N.W.2d 514, 523 (1952) (Attorney General and Conservation Commission); *cf.* Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201 (1967); Ponzi v. Fessenden, 258 U.S. 254 (1922).

ations involving a challenge by one agency to the action of another, might have responsibilities to both. It would be unrealistic to suppose, however, that under modern conditions the chief law officer, even with a large staff, could effectively represent all agencies of the same government or that, if he could do so as a matter of sheer logistics, he would command the knowledge to make wise adjustments among them in the public interest. Consequently the agencies often are independently represented; and the history of the attorney general's office in this country, both federal and state, reflects an uneasy and shifting adjustment between vesting centralized power in that office and permitting the agencies to develop their own legal opinions and to appear independently in court.[101] Cooperation such as prevails in the federal system, leading to the occasional submission of irreconcilable differences to the courts,[102] probably represents the optimum solution to this problem in so complex a government.

In the states, the interpretation of constitutional and statutory provisions, especially with reference to the bestowal of common law powers upon the attorney general, may[103] or may not[104] lead to the conclusion that the authority of his office includes the initiation of proceedings to review a specialized agency's action when the attorney general or the chief executive considers this course necessary. The use of this authority involves a danger of intrusion into responsibilities which the legislature

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101 H. CUMMINGS & C. MCFARLAND, FEDERAL JUSTICE (1937), 149-60, 219-29, 486-91, 509-20; NATIONAL ASS'N OF ATTORNEYS GENERAL, REPORT ON THE OFFICE OF ATTORNEY GENERAL (1971), 7 (recommendation 34), 9 (recommendations 44, 45), 33, 35, 43-46, 49-51, 271-95, 335-37. *See also* Shepperd, *Common Law Duties of the Attorney General*, 7 BAYLOR L. REV. 1 (1955).

102 *See* Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A.J. 154 (1960); Stern, *"Inconsistency" in Government Litigation*, 64 HARV. L. REV. 759 (1951). For an interesting instance of interagency litigation to determine the constitutionality of a statute establishing one of the agencies, a "body corporate and politic," *see* New Jersey Turnpike Authority v. Parsons, 3 N.J. 235, 69 A.2d 875 (1949).

103 State *ex rel.* Olsen v. Public Serv. Comm'n, 129 Mont. 108, 283 P.2d 594 (1955); Petition of Pub. Serv. Coordinated Transp., 5 N.J. 196, 74 A.2d 580 (1950); Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952). In the first two of these cases the opinions brush aside conflict-of-interest objections growing out of the attorney generals' duties to represent the agencies whose orders were being challenged. For a recognition that the conflict-of-interest problem may arise but need not be insurmountable, *see* Attorney General v. Department of Pub. Util., 342 Mass. 666, 668, 175 N.E.2d 255, 257 (1961).

104 Arizona State Land Dep't v. McFate, 87 Ariz. 139, 348 P.2d 912 (1960); State *ex rel.* McKittrick v. Missouri Pub. Serv. Comm'n, 352 Mo. 29, 175 S.W.2d 857 (1943). *See also* People v. Debt Reducers, Inc., 484 P.2d 869 (Ore. App. 1971), with reference to the authority to sue a regulated private business in behalf of an interest of numerous members of the public who had or might have dealings with it.

has reposed in the specialized agency,[105] and can be justified only when the state alleges a proprietary interest, when some other important public interest is alleged to have been overlooked or to have been disregarded as beyond the agency's province,[106] or when there is a likelihood of serious failure of legal duty that could not be overcome by other means.[107] On the other hand, a specialized officer or agency charged with advancing or safeguarding a particular public interest may, in order to safeguard that interest against another one which has been entrusted to another agency, have standing to challenge in court an action or refusal to act of the other agency.[108]

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[105] The Montana and New Jersey cases cited in note 103 *supra*, in which respectively, the attorney general and the attorney general at the direction of the governor challenged the merits of public utility rate increases allowed by a public service commission, exemplify this danger. *Compare* the careful opinion in State *ex rel.* McKittrick v. Missouri Pub. Serv. Comm'n, 352 Mo. 29, 175 S.W.2d 857 (1943), holding that standing on the part of the Attorney General would arise only when he represented a proprietary interest of the State or a public interest that transcended the interests of consumers which the Commission was itself charged with safeguarding. It can be argued, however, that the review proceedings are merely a means of bringing to court issues which properly belong there, and that the danger of harmful intrusion is outweighed by the need for vigilance on behalf of consumers by the general officers of the government. As to a county's standing to seek judicial review of the action of a state agency affecting county revenues, *see* County of Bergen v. Port of New York Authority, 32 N.J. 303, 160 A.2d 810 (1960).

[106] In Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952), the court concluded that, as a matter of the interpretation of several interrelated statutes which were applicable, the Attorney General rather than the Commission was primarily responsible for safeguarding public fishing rights that would be affected by the Commission's authorization of a dam for electric power generation. To protect those rights, he had appeared before the Commission as a representative of the Conservation Commission. The hierarchy of interests which the attorney general may represent does not extend, obviously, to the level of individual interests which those possessing them can vindicate in ordinary litigation. *See* Commonwealth of Pennsylvania *ex rel.* Rafferty v. Philadelphia Psychiatric Clinic, 356 F. Supp. 500 (E.D. Pa. 1973); Pennsylvania v. New Jersey, 96 S. Ct. 2333 (1976); Pennsylvania v. Kleppe, 533 F.2d 668 (D.C. Cir. 1976).

[107] *See* State *ex rel.* Morrison v. Thomas, 80 Ariz. 327, 297 P.2d 624 (1956), in which the Attorney General was held to be empowered to seek appellate review by means of certiorari of an otherwise unappealable lower-court decision reversing an administrative denial of a liquor license, when the licensing authority declined to petition for the writ. Abuse of discretion on its part was not alleged. A dissenting opinion argued cogently that the Governor possessed sole authority to overcome any agency failure involved and that, subject to this possible safeguard, the matter was committed by statute to the licensing agency.

[108] United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 156 (1953) (Secretary of the Interior's interest as a distributor of power from public projects); Nuesse v. Camp, 385 F.2d 694, 699-700 (D.C. Cir. 1967) (state banking commissioner as intervenor in relation to national bank branching); Board of Social Welfare v. Los Angeles County, 27 Cal. 2d 98, 162 P.2d 627 (1945); State Bd. of Educ. v. Board of Educ. of Netcong, 108 N.J. Super. 564, 262 A.2d 21 (1970), *aff'd*, 57 N.J. 172, 270 A.2d 412 (1970), *cert. denied*, 401 U.S. 1013 (1971). Standing is conferred on the Secretary of Agriculture with respect to Interstate Commerce Commission rate orders and orders dealing with carrier practices by 7 U.S.C. § 1291 (1970). In Udall v. FPC, 387 U.S. 428 (1967), the standing of the Secretary of the Interior was recognized without discussion, in relation to his duties to protect fish and wildlife, even though the Federal Power Commission as the deciding agency, differently oriented and equipped, was also charged, by the Court's interpretation, with safeguarding

Intra-governmental litigation in fact has a long history. In the Anglo-American system, the courts have traditionally been called upon in prerogative writ proceedings to effectuate the authority of the general government over its subordinates with reference to certain litigable matters. The disposition of criminal charges against public officers for offenses connected with their official status, of which the government is often the victim, is another example of judicial action to settle disputes arising within the government. Consequently, statutes which call upon the courts to entertain and decide similar intra-governmental disputes in additional ways, such as the determination of controversies growing out of the disciplining of public officers, may well be valid. In these instances the personal interest of the officers involved, adverse to the interest of the government, renders the controversies suitable for judicial determination; but there is no difference in principle between entrusting this kind of dispute to judicial determination, as has become quite usual, and entrusting other genuine disputes arising within government and presenting otherwise justiciable issues. The standing of an agency to bring a dispute over the action of another agency to court requires that the challenging agency possess or represent a litigable interest which is alleged to have been damaged and that the agency be not itself a subordinate one incapable of acting independently of the respondent agency. The question whether these prerequisites are met arises in a wide range of situations.

An officer or agency in charge of a segregated public fund or enterprise is quite likely to have standing to seek review of the action of another agency which would impair the assets of the fund or enterprise.[109] Similarly, the sovereign may in its own name invoke judicial remedies to vindicate its financial interests as against agency action imposing costs upon it or withholding funds from its treasury.[110] Apart

the same interest in relation to the hydroelectric project involved in the case. Citizens' advisory groups attached to agencies and entitled by statute to be consulted have been held to possess standing to challenge agency failure to maintain and consult them. *See* Comprehensive Group Health Serv. Bd. v. Temple University, 363 F. Supp. 1069 (E.D. Pa. 1973).

[109] Summerfield v. CAB, 207 F.2d 200 (D.C. Cir. 1953), *aff'd sub nom.* Western Air Lines v. CAB, 347 U.S. 67 (1954); Delta Airlines v. Summerfield, 347 U.S. 74 (1954); Police Pension & Relief Bd. v. Goldman, 486 P.2d 469 (Colo. App. 1971); *compare* Subsequent Injury Fund v. Pack, 250 Md. 306, 242 A.2d 506 (1968) (fund not made a separate entity in the hands of the state treasurer).

[110] United States v. ICC, 337 U.S. 426 (1949). The governmental standing in this regard may exclude that of a subordinate agency of the same government which is involved in the same matter. *See* Subsequent Injury Fund v. Pack, 250 Md. 306, 242 A.2d 506 (1968); King v. Stark County, 72 N.D. 717, 10 N.W.2d 877 (1943) (agency does not have standing by virtue of its interest, adverse to liability under a money judgment growing out of its operations, payable from the state treasury).

from such situations involving governmental proprietary interests, governmental standing to litigate often involves the question whether the unit of government presenting the issue does so in behalf of an interest falling within its province. As respects the states of the Union, standing to sue private defendants in order to protect natural resources within a state's boundaries without regard to their ownership was recognized in *Georgia v. Tennessee Copper Company.*[111] A state's interest in the health of its economy was recognized as a basis of standing to sue private defendants under the Sherman Act in *Georgia v. Pennsylvania Railroad Company.*[112] The standing of one state to sue another, otherwise than in traditional boundary dispute situations, in order to protect the public interest in the welfare of all or part of its society or economy as against action by the other state, has also been recognized.[113] The interest of a state in maintaining its economy or the general welfare within its borders,[114] or its ability to control specific matters of state concern within its boundaries,[115] as against past or threatened federal agency action,

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111 206 U.S. 230 (1907). *See also* State of Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971); Maryland Dep't of Natural Resources v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972). As to standing of the states and federal government to invoke the federal question jurisdiction of the federal courts against infractions of a developing federal common law of nuisances on the navigable waters, *see* Illinois v. City of Milwaukee, 406 U.S. 91, 103-08 (1972); United States *ex rel.* Scott v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973). *See also* State *ex rel.* Shartel v. Humphreys, 338 Mo. 109, 93 S.W.2d 924 (1926).

112 324 U.S. 439, 445-55 (1945). *See also* Cascade Nat'l Gas Co. v. El Paso Nat'l Gas Co., 386 U.S. 129 (1967) (intervention by California in proceedings to fashion an antitrust divestiture decree); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972) (state's remedy for injury to its economy is limited to injunction). As to the standing of the United States to sue to enjoin obstructions to interstate commerce, *see In re* Debs, 158 U.S. 564, 584 (1895).

113 Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Pennsylvania v. West Virginia, 262 U.S. 553, 591-92 (1923) (interest in preventing curtailment of natural gas supply from another state); Kansas v. Colorado, 185 U.S. 125 (1902); Missouri v. Illinois, 180 U.S. 208 (1901). *See also* New York v. New Jersey, 256 U.S. 296 (1921).

114 New York v. United States, 65 F. Supp. 856, 872 (S.D.N.Y. 1946), *aff'd*, 331 U.S. 284 (1947) (interest in the state's economy as affected by an I.C.C. railroad rate order); Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) (recognizing without discussion the interest of a state and of municipalities in the local availability and cost of natural gas and hence in the Federal Power Commission's regulation of production and prices); Arizona v. California, 373 U.S. 546 (1963) (same as to interest of states in federal river-water allocations for their areas); Government of Guam v. FMC, 329 F.2d 251 (D.C. Cir. 1964) (interest of territorial government in its economy, as affected by a Maritime Commission order establishing shipping rates).

115 Missouri v. Holland, 252 U.S. 416 (1923) ("quasi sovereign rights" of the state with respect to wild game, as against federal action under a migratory bird treaty with Canada); Hopkins Federal Sav. & Loan Assoc. v. Cleary, 296 U.S. 315, 339-40 (1935) (interest of a state in creating and regulating corporate savings institutions, as against federal assumption of control over them); South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (recognizing without discussion the interest of the state in maintaining its election laws, as against federal interference). The federal courts must, of course, reach their own judgments as to the adequacy of the state interest which is alleged as the basis

has also been increasingly recognized. It follows that a state or local agency to which a particular matter of state interest has been entrusted may have standing in a federal court in behalf of that interest, to challenge federal agency action.[116]

The capacity of a state, local unit of government, or specialized state agency to represent an interest in federal proceedings is limited to interests that are differentiated from nation-wide interests which have been committed wholly to federal consideration and determination. Consequently a state lacks standing to litigate in behalf of its citizens in opposition to federal welfare expenditures[117] or, in behalf of federal taxpayers or of voters within its boundaries, to challenge federal actions allegedly harmful to them,[118] or to seek to protect those of its inhabitants who are subject to call for federal military service against allegedly unconstitutional demands upon them.[119] The State or one of its agencies may, on the other hand, vindicate in federal court the relevant interests of its inhabitants who are users of federally regulated utility services, if their needs are distinguishable from those of users elsewhere and have not been committed wholly to federal protection.[120] The inhabitants collec-

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of standing in those courts. The state cannot, merely by providing for state representation of a private interest, transform it for this purpose into a governmental one. Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387 (1938); Land O'Lakes Creameries v. Louisiana State Bd. of Health, 160 F. Supp. 387 (E.D. La. 1958). *See also* note 108 *supra.*

116 *See* Washington Util. & Transp. Comm'n v. FCC, 513 F.2d 1142, 1145-53 (9th Cir. 1975), *cert. denied sub nom.* National Ass'n of Regulatory Comm'rs v. FCC, 423 U.S. 836 (1975); Public Serv. Comm'n of N.Y. v. FPC, 329 F.2d 242 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 963 (1964); Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967), note 108 *supra* (case involved intervention; but held also, state banking commissioner has standing to sue, based on the state's interest, recognized by Congress, in maintaining the banking industry structure provided by its laws, as against impairment by action of the Comptroller of the Currency); Leuchtold v. Camp, 405 F.2d 499 (9th Cir. 1969) (standing in behalf of the same interest recognized by virtue of the Administrative Procedure Act); Wood v. National Ry. Passenger Corp., 341 F. Supp. 908 (D. Conn. 1972). *Cf.* Jackson v. First Nat'l Bank, 349 F.2d 71 (5th Cir. 1965); Idaho v. First Sec. Bank, 315 F. Supp. 274 (D. Idaho 1970). The standing in a federal court of a state-created local unit of government may be recognized in opposition to the state itself, on the basis of federal recognition of its interest in relation to federal statutory matters. *See* Bass v. Richardson, 338 F. Supp. 478 (S.D.N.Y. 1971) (intervention by a city in a suit challenging federal-state public assistance arrangements, because of fiscal consequences to the city).

Apart from such federal recognition for specific purposes, the state controls the role in litigation of its officials and subordinate units. *See* Aguayo v. Richardson, 352 F. Supp. 462 (S.D.N.Y. 1972), *modified & aff'd*, 473 F.2d 1090 (2d Cir. 1972), *cert. denied*, 414 U.S. 1146 (1974), applying the principle of Williams v. Baltimore, 289 U.S. 36 (1933); Coleman v. Miller, 307 U.S. 933, 441 (opinion of the Court), 466 (separate opinion) (1939).

117 Massachusetts v. Mellon, 262 U.S. 447, 485-86 (1923).

118 South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (voters); Florida v. Mellon, 273 U.S. 12, 18 (1927) (taxpayers).

119 Massachusetts v. Laird, 400 U.S. 886 (1970) (*semble*); Massachusetts v. Laird, 451 F.2d 26, 29 (1st Cir. 1971).

120 *See* Washington Util. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir. 1975), *cert. denied sub nom.* National Ass'n of Regulatory Comm'rs v. FCC, 423 U.S. 836 (1975);

tively, one supposes, may be similarly represented as subjects of regulation or as participants in the economy in some distinctive way, if their interests differ in identifiable respects from those of persons in the nation as a whole and, again, have not been entrusted wholly to federal authority.[121] The standing of municipal governments to challenge state agency decisions in behalf of their inhabitants in the state courts is similarly confined to the representation of interests which are separable from those for which the state agency involved is exclusively responsible.[122] Fine distinctions are involved in these situations; yet adherence by means of them to prescribed allocations of government responsibility is not unimportant.

