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Standing in Public Interest Litigation: Removing the Procedural Barriers

Robert M. Myers

STANDING IN PUBLIC INTEREST LITIGATION: REMOVING THE PROCEDURAL BARRIERS

By
*Robert M. Myers**

"Give me a place to stand . . .
and I can move the earth."—Archimedes[1]

I. INTRODUCTION

In recent years public interest lawsuits have proliferated.[2] Under the rubric of taxpayers' suits, private attorney general actions, or public interest litigation,[3] the judicial process has been frequently resorted to in order to vindicate important commonly shared rights in such areas as civil liberties and civil rights, environmental conservation, administrative regulation, consumer protection, tax assessments, and municipal affairs. Together with state initiatives, referenda, recall measures, public hearings, and public record acts, public interest lawsuits serve to ensure more meaningful and democratic participation in the governmental decisionmaking process. At the same time, such measures afford the public an opportunity to correct governmental abuses that might otherwise go unchecked.

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* B.A. California State University, Fullerton; J.D. Loyola Law School, Los Angeles; City Attorney of the City of Santa Monica; Adjunct Professor of Law, Loyola Law School. Portions of this article have been adapted from Collins & Myers, *The Public Interest Litigant in California: Observations on Taxpayers' Actions*, 10 LOY. L.A.L. REV. 329 (1977). The author would like to thank Ronald K.L. Collins, Richard Rothschild and Crystal C. Sims for their thoughtful comments.

1. 11 GREAT BOOKS OF THE WESTERN WORLD 329 (R.M. Hutchins ed. 1952).

2. Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301, 301 n.1 (1973) [hereinafter cited as Nussbaum].

3. Public interest litigation has been described as that kind of lawsuit which "is brought by private plaintiffs in the hope of achieving broader results by litigating issues of . . . current importance which when resolved will affect substantial numbers of people." *Id.* at 305. For the definitional characteristics of the aforementioned description, see *id.* at 304-05; Cahn & Cahn, *Power to the People or to the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976). Since the above characteristics are common to private attorney general, taxpayer, and public interest suits, the terms, although they may be technically distinguishable, will, for the purposes of this article, be used interchangeably unless otherwise specifically designated.

Although the focus of public interest litigation is to vindicate important rights, the public interest litigant is regularly required to demonstrate sufficient standing to maintain the action. Before addressing the substantive concerns giving rise to the lawsuit, the public interest litigant must first overcome a myriad of jurisdictional barriers typically erected by the defendants to forestall a decision on the merits. This has been especially true in federal courts, where traditional article III standing rules, requiring a plaintiff to have a personal stake in the outcome of a controversy, frequently bar public interest litigation.[4]

In California, public interest litigants do not confront the same restrictive standing rules that make the federal forum all but hostile to vindicating public rights. This article will examine the current scope of public interest standing in California. Additionally, this article will examine the doctrinal basis for standing in California courts and will argue that standing requirements should be discarded by state courts in public interest litigation.

II. TAXPAYER STANDING

In the federal court system, taxpayers' suits[5] are clearly of limited utility to the public interest litigant.[6] Despite the continued reluctance

4. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, 102 S. Ct. 752 (1982); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); *Ex parte* Levitt, 302 U.S. 633 (1937); Massachusetts v. Mellon, 262 U.S. 447 (1923).

5. A description of taxpayers' suits can be found in 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 52.02-.03a, at 3-4 (3d rev. ed. 1977) [hereinafter cited as MCQUILLIN]; *see infra* text accompanying notes 16-19. For a broad analysis of taxpayers' suits, see MCQUILLIN, *supra*, §§ 52.01-.52, at 2-94; Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895 (1960) [hereinafter cited as *Taxpayers' Suits*].

6. To bring a taxpayer action in federal court, potential litigants must comply with the "two-tiered nexus test" of Flast v. Cohen, 392 U.S. 83 (1968). Chief Justice Warren, writing for the majority, outlined the test as follows:

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

Id. at 102-03.

The net result of restrictive federal standing requirements is that the slow, cumbersome, and sometimes unresponsive electoral process remains the only realistic federal forum available to taxpayers to check legislative and executive abuses. Ironically, not long ago the

of federal courts to permit taxpayers to bring suits in the public interest, however, state courts liberally permit such suits to be maintained.[7] This liberal attitude of the states hinges on three fundamental propositions. First, "the nominal nature of the individual taxpayer's interest is held not to rule out his standing."[8] Second, the state courts reject the notion that potential flooding of the court dockets constitutes sufficient cause to ban taxpayers' actions.[9] Third, the legislatures of the various states have seen fit to encourage the challenge of illegal governmental action. As Professor Schwartz aptly points out:

> To the state judges, of greater importance has been the need to ensure that invalid public action will not be rendered immune from attack. In the state view, the taxpayer, both as such and as a member of a society grounded upon the rule of law, is intimately concerned with the validity of action taken by the government which his tax dollars support.[10]

The combined effect of these three tenets of the states' general scheme has been to place another sword for checking governmental abuses in the otherwise meager arsenal of the citizen taxpayer.[11] By contrast to the federal forum, there is a plenitude of "standing" room in the state courthouses for taxpayers.

As far back as 1858, the California Supreme Court established the right of a citizen taxpayer to challenge the validity of local government

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Supreme Court noted that "under the conditions of modern government, litigation may well be the sole practicable avenue . . . to petition for redress of grievances." NAACP v. Button, 371 U.S. 415, 430 (1963); *see* Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 231 (1936); *Taxpayers' Suits, supra* note 5, at 910.

7. Only New Mexico bars state taxpayers' actions. Comment, *Taxpayers' Actions: Public Invocation of the Judiciary*, 13 WAKE FOREST L. REV. 397, 402-03 (1977). Every state now permits municipal taxpayers' actions. *Id.* at 399-400.

8. B. SCHWARTZ, ADMINISTRATIVE LAW 461 (1976) (footnote omitted) [hereinafter cited as SCHWARTZ]; *see* Wirin v. Parker, 48 Cal. 2d 890, 894, 313 P.2d 844, 846 (1957); Wirin v. Horrall, 85 Cal. App. 2d 497, 504-06, 193 P.2d 470, 474-75 (1948).

9. *See* SCHWARTZ, *supra* note 8, at 462. In this respect, Professor Kenneth Culp Davis notes:

> If any special evils flow from the extreme liberality of these state courts on the problem of standing, the evils are not apparent in the reported opinions. The courts are not flooded by cases brought by officious intermeddlers, and no sign appears that the adversary system has been either destroyed or impaired.

3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.10, at 254 (1958) (footnote omitted); *see* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 470-71 (1970).

10. SCHWARTZ, *supra* note 8, at 462 (footnote omitted).

11. One commentator has observed: "Such litigation allows the courts, within the framework of traditional notions of 'standing,' to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts." *Taxpayers' Suits, supra* note 5, at 904.

spending practices.[12] By 1909, the state legislature had codified the right of such plaintiffs.[13] Today that provision, section 526a of the California Code of Civil Procedure, provides in part:

> An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.[14]

Section 526a reflects the "very liberal" attitude of California courts in permitting taxpayers to bring suits on behalf of the public to prevent illegal governmental conduct.[15] More importantly, as a unanimous court in *Blair v. Pitchess*[16] declared: "[t]he primary purpose of this statute . . . is to 'enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.' "[17]

The decisional law holds that "the principles of justiciability in taxpayers' suits under section 526a differ fundamentally from the restrictive federal doctrine."[18] That difference applies to taxpayers' suits

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12. Foster v. Coleman & Alexander, 10 Cal. 278, 281 (1858); *accord* Winn v. Shaw, 87 Cal. 631, 637, 25 P. 968, 969 (1891).

13. Act of March 20, 1909, ch. 348, § 1, 1909 Cal. Stat. 578.

14. CAL. CIV. PROC. CODE § 526a (West 1979). The remainder of § 526a states:

> This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.
>
> An action brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

Id.; *see* Note, *California Taxpayers' Suits: Suing State Officers Under Section 526a of the Code of Civil Procedure*, 28 HASTINGS L.J. 477 (1976).

15. *See* Blair v. Pitchess, 5 Cal. 3d 258, 268, 486 P.2d 1242, 1249, 96 Cal. Rptr. 42, 49 (1971); Crowe v. Boyle, 184 Cal. 117, 152, 193 P. 111, 125 (1920). In order to prevail under § 526a, "the taxpayer must establish that the expenditure of public funds which he seeks to enjoin is illegal." National Org. for the Reform of Marijuana Laws v. Gain, 100 Cal. App. 3d 586, 599, 161 Cal. Rptr. 181, 188 (1979).

16. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

17. *Id.* at 267-68, 486 P.2d at 1248-49, 96 Cal. Rptr. at 48-49 (quoting *Taxpayers' Suits, supra* note 5, at 904). Recently, the California Supreme Court reaffirmed this position in Van Atta v. Scott, 27 Cal. 3d 424, 447, 613 P.2d 210, 222, 166 Cal. Rptr. 149, 161 (1980).