Taxpayer Suits

The taxpayer interest, as has been noticed,[123] is basically an economic interest in securing and conserving government assets or limiting the costs of government to legitimate ones, so as to hold taxpayer burdens to proper levels. This interest is narrower than the citizen interest in keeping governmental action legal for a variety of reasons. Typically,

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Public Serv. Comm'n of N.Y. v. FPC, 436 F.2d 904 (D.C. Cir. 1970); Public Serv. Comm'n of N.Y. v. FPC, 329 F.2d 242 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 963 (1964); Detroit v. FPC, 230 F.2d 810 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 829 (1956); Wisconsin v. FPC, 205 F.2d 706 (D.C. Cir. 1953), *aff'd*, Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954). *Compare* Public Util. Comm'n of Cal. v. United States, 356 F.2d 236, 241 (9th Cir. 1966) (dictum that state agency lacks standing to assert procedural rights of state citizens in federal agency proceedings); San Juan County v. Russell, 340 F. Supp. 1006 (D. Utah 1971) (county lacks standing in behalf of citizens with respect to federal public lands policy); Jersey City v. United States, 101 F. Supp. 702 (D.N.J. 1950) (interest of local residents in interstate transit fares is wholly entrusted to the ICC and City lacks standing to challenge its action).

[121] Kelley v. Butz, 404 F. Supp. 925 (W.D. Mich. 1975); National Indus. Traffic League v. United States, 396 F. Supp. 456 (D.D.C. 1975). Doubts expressed by the court in Pearce v. Freeman, 238 F. Supp. 947, 955 (E.D. La. 1965), as to the standing of a state commissioner of argiculture to represent the interests of state dairy farmers in opposition to a federal marketing order which preempted a differing state order, appear to be well founded. The standing of a local governmental unit by reason of a proprietary interest or function of its own should be evident under most statutes. *See, e.g.*, City of Davis v. Coleman, 521 F.2d 661, 670-72 (9th Cir. 1975).

[122] Town of Milford v. Commissioner of Motor Vehicles, 139 Conn. 677, 96 A.2d 806 (1953) (town represents welfare of inhabitants in challenging the commissioner's licensing of a gasoline filling station); Town of Sudbury v. Department of Pub. Util., 351 Mass. 214, 218 N.E.2d 415 (1966) (same as to location of power line); Town of Wilmington v. Department of Pub. Util., 340 Mass. 432, 165 N.E.2d 99 (1960) (same as to discontinuance of passenger station); Town of East Ridge v. City of Chattanooga, 191 Tenn. 551, 235 S.W.2d 30 (1950) (town lacks standing in relation to bus rates fixed by neighboring city under statutory power and extending into the territory of the town); County of Bergen v. Port of N.Y. Authority, 23 N.J. 303, 160 A.2d 810 (1960); *cf.* City of New York v. New York Tel. Co., 261 U.S. 312 (1923). As to the standing of the state as *parens patriae* to challenge the actions of local authorities, *see* Pennsylvania v. Flaherty, 404 F. Supp. 1022 (W.D. Pa. 1975).

[123] *See* text accompanying note 56 *supra*.

state court decisions and those of the federal courts with respect to the territories employ this economic test in determining taxpayer standing to challenge agency action.[124] Nevertheless the interest of taxpayer plaintiffs is often in policy issues rather than in any cost to them as taxpayers or loss to the government which they might have to make up, stemming from a challenged course of action.[125] Hence the foregoing reasoning unrealistically gives them standing which others equally concerned may not have, if but only if economic consequences to them as taxpayers can be identified.[126]

In relation to the governmental economics involved, taxpayer suits concern a variety of agency actions which may be challenged as detrimental: (1) allegedly illegal expenditures draining or endangering the

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[124] Reynolds v. Wade, 249 F.2d 73 (9th Cir. 1957); Henderson v. McCormick, 70 Ariz. 19, 215 P.2d 608 (1950); Bryan v. City of Miami, 56 So. 2d 924 (Fla. 1951); Daly v. Madison County, 378 Ill. 357, 38 N.E.2d 160 (1941); Price v. City of Mattoon, 364 Ill. 512, 4 N.E.2d 850 (1936); Funk v. Mullan Contracting Co., 197 Md. 192, 78 A.2d 632 (1951); Baltimore Retail Liquor Package Stores Ass'n v. Board of License Comm'rs, 171 Md. 426, 189 A. 209 (1937); Richards v. Treasurer & Receiver General, 319 Mass. 672, 67 N.E.2d 583 (1946) (taxpayers' suit under limiting statute); Hinds County v. Johnson, 133 Miss. 591, 98 So. 95 (1923); Badgett v. Rogers, 436 S.W.2d 292 (Tenn. 1969); S.D. Realty Co. v. Sewerage Comm'n, 15 Wis. 2d 15, 112 N.W.2d 177 (1971).

[125] Reynolds v. Wade, 249 F.2d 73 (9th Cir. 1957) (challenge to use of territorial funds for transporting pupils to non-public schools); Cusack v. Howlett, 44 Ill. 2d 233, 254 N.E.2d 506 (1969) (challenge to legislative investigation of alleged judicial impropriety); Turkowich v. Board of Trustees, 11 Ill. 2d 460, 143 N.E.2d 229 (1957) (challenge, supported by private broadcasters, to use of state university funds for television station); Funk v. Mullan Contracting Co., 197 Md. 192, 78 A.2d 632 (1951) (challenge by contractor-taxpayers to statute requiring payment of prevailing rate of wages by contractors with the government); Golding v. Armstrong, 281 Miss. 899, 97 So. 2d 379 (1957) (challenge to compensation of legislator for services in a second state position); S.D. Realty Co. v. Sewerage Comm'n, 15 Wis. 2d 15, 112 N.W.2d 177 (1971) (challenge by owner of shipping center to expenditure benefiting competing center).

[126] In Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950), doubts as to taxpayer standing under an economic test were put aside, but prevailed in the Supreme Court, 342 U.S. 429 (1952), in relation to its own jurisdiction to entertain an appeal. In Adler v. Board of Educ., 342 U.S. 485 (1952), the Court entertained an appeal by taxpayers and others which, as to taxpayer standing, is indistinguishable from *Doremus*, but as to the other appellants presented other issues. *See* the discussion in the dissenting opinion of Mr. Justice Frankfurter. In Wieman v. Updegraff, 344 U.S. 183 (1952), which has sometimes been characterized as in conflict with *Doremus* on the standing issue, the taxpayer plaintiff was an appellee in the Supreme Court and a clear controversy existed between the appellants who had an economic interest in the outcome as salaried teachers whose retention of their jobs was at issue, and Oklahoma officials who were also appellees. For other instances of both sufficiency and insufficiency of taxpayer economic interest in challenges to the validity of statutes or ordinances on largely non-economic grounds *see* Annot., 174 A.L.R. 549, 555-68 (1948). Some statutes confer standing on taxpayers to challenge official action or inaction having little or no relation to fiscal burdens. *See* the instances cited in *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 903 n.42 (1960); Smith v. Government of the Virgin Islands, 329 F.2d 131 (3d Cir. 1964), *followed in* Smith v. Virgin Islands, 329 F.2d 135 (3d Cir. 1964), and Holmes v. Virgin Islands, 370 F. Supp. 715 (D.V.I. 1974).

general treasury;[127] (2) expenditures under an allegedly unconstitutional law or an otherwise invalid arrangement which also provides income that will fail if the challenge is successful;[128] (3) illegality for procedural or other limited reasons of expenditures for necessary purposes, the curing of which will not prevent equivalent expenditures from being undertaken;[129] (4) allegedly illegal expenditure of money or alienation of property involving only segregated funds or assets to which the plaintiff's taxes have no relation;[130] (5) failure to collect taxes allegedly due or to secure needed assets allegedly belonging to the government;[131] and (6) alienation of government property or diversion of property reserved for specific, necessary uses, with or without full financial compensation to the government.[132]

Among the foregoing situations, the first and fifth involve actual or threatened deprivation to the taxpayers as such; the second and sixth could involve similar deprivation if the offsetting revenues under the

[127] *See* cases cited, note 125 *supra*; Mathews v. Massell, 356 F. Supp. 291 (N.D. Ga. 1973); Funk v. Mullan Contracting Co., 197 Md. 192, 78 A.2d 632 (1951); Sears v. Treasurer & Receiver General, 327 Mass. 310, 98 N.E.2d 621 (1957); Arens v. Village of Rogers, 240 Minn. 386, 61 N.W.2d 508 (1953). In such matters as nonobservance of statutory procedures for letting public contracts, danger of loss to the treasury, rather than demonstrated loss in the individual instance, suffices as the basis of taxpayer interest. *See* Waszen v. Atlantic City, 1 N.J. 272, 63 A.2d 255 (1949).

[128] Krebs v. Thompson, 387 Ill. 471, 56 N.E.2d 761 (1944) (standing to challenge statute regulating practice of professional engineering, which provided for license fees probably in excess of costs of regulation recognized); Hinds County v. Johnson, 133 Miss. 591, 98 So. 95 (1923) (standing to challenge grade crossing elimination for which the county was to be reimbursed held lacking).

[129] *Cf.* Daly v. Madison County, 378 Ill. 357, 371-74, 38 N.E.2d 160, 167-69 (1941) (success of taxpayer action would result in greater expenditures than those attacked).

[130] Price v. City of Mattoon, 364 Ill. 512, 4 N.E.2d 850 (1963); Crews v. Beattie, 197 S.C. 32, 14 S.E.2d 351 (1941). *Cf.* State *ex rel.* Masterson v. Ohio State Racing Comm'n, 162 Ohio St. 366, 123 N.E.2d 1 (1954).

[131] Iowa Mut. Tornado Ins. Ass'n v. Timmons, 252 Iowa 163, 105 N.W.2d 209 (1960); State *ex rel.* Miller v. Price, 3 Ohio St. 2d 177, 209 N.E.2d 578 (1965) (statutory mandamus); State *ex rel.* St. Louis-S.F.R. Co. v. Boyett, 183 Okla. 49, 80 P.2d 201 (1938). *Cf.* Stietenroth v. Managhan, 239 Miss. 376, 123 So. 2d 534 (1960) (statutory mandamus at suit of taxpayer does not lie).

[132] Alienation or diversion of property with less than full compensation for the interest lost involves the same kind of injury to the taxpayer interest as other losses to the treasury. Watson v. City of East Point, 223 Ga. 185, 154 S.E.2d 15 (1967); Heilig Bros. Co. v. Kohler, 366 Pa. 72, 76 A.2d 613 (1950). Nevertheless, in Booth v. Metropolitan Sanitary Dist., 79 Ill. App. 2d 310, 224 N.E.2d 591 (1967), taxpayers were held to lack standing to challenge transactions relating to property for either this reason or an alternative reason, asserted in some cases, that taxpayers have an equitable interest in the preservation of public uses to which particular government property may have been dedicated (*cf.* Harvey v. Board of Pub. Instruction, 101 Fla. 273, 133 So. 868 (1931); Matson v. Town of Caledonia, 200 Wis. 43, 227 N.W. 298 (1929)). This restrictive view as to the second basis of standing and probably as to the first basis also was abandoned in Paepcke v. Public Bldg. Comm'n, 46 Ill. 2d 330, 341, 263 N.E.2d 11, 18 (1970). The resulting taxpayer interest, however, was held not to be a property interest protected by the due process clause of the fourteenth amendment in Booth v. LeMont Mfg. Corp., 440 F.2d 385 (7th Cir. 1971), *cert. denied*, 404 U.S. 916 (1971).

challenged statute or compensation for property fail to equal the loss sought to be prevented; and the third and fourth do not involve economic deprivation to the taxpayers. As might be expected, a court which purports to apply the economic theory of taxpayer standing may occasionally depart from it in order to decide an issue which needs to be decided in the public interest,[183] as may well be the case in the second kind of situation.[184] In the third and fourth types of situation, although the taxpayer economic interest does not support standing,[185] a broader taxpayer interest in preventing all illegal disbursement of funds or dissipation of assets by the government, which may be characterized as economic in a different sense or as identical to the citizen interest, is recognized in a number of jurisdictions.[186] Such a merging of interests, together with the frequent avowed or unavowed non-economic motivation of taxpayer plaintiffs, causes numerous references to be made to a merged category of citizen-taxpayer proceedings.

Taxpayer standing on one or another of the foregoing theories is more frequently recognized by court decisions or by statute with relation to the actions of local authorities than with reference to the actions of agents of the general government.[187] The reasons lie partly in the somewhat larger relative share the individual taxpayer has in the treasury of a local unit of government than in that of the general government; partly in a fictional analogy which is sometimes drawn between municipal taxpayers and shareholders in private corporations who possess proprietary interests in relation to corporate affairs;[188] and partly in a diminished judicial reluctance, when local authorities are concerned,

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183 Hammond v. Lancaster, 194 Md. 462, 71 A.2d 474, 483 (1950) (court, adhering generally to the view that taxpayer standing requires tax consequences from challenged actions, determines emergency clause issue which involves no such consequences).

184 *Compare* the two cases cited in note 128 *supra.*

185 *See* cases cited notes 129 & 130 *supra.*

186 Blair v. Pitchess, 5 Cal. 3d 258, 267-70, 486 P.2d 1242, 1248-50 (1971) (statutory action, but principle more broadly stated); Howard v. City of Boulder, 132 Colo. 401, 290 P.2d 237 (1955); McGinty v. Pickering, 180 Ga. 447, 179 S.E. 358 (1935); Haines v. Burlington County Bridge Comm'n, 1 N.J. Super. 163, 170-73, 63 A.2d 284, 287-88 (1949), *cited with approval*, Driscoll v. Burlington County Bridge Comm'n, 8 N.J. 433, 478, 86 A.2d 201, 222 (1952), *cert. denied*, 344 U.S. 838 (1952) (*See also* Haines v. Burlington County Bridge Comm'n, 8 N.J. 539, 86 A.2d 236 (1952)); Faden v. Philadelphia Housing Authority, 424 Pa. 273, 227 A.2d 619 (1967). *Cf.* Paepcke v. Public Bldg. Comm'n, 46 Ill. 2d 330, 263 N.E.2d 11 (1970); Dickman v. School Dist. No. 62C, 232 Ore. 238, 245, 366 P.2d 533, 537 (1961).

187 Note, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895 (1960).

188 Frothingham v. Mellon, 262 U.S. 447, 486-87 (1923); Mauldin v. City Council, 33 S.C. 1, 11 S.E. 434 (1890); Victoria v. Village of Muscoda, 228 Wis. 455, 279 N.W. 663 (1938); J. DILLON, MUNICIPAL CORPORATIONS §§ 1579-87 (5th ed. 1911). Originally applicable to taxpayers to incorporated municipalities, this analogy has been conveniently extended to those in other kinds of units of local government. *See, e.g.*, Lamar v. Croft, 73 S.C. 407, 53 S.E. 540 (1906).

to interfere with government operations, because of the subordinate status of local units and of a somewhat greater need to check maladministration in them than in the general government.[139] The standing, on some suitable ground, of state taxpayers to challenge state agency action is, however, recognized in most states, but not in some.[140] Nonresident taxpayers may share in taxpayer standing based on economic grounds, including not only increased taxes but also, in some cases, loss in the value of a taxpayer's property, allegedly stemming from the challenged governmental action.[141]

The standing of federal taxpayers to challenge federal action was rejected altogether by the Supreme Court because of reluctance to interfere with the concerns of the coordinate branches of government and because of the relative minuteness of each taxpayer's interest in federal funding,[142] until the decision of *Flast v. Cohen* in 1968.[143] There, federal taxpayer standing was upheld in relation to a challenge to the use of the spending power in alleged violation of the clause of the first amendment forbidding "an establishment of religion," because that clause is specifically applicable to the spending power and a "nexus" exists between the concern a taxpayer has in holding that power in check—despite the minuteness of his interest—and the constitutional protection he invokes.

The actual decision in *Flast* related only to the establishment clause, which the framers of the first amendment envisaged in part as limiting the use of government money; but the reasoning embraces any additional

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139 The courts are empowered to declare municipal ordinances adopted by virtue of implied powers to be void on the ground of unreasonableness—a wider authority than exists with respect to statutes or, seemingly, with respect to most agency actions. *See* 2 J. DILLON, MUNICIPAL CORPORATIONS § 589 (5th ed. 1911). As to the origin in municipal corruption of the New York statutes authorizing taxpayer suits to enjoin threatened illegal acts of local officials *see* 4 J. DILLON, MUNICIPAL CORPORATIONS §§ 1578, 1585; *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 898-99 (1960).

140 *See* Note, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 900-902 (1960); Flast v. Cohen, 392 U.S. 83, 108-09 (1968) (Douglas, J., concurring). This issue has been prominently before the New York Court of Appeals which by a narrow division has adhered to the view that taxpayer suits, along with citizen suits, may not be brought to challenge state agency action. Hidley v. Rockefeller, 28 N.Y.2d 439, 271 N.E.2d 530 (1971). *But see* Kuhn v. Curran, 294 N.Y. 207, 61 N.E.2d 513 (1945), where the importance of the issue sought to be litigated led the court to disregard the question of standing. The issue was unnecessarily raised in a contemporaneous case involving a taxpayer's challenge to the method employed in valuing his property for tax purposes, Bloom v. Mayor of New York, 28 N.Y.2d 952, 271 N.E.2d 919 (1971). *See* Note, *New York and the Non-Hohfeldian Plaintiff; Taxpayers' Standing to Sue the State*, 36 ALB. L. REV. 203 (1971).