18. White v. Davis, 13 Cal. 3d 757, 764, 533 P.2d 222, 227, 120 Cal. Rptr. 94, 99 (1975).

grounded on common law doctrines[19] as well as those arising under section 526a. The distinction between common law and statutory causes of action is important in that one form of action may offer broader standing than another. When a court decides to invoke a more generous interpretation of the applicable taxpayer statutes, such a court may well be availing itself of its independent powers under the precedents established at common law. In part, the practice can be attributed to the conviction, long subscribed to in California, that public interest litigation ought to be encouraged. For over a century the state attitude has always been to encourage the private attorney general "[b]ecause [when] the *motive* of a plaintiff-taxpayer is viewed as irrelevant, taxpayers' suits afford a means of mobilizing the self-interest of individuals within the body politic to challenge legislative programs, prevent illegality, and avoid corruption."[20]

Given the long tradition of taxpayer suits in California, few issues concerning the scope of such lawsuits remain unresolved. However, when issues do arise, they usually fall within one of three categories: the status of the plaintiff, the status of the defendant, or the nature of the relief sought.[21]

A. Who Qualifies as a Taxpayer Plaintiff?

Section 526a expressly confers standing upon four distinct classes of litigants: (1) upon a citizen resident who is "assessed" a tax; (2) upon a corporation which is "assessed" a tax; (3) upon a citizen resident who "has paid a tax"; or (4) upon a corporation which "has paid a tax." Separate and apart from any corporate status, a literal interpretation of section 526a would indicate that a taxpayer plaintiff must be a citizen *resident* in order to establish standing. However, the California Supreme Court in *Irwin v. City of Manhattan Beach*,[22] held that such a literal interpretation of the code violates federal equal protection guarantees:

> We would consider these arguments [requiring local resi-

19. *See* Harman v. City & County of San Francisco, 7 Cal. 3d 150, 159-61, 496 P.2d 1248, 1254, 101 Cal. Rptr. 880, 886 (1972); cases cited *supra* note 12.

20. *Taxpayers' Suits, supra* note 5, at 904 (emphasis added) (footnote omitted); *see* Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826 (1899); MCQUILLIN, *supra* note 5, § 52.11, at 20-22. In keeping with this general policy, the Legislature has enacted the Public Records Act, CAL. GOV'T CODE §§ 6250-6261 (West 1980).

21. A more extensive discussion of the problem appears in Collins & Myers, *The Public Interest Litigant in California: Observations on Taxpayers' Actions*, 10 LOY. L.A.L. REV. 329 (1977) [hereinafter cited as Collins & Myers].

22. 65 Cal. 2d 13, 415 P.2d 769, 51 Cal. Rptr. 881 (1966).

> dence] eminently persuasive if it were not for the fact that [such a] reading of section 526a . . . violates the equal protection clause of the Fourteenth Amendment. No reason has been presented to us, *or conceived by us*, which would render less than arbitrary and capricious a distinction which would give a nonresident corporate taxpayer the right to maintain a suit such as here contemplated, but would deny the same right to a nonresident taxpayer who is a natural person.[23]

Significantly, the *Irwin* court extended the scope of section 526a to encompass nonresident taxpayers even though the section expressly precluded such an interpretation. Nevertheless, one fortuitous factual aspect of the *Irwin* case might be interpreted as a limitation on the court's holding. While the plaintiff in *Irwin* was not a resident taxpayer, she was a *property* owner and had paid taxes levied against her property by the city.[24] That factor could arguably convert *Irwin*'s holding to a *sub silentio* rule requiring property ownership whenever the taxpayer plaintiff is not a citizen resident. While the *Irwin* court did not pen a single word which would justify the notion that property taxpayers are to be given special treatment, the plaintiff's status in that case remains potentially significant.

However, such a property ownership requirement is at odds with the logic of *Irwin*. The *Irwin* court's holding turns on the single principle that nonresident individuals should be treated no differently than nonresident corporations. Certainly, the *Irwin* holding does not restrict standing to those natural persons who are nonresident property owners. The statute on its face requires no such ownership status. To adopt the argument that an individual must be a real property owner within a given city or county, while a nonresident corporation need not be, would perpetuate the same kind of equal protection violation invalidated in *Irwin*. Moreover, it would prove equally discriminatory as against nonresident lessees who do not own property. So understood, any interpretation which would condition section 526a standing upon a property ownership requirement would clash with the very rationale applied in *Irwin*.[25]

Section 526a, as modified by *Irwin*, automatically affords standing

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23. *Id.* at 19, 415 P.2d at 772-73, 51 Cal. Rptr. at 884-85 (emphasis added and omitted).

24. *Id.* at 18-19, 415 P.2d at 772, 51 Cal. Rptr. at 884; *see also* Gamble v. City of San Diego, 79 F. 487 (9th Cir. 1897); *Taxpayers' Suits, supra* note 5, at 910.

25. A nonresident corporation which paid a sales tax within a given city, town, or county, by the express terms of the statute, has a right to sue since it has "paid a tax therein." Moreover, a nonresident, nonproperty owner plaintiff may just as easily form a close corporation which would, after paying a sales tax, have standing to sue under the statute. Nothing

to all corporate or individual plaintiffs who have paid a tax. Since the statute does not specify the *kind* of tax required, the statutory language can certainly be construed to include the payment of all forms of taxes, such as license, gasoline, cigarette, sales, utility, and various business or city income taxes. Moreover, section 526a requires only that the tax being paid is ultimately deposited in the treasury of a city or county, thereby precluding any necessity for tracing the tax paid to the activity on which the complaint is based.[26]

At first blush, it may seem ludicrous to permit nonresidents to challenge city or county actions merely because they have paid some nominal tax. But when one recalls the "primary purpose" of state taxpayers' suits,[27] it is readily apparent that such criticism is unfounded. The rule in California has always been that "[i]t is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds."[28] The essential focus is on the illegal or wasteful nature of the governmental act. It does not matter that the plaintiff has suffered little or no injury as a taxpayer or that the taxpayer is not a resident or local property owner. The only requisite is that the complaining party has paid a tax and on that basis seeks to enjoin certain illegal, wasteful or injurious acts which are incompatible with the public interest of the citizenry affected. Consequently, the taxpayer's primary interest inheres in the wrongful act committed against the public per se. The various state court holdings which encourage generous application of the rules in taxpayers' suits[29]—even where the plaintiff is a nonresident,[30] or where the amount of the tax paid is de minimis,[31] or where there is no showing of special damages to the taxpayer[32]—all lend support to the private attorney general concept of tax-

in California law, however, requires an earnest taxpayer litigant to embark upon such a charade.

26. *Cf.* City of Columbus *ex rel.* Willits v. Cremean, 27 Ohio App. 2d 137, 141-42, 273 N.E.2d 324, 327 (1971) (court held that payment of a city income tax was sufficient to grant the plaintiff standing even though he was a nonresident of the city whose sewer charges he was challenging).

27. *See supra* text accompanying notes 17-20.

28. Wirin v. Parker, 48 Cal. 2d 890, 894, 313 P.2d 844, 846 (1957); *see* County of Los Angeles v. Superior Ct., 253 Cal. App. 2d 670, 678, 62 Cal. Rptr. 435, 441 (1967); SCHWARTZ, *supra* note 8, at 461; *Taxpayers' Suits, supra* note 5, at 905. *But see* Shavers v. Kelley, 402 Mich. 554, 267 N.W.2d 72 (1978) (incidental expenditure insufficient for taxpayer lawsuit), *cert. denied*, 442 U.S. 934 (1979).

29. *See supra* note 15 and accompanying text.

30. *See supra* notes 22-23 and accompanying text.

31. *See supra* note 28 and accompanying text; *infra* text accompanying note 53.

32. *See infra* text accompanying note 56.

payers' actions.[33]

This suggests that a citizen resident could properly maintain a taxpayer action based upon even a nominal tax payment to the government. Nevertheless, it has been suggested that the payment of a property tax is necessary even by a citizen resident to invoke section 526a.[34] This suggestion flies in the face of the plain wording of section 526a and would create an unwarranted distinction between taxpayers who own property and taxpayers who do not.[35] To avoid any unconstitutional classification, section 526a must be extended to all taxpayers regardless of the nature of the tax paid.[36]

Notwithstanding the long history of liberally interpreting section 526a, two appellate court decisions, *Gould v. People*[37] and *Di Suvero v. County of Los Angeles*,[38] attempted to preclude taxpayer standing because of the existence of a potential plaintiff who might have personal standing. However, the California Supreme Court, in *Van Atta v.*

33. Regarding the residency or property ownership questions, it cannot be accurately maintained that *only* residents or property owners have a real interest in the actions of any given community or that they are the only ones affected. This is borne out by the very character of modern day city life. In a mobile society like our own, people do not restrict their activities to a single locale. It is not uncommon to work in one city, live in another, and seek entertainment in a third, while at the same time commuting through a number of other cities or counties. Consequently, it is not necessarily accurate to picture the acts of one city or county as affecting only its residents or property owners. Consider what would happen if a metropolitan hub like Hollywood, California enacted an ordinance banning all cinema theatres or all bookstores. Would only the residents or property owners of Hollywood be harmed? *See generally* Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979); Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972); Hutchinson, *Standing to Sue in Public Interest Litigation*, 7 LINCOLN L. REV. 40 (1971); Comment, *Land-Use Control, Externalities, and the Municipal Affairs Doctrine: A Border Conflict*, 8 LOY. L.A.L. REV. 432 (1975).