141 Irwin v. City of Manhattan Beach, 65 Cal. 2d 13, 415 P.2d 769 (1966); Zuckerman v. Board of Zoning Appeals, 144 Conn. 160, 128 A.2d 325 (1956).

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

143 392 U.S. 83 (1968).

constitutional limitations that apply "specifically" to the spending power.[144] The Court's formulation supplies at best an arbitrary basis for distinguishing cases; for, as Mr. Justice Harlan pointed out in dissent, realistically the taxpayer interest attaches to all federal expenditures and to restrictions on the purposes for which they may be made, not just to those which rest on the spending power. Many expenditures, moreover, such as those on the postal service, on government-owned transportation, on the elimination of social evils in interstate commerce, on social security, on the development of atomic energy, and on preservation of the environment, rest in varying degree on the power to tax and spend for the general welfare as well as on other powers of Congress.

What, then, of federal taxpayer standing to invoke constitutional limitations on the kinds of measures just suggested? What, further, of taxpayer standing to challenge alleged excess of statutory rather than constitutional authority on the part of spending agencies, especially when the statutory provisions invoked are designed to protect the treasury? Some lower-court decisions, including one affirmed by the Supreme Court, have applied the principle of *Flast v. Cohen* by denying standing with respect to expenditures that were thought to rest on powers other than the spending power[145] or where an exercise of the spending power was challenged as an invasion of state authority rather than as otherwise forbidden.[146] Other decisions have recognized taxpayer standing in situations similar to that in *Flast*.[147] In two companion cases the majority of the Supreme Court rejected contentions that taxpayers as such had standing to secure judicial enforcement of constitutional provisions other than restrictions on the use of the spending clause, which were claimed to have the specific purpose of safeguarding the federal fisc (as clearly the provision involved in the first of the two cases did have), along with

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144 The Court adduced historical evidence that in providing against an "establishment of religion" the framers were consciously concerned with prohibiting governmental subsidies to religion, 392 U.S. at 102-03, and specifically reserved the question whether other, similarly applicable limitations on the spending power exist, *id.* at 105. Mr. Justice Stewart, concurring specially, stressed the consequent narrowness of the issue decided; Mr. Justice Fortas, also concurring, stressed the importance of so limiting the scope of the decision. *Id.* at 114-15.

145 Pietsch v. President of the United States, 434 F.2d 861 (2d Cir. 1970), *cert. denied*, 403 U.S. 920 (1971); Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) (military expenditures); Richardson v. Kennedy, 313 F. Supp. 1282 (W.D. Pa. 1970), *aff'd*, 401 U.S. 901 (1971) (salary increases for members of Congress).

146 Lamm v. Volpe, 449 F.2d 1202 (10th Cir. 1972) (highway beautification law, attributable also to the commerce power).

147 Protestants & Other Americans United v. Watson, 407 F.2d 1264 (D.C. Cir. 1968).

other possible purposes.[148] Taxpayer standing to invoke statutory provisions allegedly imposing taxes on others or safeguarding the expenditure of funds has been denied,[149] in the absence of a statutory bestowal of standing.[150] Citizen standing, if it were bestowed by the Administrative Procedure Act[151] or some other statute,[152] would take the place of taxpayer standing.

Organizational Representation of Broad Interests

Representation of the general public interest or the common interest of numerous persons, in challenges to agency action as well as other litigation, is aided if established or ad hoc organizations of persons concerned with those interests can, as representatives of their members and perhaps of others similarly situated, take part directly. The organizations in effect pool the resources of their members in behalf of a common interest, to finance litigation which otherwise might not be feasible, leading to judgments which will, as the case may be, either benefit the members or bind them by an adverse outcome. An established organization may also have standing in its own interest when agency action deters membership participation—*e.g.*, by disclosure of names to a hostile public —or impairs certain organizational activities, such as the provision of services to members or to other persons, by prohibiting the activities or attaching conditions to them. Apart from these kinds of litigation by organizations acting in their own names, class actions provide a means whereby persons having common interests which are litigable, perhaps aided by organizations to which they belong, may join together as plaintiffs. Developments have occurred which expand all the foregoing means for a plurality of people acting together to secure judicial review of agency action.

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148 United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

149 Tax Analysts & Advocates v. Simon, 390 F. Supp. 927 (D.D.C. 1975); Civic Awareness of America, Ltd. v. Richardson, 387 F. Supp. 1086 (E.D. Wis. 1975); Lind v. Staats, 289 F. Supp. 182 (N.D. Cal. 1968) (competitive bidding requirements in relation to federal projects). *But see* Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

150 The court in Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), in relation to the standing of a disappointed bidder to challenge the bid procedures that were followed, found a basis in the Administrative Procedure Act, note 44 and text at notes 71-73, *supra*, but suggested also that the rationale of Flast v. Cohen supports the standing of persons (including taxpayers?) injured by agency violations of statutes even though no statutory provision for review is made. 424 F.2d at 871-72. *See also* West Coast Constr. Co. v. Oceano Sanitary Dist., 311 F. Supp. 378 (N.D. Cal. 1970) (same as to interest of a creditor of a governmental unit, said by the court to be more immediate than the interest of a taxpayer).

151 *See* notes 71–75 & text accompanying.

152 *See* notes 79–80 & text accompanying.

Enlargement in recent years of the standing of organizations to represent their members in the federal courts in relation to agency action has been especially important. It began with recognition under varying circumstances of standing on the part of trade associations and similar organizations which had as a central purpose the furtherance of the economic interest of their members,[153] and spread from these to established[154] and ad hoc[155] groups which were formed to promote non-

[153] Merchants & Mfrs' Traffic Ass'n v. United States, 231 Fed. 292 (N.D. Cal. 1915), *rev'd on other grounds,* 242 U.S. 178 (1916); Land O'Lakes Creameries v. McNutt, 132 F.2d 653 (8th Cir. 1943); Associated Indus. v. Ickes, 134 F.2n 694, 712-13 (2d Cir. 1943), *vacated as possibly moot,* 320 U.S. 707 (1943); National Coal Ass'n v. FPC, 191 F.2d 462 (D.C. Cir. 1951); American Trucking Ass'n v. United States, 364 U.S. 1, 17-18 (1960); National Motor Freight Traffic Ass'n v. United States, 372 U.S. 246 (1963); State Chartered Banks v. Peoples Nat'l Bank, 291 F. Supp. 180 (W.D. Wash. 1966); Lodge 1858, American Fed. of Gov't Employees v. Paine, 436 F.2d 882 (D.C. Cir. 1970); National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 693 (D.C. Cir. 1971); Virgin Islands Hotel Ass'n v. Virgin Islands Water & Power Authority, 465 F.2d 1272 (3d Cir. 1972), *cert. denied,* 414 U.S. 1067 (1973); Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970) (standing of organization assumed on the basis of that of its members). *See also* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967); and the same cases in the district courts, Abbott Laboratories v. Celebrezze, 228 F. Supp. 855, 860-61 (D. Del. 1964), and Toilet Goods Ass'n v. Celebrezzi, 235 F. Supp. 648, 653 (S.D.N.Y. 1964). *But see* Utah Citizens Rate Ass'n v. United States, 192 F. Supp. 12, 15 (D. Utah 1960), *aff'd,* 365 U.S. 549 (1961), and Teamsters Joint Council 40 v. United States, 238 F. Supp. 301, 307-08 (W.D. Pa. 1965).

[154] NAACP v. Alabama, 357 U.S. 449, 458-60 (1958); Bates v. Little Rock, 361 U.S. 516, 523 (1960); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961); NAACP v. Button, 371 U.S. 415, 428 (1963); Sierra Club v. Morton, 405 U.S. 727, 739 (1972); Alston v. School Bd., 112 F.2d 992, 997 (4th Cir. 1940), *cert. denied,* 311 U.S. 693 (1940); Washington Dep't of Game v. FPC, 207 F.2d 391 (9th Cir. 1953), *cert. denied,* 347 U.S. 936 (1954); National Hells Canyon Ass'n v. FPC, 237 F.2d 777 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 924 (1957); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615-17 (2d Cir. 1965); Office of Communications of United Church of Christ v. FCC, 359 F.2d 994, 998, 1000-06 (D.C. Cir. 1966); Smith v. Board of Educ., 365 F.2d 770, 777 (8th Cir. 1966); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 937 (2d Cir. 1968); Citizens Ass'n of Georgetown v. Simonson, 403 F.2d 175 (D.C. Cir. 1968), *cert. denied,* 3259 M Street, Inc. v. Citizens Ass'n, 394 U.S. 975 (1969); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), *cert. denied,* 400 U.S. 949 (1970); Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970); Washington Util. & Transp. Comm'n v. FCC, 513 F.2d 1142, 1154-55 (9th Cir. 1975), *cert. denied sub nom.* National Ass'n of Regulatory Comm'rs v. FCC, 423 U.S. 836 (1975); Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Cape May County Chapter, Izaak Walton League v. Macchia, 329 F. Supp. 504 (D.N.J. 1971); Seafarers Int'l Union v. Weinberger, 363 F. Supp. 1053 (D.D.C. 1973); Percy v. Brennan, 384 F. Supp. 800, 808-09 (S.D.N.Y. 1974). *Cf.* Conservation Society v. Volpe, 345 F. Supp. 761 (D. Vt. 1972).

[155] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (issue of standing not raised; *see* Sierra Club v. Morton, 405 U.S. 727, n.7 (1972)); Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967), *cert. denied,* 390 U.S. 921 (1968); Road Review League v. Boyd, 270 F. Supp. 650, 661 (S.D.N.Y. 1967); Powelton Civic Home Owners Ass'n v. Department of Housing & Urban Dev., 284 F. Supp. 809, 827 (E.D. Pa. 1968); Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968); Crowther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), *cert. denied,* 400 U.S. 949 (1970).

economic interests, welfare, or personal concerns of their members. The courts may, however, as a prerequisite to according standing to an organization in a representative capacity, determine whether its authorization to represent those for whom it purports to speak and its capacity to conduct the litigation adequately justify recognizing it.[156]

In the leading Supreme Court case recognizing the standing of a non-trade organization to represent its members, the decision on this point was placed on the ground that deterrents to action by the members themselves were present, supplemented by threatened injury to an interest of the organization in maintaining its membership.[157] The presence of similar factors has contributed to decisions to the same effect in some of the later cases,[158] and the absence of these factors results at times in decisions that deny standing which is sought on the simple ground of organizational purpose to serve the relevant interests of members.[159] In other instances this simple ground of decision suffices, in accordance with a dominant trend.[160] A slight question remains whether the wording of the principal jurisdictional statute authorizing federal district court suits "by any person" to vindicate civil rights "of citizens or of all

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[156] *Cf.* Moffat Tunnel League v. United States, 289 U.S. 113 (1933); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 103 (2d Cir. 1970), *cert. denied*, 400 U.S. 499 (1970); Izaak Walton League of America v. St. Clair, 313 F. Supp. 1312, 1317 (D. Minn. 1970), *subsequent judgment rev'd & remanded on other grounds*, 497 F.2d 849 (8th Cir. 1974), *cert. denied*, 419 U.S. 1009 (1974).

[157] NAACP v. Alabama, 357 U.S. 449, 458-460 (1958).

[158] Smith v. Board of Educ., 365 F.2d 770, 776-77 (8th Cir. 1966); Elk Grove Firefighters Local v. Willis, 391 F. Supp. 487 (N.D. Ill. 1975); Robinson v. Conlisk, 385 F. Supp. 529 (N.D. Ill. 1974).

[159] Alameda Conservation Ass'n v. State of California, 437 F.2d 1087 (9th Cir. 1971), *cert. denied*, 402 U.S. 908 (1971); Alabama Educ. Ass'n v. Wallace, 362 F. Supp. 682, 684 (M.D. Ala. 1973); National Welfare Rights Organization v. Wyman, 304 F. Supp. 1346 (E.D.N.Y. 1969).

[160] NAACP v. Button, 371 U.S. 415, 428 (1963) (*semble*); Aguayo v. Richardson, 473 F.2d 1090, 1099 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 693-94 (D.C. Cir. 1971); Seafarers Int'l Union v. Weinberger, 363 F. Supp. 1053 (D.D.C. 1973); State v. Direct Sellers Ass'n, 108 Ariz. 165, 494 P.2d 361 (1972); Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 17, 109 Cal. Reptr. 724 (1973); White Lake Improvement Ass'n v. City of Whitehall, 177 N.W.2d 473, 476-78 (Mich. App. 1970); Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 275 A.2d 433 (1971). *Contra*, Citizens Planning & Housing Ass'n v. County Executive of Baltimore County, 273 Md. 333, 345, 329 A.2d 681, 687-88 (1974); Bar Ass'n of Montgomery County v. District Title Insurance Co., 224 Md. 474, 168 A.2d 395 (1961). In many instances the standing of organizational parties is not contested. *See, e.g.*, the cases listed in Smith v. Board of Educ., 365 F.2d 770, 777 (8th Cir. 1966). In Sierra Club v. Morton, 405 U.S. 727 (1972), where the standing of the Club was denied because the alleged injury to the interest it represented was not sufficiently direct, the Court stated broadly that "[i]t is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." 405 U.S. at 739. *See also* Warth v. Seldin, 422 U.S. 490, 511 (1975) ("Even in the absence of injury to itself, an organization may have standing solely as the representative of its members.").

persons in the United States" against conduct which impairs these rights under color of state law, permits such suits to be brought by organizations solely in behalf of their members.[161]

The opportunity for membership organizations to challenge agency actions in court in behalf of members and often of others as well has been enlarged by recognition of the status of organizations to institute class actions in behalf of members. Although technically an organization is not a member of a class into which its members may fall, so as to entitle it to sue in behalf of the class under Rule 23 of the Federal Rules of Civil Procedure, the dominant view seems now to be that it may substitute for those members by initiating a class action in their place.[162] Alternatively, it may be a co-plaintiff, not claiming to represent the class, with members or others who institute a class action or with members who sue individually.[163] When the members of an organization fall into a class extending beyond the membership, which has a common interest, the court may require that, through individual co-plaintiffs, an organizational suit in behalf of members become a class action, so as to embrace all interested persons.[164]

As a result of the foregoing decisions and despite some remaining technicalities, membership organizations have effectively become "the collective embodiment" of their members[165] for purposes of standing to

[161] Aguayo v. Richardson, 473 F.2d 1090, 1099-1100 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); National Organization for Women v. Goodman, 374 F. Supp. 247, 250 (S.D.N.Y. 1974). Where, however, as is often the case, the challenged statute or agency action injures both the relevant interests of organizational members and correlative activities or interests of the organization itself, the standing of the organization to sue to redress the resulting Civil Rights violation in its own behalf and in behalf of its members is established. Allee v. Medrano, 416 U.S. 802, 819 n.13 (1974); *id.* at 829 (concurring opinion); Percy v. Brennan, 384 F. Supp. 800, 808-09 (S.D.N.Y. 1974). *See* the discussion in Elk Grove Firefighters Local v. Willis, 391 F. Supp. 487, 490-91 (N.D. Ill. 1974), note 158 *supra*.

[162] Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 937 (2d Cir. 1968); Smith v. Board of Educ., 365 F.2d 770, 777-78 (8th Cir. 1966); English v. Town of Huntington, 335 F. Supp. 1369 (E.D.N.Y. 1970); Sierra Club v. Hardin, 325 F. Supp. 99, 110 (D. Alaska 1971) (class seemingly viewed as confined to members of the organization suing); Local 186, Int'l Pulp, Sulphite & Paper Mill Workers v. Minnesota Mining & Mfg. Co., 304 F. Supp. 1284, 1293 (N.D. Ind. 1969); Merchants & Manufacturers Traffic Ass'n v. United States, 231 Fed. 292 (N.D. Cal. 1915), *rev'd on other grounds*, 242 U.S. 178 (1916) (suit by association in behalf of its members viewed as a form of class action); Western Addition Community Organization v. Weaver, 294 F. Supp. 433, 434 (N.D. Cal. 1968). *Compare* Rock Drilling Laborers' Local Union v. Mason & Hanger Co., 217 F.2d 687, 693 (2d Cir. 1954), *cert. denied*, 349 U.S. 915 (1955); Organized Migrants for Community Action v. James Archer Smith Hospital, 325 F. Supp. 268 (S.D. Fla. 1971); Clark v. Chase Nat'l Bank, 45 F. Supp. 820 (S.D.N.Y. 1942).

[163] *See* Allee v. Medrano, 416 U.S. 802, n.10, 819 n.13 (1974).

[164] *See* National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 704 (D.C. Cir. 1971).