34. Brief of Respondent City of Irvine at 39, Stocks v. City of Irvine, 114 Cal. App. 3d 520, 170 Cal. Rptr. 724 (1981).

35. Property ownership requirements in connection with voting rights have been consistently invalidated under the federal equal protection clause. *See, e.g.*, Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Kramer v. Union Free School Dist., 395 U.S. 621 (1969). The California Supreme Court has required that a compelling state interest be demonstrated in denying judicial access to one group and granting it to another. Payne v. Superior Ct., 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

36. One cannot imagine a more irrelevant distinction in taxpayer actions. California case law has consistently focused on the illegality of the governmental conduct. The type or quantity of tax paid or the amount of monies illegally expended has never been a subject of judicial concern. Any distinction based on the type of tax paid will risk giving persons with large tax payments greater access to the courts to correct government abuses than persons with smaller tax payments.

37. 56 Cal. App. 3d 909, 128 Cal. Rptr. 743 (1976).

38. 73 Cal. App. 3d 718, 140 Cal. Rptr. 895 (1977).

Scott,[39] disapproved of such narrowing of the taxpayer remedy, holding "that taxpayers may maintain an action under section 526a to challenge an illegal expenditure of funds even though persons directly affected by the expenditure also have standing to sue."[40] Thus, the California Supreme Court reaffirmed that section 526a "provides 'a general citizen remedy for controlling illegal governmental activity.' "[41]

B. Who can be Named as a Defendant?

The applicable provision of section 526a provides that an action "may be maintained against any officer thereof, or any agent, or other person, acting in [a county, town, or city's] behalf."[42] On its face, the statute applies only to specific agents or officers of the governmental entity rather than to the entity itself. Notwithstanding this limitation, nonrestrictive interpretations by the courts of statutory and common law requirements for taxpayers' suits have permitted plaintiffs to maintain actions against governmental entities such as counties[43] and cities.[44] Likewise, decisional law indicates that it may also be proper to join bondholders or contractors as defendants in a taxpayer's action.[45]

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39. 27 Cal. 3d 424, 613 P.2d 210, 166 Cal. Rptr. 149 (1980).

40. *Id.* at 449, 613 P.2d at 224, 166 Cal. Rptr. at 163; *see* Mendoza v. County of Tulare, 128 Cal. App. 3d 403, 180 Cal. Rptr. 347 (1982). In Darr v. Alvord, 101 Cal. App. 3d 480, 161 Cal. Rptr. 658 (1980), the court of appeal held that § 526a could not be invoked to enjoin the collection or expenditure of a tax claimed to be illegally imposed. *Id.* at 486-87, 161 Cal. Rptr. at 662. The decision was predicated upon a statutory scheme designed to *resolve* such disputes in a tax refund proceeding. *Id.* at 486, 161 Cal. Rptr. at 661. In light of *Van Atta*, the precedential value of this decision remains to be seen. In Cornblum v. San Diego County Bd. of Supervisors, 110 Cal. App. 3d 976, 168 Cal. Rptr. 294 (1980), the court of appeal held that a taxpayer's suit challenging jail conditions was moot because a similar lawsuit had already been filed by inmates. "To authorize a taxpayer's suit by these plaintiffs when another suit was in progress . . . brought by persons with an immeasurably greater stake in the issues tendered is to invite a duplicative, unnecessary lawsuit." *Id.* at 982, 168 Cal. Rptr. at 298. Although the court purported to follow *Van Atta*, the precedential value of this decision also remains to be seen.

41. 27 Cal. 3d at 447, 613 P.2d at 222, 166 Cal. Rptr. at 161 (quoting White v. Davis, 13 Cal. 3d 757, 763, 533 P.2d 222, 226, 120 Cal. Rptr. 94, 98 (1975)); *see* Collins, *Controversial Calif. Bail Decision Expands Standing in Taxpayer Suits*, Western L.J., Sept.-Oct. 1980, at 2, Col. 1.

42. CAL. CIV. PROC. CODE § 526a (West 1979).

43. Harman v. City & County of San Francisco, 7 Cal. 3d 150, 496 P.2d 1248, 101 Cal. Rptr. 880 (1972); Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1 (1956); Advance Med. Diagnostic Laboratories v. County of Los Angeles, 58 Cal. App. 3d 263, 129 Cal. Rptr. 723 (1976).

44. Harman v. City & County of San Francisco, 7 Cal. 3d 150, 496 P.2d 1248, 101 Cal. Rptr. 880 (1972); Irwin v. City of Manhattan Beach, 65 Cal. 2d 13, 415 P.2d 769, 51 Cal. Rptr. 881 (1966); Carl v. City of Los Angeles, 61 Cal. App. 3d 265, 132 Cal. Rptr. 365 (1976).

45. MCQUILLIN, *supra* note 5, § 52.45, at 87; *see* Smith v. Mount Diablo Unified School Dist., 56 Cal. App. 3d 412, 128 Cal. Rptr. 572 (1976).

The express language of the statute also would appear to preclude its application to state officials who do not fall within the class of enumerated defendants. Here again, California courts have recognized a taxpayer's cause of action against state officials independent of section 526a's provisions.[46] Similarly, in *Duskin v. San Francisco Redevelopment Agency*,[47] the court held that a taxpayer's suit could be maintained against a state agency where the complaint was not specifically limited to a section 526a cause of action.[48] These cases illustrate the significance of an independent common law doctrine which the courts will sometimes utilize in addition to, or instead of, section 526a to encourage the successful institution of taxpayers' suits.

C. Remedies Available in Taxpayers' Actions

For public interest suits to be effective, broad relief must be available. Depending upon the illegal governmental act committed, the appropriate remedy will require such relief as may be necessary to reimburse the public, punish the wrongful parties, or prevent continuation of the act in question.

A taxpayer seeking to challenge the illegal expenditure of public funds has available a wide range of remedies to ensure governmental compliance with the controlling law. While section 526a is directed to injunctive actions "restraining or preventing" the illegal expenditure of public monies, California courts have sustained taxpayers' actions where the relief sought was mandamus,[49] declaratory,[50] or damages on

46. Blair v. Pitchess, 5 Cal. 3d 258, 268, 486 P.2d 1242, 1249, 96 Cal. Rptr. 42, 49 (1971); Hooper v. Deukmejian, 122 Cal. App. 3d 987, 1018-19, 176 Cal. Rptr. 569, 587-88 (1981); Central Valley Chapter of the 7th Step Found., Inc. v. Younger, 95 Cal. App. 3d 212, 232, 157 Cal. Rptr. 117, 128 (1979); Farley v. Corey, 78 Cal. App. 3d 583, 588-89, 144 Cal. Rptr. 923, 926 (1978); Los Altos Property Owners Ass'n v. Hutcheon, 69 Cal. App. 3d 22, 29-30, 137 Cal. Rptr. 775, 779 (1977); California State Employees' Ass'n v. Williams, 7 Cal. App. 3d 390, 395, 86 Cal. Rptr. 305, 308 (1970); Ahlgren v. Carr, 209 Cal. App. 2d 248, 252-54, 25 Cal. Rptr. 887, 890-91 (1962); *see* Note, *California Taxpayers' Suits: Suing State Officers Under Section 526a of the Code of Civil Procedure*, 28 HASTINGS L.J. 477 (1976).

47. 31 Cal. App. 3d 769, 107 Cal. Rptr. 667 (1973); *see* Marin Hosp. Dist. v. Department of Health, 92 Cal. App. 3d 442, 449-50, 154 Cal. Rptr. 838, 841-42 (1979) (hospital district); Card v. Community Redev. Agency, 61 Cal. App. 3d 570, 574, 131 Cal. Rptr. 153, 157 (1976) (redevelopment agency).

48. 31 Cal. App. 3d at 773-74, 107 Cal. Rptr. at 670.

49. Van Atta v. Scott, 27 Cal. 3d 424, 449-50, 613 P.2d 210, 224, 166 Cal. Rptr. 149, 163 (1980); Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 151, 520 P.2d 961, 964, 113 Cal. Rptr. 145, 147 (1974); Knoff v. City & County of San Francisco, 1 Cal. App. 3d 184, 198, 81 Cal. Rptr. 683, 691-92 (1969).

50. Van Atta v. Scott, 27 Cal. 3d 424, 449-50, 613 P.2d 210, 224, 166 Cal. Rptr. 149, 163 (1980); Stanson v. Mott, 17 Cal. 3d 206, 223, 551 P.2d 1, 12, 130 Cal. Rptr. 697, 708 (1976); Central Valley Chapter of the 7th Step Found., Inc. v. Younger, 95 Cal. App. 3d 212, 232,

behalf of the public entity.[51] The interposition of common law principles in such cases may well have been responsible for producing greater relief than that expressly provided for under section 526a.