[165] Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 652 (1962).

invoke remedies in the federal system and in most states, once the standing of the members, the relevance of the organization's purposes to their interest which is asserted, and the competence of the organization to act in behalf of that interest appear.[166] The standing of organizations in their own behalf when organizational interests are at stake has also been recognized increasingly.[167]

In addition to the common representation or joinder in litigation of individuals possessing identical interests, which these developments facilitate, the relation of an interest of one person to a connected but not identical interest of another may provide a basis for the one, without joinder of the other, to present both interests in challenging an injury to both (ordinarily without res judicata effect as to the other person's interest) in suits over agency action. In these situations the basic theory that standing rests on injury to an interest of the person claiming it is augmented.[168] Such situations arise when one person has responsibility relating to the other's interest, as school authorities may have in relation to the interests of students,[169] or when the two interests are factually connected.[170] They may be connected because of a professional or ad-

[166] In addition to cases previously cited, *see* Upper Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1971), *vacated as moot*, 500 F.2d 17 (10th Cir. 1974); North City Areawide Council v. Romney, 428 F.2d 754, 757 (3d Cir. 1970), *cert. to later decision denied*, 406 U.S. 963 (1972); Saxon v. Georgia Ass'n of Ins. Agents, 399 F.2d 1010, 1016-18 (5th Cir. 1968); Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132, 137 (N.D. Ga. 1971); Federation of Homemakers v. Hardin, 328 F. Supp. 181 (D.D.C. 1971); Coalition for United Community Action v. Romney, 316 F. Supp. 742, 748 (N.D. Ill. 1970). *See also* Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't., 446 F.2d 1013, 1019 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972).

[167] NAACP v. Button, 371 U.S. 415 (1963); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 140-41 (Burton and Douglas, JJ.), 142-43 (Black, J.), 159-60 (Frankfurter, J.), 198-99 (Reed, J., Vinson, Ch. J., and Minton, J.) (Jackson, J., at 184, regarded the standing of the organizations in their own behalf as "very dubious" under the circumstances) (*see also* American Communications Ass'n v. Douds, 339 U.S. 382, 389-90 (1950)); National Student Ass'n v. Hershey, 412 F.2d 1103, 1120-21 (D.C. Cir. 1969); Smith v. Board of Educ., 365 F.2d 770, 777 (8th Cir. 1965); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 616 (2d Cir. 1965); National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969), *appeal voluntarily dismissed*, 400 U.S. 801 (1970).

[168] Warth v. Seldin, 422 U.S. 490, 509-10 (1975); Tyler v. Judges of Court of Registration, 179 U.S. 405 (1900); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972); Broadrick v. Oklahoma, 413 U.S. 601, 609-13 (1973).

[169] Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956) (suit against non-official wrongdoers). *Cf.* Paton v. La Prade, 524 F.2d 862, 873-74 (3d Cir. 1975).

[170] I.T. & T. Corp. v. Alexander, 396 F. Supp. 1150 (D. Del. 1975). An addendum to the theory, often stated, is that circumstances should render it "difficult or impossible" to vindicate the interest of the absent person directly. *See* the opinion of Mr. Justice Brennan, dissenting, in Village of Belle Terre v. Borass, 416 U.S. 1, 10-11 (1974), *quoting from* Barrows v. Jackson, 346 U.S. 249, 257 (1965), the leading authority to this effect. Difficulty is a matter of degree, however, and it is not at all clear that the stated circumstance has actually been present in some of the cases where it has been alluded to or that it has played a significant role in determining decisions. *Cf. further* Singleton v. Wulff, 96 S. Ct. 2868, 2871 (1976).

visory relationship, such as that between physician and patient, or because a common concern is involved, such as student-faculty concern over racial desegregation of faculty in schools, the interest of members of different races in racial desegregation in housing, or varying interests in the dissemination and use of a given body of information.[171] Often the interest of members of an organization in, for example, not having their membership known or continuing to enjoy the benefits of their association, which may be threatened or impaired by agency action, is linked to an interest of the organization in maintaining its roster and funds or continuing its services. When such is the case, the effects on the members as third persons may supplement the representative character of the organization as a basis for standing on its part to challenge the action in court.[172]

Miscellaneous Aspects of Standing

In addition to the most frequently litigated aspects of the law of standing which have been discussed, several rather technical features of the subject require mention. These involve the questions (1) of whether standing differs for would-be plaintiffs, defendants, and intervenors, respectively; (2) whether standing relates to jurisdiction; and (3) whether in certain instances standing is a matter of federal or of state law.

In the bulk of instances in which standing to challenge agency action becomes an issue, the challenger is the plaintiff or petitioner seeking review of the action. It may make a difference when, instead, he is the defendant in court, seeking to defeat an enforcement action against him. The right of the defendant to be a party in court and the over-all

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171 Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Barrows v. Jackson, 346 U.S. 249 (1953); Parkview Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1213 (8th Cir. 1972); Freeman & Bass, P.A. v. State of N.J. Comm'n of Investigation, 359 F. Supp. 1053, 1056 (D.N.J. 1973), *vacated and remanded on other grounds*, 486 F.2d 176 (3d Cir. 1973); Sisters of Providence v. City of Evanston, 335 F. Supp. 396, 401 (N.D. Ill. 1971); Ballard v. Anderson, 4 Cal. 3d 873, 877-78, 484 P.2d 1345, 1348 (1971). *Compare* United States v. Raines, 362 U.S. 17, 20-24 (1960); United States v. Taranowski, 467 F.2d 1027 (7th Cir. 1972). Even when the interests are not factually related but are threatened in the same manner by a statute or regulation restrictive of constitutional freedom, one whose interest may not, on the merits, be entitled to protection can challenge the measure on the ground of its effect on others. Coates v. Cincinnati, 402 U.S. 611 (1971); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); Adamian v. University of Nevada, 359 F. Supp. 825 (D. Nev. 1973). *Compare* Parker v. Levy, 417 U.S. 733, 759-61 (1974). *See generally* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 1 YALE L.J. 599 (1962). *See also* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 403 and (Bazelon, Ch. J., dissenting) 412-13 (D.C. Cir. 1975).

172 NAACP v. Alabama, 357 U.S. 449 (1958), note 157 *supra*.

existence of a case or controversy are not in question in such an instance; the question relates, rather, to competence to raise particular issues defensively. The consequences to the defendant of a denial of standing to raise such an issue, involving a liability which otherwise might be avoided, militate in favor of permitting the issue to be raised,[173] often with reference to some of the same considerations as are relevant to standing to sue.[174] Similar questions may arise in a proceeding to review an order, which the plaintiff or petitioner has or would have standing to bring on proper grounds, with respect to particular grounds which he advances;[175] here too the case or controversy aspect of standing is hardly a factor. The relevant considerations in both kinds of situations relate to the possible nonreviewability of the issue, the ability of one in the position of the would-be challenger to handle the particular issue if it is reviewable, the availability of alternative ways to secure a decision of the issue, the social importance of the issue,[176] and the appropriateness in relation to the separation of powers of the court's entering into the matter.

The problem is similar when intervention in a pending judicial review proceeding is sought;[177] but intervention usually depends on statutes or rules of court other than those which determine the standing of primary parties.[178] If intervention can be had by "any party in in-

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[173] *Compare* Griswold v. Connecticut, 381 U.S. 479 (1965) (defense to a prosecution under an allegedly invalid statute); NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953) (defense on constitutional grounds to enforcement of a racially restrictive covenent), *with* United States v. Raines, 362 U.S. 17, 22-24 (1960).

[174] *Cf.* McGowan v. Maryland, 366 U.S. 420, 429-31 (1961). *Compare* the treatment of challenges to statutes by plaintiffs and defendants, respectively, in Pierce v. Society of Sisters, 268 U.S. 510 (1925); Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie, 262 U.S. 404 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v. Iowa, 262 U.S. 404 (1923).

[175] American Power & Light Co. v. SEC, 329 U.S. 90, 107 (1946); Akers v. Resor, 339 F. Supp. 1375 (W.D. Tenn. 1972).

[176] *See* Barrows v. Jackson, 346 U.S. 244, 257-60 (1953). In NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1951), the question was whether an employer, against whom the Board brought proceedings to enforce an unfair labor practice order, could defend on the ground that the union which had brought charges originally was ineligible to do so because its officers had not filed non-Communist oaths required by statute. In holding that the employer could, the Court stressed the undesirability of causing the courts to enforce orders tainted by illegality. *See also* Nuclear Data, Inc. v. AEC, 344 F. Supp. 719 (N.D. Ill. 1972), where a potential user of the technology covered by a patent was held to have standing to challenge the Atomic Energy Commission's assignment to a private assignee of the government's rights in the patent, partly because of the concern of Congress in the Atomic Energy Act with developing the use of nuclear energy.

[177] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 510-17 (1975), where the court discusses the standing of original plaintiffs and of would-be intervenors in the district court without differentiation as to the determining considerations.

[178] Moffat Tunnel League v. United States, 289 U.S. 113, 120 (1933).

terest,"[179] it will be governed by the same principles as apply under statutes applicable to standing which are similarly worded; but different wording or the absence of a specific prescription as to intervention would lead to a determination that was differently based.[180] Rule 24 of the Federal Rules of Civil Procedure governs intervention in the United States District Courts. A growing number of states are adopting the same rule. Aside from recognition of unconditional rights of intervention under some statutes, the Rule provides for intervention "as of right" under criteria which require judicial interpretation, and for permissive intervention in the appealable exercise of discretion by the courts, both guided by standards contained in the Rule. The Rule emphasizes practical considerations in relation to both intervention as of right and permissive intervention.[181] A statute may inferentially preclude intervention if the interest which the applicant for intervention wishes to advance has been committed by the statute to another party, usually a government agency.[182]

As is true of ripeness,[183] standing is commonly stated to be a matter of jurisdiction, open to consideration by a court at any stage of a case.[184] The primary reason for this view is that standing of the party bringing a suit is linked to the existence of a case or controversy[185] which is

[179] Section 8 of the Review Act of 1950, 28 U.S.C. § 2348 (1970), provides for intervention by "persons whose interests are affected by the order of the agency," in addition to appearance as of right by "any party in interest in the proceeding before the agency."

[180] *Cf.* International Union, U.A.W. v. Scofield, 382 U.S. 205, 210, 216-17 (1965); Alexander Sprunt & Son v. United States, 281 U.S. 249, 255 (1930).

[181] *Cf.* Trbovich v. United Mine Workers, 404 U.S. 528 (1972); Donaldson v. United States, 400 U.S. 517, 528-31 (1971); SEC v. United States Realty Co., 310 U.S. 434, 458-60 (1940); United States v. Board of School Comm'rs, 466 F.2d 573 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); Bennett v. Marion County Bd. of Educ., 437 F.2d 554 (5th Cir. 1970); Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967); Hinds v. McNair, 153 Ind. App. 475, 287 N.E.2d 767 (1972); American Discount Corp. v. Saratoga West, Inc., 81 Wash. 2d 34, 499 P.2d 869 (1972); Annot., 5 A.L.R. Fed. 518 (1970); Shapiro, *Some Thoughts on Intervention Before Agencies, Courts, and Arbitrators*, 81 HARV. L. REV. 721 (1968).

[182] Air Lines Stewards Ass'n v. American Air Lines, 455 F.2d 101 (7th Cir. 1972). *Cf.* the opinion of McGowan, J., in Smuck v. Hobson, 408 F.2d 175, 190-91 (D.C. Cir. 1969).

[183] *See* Introduction *supra*.

[184] Flast v. Cohen, 392 U.S. 83, 99 (1968); United States v. Storer Broadcasting Co., 351 U.S. 192, 197 (1956); Doremus v. Board of Educ., 342 U.S. 429 (1952); FCC v. National Broadcasting Co. (KOA), 319 U.S. 239, 246 (1943). Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953), is sometimes cited in support of the contrary position that the issue of standing is not jurisdictional, because in that case the issue was not raised by the parties and was therefore not decided by the Court. The issue related to only one of the plaintiffs in the district court (respondents in the Supreme Court). However, there were others whose standing was evident, the same counsel represented all of the plaintiffs throughout, and the case was decided without trial on motions for summary judgment. Consequently, nothing would have been changed by the Supreme Court's consideration of the standing question, except for a dismissal as to one of the respondents.

[185] Flast v. Cohen, 392 U.S. at 101 (1968).

a prerequisite to jurisdiction. In addition, however, standing conventionally requires that statutory or other legal recognition have been given to the particular interest possessed by the plaintiff.[186] This element is less clearly jurisdictional, because it does not involve the constitutional power of the court but, rather, the court's authority to act by virtue of the applicable body of law. Standing has been stated not to be jurisdictional where this aspect of it has been the disputed element,[187] as it was in the leading power company cases of the 1930's.[188] It ought to be determined at the inception of litigation in order to avoid as fully as possible the burden of unfruitful judicial proceedings which the prerequisite of standing exists in part to forestall;[189] but its purpose can still be partially fulfilled if the presence of standing remains open to determination throughout a case, even though actual injury to an interest of the challenger of agency action is sufficiently alleged and the question is whether the interest is legally cognizable. Initiative to consider this issue should continue in the court, along with opportunity for the parties to raise it, whether or not the issue is characterized as jurisdictional. If it does not involve power to act at all, it at least concerns the basis for considering the claim to relief—not merely the merits of that claim as they may emerge.

The existence of standing to challenge state action in a state court on federal constitutional grounds has traditionally been regarded as presenting a question of state law.[190] On review by the United States Supreme Court, however, standing in that Court is determined by federal

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[186] *See* text at note 6 *supra.*

[187] Greenwood County v. Duke Power Co., 81 F.2d 986, 997-99 (4th Cir. 1936), 91 F.2d 665, 676 (4th Cir. 1937); Dickman v. School Dist. No. 62C, 232 Ore. 238, 366 P.2d 533 (1961).

[188] In Alabama Power Co. v. Ickes, 302 U.S. 464 (1938), the Court decided, 302 U.S. at 478, that "petitioner has no such interest and will sustain no such legal injury as enables it to maintain the present suits," and, at 482, "was without legal standing to maintain the suit." The opinion also spoke of the absence of "a basis for judicial relief" by way of injunction, *id.* at 481, and of the inability of the petitioner to raise particular issues. *Id.* at 483. It also cited lower-court cases involving the same precise question in which the standing issue was not treated as jurisdictional. *Id.* at 484. Among other cases, the Court cited Greenwood County v. Duke Power Co., 81 F.2d 986 (4th Cir. 1936), in which it was said that although standing "is frequently treated as going to the question of jurisdiction, it really goes to the right of plaintiff to relief . . . ." *Id.* at 999. Hence the court in *Duke* dismissed the case on the merits, rather than for want of jurisdiction. The *Duke Power Co.* decision was itself ultimately affirmed by the Supreme Court, 302 U.S. 485 (1938), at the same time as *Alabama Power Co.* was decided, on the ground that the opinion below "upon this branch of the case is in harmony with the views we have just expressed." The Supreme Court may or may not have addressed itself to the question of whether the standing issue was jurisdictional.

[189] *Cf.* Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

[190] Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).

requirements,[191] as it is at the district court level when the same kinds of cases are brought there.[192] The issue of standing in such cases in the state courts could be regarded as a federal question,[193] involving rights under federal law, instead of as an issue under state law; but this view has not been followed. Uniformity of decision would be desirably enhanced if it were.

The Developed Law of Standing

As it has evolved through the foregoing developments, the law of standing to challenge agency action, particularly in the federal system, displays several noteworthy features. One relates to the current criteria for determining standing, compared to those which formerly prevailed; the others relate to the scope of standing in several areas of litigation over matters of large political, economic, and social significance.

The *Data Processing* decision and its companion case, *Barlow v. Collins*, although they were decided under the Federal Administrative Procedure Act and construed its language, made a new start in basic reasoning about standing to challenge agency action. Previously injury to a "legal right"—*i.e.*, under the Act, a "legal wrong"—and injury to interests which statutes made the basis for instituting review proceedings were alternative foundations of standing; the opinion in *Data Processing* replaced both by "injury in fact" to an actual interest of the person claiming standing, provided the interest falls "arguably within the zone of interest to be protected or regulated by the applicable statute or constitutional guarantee."[194] This formulation contains two major innovations in addition to its consolidation of the kinds of injury which were separately stated before: (1) it asserts that to bestow standing,

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[191] Cramp v. Board of Pub. Instruction, 368 U.S. 278, 282 (1961); Doremus v. Board of Educ., 342 U.S. 429 (1952); Columbus & Greenville R.R. v. Miller, 283 U.S. 96 (1931); Smith v. Indiana, 191 U.S. 138 (1903); Tyler v. Judges of the Court of Registration, 179 U.S. 405 (1900).

[192] Baker v. Carr, 369 U.S. 186, 204 (1962); Williams v. Mayor & Council of Baltimore, 289 U.S. 36 (1933).

[193] *Cf.* Harlan, J., dissenting, in Flast v. Cohen, at 392 U.S. 132.