In actions to "restrain or prevent" the illegal expenditure of public funds, one need not identify the tax dollars illegally expended. The California Supreme Court has specifically adopted the holding of a lower court that "the mere 'expending [of] the time of . . . [paid officials] in performing illegal and unauthorized acts' constituted an unlawful use of funds which could be enjoined under section 526a."[52] Moreover, decisional law holds that "[i]t is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds."[53] The rule of these cases is consistent with the essential purpose of taxpayers' suits—to prevent illegal governmental action. To focus instead on the amount of tax dollars actually expended for such purposes would frustrate the aim of taxpayers' suits.

California courts have not generally conditioned the granting of permanent injunctive relief in taxpayers' suits upon a showing of tradi-

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157 Cal. Rptr. 117, 128 (1979); Card v. Community Redev. Agency, 61 Cal. App. 3d 570, 583, 131 Cal. Rptr. 153, 163 (1976).

51. Van Atta v. Scott, 27 Cal. 3d 424, 449-50, 613 P.2d 210, 224, 166 Cal. Rptr. 149, 163 (1980); Stanson v. Mott, 17 Cal. 3d 206, 226, 551 P.2d 1, 15, 130 Cal. Rptr. 697, 711 (1976); Briare v. Mathews, 202 Cal. 1, 8, 258 P. 939, 942 (1927); Osburn v. Stone, 170 Cal. 480, 482, 150 P. 367, 368 (1915). The justification for the taxpayer's damages action was extensively explored in the early case of Osburn v. Stone, 170 Cal. 480, 150 P. 367 (1915). The *Osburn* court, while recognizing that § 526a does not specifically authorize such an action, noted that the statutory language "does not in letter or in spirit forbid a taxpayer from seeking to recover on behalf of his municipality the same moneys if illegally expended." *Id.* at 482, 150 P. at 368. For a more extensive discussion of the taxpayers' damages action, see Collins & Myers, *supra* note 21, at 342-46.

52. Blair v. Pitchess, 5 Cal. 3d 258, 268, 486 P.2d 1242, 1249, 96 Cal. Rptr. 42, 49 (1971) (quoting Wirin v. Horall, 85 Cal. App. 2d 497, 504-05, 193 P.2d 470, 474 (1948)). In *Blair*, the court stated:

> It appears from the complaint that plaintiffs seek to enjoin defendants, who admittedly are county officials, from expending their own time and the time of other county officials in executing claim and delivery process. If the claim and delivery law is unconstitutional, then county officials may be enjoined from spending their time carrying out its provisions even though by the collection of fees from those invoking the provisional remedy the procedures actually effect a saving of tax funds.

5 Cal. 3d at 269, 486 P.2d at 1249, 96 Cal. Rptr. at 49 (citations omitted).

53. Wirin v. Parker, 48 Cal. 2d 890, 894, 313 P.2d 844, 846 (1957); *accord* Blair v. Pitchess, 5 Cal. 3d 258, 269, 486 P.2d 1242, 1249, 96 Cal. Rptr. 42, 49 (1971). Some jurisdictions, unlike California, require that the illegal or unauthorized act actually "result in an increase of . . . [the plaintiff's] taxes or will otherwise result in direct or indirect pecuniary injury." McQUILLIN, *supra* note 5, § 52.13, at 24.

tional equitable requirements.[54] In *Crowe v. Boyle*,[55] the California Supreme Court articulated the applicable standard: "In this state we have been very liberal in the application of the rule permitting taxpayers to bring a suit to prevent the illegal conduct of city officials, and no showing of special damage to the particular taxpayer has been held necessary."[56]

The showing required for taxpayer injunctive relief is minimal, which helps to further section 526a's primary purpose of "[giving] a large body of citizens standing to challenge governmental actions."[57] Observing that "[i]t is elementary that public officials must themselves obey the law,"[58] the California Supreme Court has declared that section 526a "provide[s] a general citizen remedy for controlling illegal governmental activity."[59]

It is now well established that ample relief must be available in taxpayers' actions. A recent pronouncement by the California Supreme Court reiterates this point: "To achieve the 'socially therapeutic purpose' of section 526a, 'provision must be made for a broad basis of relief. Otherwise, the perpetration of public wrongs would

54. *But cf.* Cota v. County of Los Angeles, 105 Cal. App. 3d 282, 164 Cal. Rptr. 323 (1980) (trial court may exercise discretion in balancing the equities of relative hardship where injunction may result in severe harm to the public). The issuance of injunctive relief in California is governed by statute and judicial decisions. *See* CAL. CIV. CODE § 3422 (West 1970); CAL. CIV. PROC. CODE § 526 (West 1979).

To date, no California court has specifically articulated the showing necessary for a preliminary injunction to issue in a taxpayer's action. The traditional test for preliminary injunctive relief generally, i.e., the balancing of the equities of the parties, has been set forth in numerous cases. *See* Continental Baking Co. v. Katz, 68 Cal. 2d 512, 439 P.2d 889, 67 Cal. Rptr. 761 (1968); Socialist Workers 1974 Cal. Campaign Comm. v. Brown, 53 Cal. App. 3d 879, 125 Cal. Rptr. 915 (1975); California State Univ. v. NCAA, 47 Cal. App. 3d 533, 121 Cal. Rptr. 85 (1975); Transcentury Properties, Inc. v. State, 41 Cal. App. 3d 835, 116 Cal. Rptr. 487 (1974). However, application of this test in the context of taxpayers' suits is clearly inappropriate. The policies underlying taxpayers' actions dictate that the plaintiff's probability of success on the merits should be the only showing necessary for issuance of a preliminary injunction. *See* Collins & Myers, *supra* note 21, at 342-43. *But see* Gluck v. County of Los Angeles, 93 Cal. App. 3d 121, 136, 155 Cal. Rptr. 435, 443 (1979) (Hanson, J., concurring and dissenting) (suggesting that preliminary injunction not appropriate in taxpayer action unless traditional requirements are satisfied).

55. 184 Cal. 117, 193 P. 111 (1920).

56. *Id.* at 152, 193 P. at 125.

57. Blair v. Pitchess, 5 Cal. 3d 258, 269, 486 P.2d 1242, 1250, 96 Cal. Rptr. 42, 50 (1971).

58. Wirin v. Parker, 48 Cal. 2d 890, 894, 313 P.2d 844, 846 (1957). One of the classic statements of this proposition can be found in the majority opinion in Mapp v. Ohio, 367 U.S. 643 (1961), where the Court stated: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Id.* at 659; *see* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

59. White v. Davis, 13 Cal. 3d 757, 763, 533 P.2d 222, 226, 120 Cal. Rptr. 94, 98 (1975).

continue almost unhampered.' "[60]

III. CONSUMER STANDING

The California Legislature has adopted a wide variety of statutes designed to provide protection for consumers.[61] Beyond providing remedies for individually aggrieved consumers,[62] the legislature has provided for private attorney general actions to redress unlawful consumer practices.[63]

California Business and Professions Code section 17200 outlaws a variety of unlawful practices: "As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with section 17500) of Part 3 of Division 7 of the Business and Professions Code."[64] In Busi-

60. Van Atta v. Scott, 27 Cal. 3d 424, 450, 613 P.2d 210, 225, 166 Cal. Rptr. 149, 163 (1980) (quoting Collins & Myers, *supra* note 21, at 340).

61. *E.g.*, Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1750-1784 (West 1973 & Supp. 1981); Consumer Credit Reporting Agencies Act, CAL. CIV. CODE §§ 1785.1-.35 (West 1973 & Supp. 1981); Robbins-Rosenthal Fair Debt Collection Practices Act, CAL. CIV. CODE §§ 1788-1788.32 (West Supp. 1981); Song-Beverly Consumer Warranty Protection Act, CAL. CIV. CODE §§ 1790-1790.4 (West 1973 & Supp. 1981); Unruh Act, CAL. CIV. CODE §§ 1801-1807 (West 1973 & Supp. 1981); Rees-Levering Automobile Sales Finance Act, CAL. CIV. CODE §§ 2981-2984.4 (West 1974 & Supp. 1981).

62. *See supra* note 61.

63. CAL. BUS. & PROF. CODE §§ 17200-17208 (West Supp. 1981). These provisions were added to the Business and Professions Code in 1977. Act of July 7, 1977, ch. 299, § 1, 1977 Cal. Stat. 1201-02. Although new to the Business and Professions Code, many of these provisions had been contained in Civil Code § 3369, amended in 1977. Former California Civil Code § 3369 provided:

> 1. Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition.
>
> 2. Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.
>
> 3. As used in this section, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act denounced by Business and Professions Code Sections 17500 to 17535, inclusive.
>
> 4. As used in this section, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.
>
> 5. Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney or any city attorney of a city having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city or city and county having a fulltime city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interest of itself, its members or the general public.

Act of Sept. 16, 1976, ch. 1005, § 1, 1976 Cal. Stat. 2378-79.

64. CAL. BUS. & PROF. CODE § 17200 (West Supp. 1981).

ness and Professions Code section 17204, enforcement powers are specifically conferred on persons acting for the general public:

> Actions for injunction pursuant to this chapter may be prosecuted by the Attorney General or any district attorney or any city attorney of a city having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city or city and county having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or associations *or by any person acting for the interests of itself, its members or the general public*.[65]

Consistent with the statute's remedial nature, broad equitable relief[66] and substantial civil penalties[67] have been authorized.