[194] Association of Data Processing Serv. Organizations v. Camp., 397 U.S. 150, 154 (1970); Barlow v. Collins, 397 U.S. 159 (1970). *See* notes 6, 17, 27, 186 *supra* & text accompanying. The opinions do not distinguish clearly between the interest which is made the basis of standing and the sometimes different interest sought to be protected, such as a represented public interest; but clearly the Court did not intend to exclude standing to engage in this type of representation. In the *Data Processing* and *Barlow* cases only the interests of the plaintiffs themselves were involved. The "applicable statute" usually is the one under which the agency operates, but may be another, such as the Environmental Policy Act, which is applicable and from which the challenger's interest may stem. *See* Ely v. Velde, 321 F. Supp. 1088 (E.D. Va. 1971), *rev'd on other grounds*, Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971).

an interest need only "arguably" be recognized by prior law;[195] and (2) it bases statutory recognition of an interest, sufficient to bestow standing, on regulation as well as on protection of the interest.

Except for this last innovation, the changes in the new formulation are not analytically very significant. Under the previous formulation, actual interests necessarily underlay the recognition of legal rights or of legal injuries by constitutional provisions, the common law, or statutes,[196] upon which standing rested. The question of whether a right existed or an injury had occurred was necessarily arguable in many cases; and changing interpretations had already accommodated new interests. Neither aspect of the law of standing has become inherently different by virtue of *Data Processing* and *Barlow*. Regulation of an interest by a statute as an element of standing to vindicate that interest was newly included in the *Data Processing* formula, however, and the scope of this addition is not yet apparent. Regulation is evident and adds nothing as an element of the standing which is clearly apparent when a statute authorizes actions bearing directly on interests, such as license refusals or cease-and-desist orders;[197] but the scope of the term "regulated" becomes doubtful when the interest relied on is only collaterally affected by action involving a person other than its possessor, such as a competitor, an employer or employee, or a supplier or buyer of goods or services.[198]

In the *Data Processing* and *Barlow* cases themselves, the interests

[195] The omission of any reference to recognition of an interest by the common law was probably inadvertent. The new formulation also speaks of "zone of interest" instead of simple "interest." No significant consequence has so far resulted from this change.

[196] *See* notes 7-17 *supra*.

[197] *Cf.* Klanke v. Camp, 320 F. Supp. 1185 (S.D. Tex. 1970), where the court, in part, based its decision in favor of standing of applicants who had been denied a national bank charter on the irrationality of denying it to them while according it, as other decisions had done for a variety of reasons, to opponents of the issuance of such authorizations. A rationale based on the regulatory effect of the governing statute on the plaintiffs seems equally applicable. The long-standing exclusion of the standing of producers to challenge most kinds of provisions of orders under the Agricultural Marketing Agreements Act, which arises by inference from the Act's bestowal of specified standing on handlers, is inconsistent with the newer rationale, but rests on its own statutory foundation. Benson v. Schofield, 236 F.2d 719 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 976 (1957); United Milk Producers of N.J. v. Benson, 225 F.2d 527 (D.C. Cir. 1955); Inter-State Milk Producers Coop. v. St. Clair, 314 F. Supp. 108 (D. Md. 1970); Uehlman v. Freeman, 267 F. Supp. 842 (E.D. Wis. 1967). *Cf.* Calhoun v. Freeman, 316 F.2d 386 (D.C. Cir. 1963).

[198] *Cf.* Walker v. Stanhope, 23 N.J. 657, 130 A.2d 372 (1957) (dealer in automobile trailers has standing, because of threatened loss of business, to challenge a municipal zoning ordinance because it eliminated trailer parking in an area four miles way). Defendants in actions to enforce agency orders were permitted to challenge the orders on the ground they illegally imposed economic disadvantage on the challengers by favoring others who were involved in the same orders, in NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1951), and United States v. Rock Royal Coop., 307 U.S. 533, 560-61 (1939). There the "regulated" status of the defendants was evident.

which were recognized as the basis of standing were, rather obliquely, "protected" rather than "regulated" by the applicable statutes. In *Data Processing* an association of independent firms engaged in selling data processing services was held to have standing to challenge a ruling of the Comptroller of the Currency that a national bank might engage in the business of rendering the same kinds of services to customers, on the ground that the Bank Service Corporation Act[199] was intended to prevent banks, as well as the bank service corporations with which it dealt specifically, from engaging in this kind of venture. In *Barlow* the plaintiffs were tenant farmers who were held to have standing to challenge a regulation of the Secretary of Agriculture which permitted them to assign certain anticipated federal crop benefit payments to their lessors as security for rent, thereby enlarging their capacity to incur debt under economic pressure, despite a statutory purpose to have tenant interests safeguarded. The economic realism of the two decisions in relation to the facts involved, and the non-technical language of the new formulation, are the main reasons for the liberalizing effect of these cases on the law of standing.

Several later cases indicate the potential reach of statutory regulation of an interest as a basis for standing. An employer denied access to a supply of alien labor commuting across the Mexican border, by restrictions placed upon the aliens to prevent their working for the employer during a strike of his employees, was held entitled to challenge the restrictions even though their purpose was to protect the striking workers, without concern for the employer's interest; for his interest was "regulated" when his access to labor and "the very economy" of his operation were limited.[200] Similarly, federal agency action excluding

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[199] The Act, in order to enable small banks to cooperate in providing costly electronic and related services to themselves, authorized any two or more of them to establish and own corporations to render these services to banks exclusively. 12 U.S.C. §§ 1861-1865 (1970).

[200] Sam Andrews' Sons v. Mitchell, 326 F. Supp. 35 (S.D. Cal. 1971), *rev'd on the merits*, 457 F.2d 745 (9th Cir. 1972). *See* Hom Sin v. Esperdy, 239 F. Supp. 902 (S.D.N.Y. 1965), where, apart from an issue of procedural due process, an alien for whom his employer sought permanent immigrant status was held, by dint of strained reasoning, to have stading to challenge denial of the status on substantive grounds, because of his otherwise unprotected interest in remaining in this country. Under the *Andrews* reasoning, which rests on the intervening *Data Processing* decision of the Supreme Court, the *Hom Sin* decision could have been based simply on the ground that the alien's employment was being regulated. Prior to *Data Processing*, would-be employers were held to be without standing to challenge exclusions of aliens resident abroad, when the exclusion was based on the availability of qualified workers in the relevant domestic labor market. Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965); *see also* Cobb v. Murrell, 386 F.2d 947 (5th Cir. 1967). Subsequently several Court of Appeals have upheld the standing of resident aliens, Ratnayaki v. Mack, 499 F.2d 1207, 1210 (8th Cir. 1974); Reddy, Inc. v. United States Dep't of Labor, 492 F.2d 538, 542 (5th Cir. 1974), and of would-be employers of aliens who were residents, Yong v. Regional Manpower Adm'r, 509 F.2d 243, 245 (9th Cir. 1975); Secretary

the authority of federally funded organizations to do business for certain purposes with profit-seeking enterprises has been held to bring these enterprises within the "regulated zone" for purposes of standing to challenge the action.[201] The courts have not said whether agency action "regulates" an enterprise indirectly by regulating the entry of competitors into the same business or controlling their conduct solely for the protection of members of the public. In the usual sense of the word "regulated" it does not; but a broader interpretation is possible.

The expansion of standing in specific areas of litigation, especially in the federal system, has been particularly noteworthy in relation to agency action which impinges on (1) business enterprises by contributing to the competitive strength of rivals, (2) personal welfare as affected by housing and urban development projects under federal-aid legislation, and (3) the environment in relation to its use and enjoyment by people. In all three of these areas courts, in order to establish standing, have gone far in finding statutory recognition of interests, or in some instances have interpreted the Administrative Procedure Act to dispense with the need for other statutory recognition of an interest as a basis of standing.[202]

In relation to standing based on the interest of business enterprises

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of Labor v. Farino, 490 F.2d 885, 889 (7th Cir. 1973), and non-residents, Pesikoff v. Secretary of Labor, 501 F.2d 757, 760-61 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1038 (1974), to challenge unfavorable determinations by the Secretary. As to the standing of competing American workers to challenge the admission of alien commuters for purposes of employment, where protection to the domestic labor market was a statutory purpose, *see* Gooch v. Clark, 433 F.2d 74 (9th Cir. 1970), applying the *Data Processing* formula. The reasoning of the *Andrews* case would seemingly require recognition of standing in a case such as Montgomery v. Ffrench, 299 F.2d 730 (8th Cir. 1962), where the adopting parents of an alien infant were held to have no right to a review of action excluding the infant because of circumstances in the American couple's home. The action might still, however, be considered non-reviewable because made so by statute or committed wholly to agency discretion. The decision in Harry H. Price & Sons, Inc. v. Hardin, 425 F.2d 1137 (5th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971), involving the standing of a tomato importer to challenge regulations which limited imports collaterally to regulating domestic marketing, rests easily on the ground that imports, along with domestic marketing, were specifically regulated. The result in Independent Broker-Dealers Trade Ass'n v. SEC, 442 F.2d 132 (1971), *cert. denied*, 404 U.S. 828 (1971), is similar inasmuch as the agency action there had specific reference to business transactions with the plaintiffs who sought review.

[201] Gotoveski-Caplan Physical Therapy Ass'n v. United States, 507 F.2d 1363 (7th Cir. 1975). The decision in Duke City Lumber Co. v. Butz, 382 F. Supp. 362 (D.D.C. 1974), which recognized the plaintiffs' standing on another theory, could have been placed on this ground. The challenged agency action was a "set aside" of timber under the Small Business Act, for harvesting by small lumber companies with consequent exclusion of the plaintiffs who could not qualify. They were held to possess standing because the over-all purpose of the act was said to be to enhance competition generally, including competition on the part of large as well as small firms. It might have been said that large firms were "regulated" by limitation of their business opportunities.

[202] *See* note 44 *supra*.

in overcoming agency aid to competition by rivals, the traditional view is founded on a policy of exposing "free enterprise" to the hazards of not only the conduct of private competitors, subject to liability on their part for legally unfair competition,[203] but also of actions by government which authorize competitors to operate or which aid them in some way, unless statutes afford protcetion.[204] Hence standing on the part of an established concern to challenge the intrusion of a public enterprise into its market[205] or an agency's authorization of[206] or assistance to[207] such an intrusion

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[203] Unfair competition does not traditionally include competition from another business, merely because that business has not validly secured a required legal authorization. *See* Railroad Co. v. Ellerman, 105 U.S. 166, 174 (1881). The holder of a franchise or other authorization for doing business which is designed to be wholly or in part an exclusive benefit to the franchisee may, however, bring suit for an injunction to prevent invasion by an unauthorized or invalidly authorized competitor. Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 323 F.2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965); Frost v. Corporation Comm'n of Okla., 278 U.S. 515, 521 (1929); National Bank of Detroit v. Wayne Oakland Bank, 252 F.2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830 (1958); Jackson v. First Nat'l Bank, 246 F. Supp. 134 (M.D. Ga. 1965); Suburban Trust Co. v. National Bank of Westfield, 211 F. Supp. 604 (D.N.J. 1962). *Cf.* First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 282 (1966); *cf.* text accompanying notes 11-15 *supra*.

[204] Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Pennsylvania R. Co. v. Dillon, 335 F.2d 292 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 945 (1964); Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969), *cert. denied*, 397 U.S. 923 (1970); Lexington Retail Beverage Dealers Ass'n v. ABC Bd., 303 S.W.2d 268 (Ky. 1957); Kreatchman v. Ramsburg, 224 Md. 209, 167 A.2d 345 (1967) (discussion of standing based on competitive business interest to challenge zoning decisions aiding rivals, citing other cases); Hubbard Broadcasting, Inc. v. City of Albuquerque, 82 N.M. 164, 477 P.2d 602 (1970) (under declaratory judgment act); Ritter Fin. Co. v. Myers, 401 Pa. 467, 160 A.2d 246 (1960); Lampinski v. Rhode Island Racing & Athletic Comm'n, 181 A.2d 438, 440 (R.I. 1962) (business competitors are not statutory "persons aggrieved"). *But see* Elizabeth Fed. Sav. & Loan Ass'n v. Howell, 24 N.J. 488, 132 A.2d 779 (1957), where the standing of banking institutions to challenge agency action benefiting competitors was upheld, principally on the ground that otherwise judicial review with relation to the public interests at stake would be difficult to achieve.

[205] Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969), *cert. denied*, 397 U.S. 923 (1970); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939).

[206] C. Brooke Matlock, Inc. v. United States, 195 F. Supp. 399 (E.D. Pa. 1961); American Surety Co. v. Jones, 284 Ill. 222, 51 N.E.2d 122 (1943); Nantucket Boat, Inc. v. Woods Hole, Martha's Vineyard, etc. S.S. Auth., 345 Mass. 551, 188 N.E.2d 476 (1963); Colantuoni v. Selectmen of Belmont, 326 Mass. 778, 96 N.E.2d 870 (1951); Hubbard Broadcasting, Inc. v. City of Albuquerque, 82 N.M. 164, 477 P.2d 602 (1970); National Motor Club v. State Ins. Bd., 393 P.2d 511 (Okla. 1964).

[207] Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Rural Electrification Administration v. Northern States Power Co., 373 F.2d 686 (8th Cir. 1967), *cert. denied*, 387 U.S. 945 (1967); Rural Electrification Administration v. Central Louisiana Elec. Co., 384 F.2d 859 (5th Cir. 1966); Berry v. Housing & Home Fin. Agency, 340 F.2d 939 (2d Cir. 1965); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 884 (1955). The decision to the same effect in Alabama Power Co. v. Alabama Elec. Coop., 394 F.2d 673 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000 (1968), seems questionable in its rejection of the plaintiff's reliance on having furnished central station electric service in territories that would be invaded as a result of the Rural Electrification Administration's challenged financing of extensions of competing cooperative service in alleged disregard of a statutory limitation of such financing to the creation of facilities "for the furnishing of electric energy to persons in rural areas who are not receiving central station service." *See*

by a private or semiprivate venture, does not arise merely by virtue of the resulting economic injury, unless a statute affords a basis for the challenge. Similarly, government action which strengthens an existing competitor cannot under the traditional view be challenged merely for the same reason by another concern which considers itself injured.[208]

Noteworthy expansion of this restricted view of standing based on competitive interest has taken place under the Federal Administrative Procedure Act, with consequent enlargement of the standing of business enterprises, either in their own right or as private attorneys general, to challenge agency actions favorable to competitors. Under the provision of the Act, whereby standing is conferred on persons "adversely affected or aggrieved within the meaning of a relevant statute," the search for a basis of standing turns to other legislation, where the basis may be found either in express provisions for standing or in an ascertainable purpose to protect the interests asserted.[209] The Supreme Court has noted that, over all, "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action."[210] Previously in *Hardin v. Kentucky Utilities Company*,[211] legislative history and the wording of a recent statutory provision lent themselves to a generous interpretation in favor of a power company's standing to challenge T.V.A. expansion into the company's territory, which contrasted in result with earlier T.V.A. decisions. Although a less generous interpretive technique was afterward applied by the Fifth Circuit under a similar statute,[212] the general tendency to find statutory provisions for competitive business interests to receive consideration has been strong in a variety of situations before and after *Hardin*.[213] Never-

7 U.S.C. §§ 902, 904, *quoted* indirectly *in* n.27 of the opinion of Godbold, J., dissenting, 394 F.2d at 687. *Cf.* Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968), which is differentiated in the majority opinion in the principal case, at 675 n.5.

[208] Union Nat'l Bank v. Home Loan Bank Board, 233 F.2d 695 (D.C. Cir. 1956).

[209] *See* text accompanying notes 39-45 *supra*.

[210] Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 154 (1970).

[211] 390 U.S. 1 (1968).

[212] Alabama Power Co. v. Alabama Elec. Coop., 394 F.2d 672 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000 (1968). *See also* Rural Electrification Admin. v. Northern States Power Co., 373 F.2d 686 (8th Cir. 1967), *cert. denied*, 387 U.S. 945 (1967).

[213] Armco Steel Corp. v. Stans, 431 F.2d 779, 784 (2d Cir. 1970) (interest of domestic steel producer in challenging a customs duty advantage to foreign producers); National Aviation Trade Ass'n v. CAB, 420 F.2d 209 (1969); National Ass'n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); Safir v. Gibson, 417 F.2d 972 (2d Cir. 1969) (interest of water carrier in government recovery of subsidy previously paid to plaintiff's competitors); Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958); National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (D.D.C. 1967), *aff'd* 393 U.S. 18 (1968) (interest of carriers in challenging a regulation which facilitates rate reductions by competitors). As to competitor standing under state law, *see* Keating v. State *ex rel.* Ausebel, 173 So. 2d 673 (Fla. 1965); People *ex rel.* Buffalo Util.

theless, contrary decisions when statutory recognition of a competitive interest seemed absent or competitive injury from agency action in the particular case seemed minimal have not lost all force.[214]

Decisions involving the banking laws, of which the *Data Processing* case is one, have been especially important in the recent expansion of standing of business enterprises to challenge agency action which aids competitors. In *Arnold Tours, Inc. v. Camp*, travel agencies challenged a ruling of the Comptroller of the Currency that national banks might render travel agency services to their customers. The Supreme Court at first remanded the case for further consideration in the light of its Data Processing decision.[215] The Court of Appeals then ruled in a carefully reasoned opinion that Congress in enacting the Bank Service Corporation Act[216] had not manifested a concern for all kinds of enterprises with which banks might compete, but only for those rendering the kinds of services which a bank service corporation might perform. Travel agencies were not among these and consequently lacked standing to challenge the Comptroller's ruling.[217] On certiorari, the Supreme Court held to the contrary, attributing to the Bank Service Corporation Act a broader purpose to protect non-banking enterprises from competition by banks.[218]

Later in *Investment Company Institute v. Camp*[219] the Court dealt with a statutory limitation on the authority of national banks, which restricted their purchase and sale of securities to transactions without recourse for the accounts of customers upon their order.[220] The Institute,

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Co. v. Village of Buffalo Grove, 85 Ill. App. 2d 382, 229 N.E.2d 401 (1967); Indianapolis & Southern Motor Express, Inc. v. Public Serv. Comm'n, 232 Ind. 377, 112 N.E.2d 864 (1953). *See also* L'Enfant Plaza North, Inc. v. D.C. Redev. Agency, 437 F.2d 698 (D.C. Cir. 1970).