There have been several attempts to narrow the scope of the unfair business practices statute. For example, in *Barquis v. Merchants Collection Association*,[68] the defendant sought to limit the scope of the statute to competitive injury and, alternatively, to conduct that was fraudulent or deceptive.[69] The California Supreme Court rejected the invitation to taper the scope of the statutory scheme. In holding that the statute was not limited to competitive injury, the court stated:

> We conclude that in a society which enlists a variety of psychological and advertising stimulants to induce the consumption of goods, consumers, rather than competitors, need the greatest protection from sharp business practices. Given

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65. *Id.* at § 17204 (emphasis added).

66. California Business and Professions Code § 17203 provides:

> Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

CAL. BUS. & PROF. CODE § 17203 (West Supp. 1981).

67. CAL. BUS. & PROF. CODE §§ 17206-17207 (West Supp. 1981). California Business and Professions Code § 17206 provides for civil penalties of up to $2,500.00 per violation. California Business and Professions Code § 17207 provides for civil penalties of up to $6,000.00 per violation for violating any injunction issued pursuant to Business and Professions Code § 17203. *See supra* note 66. Standing to seek recovery of civil penalties has been vested only with public officials or agencies.

68. 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

69. In *Barquis*, the plaintiffs challenged the practice of a licensed collection agency in filing debt collection actions in improper counties for the purpose of making it more difficult for consumers to defend the actions. *Id.* at 97, 496 P.2d at 819, 101 Cal. Rptr. at 747.

> the terms of the section, the purpose of the enactment and the controlling precedent, we reject defendant's suggested limitation of section 3369 [now Business and Professions Code section 17204] to "anti-competitive" business practices.[70]

The court specifically noted that the "broad standing provision"[71] demonstrated "a clear design to protect consumers as well as competitors."[72]

The *Barquis* court also emphasized that the statutory scheme was not limited to deceptive practices. The court looked at the statute and concluded that its "sweeping language [was intended] to permit tribunals to enjoin ongoing wrongful business conduct in whatever context such activity might occur."[73]

As the court in *Barquis* declared, Business and Professions Code section 17204 contains a "broad standing provision." California courts

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70. *Id.* at 111, 496 P.2d at 829, 101 Cal. Rptr. at 757 (citations omitted).

71. *Id.* at 110 n.11, 496 P.2d at 828-29 n.11, 101 Cal. Rptr. at 756-57 n.11.

72. *Id.* at 110, 496 P.2d at 828, 101 Cal. Rptr. at 756.

73. *Id.* at 111, 496 P.2d at 829, 101 Cal. Rptr. at 757 (footnote omitted). In *Barquis*, the court found that since the challenged practices were unlawful, there was no necessity to determine the unfairness of the defendant's conduct. *Id.* at 112, 496 P.2d at 830, 101 Cal. Rptr. at 758. The court did note that the statute authorized equitable relief against business practices found to be unfair:

> In permitting the restraining of all "unfair" business practices, section 3369 undeniably establishes only a wide standard to guide courts of equity; as noted above, given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate.

Id.; *see* People v. James, 122 Cal. App. 3d 25, 36, 177 Cal. Rptr. 110, 116 (1981) ("[t]he fact that defendants' scheme had never been dealt with by the appellate court does not render it any less fundamentally dishonest, unfair, or unlawful"); People *ex rel.* Mosk v. National Research Co., 201 Cal. App. 2d 765, 772, 20 Cal. Rptr. 516, 521 (1962) ("fraudulent business practices may run the gamut of human ingenuity and chicanery").

In Motors, Inc. v. Times-Mirror Co., 102 Cal. App. 3d 735, 162 Cal. Rptr. 543 (1980), the court elaborated on the definition of unfairness:

> To these open-ended definitions of unfairness, we would add this obvious thought: that the determination of whether a particular business practice is unfair necessarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim—a weighing process quite similar to the one enjoined on us by the law of nuisance. While this process is complicated enough after a hearing in which the defendant has revealed the factors determining the utility of his conduct, it is really quite impossible if only the plaintiff has been heard from, as is the case when it is sought to decide the issue of unfairness on demurrer. Therefore—since the complaint is unlikely to reveal defendant's justification—if that pleading states a prima facie case of harm, having its genesis in an apparently unfair business practice, the defendant should be made to present its side of the story. If, as will often be the case, the utility of the conduct clearly justifies the practice, no more than a simple motion for summary judgment would be called for.

Id. at 740, 162 Cal. Rptr. at 546 (citations and footnote omitted).

have consistently applied the section to give full effect to the statutory language.[74] "The code authorizes any person to bring an action on behalf of the general public to enjoin 'unlawful, unfair or fraudulent business practice.' "[75] Relief is appropriate notwithstanding the availability of other enforcement mechanisms[76] and notwithstanding the plaintiff's lack of any personal interest in the controversy.[77]

The "broad standing" permitted by section 17204 is illustrated by the recent decision of the California Court of Appeal in *Hernandez v. Atlantic Finance Co.*[78] In *Hernandez*, the plaintiff brought suit on behalf of the general public seeking to enjoin an automobile dealer and loan company from violating the Rees-Levering Automobile Sales Finance Act.[79] The plaintiff had not entered into any business transaction with the defendants, either by purchasing an automobile or borrowing money.[80]

The defendants argued "that this section does not enlarge the number of persons who may seek injunction to prevent unlawful business practices, and that traditional concepts of standing must be read into the statute."[81] The court rejected this argument, noting that neither the legislative history nor judicial decisions reflected any intention "to narrowly circumscribe the class of persons who may seek injunction under its terms."[82] The court concluded: "we read the statute as expressly authorizing the institution of action by any person on be-

74. *See* People v. McKale, 25 Cal. 3d 626, 602 P.2d 731, 159 Cal. Rptr. 811 (1980); Bondanza v. Peninsula Hosp. & Med. Center, 23 Cal. 3d 260, 590 P.2d 22, 152 Cal. Rptr. 446 (1979); Chern v. Bank of America, 15 Cal. 3d 866, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976); Hernandez v. Atlantic Fin. Co., 105 Cal. App. 3d 65, 164 Cal. Rptr. 279 (1980).

75. Bondanza v. Peninsula Hosp. & Med. Center, 23 Cal. 3d 260, 265, 590 P.2d 22, 25, 152 Cal. Rptr. 446, 449 (1979) (quoting CAL. BUS. & PROF. CODE § 17200 (West Supp. 1981)).

76. *See* People v. McKale, 25 Cal. 3d 626, 632-33, 602 P.2d 731, 734, 159 Cal. Rptr. 811, 814 (1980); People v. Los Angeles Palm, Inc., 121 Cal. App. 3d 25, 32-33, 175 Cal. Rptr. 257, 262 (1981); People v. National Ass'n of Realtors, 120 Cal. App. 3d 459, 473-76, 174 Cal. Rptr. 728, 735-37 (1981); Coast & S. Fed. Sav. & Loan Ass'n v. Trans Coast Sav. & Loan Ass'n, 16 Cal. App. 3d 205, 209-10, 93 Cal. Rptr. 791, 794 (1971). These holdings are clearly consistent with, if not now required by, Business and Professions Code § 17205: "Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state." CAL. BUS. & PROF. CODE § 17205 (West Supp. 1981).

77. Hernandez v. Atlantic Fin. Co., 105 Cal. App. 3d 65, 164 Cal. Rptr. 279 (1980).

78. 105 Cal. App. 3d 65, 164 Cal. Rptr. 279 (1980).

79. CAL. CIV. CODE §§ 2981-2984.4 (West 1974 & Supp. 1981).

80. 105 Cal. App. 3d at 71, 164 Cal. Rptr. at 283. The record indicates that plaintiff's mother had purchased an automobile and borrowed money from the defendants. *Id.* at 73, 164 Cal. Rptr. at 285.

81. *Id.* at 71-72, 164 Cal. Rptr. at 284.

82. *Id.* at 73, 164 Cal. Rptr. at 284.

half of the general public. The Legislature has provided that suit may be brought by any person acting in his own behalf *or* on behalf of the general public."[83]

Under section 17204, it is clear that any person may seek to enjoin unlawful business practices in California. The only requirement necessary to invoke its provisions is that the person[84] plead that the action is brought on behalf of the general public pursuant to section 17204.[85] As such, the statutory scheme provides generous protection to consumers by focusing the judicial inquiry on the conduct of the defendant and not on the standing of the plaintiff.[86]

IV. PUBLIC INTEREST STANDING

Cognizant of the need to ensure that issues of public importance are resolved, California courts have consistently abandoned rigid standing requirements even in the absence of some special standing statute. "In recent years there has been a marked accommodation of formerly strict procedural requirements of standing to . . . sue and of even capacity to sue . . . where matters relating to the 'social and economic realities of the present-day organization of society' . . . are concerned."[87] In *McDonald v. Stockton Metropolitan Transit District*,[88] the court announced:

When the duty is sharp and the public need weighty, the

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83. *Id.* at 72, 164 Cal. Rptr. at 284.

84. For purposes of the statute, "the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons." CAL. BUS. & PROF. CODE § 17201 (West Supp. 1981).

85. In the absence of any personal standing, such an allegation is apparently necessary to obtain injunctive relief. In Stoiber v. Honeychuck, 101 Cal. App. 3d 903, 162 Cal. Rptr. 194 (1980), the court stated:

> regardless of the broad scope of the injunctive relief afforded under the unfair business practices act, we conclude that appellant has failed to allege a cause of action for such relief. Appellant is not now in possession of any of the properties owned or managed by the defendants; therefore, she has no need of or standing to seek an injunction on her own behalf. Furthermore, appellant has failed to allege that she is suing on behalf of the general public.

Id. at 928, 162 Cal. Rptr. at 207; *see* Plotkin v. Tanner's Vacuums, 53 Cal. App. 3d 454, 460, 125 Cal. Rptr. 697, 700 (1975).

86. As the California Supreme Court declared in Vasquez v. Superior Ct., 4 Cal. 3d 800, 808, 484 P.2d 964, 968, 94 Cal. Rptr. 796, 800 (1971): "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." *Id.*

87. Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 117, 122, 109 Cal. Rptr. 724, 727 (1973) (citations omitted) (quoting Daniels v. Sanitarium Ass'n, 59 Cal. 2d 602, 607, 381 P.2d 652, 656, 30 Cal. Rptr. 828, 832 (1963)).

88. 36 Cal. App. 3d 436, 111 Cal. Rptr. 637 (1973).

> courts will grant a mandamus at the behest of an applicant who shows no greater personal interest than that of a citizen who wants the law enforced. . . . When the public need is less pointed, the courts hold the petitioner to a sharper showing of personal need.[89]

These relaxed standing rules have found application in a number of cases. In *Bozung v. Local Agency Formation Commission*,[90] the California Supreme Court upheld the right of nonresident plaintiffs to enforce the California Environmental Quality Act:[91]

> We do not perceive the significance attributed by defendants to whether plaintiffs live within or without the Camarillo city boundaries. Effects of environmental abuse are not contained by political lines; strict rules of standing that might be appropriate in other contexts have no application where broad and long-term effects are involved.[92]

The court of appeal in *Environmental Law Fund, Inc. v. Town of Corte Madera*,[93] considered, on the merits, an environmental group's challenge to certain land use decisions of the Town of Corte Madera. Despite the fact that the environmental group did not own property

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89. *Id.* at 440, 111 Cal. Rptr. at 641 (citations omitted). This low threshold standing requirement was first enunciated by the California Supreme Court in Board of Social Welfare v. County of Los Angeles, 27 Cal. 2d 98, 162 P.2d 627 (1945):

> By the preponderance of authority . . . where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.

Id. at 100-01, 162 P.2d at 628-29 (quoting 35 AM. JUR. *Mandamus* § 320 (1941)). This standard has won favorable application in the public interest context. *See, e.g.*, Diaz v. Quitoriano, 268 Cal. App. 2d 807, 811, 74 Cal. Rptr. 358, 362 (1969); Kappadahl v. Alcan Pac. Co., 222 Cal. App. 2d 626, 643, 35 Cal. Rptr. 354, 365 (1963).

The relaxed standing requirements have been applied in a wide variety of areas. *See, e.g.*, Pacific Legal Found. v. California Unemployment Ins. Appeals Bd., 74 Cal. App. 3d 150, 155-58, 141 Cal. Rptr. 474, 477-78 (1977) (plaintiff had standing to challenge regulation because of its own status as an employer which might be affected in future cases, because of the public issue involved, and because many of its members were employers); Pillsbury v. South Coast Regional Comm'n, 71 Cal. App. 3d 740, 750, 139 Cal. Rptr. 760, 765 (1977) (non-neighbors, non-property owners, held to be aggrieved parties for purpose of challenging issuance of coastal development permit); Klitgaard & Jones, Inc. v. San Diego Coast Regional Comm'n, 48 Cal. App. 3d 99, 110, 121 Cal. Rptr. 650, 656 (1975) (representative of San Diego Coastwatchers Association found to be aggrieved person despite lack of direct interest).

90. 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975).

91. CAL. PUB. RES. CODE §§ 21000-21176 (West 1977).

92. 13 Cal. 3d at 272, 529 P.2d at 1023, 118 Cal. Rptr. at 255.

93. 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975).

affected by the town's actions, and despite the fact that the group was not even present at the administrative hearing, the court concluded that the trial court had properly heard the merits of the group's claims: "Respondents are thus pursuing more than privately-held rights, and are asserting more than privately-held grievances: they are acting as members of the public and in the public interest."[94] The court concluded that to bar from court a group seeking to vindicate public rights would punish the public by insulating allegedly illegal land use practices from judicial review.[95]

As these cases demonstrate, California courts, even in the absence of liberal statutory standing provisions, have regularly discarded strict standing requirements to permit lawsuits in the public interest. Nonetheless, no California appellate court has articulated generally applicable standards for determining the appropriate use of these relaxed standing requirements. Consequently, standing issues are regularly raised in public interest litigation as a device to frustrate or avoid substantive decisionmaking. Although the public interest litigant can cite ample precedent to overcome the standing objection, the considerable attention devoted to standing evidences the disturbing barriers that continue to plague current public interest litigation.[96]

V. ELIMINATING STANDING IN PUBLIC INTEREST LITIGATION

The discussion thus far leaves little doubt concerning the low threshold set by California courts for meeting standing requirements. As for the jurisprudence of public interest standing, there are two kinds of problems—"those that have been answered and those that have not been answered."[97] In the latter category, the courts have engaged in no genuine and searching examination of the standing requirements they are supposedly relaxing. Although many decisions suggest that federal

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94. *Id.* at 114, 122 Cal. Rptr. at 287.

95. The court stated:

> Application of the exhaustion doctrine against them, by reason of their "default" in the administrative proceeding to which they were not "parties" at all, would mean in effect the imputation of their "default" to the public in the absence of any factual basis for such imputation. In general, the doctrine would thus operate to bar the public from redressing a public wrong; specifically, it would burden the public of the Town, in perpetuity, with the illegal zoning of a substantial area of the community by insulating the zoning action from judicial review.
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> This result would not be consistent with principles of waiver or *res judicata*, and it would totally disserve the public interest.

Id.

96. *See* Stocks v. City of Irvine, 114 Cal. App. 3d 520, 170 Cal. Rptr. 724 (1981).

97. Rodell, *A Primer on Interstate Taxation*, 44 YALE L.J. 1166, 1167 (1935).

standing requirements are inapplicable,[98] there is no comprehensive *independent* discussion of the basis for California standing requirements. To determine the proper role of standing in public interest litigation, it is important to explore the doctrinal basis for California's standing requirement.

Federal standing requirements are based, in part, on the "case or controversy" requirement of article III of the federal constitution.[99] While article III limits the jurisdiction of the federal judiciary, it of course has no application to state courts. Unlike the United States Constitution, the California Constitution contains no "case or controversy" provision. This alone renders inapplicable much of the discussion contained in federal cases.

The California Constitution is not silent on the appropriate role of the judiciary: "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts."[100] Moreover, article III, section 3 of the California Constitution provides: "The powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."[101]

The separation of powers doctrine of article III, section 3, has consistently been held to act as a bar to advisory opinions. As the Califor-

98. *See, e.g.*, White v. Davis, 13 Cal. 3d 757, 763, 533 P.2d 222, 226, 120 Cal. Rptr. 94, 98 (1975) ("restrictive federal doctrine of justiciability . . . does not apply to taxpayer suits in California"); McDonald v. Stockton Metropolitan Transit Dist., 36 Cal. App. 3d 436, 440 n.4, 111 Cal. Rptr. 637, 641 n.4 (1973) ("we apply the California criterion of beneficial interest [in mandate cases] without concern over petitioner's standing to maintain an equity action in a federal court").

99. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); Barlow v. Collins, 397 U.S. 159, 163-64 (1970); Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 152-53 (1970); Jenkins v. McKeithen, 395 U.S. 411 (1969); Doremus v. Board of Educ., 342 U.S. 429, 433-35 (1952); Tileston v. Ullman, 318 U.S. 44 (1943); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971).

100. CAL. CONST. art. VI, § 1. The other provisions of article VI contain some limitations on the judicial power unrelated to any concept of standing. For example, the power of the appellate courts to set aside a trial court judgment in certain situations is restricted. CAL. CONST. art. VI, § 13.

101. CAL. CONST. art. III, § 3. The primary purpose of this section, which embodies the separation of powers doctrine, "is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government." Parker v. Riley, 18 Cal. 2d 83, 89, 113 P.2d 873, 877 (1941). This provision prohibits legislative interference with the constitutional jurisdiction of California courts. Merco Constr. Eng'rs, Inc. v. Municipal Ct., 21 Cal. 3d 724, 581 P.2d 636, 147 Cal. Rptr. 631 (1978); Vidal v. Backs, 218 Cal. 99, 21 P.2d 952 (1933); Dorris v. McKamy, 168 Cal. 531, 143 P. 752 (1914); Frazier v. Moffatt, 108 Cal. App. 2d 379, 239 P.2d 123 (1952).

nia Supreme Court has often stated, "[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court."[102] Except for this prohibition against advisory opinions, there does not appear to be any other constitutional limitation on the exercise of *judicial* power.