214 Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969), *cert. denied*, 397 U.S. 923 (1970); Tax Analysts & Advocates v. Simon, 390 F. Supp. 927 (D.D.C. 1975). *Cf.* Association of Fair Competitive Practices v. Public Serv. Comm'n, 372 F.2d 934 (D.C. Cir. 1967); Pittsburgh Hotels Ass'n v. Urban Redev. Authority, 309 F.2d 186 (3d Cir. 1962); Sapp v. Hardy, 204 F. Supp. 602 (D. Del. 1962); North Carolina Natural Gas Corp. v. United States, 200 F. Supp. 745, 751-52 (D. Del. 1961). The holding on this point in South Suburban Safeway Lines, Inc. v. City of Chicago, 416 F.2d 535 (7th Cir. 1969), seems wrong in the context of applicable provisions of the Urban Mass Transportation Act. *See, however*, Bradford School Bus Transit, Inc. v. Chicago Transit Authority, 537 F.2d 943 (7th Cir. 1976).

215 Arnold Tours, Inc. v. Camp, 397 U.S. 315 (1970).

216 *See* note 199 *supra*.

217 Arnold Tours, Inc. v. Camp, 428 F.2d 359 (1st Cir. 1970).

218 Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970). *See also* American Soc'y of Travel Agencies v. Bank of America Nat'l Trust & Sav. Ass'n, 385 F. Supp. 1084, 1092 (N.D. Cal. 1974).

219 401 U.S. 617 (1971).

220 12 U.S.C. § 24 Seventh (1970), *as amended from* 48 Stat. 184 (1933).

composed of mutual investment fund enterprises, challenged a regulation and an approval by the Comptroller of the Currency which authorized the National City Bank of New York to establish and operate a collective investment fund. The Court held that because Congress "had arguably legislated against the competition that the petitioners sought to challenge," they had standing to bring a proceeding to review the Comptroller's action even though the purpose of the legislation was to guard against abuses and conflicts of interest on the part of banks and not to protect competitors or prevent abuses in the securities industry. Mr. Justice Harlan, dissenting, pointed out the distortion involved in the Court's unacknowledged shift from reliance in *Data Processing* on legislation specifically intended for the protection of competitors to reliance on legislation which for unrelated reasons forbade conduct that involved competition with others. The fact that the statute contained an express prohibition, although relied upon in the Court of Appeals,[221] is hardly significant; for an implied limitation, such as follows from the National Bank Act's empowerment of only such activities as are "necessary to carry on the business of banking," operates quite as fully as a prohibition "against [the] competition" which it prevents.[222] If so, the *Investment Company Institute* case means that business enterprises confronted by competition which agency action has either established or aided have standing to challenge the action on the ground that the competition transgresses statutory limits which exist for any reason. Standing because of the business interest involved, to challenge the agency action on procedural or other collateral grounds not touching the challenger, might still be lacking; but the former policy of not permitting standing to arise at all, merely because of such an interest, would have been curtailed to a significant extent.

Standing of existing banks to challenge authorization of the entry of new ones or extension of the establishments of competitors into their territories has undergone a parallel expansion. Authorization of new national banks by the Comptroller of the Currency depends on their

[221] National Ass'n of Sec. Dealers v. SEC, 420 F.2d 83, 97 (D.C. Cir. 1969). *See also* Baker, Watts & Co. v. Saxon, 261 F. Supp. 247 (D.D.C. 1966), *aff'd sub nom.*, Port of N.Y. Authority v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968).

[222] 12 U.S.C. § 24 Seventh (1970). This provision has been construed to exclude the banks from activities not necessary to the business of banking in order to prevent diversion of the attention of management and impairment of financial soundness, because of collateral interests. Logan County Nat'l Bank v. Townsend, 139 U.S. 67, 73 (1891); National Bank v. Mathews, 98 U.S. 621, 625-26 (1878); Baltimore & Ohio R. Co. v. Smith, 56 F.2d 799 (3d Cir. 1932). *See also* Saxon v. Georgia Ass'n of Independent Ins. Agents, 399 F.2d 1010 (5th Cir. 1968), involving this implied prohibition and a statutory authorization for national banks to engage in the insurance agency business in "any place the population of which does not exceed five thousand inhabitants."

compliance with federal requirements related to their structure and financial soundness and, under the Act as interpreted since 1909, on community need for banking services.[223] Existing national banks in the same localities, with which a new one would compete, would seemingly lack any interest of their own in exclusiveness, which they had standing to defend. Nevertheless both they and state banks which are subject to similar statutory provisions for entry into business[224] have in some instances been accorded standing, without specific statutory provision for it, to oppose the authorization of new entries, either in their own behalf or as private attorneys general to represent the public interest in adapting banking service to need.[225] As to national bank branches, the Act expressly subjects the Comptroller's authorization of new branches by such banks to the same restrictions as state law may place on state bank branches in the same areas.[226] Since these restrictions are imposed for reasons that include the protection of established banks from unwarranted invasion of their markets by branches of outside banks, the established state or national institutions which are confronted by branch authorizations in their areas by state agencies[227] or by the Comptroller,[228] have standing to challenge the authorizations.

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[223] 12 U.S.C. §§ 26, 27 (1970); Redford, *Dual Banking: A Case Study in Federalism* 31 LAW & CONTEMP. PROB. 749, 757 (1966). The Banking Act of 1935 requires a similar showing of need on the part of banks newly admitted as insured banks to the Federal Deposit Insurance system. 49 Stat. 687-88 (1935), as continued, 12 U.S.C. §§ 1814(b), 1816 (1970). *See* Smith & Greenspun, *Structural Limits on Bank Competition*, 32 LAW & CONTEMP. PROB. 41, 43 (1967).

[224] *See* Smith & Greenspun, note 223 *supra*, at 43-45; Comment, *Bank Charter, Holding Company and Merger Laws: Competition Frustrated*, 71 YALE L.J. 502, 509-16 (1962); D. ALAHADEFF, MONOPOLY AND COMPETITION IN BANKING 205-06 (1954).

[225] Webster Groves Trust Co. v. Saxon, 370 F.2d 381 (8th Cir. 1968); Association of Data Processing Serv. Organizations v. Camp. 406 F.2d 837, 840 (8th Cir. 1969), *rev'd as to other issues*, 397 U.S. 150 (1970). *See also* North Fed. Sav. & Loan Ass'n v. Becker, 24 Ill. 2d 514, 182 N.E.2d 155 (1962) (standing to challenge change of location of competitor). Standing is accorded without discussion in Sterling Nat'l Bank v. Camp, 431 F.2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971); Ramapo Bank v. Camp, 425 F.2d 333 (3d Cir. 1970), *cert. denied*, 400 U.S. 828 (1970); Warren Bank v. Camp, 396 F.2d 52 (6th Cir. 1968), and Application of State Bank, 61 N.J. Super. 150, 160 A.2d (1960). *Compare* Ruidoso State Bank v. Brumlow, 81 N.M. 379, 467 P.2d 395 (1970); State *ex rel.* Rouveyrol v. Donnelly, 365 Mo. 686, 285 S.W.2d 669 (1956); *see also* Comment, 71 YALE L.J. 502 at 512, *supra* note 224.

[226] 12 U.S.C. § 36(c) (1970); First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966); Marion Nat'l Bank v. VanBuren Bank, 418 F.2d 121 (7th Cir. 1970); First Nat'l Bank v. Camp, 326 F. Supp. 541 (D.D.C. 1971), *aff'd*, 465 F.2d 586 (1972), *cert. denied*, 409 U.S. 1124 (1973).

[227] South Shore Nat'l Bank v. Board of Bank Incorporation, 351 Mass. 363, 220 N.E.2d 899 (1966); Application of Summit & Elizabeth Trust Co., 111 N.J. Super. 154, 268 A.2d 21 (1970); Newport Nat'l Bank v. Provident Institution for Sav., 226 A.2d 137 (R.I. 1967) (competing bank as "person aggrieved" under state administrative procedure act).

[228] First Nat'l Bank of Logan, Utah v. Walker Bank & Trust Co., 385 U.S. 252 (1966); First Nat'l Bank of Smithfield v. Saxon, 352 F.2d 267 (4th Cir. 1965); Whitney

Emerging recurringly in the cases involving competitor standing are two reasons which were enunciated in Judge Bazelon's concurring opinion in the *Investment Company Institute* case in the Court of Appeals. These are (1) that important questions which are raised in an adversary setting should be decided and (2) the "fortuitous" nature of statutory differences which, if not overcome, would leave some interests without the standing that was accorded to others under similar circumstances.[229] The earlier case of *Pennsylvania Railroad Company v. Dillon*,[230] where standing was denied, was distinguished on the ground that it involved merely "[m]inor or speculative economic injury," giving rise only to "skirmishes among businesses over comparative advantages resulting from allegedly illegal agency action," with which it was "not worth burdening the agencies and the courts."[231] The difficulty with relying on such a difference between cases is that it requires the courts to decide in various instances, on the basis of relative importance, whether they should entertain challenges to agency action on such competitive grounds. A more sweeping recognition of standing on the ground of competitive interest, subject to a de minimis limitation, would be simpler and would confer the same benefit of more ready review of agency action at the instance of enterprises having pertinent data and argument to offer. At the federal level, in the absence of new legislation, the problem in justifying such a formulation is to avoid doing violence to honest interpretation of the Administrative Procedure Act and of the relevant statutes to which it refers.

Also illustrative of the problem of standing to challenge agency action because of its bearing on business rivalry is the situation that surrounds the standing of bidders and would-be bidders on transactions with the government to challenge allegedly illegal specifications, procedures, purchases, contract awards, or sales or leases of property, which have either conferred advantage upon rivals, placed a plaintiff under a handicap, or withheld business from him. Traditionally there is no right to do business or even to be accorded equal opportunity to do business with the government, upon which standing might be based.[232]

Nat'l Bank v. Bank of New Orleans & Trust Co., 323 F.2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965); National Bank of Detroit v. Wayne Oakland Bank, 252 F.2d 537, 544 (6th Cir. 1958), *cert. denied*, 358 U.S. 830 (1958); State Chartered Banks in Washington v. Peoples Nat'l Bank, 291 F. Supp. 180 (W.D. Wash. 1966); Bank of Sussex County v. Saxon, 251 F. Supp. 132 (D.N.J. 1966).

229 National Ass'n of Sec. Dealers v. SEC, 420 F.2d 83, 95-100 (D.C. Cir. 1969).

230 335 F.2d 292 (D.C. Cir. 1964), *cert. denied sub nom*, American S.S. Co. v. United States, 379 U.S. 945 (1964).

231 420 F.2d at 97.

232 Perkins v. Lukens Steel Co., 310 U.S. 113, 126 (1940); Colorado Paving Co. v.

Statutes and ordinances designed to secure equal opportunity and fair consideration for suppliers and contractors have been looked upon as enactments in the interest of economy and efficiency in government, not of competitors for business with the government.[233] Consequently standing has in many instances been denied to would-be contractors to challenge contract awards to competitors.[234] Nevertheless, the injustice inflicted by favoritism or error in awards of public business is often apparent[235]—increasingly so as government transactions come to account for growing portions (in some fields, such as road building and military weapons supply, virtually all) of the available business. In relation to the public interest in governmental economy and efficiency as well, no one else is as informed or as likely to institute litigation to check abuse as is the enterprise threatened with loss, even if there are others who have standing to do so. For whatever reason, some territorial and state decisions have sustained the standing of enterprises seeking government business to challenge illegality in the contracting process or in the awarding of business to others.[236] In relation to federal processes, the United

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Murphy, 78 Fed. 28 (8th Cir. 1897), *appeal dismissed*, 166 U.S. 719 (1897); Crawford v. United States Dep't of the Interior, 160 F. Supp. 417 (E.D. Pa. 1958). *Compare*, however, Gotoveski-Caplan Physical Therapy Ass'n v. United States, 507 F.2d 1363 (7th Cir. 1975).

[233] *Id. But see* Black Hotel Co. v. Froehlke, 351 F. Supp. 956 (W.D. Okla. 1972).

[234] Adelman v. Federal Housing Admin., 382 F.2d 594 (2d Cir. 1967); Colorado Paving Co. v. Murphy, 78 Fed. 28 (8th Cir. 1897); Malan Constr. Corp. v. Board of County Comm'rs, 187 F. Supp. 937 (E.D. Mich. 1960); Waszen v. Atlantic City, 1 N.J. 272, 63 A.2d 255 (1949); Noonan v. School District, 400 Pa. 391, 162 A.2d 623 (1960); Tri-State Milling Co. v. Board of County Comm'rs, 75 S.D. 466, 68 N.W.2d 104 (1955).

[235] Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Housing Authority v. Pittman Constr. Co., 264 F.2d 695 (5th Cir. 1959); Rudolph F. Matzer & Associates v. Warner, 348 F. Supp. 991 (M.D. Fla. 1972); Pullman, Inc. v. Volpe, 337 F. Supp. 432 (E.D. Pa. 1971); Shaw-Henderson, Inc. v. Schneider, 335 F. Supp. 1203 (W.D. Mich. 1971), *aff'd*, 453 F.2d 748 (6th Cir. 1971). *See also* Merriam v. Kunzig, 347 F. Supp. 713 (E.D. Pa. 1971), *rev'd*, 476 F.2d 1233 (3d Cir. 1973), *cert. denied*, 414 U.S. 911 (1973). Breach by federal officers of an implied obligation to consider a bid fairly and honestly has been recognized increasingly as a basis for limited government liability for the costs of bid preparation. Hence one who alleges such a breach "has the right to come into court to try and prove his cause of action." Keco Indus., Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970); Armstrong & Armstrong, Inc. v. United States, 514 F.2d 402 (9th Cir. 1975); Paul Sardella Constr. Co. v. Braintree Housing Authority, —— Mass. ——, 329 N.E.2d 762 (1975).

[236] Creque v. Government of Virgin Islands, 354 F. Supp. 849 (D.C.V.I. 1973); Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006 (Alaska 1967) (because of strong legislative policy to safeguard disposal and leasing of state land); Housing Authority v. Pittman Constr. Co., 264 F.2d 695 (5th Cir. 1959) (Louisiana law); School City of Gary v. Continental Elec. Co., 149 Ind. App. 416, 273 N.E.2d 293 (1971); Dictaphone Corp. v. O'Leary, 287 N.Y. 491, 41 N.E.2d 68 (1942); State *ex rel.* United Dist. Heating, Inc. v. State Office Bldg. Comm'n, 124 Ohio St. 413, 179 N.E. 138, 125 Ohio St. 413, 179 N.E. 138, 125 Ohio St. 806, 181 N.E. 129 (1931-32); State *ex rel.* Waller Chem., Inc. v. McNutt, 152 W. Va. 186, 160 S.E.2d 170 (1968); Annot., 80 A.L.R. 1382, 1394-97 (1932). *See also* Callaghan & Co. v. Smith, 304 Ill. 532, 130 N.E. 748 (1922). Occasionally the standing of an unsuccessful bidder challenging the legality of specifications is rejected because of an estoppel to attack provisions of which one has sought the benefit. Waszen v. Atlantic

States Court of Appeals of the District of Columbia,[237] taking a position later endorsed by some other federal courts,[238] has brushed aside the Administrative Procedure Act's restriction of standing to persons adversely affected or aggrieved within the meaning of other relevant statutes,[239] and has held that seekers of government business, alleging injury because of violations of statutes that regulate purchasing, contracting, or selling or leasing procedures, have standing by virtue of the Act. Other federal courts have declined to adopt so broad a theory and have looked instead for specific statutory concern for would-be contractors' interests as a basis of standing;[240] but a growing volume of litigation challenging the actions of federal purchasing and contracting agencies at the instance of disappointed seekers of government business seems certain to arise in any event.[241]

City, 1 N.J. 272, 65 A.2d 255 (1949). This principle, however, does not affect one who challenges action which foreclosed his bid or involved inadequate consideration of it. Inn Operations, Inc. v. River Falls Motor Inn Corp., 261 Ia. 72, 152 N.W.2d 808 (1967); J. Turko Paving Contractor, Inc. v. City Council, 89 N.J. Super. 93, 213 A.2d 865 (1965). The larger estoppel principle, whereby one who accepts a license or other governmental benefit is foreclosed from attacking an allegedly illegal condition attached to it, usually defeats recovery rather than withholds standing to seek it. An enterprise may, of course, be a citizen or taxpayer with standing as such, to the extent it is recognized in the jurisdiction, to challenge action which also operates to its detriment as a would-be contractor with the government. State *ex rel.* Journal Publishing Co. v. Dreyer, 183 Mo. App. 463, 167 S.W. 1123 (1914); Heilig Bros. Co. v. Kohler, 366 Pa. 72, 76 A.2d 613 (1950); Bellingham American Publishing Co. v. Bellingham Publishing Co., 145 Wash. 25, 258 P. 836 (1927).

[237] Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137 (D.C. Cir. 1970); M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971); Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971); Constructores Civiles de Centroamerica v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972). *Cf.* Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 950 (1970). *See also* Superior Oil Co. v. Udall, 409 F.2d 1115 (D.C. Cir. 1969); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955).

[238] Keco Indus., Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970); Armstrong & Armstrong, Inc. v. United States, 514 F.2d 402 (9th Cir. 1975); Rossetti Contracting Co. v. Brennan, 508 F.2d 1039, 1042 (7th Cir. 1974); Rudolph F. Matzer & Associates v. Warner, 348 F. Supp. 991 (M.D. Fla. 1972). *See also* Merriam v. Kunzig, 476 F.2d 1233 (3d Cir. 1973) (in which the court, at 1242, also ascribed to the governing statute a purpose to protect competitors for leases of office space to the government), followed in William F. Wilke, Inc. v. Department of the Army, 485 F.2d 180 (4th Cir. 1973), and Davis Associates, Inc. v. Secretary of HUD, 498 F.2d 385 (1st Cir. 1974); Hayes Int'l Corp. v. McLucas, 509 F.2d 247 (5th Cir. 1975); Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 166 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971) (would-be contractors may challenge a bid requirement which, if retained, will impose burdens on performance of contract).

[239] *See* text accompanying note 44 *supra*.

[240] Cincinnati Elec. Corp. v. Kleppe, 509 F.2d 1080, 1085-86 (6th Cir. 1975) (standing of would-be contractor must rest on a statute additional to the A.P.A.). *Cf.* Pullman, Inc. v. Volpe, 337 F. Supp. 432, 449 (E.D. Pa. 1971), and Shaw-Henderson, Inc. v. Schneider, 335 F. Supp. 1203 (W.D. Mich. 1971) (no standing of would-be contractors under A.P.A. to challenge federal approval of local contract awards). For the Second Circuit position, see Morgan Associates v. United States Postal Serv., 511 U.S. 1223, 1225 n.3 (2d Cir. 1975).

[241] *See* Pierson, *Standing to Seek Judicial Review of Government Contract Awards:*

The enlargement of standing of business enterprises to challenge agency action favoring competitors has generally been prompted by considerations of fairness and by a policy of increasing the opportunities for judicial vindication of the public interest involved. Attendant disadvantages of this development have been the unpredictability of decisions, distortion in some of the judicial reasoning involved, and some added burdens on the courts. Few would advocate, on balance, that this development continue to the point where business rivalry would become a basis for litigation to compel the equal enforcement among competitors of all kinds of tax and regulatory laws that affect business capability; consequently, this kind of basis for standing must have limits. A principle is evolving imperfectly through the decisions and commentaries, however, whereby competitive interest would become a proper basis of standing to challenge governmental action which is intended to take into account or protect either that interest or a public interest in adequate service by a class or classes of enterprises that includes the one for which standing is sought. Under this principle, would-be contractors with the government would have standing with respect to contract procedures or awards to others affecting either a statutory interest of theirs or the cost and quality of goods and services the government receives.[242] Franchisees and holders of certificates of convenience and necessity would have standing to challenge agency actions favorable to rival enterprises, supposedly based on the public interest in the quality and quantity of the goods or services offered. The enterprises that would receive standing on this basis could more clearly contribute to sound decisions, because of both motivation and knowledge, than mere citizen plaintiffs could. Denial of standing would occur in some instances in which recent decisions have bestowed it, such as the *Investment Companies Institute* case; for in that case neither the interest of the plaintiffs nor the public's need for the kinds of service the plaintiffs were rendering, but only the sound conduct of the banking business, was legally relevant. More frequently, standing of existing enterprises to oppose the authorization of new competition with them would be recognized because intertwined private and public interests, either or both of which were to be taken

Its Origins, Rationale and Effect on the Procurement Process, 12 B.C. IND. & COM. L. REV. 1 (1970); Speidel, *Judicial and Administrative Review of Government Contract Awards*, 37 LAW & CONTEMP. PROB. 63 (1972); Curtiss-Wright Corp. v. McLucas, 364 F. Supp. 750, 756 (D.N.J. 1973).

242 The influence of the decision in Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), results at least partially from emphasis on this factor in the opinion of the court which, in turn, draws heavily on K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958 and Supp. 1965).

into account, were involved.[243] In short, the principle of the *Sanders Brothers Radio Station* case,[244] which rested on statutory language bestowing standing, would become generally applicable to situations in which there was no such language but legally relevant interests were at stake and could be furthered by bestowing standing.

In another important area of litigation, federal legislation providing financial assistance for housing, urban renewal, and similar local projects has increasingly conditioned the assistance on administrative determinations that the welfare of three groups of persons, in addition to sponsors and participants in the projects, will be protected or served in specified ways. These groups are previous residents and business proprietors in the areas directly involved, who would be displaced by the projects; persons in the vicinity whose environment would be affected; and those to whom the projects were intended to offer benefits.[245] Their standing to challenge the procedures and determinations of federal, state, and local agencies involved in carrying out the projects has become solidly established. Initially their standing to seek relief in the federal courts against alleged failures of federal authorities to carry out their statutory duties toward these groups was withheld.[246] Standing to seek relief in the federal courts against the execution of noncomplying projects by local administrators was likewise denied, with statutory relief in the state courts a possibility.[247] However, the Second Circuit in *Gart v. Cole*[248] had recognized the standing of residents of an area affected by a project to challenge the withholding of procedural rights allegedly

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[243] *Cf.* Elizabeth Fed. Sav. & Loan Ass'n v. Howell, 24 N.J. 488, 132 A.2d 779 (1957). *See also* the broad view expressed in Dvorine v. Castelberg Jewelry Corp., 170 Md. 661, 185 A. 562, 565 (1936); Fitchetti v. Taylor, 191 Minn. 582, 254 N.W. 910 (1934), that members of professions have standing to challenge unauthorized practice by others. This view, if accepted, might be extended to include challenges to allegedly illegal agency action which sanctioned activities the governing statute was designed to prevent in the interest of the public, as the statute in Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969), *cert. denied*, 397 U.S. 923 (1970), was not.

[244] 309 U.S. 470 (1940). *See* notes 59-67 *supra* & text accompanying.

[245] Pertinent provisions of the Housing Acts of 1937 and 1949, of subsequent legislation for expanded urban projects, and of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 are contained in 42 U.S.C. §§ 1441, 1455, 1469, 1469c, 4601, 4602, 4604-4638 (1970); 42 U.S.C. §§ 1401, 1415 and 4603 (1970), *as amended*, (Supp. IV 1974).

[246] Harrison-Halsted Community Group v. Housing & Home Fin. Agency, 310 F.2d 99, 104 (7th Cir. 1962), *cert. denied*, 375 U.S. 914 (1963); Green Street Ass'n v. Daly, 373 F.2d 1, 5-8 (7th Cir. 1967). *Cf.* Allied City Wide, Inc. v. Cole, 230 F.2d 827 (D.C. Cir. 1956); Gibson & Perrin Co. v. Cincinnati, 480 F.2d 936 (6th Cir. 1973), *cert. denied*, 414 U.S. 1068 (1973).

[247] Johnson v. Redev. Auth., 317 F.2d 872 (9th Cir. 1963), *cert. denied*, 375 U.S. 915 (1963). *See also* Pittsburgh Hotels Ass'n v. Urban Redev. Auth., 309 F.2d 186 (3d Cir. 1962).

[248] 263 F.2d 244, 250 (2d Cir. 1959), *cert. denied*, 359 U.S. 978 (1959).

secured to affected persons by the Housing Act, at the same time as it denied standing to vindicate the purely public interest in adherence to bidding requirements in the sale of property involved in the project. In 1968, building on this foundation and on *Road Review League v. Boyd*, to be discussed below,[249] *Powelton Civic Home Owners Association v. Department of Housing and Urban Development*,[250] followed closely by two other influential decisions,[251] supplied convincingly the rationale whereby persons displaced or threatened with displacement by projects under the legislation in question were held to be persons suffering injury to a legal right and "adversely affected or aggrieved within the meaning of a relevant statute," as contemplated by the Administrative Procedure Act. This view was thereafter firmly established.[252]

By a parity of reasoning, persons in the vicinity of a project whose neighborhood may be affected adversely in ways which by statute are supposed to be taken into account in project planning and execution have standing to challenge determinations which allegedly fail to consider these factors in the manner required.[253] Needless to say, also, standing arises on the part of intended or direct beneficiaries of ongoing projects to challenge the withholding from them of requisite procedures or of statutory benefits and rights.[254] Similarly, persons entitled by statute to consultation or participation in projects, who allege that they have been denied their due in this respect, have standing to challenge the denial.[255]

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249 270 F. Supp. 650 (S.D.N.Y. 1967); *see* text accompanying note 266 *infra*.

250 284 F. Supp. 809 (E.D. Pa. 1968).

251 Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968); Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968), *preliminary injunction dissolved*, 320 F. Supp. 308 (N.D. Cal. 1969).

252 M.M. Crockin Co. v. Portsmouth Redev. & Housing Auth., 437 F.2d 784, 787-88 (4th Cir. 1971); Garrett v. City of Hamtramck, 335 F. Supp. 16 (E.D. Mich. 1971); English v. Town of Huntington, 335 F. Supp. 1369 (E.D.N.Y. 1970); Talbot v. Romney, 321 F. Supp. 458, 463 (S.D.N.Y. 1970); Coalition for United Community Action v. Romney, 316 F. Supp. 742, 747 (N.D. Ill. 1970); Triangle Improvement Council v. Ritchie, 314 F. Supp. 20 (S.D. W. Va. 1969), *aff'd* 429 F.2d 423 (4th Cir. 1970), *cert. dismissed*, 402 U.S. 497 (1971).

253 Shannon v. Department of HUD, 436 F.2d 809 (3d Cir. 1970); Northwest Residents Ass'n v. Department of HUD, 325 F. Supp. 65 (E.D. Wis. 1971). *Compare* Fletcher v. Romney, 323 F. Supp. 189, 194 (S.D.N.Y. 1971). As to similar factors in highway location, *see* Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); Lathan v. Volpe, 455 F.2d 1111, 1122-26 (9th Cir. 1972).

254 Thorpe v. Housing Auth., 393 U.S. 259 (1969); Davis v. Romney, 490 F.2d 1360 (3d Cir. 1974); Knox Hill Tenant Council v. Washington, 448 F.2d 1045 (D.C. Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243, 1246 n.3 (2d Cir. 1970); Mandina v. Lyons, 357 F. Supp. 269 (W.D. Mo. 1973).

255 North City Areawide Council v. Romney, 428 F.2d 754 (3d Cir. 1970); Coalition for United Community Action v. Romney, 316 F. Supp. 742 (N.D. Ill. 1970). *Cf.* Gains v. Martinez, 353 F. Supp. 780 (N.D. Tex. 1972) (participation in Economic Opportunity Administration).

Standing in relation to the foregoing kinds of urban projects relates closely to standing to challenge agency action because of concern for its effects on the natural environment. Litigation with respect to these environmental matters rests on legislation that directs agencies whose primary focus is on regulation or promotion of economic activity or on authorization or execution of engineering projects to take environmental factors into account. Such legislation emerged in the 1930's after earlier conservation laws, providing for management of the public domain, had occasionally involved private persons as defendants in penal proceedings[256] or as plaintiffs in litigation to secure permits or grants which had been administratively denied. In 1934 a rudimentary Fish and Wildlife Coordination Act[257] was adopted, authorizing research and planning with reference to the preservation of natural species and the provision in connection with federal dam projects of facilities for the migration of anadromous fish. In the same year the Taylor Grazing Act[258] authorized the creation of grazing districts embracing public lands, and their regulation "to preserve the land and its resources from destruction and unnecessary injury. . . ."[259] In the following year the Federal Power Act, which in 1920 had required that hydroelectric dams be licensed in accordance with comprehensive waterway development plans for commerce, power, and "other beneficial uses,"[260] was amended to specify that these uses should include "recreational purposes."[261]

Taken in conjunction with statutory judicial review provisions or with the subsequent Administrative Procedure Act as construed in the *Data Processing* and other decisions, the foregoing statutory provisions would be sufficient to bestow standing on persons possessing the requisite interests in preservation of the particular natural resources involved, to challenge agency action on the ground that it did not comply with the statutory requirements. The briefly stated conclusion in *Washington Department of Game v. Federal Power Commission*[262] was that both the Department and the Washington State Sportsmen's Council, a corporation, were "parties aggrieved" within the meaning of the Federal Power Act's review provision,[263] entitled as such to challenge a Commission license for a dam that allegedly threatened to destroy the fish in the waters affected, "which they, among others, are interested in pro-

256 The leading case of this variety is United States v. Grimaud, 220 U.S. 506 (1911).
257 48 Stat. 401.
258 43 U.S.C. § 315 *et seq.* (1970).
259 43 U.S.C. § 315a (1970).
260 41 Stat. 1068.
261 16 U.S.C. § 803(a) (1970).
262 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954).
263 16 U.S.C. § 825m(b) (1970). *See* note 26 *supra.*

tecting." This theme under the same statute was developed to maximum effect in the first *Scenic Hudson Preservation Conference* decision of the Second Circuit,[264] involving the Federal Power Commission's licensing of the Consolidated Edison Company's Storm King Mountain pumped storage power facility, in which the Conference, a private organization of persons and groups having the interests which the name of the Conference implies, was held to have standing to challenge the Commission's order because of a wide range of environmental effects of the project.

Equivalent reasoning as to persons "adversely affected or aggrieved" within the meaning of the Administrative Procedure Act in conjunction with statutes not containing explicit provisions for judical review was developed not long afterward, in relation to persons having environmental interests, in *Road Review League v. Boyd.*[265] The Federal Highways Act, applicable to the highway project involved in the case, contained provisions which, as construed administratively and by the court, required the Secretary of Commerce (later of Transportation), in deciding whether to approve such a project, to consider the conservation and development of the natural environment;[266] but the Act did not provide specifically for judicial review of approvals. At issue was the effect of the project on a wildlife refuge in New York State and on scenic beauty in the vicinity. The Court held that individuals and groups in the locality, interested in scenic beauty and wildlife preservation in the area, and alleging adverse consequences with respect to these interests, could seek relief in a United States District Court against alleged noncompliance with the Act's protective provisions.[267]

Many cases have followed the lines of reasoning developed in *Scenic Hudson* and *Road Review League.*[268] Congress during a roughly con-

[264] Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). An order approving a modified project, entered by the Commission after further proceedings pursuant to remand, was sustained by the court, 453 F.2d 463 (1971), *cert. denied*, 407 U.S. 926 (1972).

[265] 270 F. Supp. 650 (S.D.N.Y. 1967). On the merits, the court sustained the legality of the Secretary's action.

[266] The court cited 23 U.S.C. § 101(b) (1970), *as amended*, (Supp. IV. 1975); 23 U.S.C. §§ 134 and 138 (1970). Only the last of these sections was explicit as to the natural environment, and it had been enacted after the challenged decision was made administratively. The earlier provisions had been construed to permit conservation of natural resources to be considered. *See* 25 Fed. Reg. 4162 (1960), 23 C.F.R. § 1.6(c).

[267] 270 F. Supp. at 660-61.

[268] Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1970); Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Parker v. United States, 307 F. Supp. 685 (D. Colo. 1969), *decision on the merits*, 309 F. Supp. 593 (1970), *aff'd*, 448 F.2d 793 (1971), *cert. denied*, 405 U.S. 989 (1972); Crowther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970), *aff'd as to the merits*, 415 F.2d 437 (10th Cir. 1969); Ward v. Ackroyd, 344 F. Supp. 1202 (D. Md. 1972). *Cf.* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1970) (standing assumed without discussion).

temporaneous period touched the interests of vastly greater numbers of people by enacting statutes, supplemental to those empowering agency action, which require attention to a wide range of environmental factors and, in that connection, the observance of specified procedures in relevant proceedings, by federal agencies generally.[269] The Fish and Wildlife Coordination Act[270] was expanded in 1946 and 1958,[271] to amplify the required procedures for consultation with the Fish and Wildlife Service and equivalent state agencies and to provide for indicated conservation measures in connection with all federal or federally licensed projects affecting streams or other bodies of water. The National Historic Preservation Act of 1966 includes a provision for federal agencies having jurisdiction with respect to proposed public or federally licensed private undertakings to "take into account" the effects of an undertaking on any areas, sites, or structures included in a National Register of such locations which is authorized by the Act.[272] The comprehensive National Environmental Policy Act of 1970[273] and the implementing Reorganization Plan No. 3 of 1970[274] require procedures and methods whereby inter-agency consultation shall take place, a detailed statement concerning environmental impact and possible alternative measures shall be prepared, and "appropriate consideration" shall be given to "presently unquantified environmental amenities and values," as well as "economic and technical" factors, in the proceedings of all federal agencies preparatory to "proposals for legislation and other major federal actions significantly affecting the quality of the human environment."[275] The central purpose is to give effect to a continuing policy "to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony. . . ."[276] By virtue of the foregoing legislation, in conjunction with the Administrative Procedure Act, individuals and groups possessing interests affected by factors in the environment which Congress sought to safeguard have successfully claimed standing to challenge alleged agency failure to comply with

[269] The Department of Transportation Act, enacted in 1966 and revised in this respect in 1968, 82 Stat. 824, requires the Secretary to give all possible effect to environmental protection in his approvals of the various transportation programs and projects which are subject to his authority. 49 U.S.C. § 1653(f) (1970). This provision is carried into the Highways Act by 23 U.S.C. § 138 (1970).