The absence of a clear constitutional basis for standing makes the search for the underpinnings of this requirement difficult. Although standing requirements are frequently invoked, judicial decisions do not reveal any clear discussion of their origin. For example, in *California Water & Telephone Co. v. County of Los Angeles*,[103] the court of appeal stated: "The principle that courts will not entertain an action which is not founded on an actual controversy is a tenet of common law jurisprudence, the precise content of which is difficult to define and hard to apply."[104]

In *Blair v. Pitchess*,[105] the California Supreme Court recognized the existence of a case or controversy requirement. However, the court concluded that "if an action meets the requirements of section 526a, it presents a true case or controversy":[106]

> If we were to hold that such suits did not present a true case or controversy unless the plaintiff and the defendant each had a special, personal interest in the outcome, we would drastically curtail their usefulness as a check on illegal governmental activity. Few indeed are the government officers who have a personal interest in the continued validity of their official acts.[107]

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102. Lynch v. Superior Ct., 1 Cal. 3d 910, 912, 464 P.2d 126, 127, 83 Cal. Rptr. 670, 671 (1970); *see* Younger v. Superior Ct., 21 Cal. 3d 102, 119-20, 577 P.2d 1014, 1025, 145 Cal. Rptr. 674, 685 (1978); Chern v. Bank of Am., 15 Cal. 3d 866, 875, 544 P.2d 1310, 1315, 127 Cal. Rptr. 110, 115 (1976); People v. Fox, 73 Cal. App. 3d 178, 182, 140 Cal. Rptr. 615, 618 (1977). Advisory opinions are likewise prohibited by the United States Constitution, implementing both the separation of powers doctrine and the article III case or controversy requirement. *See* Flast v. Cohen, 392 U.S. 83 (1968). However, the constitutions of several states permit advisory opinions. Field, *The Advisory Opinion—An Analysis*, 24 IND. L.J. 203 (1949).

103. 253 Cal. App. 2d 16, 61 Cal. Rptr. 618 (1967).

104. *Id.* at 22-23, 61 Cal. Rptr. at 623; *see* Zetterberg v. California State Dep't of Pub. Health, 43 Cal. App. 3d 657, 118 Cal. Rptr. 100 (1974).

105. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

106. *Id.* at 269, 486 P.2d at 1249-50, 96 Cal. Rptr. at 50.

107. *Id.* (citations and footnote omitted). In Van Atta v. Scott, 27 Cal. 3d 424, 613 P.2d 210, 166 Cal. Rptr. 149 (1980), the California Supreme Court made clear that a taxpayer suit for declaratory judgment satisfied the "actual controversy" requirement necessary for such relief:

> Since section 526a authorizes taxpayer suits for declaratory relief, the further contention that this suit lacks justiciability because plaintiffs have not satisfied the

As can be seen, California courts have employed case or controversy language without careful analysis and notwithstanding the absence of an article III-type provision in the state constitution. Although its incorporation into state standing law is difficult to trace, the case or controversy requirement appears to have first originated as a judicially created guide to avoid the rendering of advisory opinions. However, as a number of early cases suggest,[108] the so-called case or controversy requirement was not a rigid rule.

In *Robinson v. Kerrigan*,[109] the California Supreme Court considered the validity of a statute providing for in rem proceedings to establish title to real property.[110] A superior court judge refused to recognize the statute on the ground that the proceeding was not properly a judicial one. Although recognizing that the exercise of judicial power necessarily "implied the existence of an actual present controversy,"[111] the supreme court nevertheless expansively interpreted the scope of the judicial power.

Initially, the court recognized that complexities in society "have long required the extension of the judicial power beyond the settlement of controversies which have actually arisen, so as to include the function of providing security against disputes and claims which may arise."[112] Accordingly, the court noted that the proper role of the judiciary includes the power to prevent controversies by acting on "unknown, hostile claims and pretensions, or to merely declare a status or right."[113] The court specifically concluded that such adjudication was within the constitutional powers of the judiciary:

> Whether or not this is strictly an exercise of judicial power, as originally instituted, it cannot be denied that it is a power of the class which, from time immemorial, has been committed to and exercised by the courts. At the time the Constitution was adopted this class of powers had long been usually exercised by the courts alone. It must be presumed that in provid-

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"actual controversy" requirements of Code of Civil Procedure section 1060 must also fail. An action, such as this one, which meets the criteria of section 526a satisfies case or controversy requirements.

Id. at 450 n.28, 613 P.2d at 225 n.28, 166 Cal. Rptr. at 163 n.28.

108. *See infra* notes 109-21 and accompanying text.

109. 151 Cal. 40, 90 P. 129 (1907).

110. *Id.* at 42, 90 P. at 130. The law was entitled "[a]n act for the certification of land titles and the simplification of the transfer of real estate." Act of Mar. 17, 1897, ch. 110, 1897 Cal. Stat. 138.

111. 151 Cal. at 47, 90 P. at 131.

112. *Id.* at 47, 90 P. at 132.

113. *Id.*

> ing therein for the division of governmental power into three departments, legislative, executive, and judicial, and declaring that no person charged with the exercise of the powers belonging to one of them should exercise functions appertaining to either of the others, this usual power of the courts was in mind, and that it was intended that the courts should continue to exercise these quasi judicial powers, as they had previously been accustomed to do.[114]

In *Title & Document Restoration Co. v. Kerrigan*,[115] the California Supreme Court was required to determine the validity of a statutory scheme for quieting title to real property.[116] The statute was challenged on the basis that it conferred nonjudicial power on the courts and thus violated the separation of powers doctrine.[117] The court acknowledged the general proposition that "the judicial function is the determination of controversies between parties."[118] However, the court noted that the proceeding may nevertheless be judicial notwithstanding the absence of an adversary party:

> But it is not to be understood that it is never the exercise of a

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114. *Id.* at 48, 90 P. at 132. The court noted that the potential for adverse claims was an additional basis for concluding that the power was judicial:

> Furthermore, in such matters, there is always a possibility that there may be a hostile claim or dispute as to the right to be established. If it were necessary to find further justification for classing this power as judicial, this circumstance would be sufficient. A hostile claim being possible, there is, in contemplation of law, an adverse claim to be settled, a right to be protected against the possible claimant, for which a judicial decree is the only practicable and effectual remedy.

Id.

Another definition of judicial power was articulated in Marin Water & Power Co. v. Railroad Comm'n, 171 Cal. 706, 154 P. 864 (1916):

> The judicial function is to "declare the law and define the rights of the parties under it." [Frasher v. Rader, 124 Cal. 132, 134, 56 P. 797, 797 (1899)]. To determine "what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action." [Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 718 (1838)]. "A determination of the rights of an individual under existing laws" is an exercise of judicial power. [Quinchard v. Board of Trustees, 113 Cal. 664, 669, 45 P. 856, 857 (1896)]. An essential element of judicial power, distinguishing it from legislative power, is that it requires "the ascertainment of existing rights." [People *ex rel.* Dean v. Board of Supervisors, 122 Cal. 421, 424, 55 P. 131, 132 (1898)]. "It is not to be disputed that, as a general proposition, the judicial function is the determination of controversies between parties." [Title Document Restoration Co. v. Kerrigan, 150 Cal. 289, 319, 88 P. 356, 364 (1906)]. "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." [Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908)].

Id. at 711-12, 154 P. at 866-67.

115. 150 Cal. 289, 88 P. 356 (1906).

116. Act of June 16, 1906, ch. 59, 1906 Cal. Stats. Extra. Sess. 78.

117. 150 Cal. at 318-19, 88 P. at 363-64.

118. *Id.* at 319, 88 P. at 364.

> judicial function for a court to act upon the application of a party who seeks some form of relief, even though at the outset of the proceeding no person is named or designated as opposing the granting of such relief. "It is certainly clear as a general rule . . . that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature."[119]

The court noted a number of instances where judicial power has been upheld in the absence of any actual dispute. For example, the court pointed out that "[a] petition for change of name . . . discloses neither controversy nor an actual or threatened denial by any one of petitioner's right, yet such proceeding is judicial."[120] The potential for dispute was sufficient to give rise to an exercise of the judicial power without running afoul of the advisory opinion admonition.

As these early cases indicate, the courts did not narrowly circumscribe their power so as to preclude decisionmaking in the absence of an actual controversy between two identifiable parties. Thus, it is not surprising that statutory schemes providing for various types of judicial determinations have been consistently upheld when challenged on the basis of the absence of an actual controversy.[121]

It is apparent that the "case or controversy" requirement is not a sacrosanct constitutional principle that California courts must blindly follow.[122] Instead, the requirement originated as a guide for avoiding

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119. *Id.* (citation omitted).

120. *Id.* at 320, 88 P. at 364 (citation omitted).