[270] *See* note 257 *supra*.

[271] 16 U.S.C. § 661 *et seq.* (1970), esp. § 662. *See also* 16 U.S.C. § 460l-12 *et seq.* (1970) (affirmative provision for wildlife enhancement in connection with water resource projects).

[272] 16 U.S.C. § 470f (1970), *as amended*, (Supp. IV, 1975).

[273] 42 U.S.C. § 4321 *et seq.* (1970).

[274] 5 U.S.C. Appendix (1970).

[275] 42 U.S.C. § 4332 (1970).

[276] 42 U.S.C. § 4331 (1970). Further specifications as to the governing policy are set forth in the statute.

the foregoing statutory requirements.[277] As might be expected, standing and a right to relief under these laws often arise in situations in which narrower statutes, such as those relating to highway location, supply an additional basis of standing on the part of the possessors of the same interests.[278]

Limits to the Development

The scope and effect of the foregoing broad recognition of standing to vindicate environmental and other broad interests, especially in light of the standing of organizations to represent the interests of their members,[279] were enhanced by the Supreme Court's decision in *United States v. Students Challenging Regulatory Agency Procedures*.[280] That case gives a broad interpretation to the kind of interest which the earlier decision in *Sierra Club v. Morton*[281] recognized as a basis of standing to bring review proceedings under the National Environmental Policy Act in conjunction with the Administrative Procedure Act, subject to the limitation which was imposed by that decision. *Sierra Club*, as has been

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277 United States v. SCRAP, 412 U.S. 669 (1973); Conservation Council v. Costanzo, 505 F.2d 498 (4th Cir. 1974); Coalition for the Environment v. Volpe, 504 F.2d 156 (8th Cir. 1974); Scientists' Institute for Pub. Information v. AEC, 481 F.2d 1079 (D.C. Cir. 1973); San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973); Upper Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1971), *vacated as moot*, 500 F.2d 17 (10th Cir. 1974); Ely v. Velde, 321 F. Supp. 1088 (E.D. Va. 1971), *rev'd on other grounds*, 451 F.2d 1130 (4th Cir. 1971) (National Historic Preservation and National Environmental Policy Acts); Environmental Defense Fund v. Corps of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972); Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971); Environmental Defense Fund v. Corps of Engineers, 324 F. Supp. 878 (D.D.C. 1971) (Fish and Wildlife Coordination and National Environmental Policy Acts); Delaware v. Pennsylvania, N.Y. Cent. Transp. Co., 323 F. Supp. 487 (D. Del. 1971) (Fish and Wildlife Coordination Act primarily). As to limitation of the spread of shared interests which can be the basis of standing, *see* Sierra Club v. Morton, 405 U.S. 727 (1970), discussed at notes 74-76 *supra*. *Compare* Ely v. Velde, 321 F. Supp. 1088 (E.D. Va. 1971), *with* South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454 6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970), and Kent County Council for Historic Preservation v. Romney, 304 F. Supp. 885 (W.D. Mich. 1969).

278 West Va. Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971) (Wilderness Act); Natural Resources Defense Council v. Grant, 355 F. Supp. 280, 290 (E.D.N.Y. 1973) (Rivers & Harbors Act); Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971) (highway location legislation); Cape May County Chapter, Izaak Walton League v. Macchia, 329 F. Supp. 504 (D.N.J. 1971) (statutes protecting water resources); Brooks v. Volpe, 329 F. Supp. 118 (W.D. Wash. 1971), *rev'd on other grounds*, 460 F.2d 1193 (9th Cir. 1972) (highway location legislation); Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970), *aff'd*, 454 F.2d 613 (3d Cir. 1971) (same). *Compare* Rhode Island Comm. on Energy v. General Serv. Adm., 397 F. Supp. 41 (D.R.I. 1975) (statute relating to disposal of federal land).

279 *See* note 153-64 *supra* & text accompanying.

280 412 U.S. 669 (1973). For the later decision of the Court on the merits, *see* Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289 (1975).

281 405 U.S. 727 (1970).

noted,[282] excluded mere ideological or citizen interest, but not direct personal interest in an environmental situation, from the category which bestows standing; the *SCRAP* case holds that the actual personal interest which will suffice may be quantitatively very slight and only remotely affected by the action complained of. The suit challenged an action of the Interstate Commerce Commission which allowed a nationwide railroad freight rate increase to go into effect. The increase, it was alleged, heightened at least slightly an economic disincentive to the recycling of solid wastes, or scrap material, which the rate structure as a whole was said to impose. The resulting stimulation to the use of new materials would in addition to raising product prices, enlarge the continuing drain on natural resources, including forests in the vicinity of Washngton, D.C. which the members of *SCRAP* used for outings and enjoyed aesthetically. This interest of theirs, the Court held, sufficed to bestow standing upon them to challenge the agency's omission of procedures required by the N.E.P.A. In pursuing their remedy the students must, of course, bear out their allegations as to environmental consequences affecting them and establish their contention that the N.E.P.A. applied; but the suit could not be dismissed at the outset, merely on the ground that they lacked standing to make the attempt.

Given the breadth of the environmental benefits, including the continued purity of water and air, which are the concern of the National Environmental Policy Act, potential standing to challenge action in order to safeguard these benefits attaches to everyone because of normal day-to-day existence, as the Court recognized.[283] In this area of concern, personal interest, sufficient to bestow standing because protected by statute, is shared by all within relevant geographical limits. Consequent problems of securing adequate presentation of cases in court by individuals who come forward, of preventing undue strain on the judicial system, and of avoiding unhelpful judicial intrusion into agency action,[284] must be solved by means not made clear in the *SCRAP* case.

The question arises whether the protection accorded by statute to widespread personal interests in the environment is more convincingly

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[282] *See* notes 74-76 *supra* & text accompanying. As to standing on similar principles under environmental protection statutes without reference to the procedural requirements of the National Environmental Policies Act *see* Campaign Clean Waters, Inc. v. Ruckelshaus, 361 F. Supp. 789 (E.D. Va. 1973), *remanded*, 489 F.2d 492 (4th Cir. 1973); Friends of the Earth v. Armstrong, 360 F. Supp. 165 (D. Utah 1973), *vacated & remanded*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

[283] 412 U.S. at 687.

[284] As to the relation of the standing requirement to judicial self-limitation for these various reasons, *see* Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

a basis of standing than the interest in personal safety which much of the criminal law, including its administration, protects, or the interest in the availability of goods and services and of employment, which fiscal, monetary, grant-in-aid, and regulatory administration are in large part designed to secure. Neither of these two interests, broadly speaking, suffices.[285] Because of the recency of environmental legislation, its purposes are often explicitly set forth in the statutes themselves or in legislative history, whereas the aims of more traditional enactments and of non-statutory and constitutional provisions of law are taken for granted; but such formal differences should hardly be decisive in determining standing.

In another area of recent concern, a group of decisions has founded standing to challenge agency action on the interest shared by all persons as members of society, if not simply as individual human beings, in the maintenance of prescribed governmental processes for effective participation in decisionmaking or for access to officials who engage in making decisions, on the part of all persons who wish to assert themselves. This interest is broader and more abstract than one in retaining office,[286] as to which additional personal interests may be said to arise, and than the interests of electors;[287] but simply because of the general interest in effective access to governmental decisionmaking, legislators as representatives of the public have been held to have standing to sue to invalidate the outcome of behind-the-scenes agency processes which had supplanted those, prescribed by statute, which were required to be open.[288] For the same reason a group lobbying for particular legislation was held to have standing to challenge the forbidden use of government money in lobbying by an opposing group.[289] An increase in suits of this nature seems likely.

Courts can, of course, avoid much unsuitable judicial intrusion

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[285] *See* notes 53-55 *supra* & text accompanying. *But see* District 65, Wholesale, etc., Union v. Nixon, 341 F. Supp. 1193 (S.D.N.Y. 1972).

[286] Powell v. McCormack, 395 U.S. 480 (1969); Board of Educ. v. Allen, 392 U.S. 236, 241 (1968); Local 2677, Amer. Fed. of Govt. Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973).

[287] Baker v. Carr, 369 U.S. 186 (1962); Shakman v. Democratic Organization of Cook County, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

[288] Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970). This interest of persons generally under a statute, which congressmen choose to represent in court, is different from that of a legislator as such in having his vote on a measure given its due effect under the Constitution and, no doubt, under any applicable statute or rule, which was recognized as the basis of standing in Coleman v. Miller, 307 U.S. 433 (1939). *See also* Kennedy v. Jones, 511 F.2d 430 (D.C. Cir. 1974). It is different too from a legislator's interest in not having his power usurped, which at least contributed to the basis for standing on the part of congressmen in Mitchell v. Laird, 476 F.2d 533 (D.C. Cir. 1973).

[289] National Ass'n for Community Action v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973).

into nonjusticiable controversies that might result from the enlargement of standing, by resort to the doctrines of unreviewable action and political questions; but many issues that can be raised through broad standing—for example, alleged abuse of discretion in the performance of official duties under licensing laws which bear on welfare in the community—fall easily within the judicial province. As to such issues, the law of standing affords the most available means of screening cases, using criteria which turn on plaintiffs' interests or on the relation of agency action to those interests. The costs of litigation are in themselves a deterrent to suits,[290] which arguably might suffice; but resources to meet these costs are increasing.[291] In any event, the availability of funds to litigants is a somewhat fortuitous factor, reflecting intensity of concern but hardly ability to contribute well to the decision of cases. A more rationally based gauging of the suitability of the challenging interests in particular cases remains desirable.

To retain effectiveness in the law of standing as a screening device despite frequent enlargment of interests to be recognized, the requirement previously mentioned,[292] that injury to the interest sought to be vindicated be not too remote from the action complained of, has emerged as crucial in several recent decisions. In *Rizzo v. Goode*,[293] where police abuse of individuals in the community was the conduct complained of by residents of Philadelphia, the plaintiffs' claim of standing suffered in the eyes of the majority of the Supreme Court from two deficiencies: (1) failure to identify adequately the probable future sufferers from the abuses complained of, in whose behalf a remedy was sought,[294] and (2) absence of a firm basis for predicting that, because of some identified causal factor, the abuses which had occurred would be repeated to a significant extent. Hence the Court concluded that, even after a full hearing in the district court, no case or controversy between the parties involving sufficiently probable injury to any right of the plaintiffs existed. The decision, questionable on the record, nevertheless emphasized rightly the need for specific allegations of probable injury to specific plaintiffs' interests in order to establish standing to bring actions to prevent official oppression of persons.

Shortly afterward the Court decided that indigent plaintiffs lacked standing to challenge a Revenue Ruling affecting non-profit hospitals'

290 As to this factor, *see* Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 643 (1973).

291 Judge Henry J. Friendly points to this development in his Foreword to B. SCHWARTZ & H.W.R. WADE, LEGAL CONTROL OF GOVERNMENT at xx (1972).

292 *See* text at note 4 *supra*.

293 423 U.S. 362 (1976).

tax exemption, which, under an allegation accepted as true by the Court, "encouraged" the hospitals to deny them free service. There was no averment that the Ruling would necessarily result in denials. Other factors influencing hospital policies rendered the threatened injury too speculative in the eyes of the Court to warrant standing based upon it.[295] Mr. Justice Brennan's dissenting opinion, in which Mr. Justice Marshall joined, is surely right in contending that the decision conflicts with the one in *United States v. SCRAP*[296] and with some of the decisions involving plaintiffs who alleged competitive injury through agency action benefiting business rivals. Yet the *SCRAP* decision, although not overruled, required limitation if standing was to continue to perform a useful function and the courts be protected from entertaining a wide range of disputes among citizens over economic, social, and tax policies.

In *Warth v. Seldin*,[297] involving challenges by variously interested persons to a zoning ordinance which virtually excluded low-cost housing from a Rochester suburb, the sharply divided Court dealt somewhat earlier with the requirement of probable injury to the plaintiffs from the measure under attack. As to builders and would-be tenants and purchasers of homes whose opportunities were denied, the majority of the Court seems to have been unduly prone to find that adequate averment of probable injury to their interest resulting from the ordinance was lacking; as to plaintiff-taxpayers in nearby Rochester who alleged cost burdens to them in coping with the regional housing problem which the ordinance intensified, the decision seems right.

It must be confessed, over all, that a requirement of sufficiently probable injury, such as the foregoing cases involve, requires subjective judgments on the part of both judges and prospective litigants.[298] Yet

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294 There were similar failures in O'Shea v. Littleton, 414 U.S. 488 (1974), involving allegations of official abuses after valid arrests, which was cited as analogous in the majority opinion, and Laird v. Tatum, 408 U.S. 1 (1972), involving allegedly military surveillance of civilians. As Mr. Justice Brennan points out in his dissent in Rizzo v. Goode, 423 U.S. 362 (1976), there was less basis for predicting that the plaintiffs in *O'Shea* might be arrested and subjected to abuse than that the *Rizzo* plaintiffs, as persons going about their business under police surveillance, might become victims of police brutality. In *Laird v. Tatum*, the alleged surveillance extended only to certain group political activities in which the plaintiffs did not allege they were involved.

295 Simon v. Eastern Ky. Welfare Rights Organization, 96 S. Ct. 1917 (1976).

296 412 U.S. 669 (1973).

297 422 U.S. 490 (1975).

298 Several recent cases in the lower courts illustrate the difficulty further. In one, Evans v. Lynn, 376 F. Supp. 327 (S.D.N.Y. 1974), standing was rightly withheld, in the eyes of the writer, from persons in need of housing who challenged a federal grant for a non-housing purpose, because it allegedly would curtail somewhat the creation of additional future housing. In Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), standing was rather oddly recognized to challenge an official failure to carry out an international measure (embargo on trade with Rhodesia) which was designed

with ripeness for review and the requirement of exhaustion of administrative remedies having become more relaxed, and with ranges of interest which form the basis of standing as broad as they are, there needs to be an efficacious, if not rigid or certain, requirement that challengers of agency actions (and of statutes or ordinances) be proximately affected or threatened by the measures or the conduct they attack, as a condition of access to court. The decision of controversies as to this aspect of standing is at least, when undertaken at the outset of litigation, less burdensome than the resolution by the courts of larger controversies over policy. Guidelines as to the degree of probable injury which is required in various contexts are not beyond attainment. As an escape from unsatisfactory decisions, the legislature can make specific provision as to standing if it wants to—unless Mr. Justice Brennan is right in the *Eastern Kentucky Welfare Rights*[299] case in interpreting the decision of the majority as foreclosing legislative liberalization of the case or controversy requirement as construed in the opinion.

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to coerce the government of that country to honor certain human rights, including those asserted by the plaintiffs. In First National Bank of Homestead v. Watson, 363 F. Supp. 466 (D.D.C. 1973), standing should have been withheld, but was not, from a bank allegedly representing the interest of individuals in the environment, which asserted that the challenged authorization of a new bank without an environmental impact inquiry might result in financing of real estate development which would be environmentally harmful. *See further* District 65, Wholesale, etc. Union v. Nixon, 341 F. Supp. 1193 (S.D. N.Y. 1972). The decision as to standing in Carman v. Richardson, 357 F. Supp. 1148 (D. Vt. 1973), although possibly supportable by analogy to local taxpayer standing, also seems extreme. In it a local user of hospital services was permitted to challenge a federal loan guaranty to a hospital, which allegedly would result, contrary to statutory requirements, in a costly duplication of facilities. In American Civil Liberties Union v. F.C.C., 523 F.2d 1344 (9th Cir. 1975), the court rightly recognized the standing of a representative of cable television viewers to challenge a regulation which allegedly would limit invalidly the programming to which the viewers would have access in the future. In Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975), standing of a high school social studies director to challenge alleged FBI investigations of students because of their inquiry into radical causes, such as the director might wish to include in future curricula, was questionably denied on the ground that the deterrent effect on his policies, which he alleged, was purely subjective. *See further*, note 4 *supra*.

[299] Simon v. Eastern Ky. Welfare Rights Organization, 96 S. Ct. 1917 (1976).

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