121. *See In re* La Société Française d'Epargus Et De Prévoyance Mutuelle, 123 Cal. 525, 56 P. 458 (1899) (petition for change of name); Blakeslee v. Wilson, 190 Cal. 479, 213 P. 495 (1923) (declaratory judgments); Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356 (1906) (quiet title); Robinson v. Kerrigan, 151 Cal. 40, 90 P. 129 (1907) (Torrens Law); Cullen v. Glendora Water Co., 113 Cal. 503, 39 P. 769 (1896) (validation statute).

122. Many of the cases that articulate the case or controversy requirement suggest that the rule is based in part upon the inclination to avoid interference with some other branch of government. Thus, California courts have repeatedly stated:

> It is well-settled law that the courts will not give their consideration to questions as to the constitutionality of a statute unless such consideration is necessary to the determination of a real and vital controversy between the litigants in the particular case before it. It is incumbent upon a party to an action or proceeding who assails a law invoked in the course thereof to show that the provisions of the statute thus assailed are applicable to him and that he is injuriously affected thereby.

People v. Perry, 212 Cal. 186, 193, 298 P. 19, 22 (1931); *see* Miller v. Municipal Ct., 22 Cal. 2d 818, 142 P.2d 297 (1943); City & County of San Francisco v. Boyd, 22 Cal. 2d 685, 140 P.2d 666 (1943); People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3 (1930); A.F. Eastabrook Co. v. Industrial Accident Comm'n, 177 Cal. 767, 177 P. 848 (1918); Franklin v. Peterson, 87 Cal. App. 2d 727, 197 P.2d 788 (1948); County of Ventura v. Southern Cal.

the rendering of advisory opinions. As the California Supreme Court stated in *City & County of San Francisco v. Boyd*,[123] courts will not entertain "an action not founded upon an actual controversy between the parties to it, but which is brought for the purpose of securing a determination of a point of law for the gratification of the curiosity of the litigants."[124]

Recently, in *Stocks v. City of Irvine*,[125] the court of appeal pointed out that the purpose of standing requirements is to avoid the rendering of advisory opinions:

> In cases challenging governmental actions, the standing requirement is the rudder that allows courts to navigate between two equally objectionable hazards. On the one side is the risk that the judiciary will impinge upon powers of the other branches of government by issuing advisory opinions. . . .
>
> But, the farther a court goes to avoid the advisory opinion hazard, the closer it comes to the opposite hazard: the shutting off of all reasonable avenues of judicial redress to a truly aggrieved plaintiff.[126]

It is manifest that California standing requirements are designed to ensure that courts do not exceed their constitutional authority.

Edison Co., 85 Cal. App. 2d 529, 193 P.2d 512 (1948); *In re* De Voe, 114 Cal. App. 730, 300 P. 874 (1931).

Even this rule had its exceptions. As the court stated in Quong Ham Wah Co. v. Industrial Accident Comm'n, 184 Cal. 26, 192 P. 1021 (1920):

> The reason for the exception is in the nature of a rule developed for the regulation of the ultimate and supreme function of the courts to declare unconstitutional statutes to be void and of no effect; and such a regulatory rule must itself be subject to exception where it would otherwise operate to prevent altogether the exercise of this function, a function which it is the most solemn duty of the courts to exercise in a state governed under a written constitution which is the supreme law of the land. Where no member of a class discriminated against could ever attack the constitutionality of the discriminatory statute, the rule reserving to such persons the right to raise the constitutional question would totally prevent the exercise by the court of its function of passing upon that question and would place it in a position where it would for all time enforce rights and obligations created by an obviously void enactment. In such case any litigant to the determination of whose claim the constitutional question is fairly relevant should be permitted to raise the constitutional question.

Id. at 32, 192 P. at 1024; *see* Pacific Indem. Co. v. Myers, 211 Cal. 635, 644, 296 P. 1084, 1087 (1931).

123. 22 Cal. 2d 685, 140 P.2d 666 (1943).

124. *Id.* at 693-94, 140 P.2d at 670; *see* Golden Gate Bridge & Highway Dist. v. Felt, 214 Cal. 308, 316, 5 P.2d 585, 589-90 (1931).

125. 114 Cal. App. 3d 520, 170 Cal. Rptr. 724 (1981). The *Stocks* court upheld the right of nonresident plaintiffs to challenge the exclusionary zoning practices of the City of Irvine.

126. *Id.* at 530, 170 Cal. Rptr. at 729-30.

Viewed as a means of judicial self-governance, standing requirements can certainly be discarded so long as judicial authority is not exceeded. Given the changes that have occurred in social institutions since standing requirements were first formulated,[127] courts should reevaluate the utility of such requirements in light of the purpose standing serves.

Conditioning judicial access on standing expressed in case or controversy language may have been an appropriate vehicle in the past to avoid advisory opinions. However, standing requirements are ill-suited to guiding courts in modern day litigation:

> Faced by the proven inadequacy of the traditional solutions, contemporary legal systems have been turning to more complex, sophisticated, and flexible solutions which have proven much more effective in dealing with the problem of protecting the emerging diffuse rights. Essentially, these modern solutions consist of . . . utilizing the initiative and zeal of *private* persons and organizations by allowing them to act in court for a general or group interest, even though they may not be directly injured in their own individual rights.[128]

Thus, the time has come for judicial rejection of standing requirements in public interest litigation.

In litigation between private citizens and the government, judicial inquiry should not focus on the standing of the plaintiff. Standing requirements in public interest litigation often obscure the fact that standing is not an end in itself but only a vehicle to avoid advisory opinions. Judicial emphasis should therefore be on the availability of meaningful relief within constitutional and statutory limits and not on the status of the public interest litigant.

A relief-directed inquiry will ensure that public interest litigants are not deprived of the right to challenge illegal government action merely because a court determines that they are not sufficiently ag-

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127. Cappelletti, *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, 25 BUFFALO L. REV. 643, 645-48 (1976) [hereinafter cited as *Vindicating the Public Interest*]; Kent, *Property, Power & Authority*, 41 BROOKLYN L. REV. 541, 542-45 (1975).

128. *Vindicating the Public Interest, supra* note 127, at 660. The abolition of standing requirements in public interest litigation has received widespread support. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1304-12 (1976); Homburger, *Private Suits in the Public Interest in the United States*, 23 BUFFALO L. REV. 343, 407-08 (1974); Miller, *Public Interest Group Participation in Decisionmaking: The Broader Meaning of the Law Reform Commission Proposals*, 10 FED. L. REV. 143, 150-54 (1979); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1721-25 (1980).

grieved or injured by the government action. The notions of "aggrieved party" and "injury in fact" have no place in modern public interest litigation at the state level. Although these concepts might be simple to apply in determining private rights among parties, they have no easy application in cases challenging public actions that have broad societal effects. As one commentator stated:

> It would be utterly unreasonable to afford the most sophisticated kind of legal protection—*judicial* protection—only to the more traditional needs and interests, such as private property rights, and to deny it to the new societal needs that are quickly becoming vital to the very survival of human civilization.[129]

Discarding standing requirements will ensure that the focus of judicial attention is on the propriety of government conduct. For example, in *Warth v. Seldin*,[130] the United States Supreme Court never reached the legality of the zoning practices under challenge. Instead, by focusing on the standing of the litigants, the Court avoided discussion of possible illegal conduct by the municipality. Had attention been directed to the availability of remedies to end the illegal zoning practices, the Court would have likely concluded that real relief was available. An injunction at the behest of the litigants would have ensured that zoning laws excluding poor people, if not necessarily the plaintiffs, would be eliminated.[131]

That standing is automatically conferred does not necessarily mean that relief is assured. Although the litigant may succeed in bringing a lawsuit, the court might well conclude on the merits that the government has not proceeded unlawfully. In such situations, the political process, not the courts, is the appropriate forum to seek change. However, where the government has proceeded unlawfully, relief should not be denied merely because the "harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citi-

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129. Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 MICH. L. REV. 793, 880-81 (1975).

130. 422 U.S. 490 (1975).

131. Assuming some developer were willing to build in the municipality, the zoning ordinance would be applied to that developer. As the court of appeal noted in Stocks v. City of Irvine, 114 Cal. App. 3d 520, 170 Cal. Rptr. 724 (1981), "[t]he more restrictive a city's zoning becomes, the less likely it will be that a builder will propose a housing project that would satisfy the needs of the excluded group." *Id.* at 533, 170 Cal. Rptr. at 731. An injunction against application of any illegal provisions of the zoning ordinance increases the types of projects that private developers may propose. An injunction in this context can hardly be characterized as an advisory opinion.

zens."[132] In such situations, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[133]

VI. CONCLUSION

Litigation in the public interest necessarily implies that the litigants are pursuing rights common to many persons. Therefore, the focus in public interest litigation should be on providing relief to protect those commonly shared rights. Any other approach will close one of three co-equal branches of government to the public participation so central to our constitutional system of government. As Justice Douglas once proclaimed: "the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need."[134]

California courts have traditionally eliminated procedural barriers to public interest litigation. Given the reason for standing requirements, the time has now come for California courts to reformulate outmoded rules so that they are consistent with their purpose. In other words, standing requirements should be discarded and judicial focus should be on the constitutional propriety of the relief sought.

132. Warth v. Seldin, 422 U.S. 490, 499 (1975).
133. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
134. Warth v. Seldin, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting).