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Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief

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A significant question in a society where courts are relied upon to protect individual and group interests from unlawful government infringements is who may obtain review of administrative action. Voluminous litigation over the doctrine of standing and widespread dissatisfaction with it by judges and commentators suggest that the question has been a difficult one.[1] A good deal of the confusion is attributable to a tradition which regards standing as a preliminary question, distinct from the merits of a claim.[2] Such threshold doc-

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1. Professor Freund has testified that the concept of standing is "among the most amorphous in the entire domain of public law." *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 2, at 498 (1966). In one standing controversy Mr. Justice Frankfurter declined to attempt to articulate the concept beyond calling it "this complicated specialty of federal jurisdiction . . . ." United States *ex rel.* Chapman v. F.P.C., 345 U.S. 153, 156 (1953). And Professor Davis characterized the older law of standing as "cluttered, confused, and contradictory . . .," 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.18 (Supp. 1965), and the newer rule as "cumbersome, inconvenient, and artificial . . .," K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.00-2 (Supp. 1970) [hereinafter cited as DAVIS TREATISE (Supp. 1970)]. Mr. Justice Douglas simply asserts that "[g]eneralizations about standing to sue are largely worthless as such." Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 151 (1970).

These difficulties are not for want of an ample literature on the subject: 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 208-94 (1958) [hereinafter cited as DAVIS TREATISE]; DAVIS TREATISE 702-87 (Supp. 1970); K. DAVIS, ADMINISTRATIVE LAW TEXT 419-39 (3d ed. 1972) [hereinafter cited as DAVIS TEXT]; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-545 (1965) [hereinafter cited as JAFFE, JUDICIAL CONTROL]; Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968) [hereinafter cited as Jaffe, *The Citizen as Litigant*]; Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Scott, *Standing In the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972).

2. *See* pp. 436-38, 440-42 *infra*. *See also* Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 153 & n.1 (1970); Flast v. Cohen, 392 U.S. 83, 101-06 (1968); A. BICKEL, THE LEAST DANGEROUS BRANCH 122-25 (1962) [hereinafter cited as BICKEL]; S. THIO, LOCUS STANDI AND JUDICIAL REVIEW 1-2 (1971); Scott, *supra* note 1, at 670-77; Comment, *Judicial Review of Agency Action: The Unsettled Law of Standing*, 69 MICH. L. REV. 540, 542-44 (1971).

trines, which include political question, ripeness, and reviewability, insure concreteness and adverseness in a case and maintain the institutional position of courts by regulating the availability and timing of review. They may characterize substantive issues as a basis for deciding whether the issues are suitable for resolution,[3] but they do not adjudicate the claim. In an unripe case, for example, a court may later decide the identical claim between the same parties. As a member of this grouping, standing is seen to define the proper occasions for adjudication of a claim.[4]

A more illuminating way of looking at standing is to recognize that its determination is an adjudication of familiar components of a cause of action,[5] resolved by asking whether a plaintiff has stated a claim for relief. Thus substantive issues—injury, legal protection, duty, and legal cause—rather than procedural or process ones are presented. In this view standing does not focus on whether the circumstances are suitable for adjudication but on whether legal policies are best served by providing or denying relief. Similarly the plaintiff's credentials or interests are not assessed as an isolated element but as an integral part of the claim. There are no better or worse plaintiffs, only those with or without a claim. This approach reveals the actual issues on which standing operates in a case, clarifies the manner in which standing rules resolve them, defines the judicial task in deciding questions of standing, and allows an assessment of the costs of resolving merit questions in this manner. This article argues that standing is concerned with components of a cause of action and should therefore be addressed under the law governing claims for relief. It examines some of the reasoning underlying the traditional access view of standing and contrasts with it merit questions common to standing in public law cases and cause of action in private law cases. It then focuses on some particular problems associated with reliance on private law rules. Next, sources of ju-

3. *See* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Boyle v. Landry, 401 U.S. 77 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967). *See also* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 529-33 (1966); Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1445, 1522-29 (1971).

4. *See* BICKEL, *supra* note 2, at 122-25; DAVIS TEXT, *supra* note 1, § 22.04; C. WRIGHT, FEDERAL COURTS 43 (2d ed. 1970); Davis, *The Liberalized Law of Standing*, *supra* note 1, at 450; Scharpf, *supra* note 3, at 528-33; Scott, *supra* note 1, at 670, 689.

5. It should be emphasized that this is one view of standing and the functions it performs. Had the tradition been to view standing as an aspect of claims it might be more illuminating now to examine it as a threshold or preliminary doctrine. An analysis of other threshold doctrines, which operate differently from standing, may show that they relate to the merits in ways that similarly cast doubt upon their preliminary status. For a suggestive beginning regarding ripeness, see Vining, *supra* note 3, at 1522-29.

dicial power and criteria for formulating rules governing claims against the government including third-party practices are explored. The article concludes with an examination of the implications of a law of claims for two significant developments in the law of judicial review—public interest standing and the Supreme Court's new zone of interest test.

I. Access Standing and Merit Questions

Standing traditionally has been regarded as an access barrier concerned with one's credentials to bring suit. It is what entitles one to obtain an adjudication and thus confers a right to review but not necessarily to relief.[6] The typical claim of a plaintiff challenging agency action, that the agency has exceeded statutory authority or abused its discretion, underscores the merit-threshold distinction. The Court's resolution of these issues appears to be the "merits"; the remainder therefore is preliminary to this decision.

Two issues have been involved in determining whether a litigant has standing to obtain review of administrative action. The first, associated with the personal interest requirement of case or controversy in Article III of the Constitution,[7] requires injury to the litigant from the action he challenges. It is said to ensure the proper occasions and conditions for adjudication, a view the Court has endorsed in stating that "the gist of the question of standing" is whether the party seeking relief "has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions."[8]

Although blended with discussions of Article III injury and seen

6. *See* DAVIS TEXT, *supra* note 1, § 22.07; 3 DAVIS TREATISE, *supra* note 1, § 22.04; Jaffe, *Standing Again*, *supra* note 1; Lewis, *Constitutional Rights and Misuse of Standing*, 14 STAN. L. REV. 433 (1962). *See also* S. THIO, *supra* note 2, at 1-5; *cf.* C. WRIGHT, *supra* note 4, § 13; Comment, *supra* note 2, at 540-45.

7. Baker v. Carr, 369 U.S. 186 (1962); Frothingham v. Mellon, 262 U.S. 447 (1923). The requirement can be traced back to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), where the judicial power to deal with constitutionality was a necessary incident of adjudicating the actual interests and legal rights of litigants. *See generally* BICKEL, *supra* note 2, at 114-17; H. WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 9-10 (1961). *But cf.* Sierra Club v. Morton, 405 U.S. 727 (1972), in which the Court chose to rely on the injury requirement of § 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1970).

8. Baker v. Carr, 369 U.S. 186, 204 (1962). *See also* Flast v. Cohen, 392 U.S. 83 (1968); Frothingham v. Mellon, 262 U.S. 447 (1923); BICKEL, *supra* note 2, at 119-22; Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 15-16.

to serve similar functions,[9] the second requirement has been distinct: A litigant must have a legally protected interest or "legal interest standing."[10] This has been the principal source of controversy in disputes over standing and it arises primarily when a plaintiff questions administrative action.

Both these components, however, are more profitably viewed as dealing with a set of issues respecting the legal relationship of the parties that are familiar merit questions. Administrative action, for example, may contravene a variety of statutory, constitutional, or judge-made legal provisions, and may impinge directly or indirectly upon many interests. These interests may be highly personal, belonging to one or several individuals, or they may be shared in common with a group of persons. The extent of infringement may range from the imperceptible to the gross. Finally, there may or may not be a statute providing for judicial review at the request of a designated class. These variables—the amount, kind, and directness of injury, the type of interests infringed, and the legal provisions on which one relies—are factors which courts routinely take into account in deciding whether a complaint states a cause of action.

In private as well as public law, courts are asked to decide when and for whom concededly harmful and unlawful conduct is remediable. In determining who may obtain relief courts are passing upon a matter of substantive law, such as contract or tort, and are ruling on whether a cause of action exists. They do so by looking to such questions as the defendant's duty in the circumstances, the directness of injury, proximate cause, and the consequences of liability. This is the inquiry and subject matter of standing in public law cases and the question of claim for relief in private law cases.

Standing, in looking to injury or recognizable harm, quite obviously deals with an essential element of a claim. In addressing protected legal interest it poses the counterpart of familiar private claim ques-

9. *See, e.g.*, BICKEL, *supra* note 2, at 115-22; Scharpf, *supra* note 3; Scott, *supra* note 1, at 669-77, 683-85.

10. Legal interest standing was summarized by Mr. Justice Frankfurter:

> A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. . . . Or standing may be based upon an interest created by the Constitution or a statute. . . . But if no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring).

Cases finding no legal interest invoke and rely on those concerning Article III standing. *See* L. Singer & Sons v. Union Pacific R.R., 311 U.S. 295 (1940); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118 (1939); Rural Elec. Admin. v. Central Louisiana Elec. Co., 354 F.2d 859 (5th Cir.), *cert. denied*, 385 U.S. 815 (1966).

tions: whether the defendant had a duty to the plaintiff, whether he had an obligation to act or refrain from acting in certain ways, and whether his conduct was a legal cause of the plaintiff's injury. All of these are matters concerned with whether a plaintiff has stated a claim for relief; they are resolved by reference to the meaning and purposes of the law relevant to the merits. The answer to the question who may sue is a by-product of this determination.

Central to the development of legal interest standing is the distinction between statutory and nonstatutory review. Statutory review refers to an action brought pursuant to a statute specifically providing for review of actions or orders of an agency,[11] usually referring broadly to those who may seek review as "any party in interest" or "a person aggrieved or adversely affected."[12] Absent such a provision, review is sought in an original action brought in a district court under a more general jurisdictional grant.[13]

A. *Legal Interest in Statutory Review Cases*

The approach to legal interest standing in cases of statutory review, developed in the 1920's, was quite straightforward. Since the alleged injury was usually economic and therefore clearly recogniz-

11. Specific statutory review is based on a provision that orders or actions of the agency may be reviewed; general statutory review on a broad provision for review of administrative action. The terms "statutory" and "nonstatutory" are not used in any technical sense, since all proceedings in federal courts rest upon some statute. But the distinction is a useful one. *See generally* Fuchs, *Judicial Control of Administrative Agencies in Indiana,* 28 INDIANA L.J. 1 (1952).

12. These are not terms of art. For example, any aggrieved party to proceedings under the Federal Power Act may seek review. 16 U.S.C. § 825(l)(b) (1970). Under the Federal Aviation Act "any person disclosing a substantial interest in such order" may obtain review. 49 U.S.C. § 1486(a) (1970), *see* Transcontinental Bus Sys. v. C.A.B., 383 F.2d 466 (5th Cir. 1967), *cert. denied,* 390 U.S. 920 (1968). "Any party in interest," or "any person aggrieved" or "adversely affected" are found in the Interstate Commerce Act, 49 U.S.C. § 1(20) (1970); National Labor Relations Act, 15 U.S.C. § 77i(a) (1970); Investment Company Act of 1940, 15 U.S.C. § 80a-42(a) (1970), and Federal Communications Act, 47 U.S.C. § 402(b)(6) (1970). The Federal Trade Commission Act is narrower. It provides for review by "[a]ny person . . . required by an order of the Commission to cease and desist . . . ." 15 U.S.C. § 45(c) (1970).

13. Most often jurisdiction will be based upon provisions of United States Code title 28, such as § 1331, the general "federal question" jurisdictional grant, or §§ 1337 and 1339, which confer jurisdiction over civil actions arising under acts "regulating commerce" or "relating to the postal service." Occasionally one may utilize a jurisdictional provision enacted as part of the substantive statute, *e.g.,* 8 U.S.C. § 1329. (1970). The plaintiff seeking nonstatutory review may encounter a variety of obstacles which are not applicable to statutory proceedings. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); Williams v. Fanning, 332 U.S. 490 (1947); Empresa Hondurena De Vapores v. McLeod, 300 F.2d 222 (2d Cir. 1962), *vacated sub nom.* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963). *See generally* Byse & Fiocca, *Section 1361 of the Mandamus Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 HARV. L. REV. 308 (1967); Crampton, *Nonstatutory Review of Federal Administrative Action: The Need For Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant,* 68 MICH. L. REV. 387 (1970).

able, the only issue was whether the plaintiff's interest was protected by the regulatory program under which review was sought. If the purposes and policies of the statute established a duty on the part of the agency toward the complainant which had been disregarded without sufficient reason, the plaintiff was entitled to relief.

Illustrative of this approach is a trilogy of Interstate Commerce Commission (ICC) cases in which the basic statutory review provision did not refer to specific parties.[14] The first, *Edward Hines Yellow Pine Trustees v. United States*,[15] denied standing to a manufacturer of lumber complaining of an ICC order requiring a railroad to discontinue storage charges on lumber allowed to remain in cars after arrival at destination. Imposed during the First World War because of a car shortage, no longer found to exist, the charge favored manufacturers not utilizing storage, such as the plaintiff, as against those who did. Mr. Justice Brandeis, who wrote for the Court in all three cases, ruled that the elimination of this advantage was not legal injury to the plaintiff, whose "right [was] limited to protection against unjust discrimination."[16] Only the carrier railroad had a protected interest under the Interstate Commerce Act against this change.

In the *Chicago Junction Case*[17] the ICC authorized the New York Central Railroad to gain control of terminal railroads under a 1920 amendment to the Act providing for joint use of terminals and requiring ICC approval of any acquisition of a terminal.[18] Competitor railroads who used the terminal railroads and from whom, as a result of the consolidation, a large volume of freight had been diverted, sought to set aside the order. There was legal injury because the loss was attributable to a denial of equal treatment re-

14. The statute provided that "suits to enjoin, set aside, or annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court." Hepburn Act, 34 Stat. 584, 592 (1906), *as amended* 28 U.S.C. § 1336 (1970). Subsequently a provision authorized any party to an ICC proceeding to intervene as of right in "any suit wherein is involved the validity of such order . . . and the interest of such party." Commerce Court Act, 36 Stat. 539, 543 (1910), *as amended* 28 U.S.C. § 2323 (1970). This provision did not govern the standing of a party in the administrative proceedings to maintain a suit in his own right. The claim that such participation automatically conferred a right to appeal from the order was rejected in Alexander Sprunt & Son v. United States, 281 U.S. 249 (1930).

15. 263 U.S. 143 (1923).

16. *Id.* at 148.

17. 264 U.S. 258 (1924). The Transportation Act of 1920 governing railroad extensions, acquisitions, and abandonments contained a standing provision authorizing review at the request of "any party in interest." 49 U.S.C. § 1(20) (1970). The Court did not appear to attach special importance to it in *Chicago Junction*. It was given narrow application in L. Singer & Sons v. Union Pacific R.R., 311 U.S. 295 (1940).

18. Transportation Act of 1920, ch. 91, § 402, 41 Stat. 477, *as amended* 49 U.S.C. § 1(18) (1970).

sulting from the acquisition. The Court stressed a statutory mandate requiring the ICC[19] to consider the effect of such an acquisition on other carriers. These carriers therefore had standing to complain of a disregard of this interest or its inadequate consideration.

Statutory standing was denied to a dockside compressor of cotton who had been favored by a differential rate on cotton for shipments to in-town and dockside warehouses in *Alexander Sprunt v. United States*.[20] The ICC had found the rate discriminatory as to the in-town warehouses and required the railroads to equalize by increasing the rate for dockside shipments. Again the fact that the carriers had not pursued the appeal was significant; the complainant had no standing since he was entitled to reasonable rates, without unjust discrimination, but not to competitive advantage.[21]

The only valid ground for criticism of these decisions is disagreement with the Court's interpretation of the Transportation Act[22] or with its acceptance of the Act as the only pertinent body of law. The determination of what served the Act's purposes controlled the availability of judicial remedies and was obviously a ruling of substance on an aspect of a claim. These rulings may be thought preliminary, because while disposing of the case, they leave unanswered whether the administrative action under challenge was warranted in law. But any dispositive issue is preliminary in this sense, since its resolution against a plaintiff will render decision of other issues superfluous.

The matter of legal interest standing does, however, have a certain priority under standard rules of procedure. Whether an interest is protected by statute usually puts in issue a question of law, the kind of question that in private lawsuits might be resolved by a motion to dismiss for failure to state a claim.[23] The issue of validity, on the other hand, entails an examination of the justifications for official action and generally requires probing into a greater range of factors in the case. It would normally not be decided on a motion to dismiss. Hence procedural techniques whose object is the efficient disposition of issues in lawsuits would assign priority in the order of resolution to the question of standing over that of administrative validity.[24]

19. 264 U.S. 258, 267 (1924).
20. 281 U.S. 249 (1930).
21. *Id.* at 257.
22. One commentator characterized the decisions as cautious and restrictive. Scott, *supra* note 1, at 655.
23. FED. R. CIV. P. 12(b), 12(c) and 56.
24. 2A MOORE'S FEDERAL PRACTICE §§ 12.08, 12.09 (2d ed. 1972).

This does not alter the substantive character of the standing question nor support the view that the purpose of the standing test is to restrict judicial interventions into the administrative sphere.[25] This conclusion confuses a by-product of substantive rules and procedural techniques with their underpinnings. The ordinary modes of procedure in a lawsuit between private parties would warrant the same course of proceedings, and the standards that dictate a result of nonintervention or intervention do not focus on propriety as a separate variable. For example, the clarity of the law controlling the validity of agency action or the impact of relief are not material to the standing determination. Thus, the restraint standing imposes does not seem particularly related to the governmental character of the defendant.

B. *Legal Interest in Nonstatutory Review Cases*

1. *Private Law Rules as Applied to Public Cases*

In the area of nonstatutory review there was no special body of public law from which courts could formulate actions against the government except for a few common law writs that were largely unavailable in federal courts.[26] The Constitution itself was not a source of claims. It provided only rules governing defenses.[27] Although courts might have elaborated upon general legal principles and policies, they did not formulate special claims for relief in non-

25. *Compare* Flast v. Cohen, 392 U.S. 83, 100 (1968), *with* Perkins v. Lukens Steel Co., 310 U.S. 113, 129 (1940), *and* Scott, *supra* note 1, at 683-90.

26. Two early cases established that the Judiciary Act of 1789 did not give federal courts jurisdiction in mandamus, M'Intire v. Wood, 11 U.S. (7 Cranch) 504 (1813), but that the courts of the District of Columbia could issue mandamus as inheritors of the common law jurisdiction of Maryland, Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838). There were doubts about the compatibility of mandamus with the separation of powers and the power was narrowly exercised, Decatur v. Pauling, 39 U.S. (14 Pet.) 497 (1840). Later the Court ruled that federal courts were without authority to issue the important writ of certiorari, Degge v. Hitchcock, 229 U.S. 162 (1913). In time equitable remedies were expanded to substitute for these common law remedies. *See* Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); Simmons v. Farley, 18 F. Supp. 758 (D.D.C. 1937), *rev'd*, 99 F.2d 343 (D.C. Cir.), *cert. denied*, 305 U.S. 651 (1938). *See also* Note, *Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts: A Study In Procedural Manipulation*, 38 COLUM. L. REV. 903 (1938).

27. *See, e.g.*, Scranton v. Wheeler, 179 U.S. 141, 152-53 (1900); Pennoyer v. McConnaughy, 140 U.S. 1, 9-18 (1891); *In re* Ayers, 123 U.S. 443, 500-02 (1887). In some special instances, however, the Constitution was viewed as the source of claims. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (reapportionment); Griffin v. County School Bd., 377 U.S. 218 (1964) (desegregation). Cases in which government officials have been enjoined from enforcing unconstitutional regulatory statutes have been viewed as being founded entirely on a constitutional claim. *See* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 (1954); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969).

statutory actions, perhaps because, as Hart and Sacks suggest, the common law writ system channeled judicial reasoning into established forms of action and a consequent search for analogy;[28] or perhaps because the common law system applicable to nongovernmental lawsuits was thought sufficiently comprehensive as to render separate rules superfluous.[29] Whatever the explanation, in cases of nonstatutory review, federal courts drew almost exclusively upon the common law of private actions to resolve disputes with government officials.[30]

Private law protections were not merely an indicia of legitimacy for the invaded interest.[31] Rather, the plaintiff had to show that the established private rules of actionability afforded protection to the interest in the very circumstances under inspection, save for the official identity of the defendant.[32] Thus, the plaintiff had to set forth a common law cause of action subject to defeat only by way of accepted defenses. One of these, however—that the defendant was acting pursuant to law—brought the defendant's official character back into the case. The plaintiff might then introduce the issue of official legality by alleging that the conduct was beyond valid constitutional or statutory authority.[33]

28. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 500 (tent. ed. 1958). They note the inhibiting effect of both a system of distinct forms of actions and a separation of law and equity on the reasoned development of rights of action or claims generally.

> English courts had never been accustomed to face the question of right of action or no right of action squarely and systematically. In denying relief they were used simply to saying "*This* form of action does not lie" or "There is no remedy for you in *this* court." With the advent of a single form of action, their tradition gave them no body of systematic thought for dealing with the fundamental question of remedy *vel non*. American courts inherited this vacuum of basic jurisprudential thinking.

Id. at 500 (emphasis in original).

29. Thus, changes in the common law should not be lightly countenanced and statutes in derogation should be strictly construed. Brown v. Barry, 3 U.S. (3 Dall.) 365 (1797). *See also* Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 217-18 (1934); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 400 (1908).

30. Mr. Justice Jackson has well described this phenomenon:

> The painfully logical French recognized from the beginning that controversies between the citizen and an official, in the performance of his duty as he saw it, involved some different elements and considerations than the contest between two private citizens over private matters. . . . But the United States and England have backed into the whole problem rather than face it.

R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 46-47 (1955).

31. Scott, *supra* note 1, at 650.

32. *See, e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940); Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118, 137-38 (1939); Philadelphia Co. v. Stimson, 223 U.S. 605, 620-23 (1912); Elliott v. Swartout, 35 U.S. (10 Pet.) 137, 153-56 (1836); *cf.* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); C.B.S. v. United States, 316 U.S. 407, 422 (1942); Alabama Power Co. v. Ickes, 91 F.2d 303 (D.C. Cir. 1937), *aff'd*, 302 U.S. 464 (1938).

33. Hill, *supra* note 27, at 1128-31. Common law pleading practices reinforced this private law perspective on claims against officers. The plaintiff made his declaration in trespass, detinue, debt, or the like, in which he alleged only his own personal or

This doctrine of official accountability under the private law has a long and respected lineage in Anglo-American law. Once regarded as a fundamental aspect of the rule of law, it was the method the English adopted, and later the Americans, to accommodate the strictures of sovereign immunity with the control of exercises of official power.[34] It worked well enough in the nineteenth century when litigation often involved resisting official impositions on one's person or property, in the form of custom or tax exactions, which unless authorized were plainly tortious.[35] It worked less well in maintaining official accountability where claims to bonuses, pensions, and public lands were involved.[36] And it worked very badly in accommodating nonstatutory review under the proliferation of spending and regulatory programs in the twentieth century.[37] But it had a profound influence on the way interests injured by agency action were regarded such that only interests within the common law rules were recognized as private and therefore worthy of protection.[38]

Thus, a theory of relief in which private duties and privileges determined the scope of those of the government was adopted as the test of standing in a cluster of Supreme Court decisions in the 1930's, and was used in innumerable cases in the lower courts extending over

property interest and the defendant's wrongful invasion or seizure. That the defendant was purportedly carrying on government business was defensive matter and hence introduced in the answering plea. The statutory or constitutional attack on the latter was first raised in the plaintiff's response to the plea, the replication. These pleading conventions structured the lawsuit in such a way as to confirm the theory that the plaintiff was pressing a private law claim, relying on a public law matter only to overcome a plea of justification. Thus, the statute or authority under which the defendant was acting, which both granted and limited his authority, was not perceived as the source of the claim of right against the officer or protection for the plaintiff; *cf.* Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963). *See also* Chaffin v. Taylor, 114 U.S. 309 (1884) (trespass); Poindexter v. Greenhow, 114 U.S. 270, 271, 282-83 (1884) (detinue); B. SHIPMAN, HANDBOOK OF COMMON LAW PLEADING 207-13, 298-301, 360-81 (3d ed. H.W. Ballantine 1923).

The pleading practice in equity was different in that the plaintiff had to allege the whole story, including the anticipation of defenses and responses thereto. But this did not necessarily change the way the suit was regarded, since defenses and responses can be viewed in much the same way as they were at law. *Ex parte* Young, 209 U.S. 123, 129-31 (1908); C.C. LANGDELL, A SUMMARY OF EQUITY PLEADING ch. 1 (2d ed. 1883).

34. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); Pennoyer v. McConnaughy, 140 U.S. 1, 10-18 (1891); *In re* Ayers, 123 U.S. 443, 500-02 (1887). *See* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 213-31.

35. *See, e.g.*, Meritt v. Welsh, 104 U.S. 694 (1881); Collector v. Doswell & Co., 83 U.S. (16 Wall.) 156 (1872); Bend v. Hout, 38 U.S. (13 Pet.) 263 (1839); Elliott v. Swartout, 35 U.S. (10 Pet.) 137, 153-61 (1836).

36. Reaves v. Ainsworth, 219 U.S. 296 (1911); Games v. Thompson, 74 U.S. (7 Wall.) 346 (1868); Dorsheimer v. United States, 74 U.S. (7 Wall.) 166 (1868); Decatur v. Pauling, 39 U.S. (14 Pet.) 497 (1840); *cf.* Lem Moon Sing v. United States, 158 U.S. 538, 546 (1895) (no review of the power to deport or exclude aliens).

37. *See* pp. 445-47 *infra*.

38. *See* pp. 476-78 *infra*.

three decades.[39] The first Supreme Court decision was *Alabama Power Co. v. Ickes*,[40] a suit by a private power company to enjoin federal loans and grants to municipalities in Alabama for the construction of competitive light and power plants on the ground that they were either unauthorized by statute or beyond the power of the federal government. A unanimous Court held the plaintiff to be without standing by virtue of the rule that where competition is itself lawful, a company cannot challenge loans or grants to a competitor by alleging that they were made without lawful authority.[41]

Tennessee Electric Power Co. v. T.V.A.[42] is similar in structure and result, except that a bevy of power companies also sought to enjoin direct sales by the TVA to industrial users. Again the Court analogized the controversy to one between two private parties, holding that one cannot charge a competitor with a defect in its grant of powers or with acquiring resources in violation of law. It concluded that damage caused by competition, which was otherwise lawful, would "not support a cause of action or a right to sue."[43]

Perkins v. Lukens Steel Co. involved a challenge by bidders for government contracts to a minimum wage order under the Public Contracts Act.[44] The Act authorized the Secretary of Labor to establish minimums pursuant to a statutory formula, which the companies charged had been disregarded. There was no standing, since Congress had imposed rules governing purchasing and the Secretary had acted as a purchasing agent implementing instructions from her

39. *See, e.g.*, South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970); Rural Elec. Admin. v. Central Louisiana Elec. Co., 354 F.2d 859 (5th Cir. 1966), *cert. denied*, 385 U.S. 815 (1967); Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965); Johnson v. Redevelopment Agency, 317 F.2d 872 (9th Cir. 1963), *cert. denied*, 375 U.S. 915 (1964); Harrison-Halsted Community Group v. Housing & Home Financing Agency, 310 F.2d 99 (7th Cir. 1962); Pittsburgh Hotels Ass'n v. Urban Redevelopment Auth., 309 F.2d 186 (3d Cir. 1962); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955); South Suburban Safeway Lines, Inc. v. City of Chicago, 285 F. Supp. 676 (N.D. Ill. 1968), *aff'd*, 416 F.2d 535 (7th Cir. 1969). *See also* 3 DAVIS TREATISE, *supra* note 1, §§ 22.11, 22.16; Note, *Protecting the Standing of Renewal Site Families to Seek Review of Community Relocation Planning*, 73 YALE L.J. 1080 (1964).

40. 302 U.S. 464 (1938).

41. As the Court stated:

> If such a suit can be maintained, similar suits by innumerable persons are likewise admissible to determine whether money is being loaned with lawful authority for uses which, although hurtful to the complainants, are perfectly lawful.

Id. at 480-81. The Court also affirmed the lower court findings that there was neither unlawful solicitation nor coercion by the federal officials nor a common law conspiracy to injure petitioner's business. *Id.* at 478.

42. 306 U.S. 118 (1939).

43. *Id.* at 139-40.

44. 310 U.S. 113 (1940). *See* 49 Stat. 2036, *as amended* 41 U.S.C. §§ 35-45 (1970).

principal, to whom she was solely responsible. She, like a private agent, was immune from suit.[45]

The common law rule of standing in these cases operated on the merits of claims in the same manner as the statutory rule. It too represented an adjudication of an official legal duty or obligation to the complainant and hence a determination of whether one had a claim for relief. As in the statutory cases, the effect of finding no claim under the private law is to moot the remaining issue in the case, that of the defendant's official justification for the action. Similarly, the private law issue may often, but not always, be decided before trial by reference to the pleadings and established common law rules.[46] The common law issue, unlike the statutory one, however, necessarily retains priority in resolution since it is the claim for relief and lawful authorization is a defense to it.[47]

It has been argued, however, that denials of standing in these common law cases represent an exercise of discretion to avoid decision on the merits, illustrating that standing, along with ripeness or political question doctrine, governs the proper conditions for reaching acceptable decisions and the occasions of conflict with other branches of government.[48] Standing in *Tennessee Electric* or *Perkins*

45. 310 U.S. at 129. *See also* City of Atlanta v. Ickes, 308 U.S. 517 (1939).

46. Common law proceedings on standing can be substantially more complex and protracted than they might appear in appellate opinions. In Alabama Power Co. v. Ickes, the district court held, after a full evidentiary hearing, that plaintiffs had standing to maintain their suit but denied the injunction on the merits. *See* note 41 *supra*. Its findings are listed in the Supreme Court's opinion, 302 U.S. at 475-77. In Tennessee Electric Power Co. v. T.V.A., a three-judge court was convened under 50 Stat. 751, 752 § 3, 28 U.S.C. § 380a (1937), to hear the complaint filed by 19 power companies. The hearing consumed seven weeks and 1,100 exhibits were offered. The district court concluded that there was no fraud, malice, coercion, or conspiracy. 21 F. Supp. 947, 961 (E.D. Tenn. 1938). *See also* Central Louisiana Electric Co. v. Rural Elec. Admin., 236 F. Supp. 271 (W.D. La. 1964), *rev'd*, 354 F.2d 859 (5th Cir. 1966); Kansas City Power & Light Co. v. McKay, 115 F. Supp. 402 (D.D.C. 1953), *rev'd*, 225 F.2d 924, 934 (D.C. Cir. 1955).

47. *See* Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963); Taylor v. Anderson, 234 U.S. 74, 75-76 (1914); Joy v. St. Louis, 201 U.S. 332, 340 (1906). *See generally* Hill, *supra* note 27, at 1128-31.

48. Ripeness and political question illustrate the access-merit distinction. Ripeness deals with preenforcement challenges to statutes by examining the fitness of the issue for resolution and hardship from delay. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). The posture of the unripe case prevents access to material and concrete data about a statute's applications, enforcement policy, and the nature of the activities subject to it. *Compare* Toilet Goods Ass'n v. Gardner, 387 U.S. 157 (1967), *and* Rescue Army v. Municipal Court, 331 U.S. 549 (1947), *with* Railroad Transfer Service, Inc. v. Chicago, 386 U.S. 351 (1967). The issues often entail a weighing of competing values in light of empirical data. *Compare* Carter v. Carter Coal Co., 298 U.S. 238 (1936), *with* United Public Workers v. Mitchell, 330 U.S. 75 (1947). Insufficient information with which to formulate standards is important in political question cases also, where the subject matter, such as foreign affairs, may preclude judicial access to the relevant facts. *See, e.g.*, Roudebush v. Hartke, 405 U.S. 15 (1972); Ludeckey v. Watkins, 335 U.S. 160 (1948); Commercial Trust Co. v. Miller, 262 U.S. 51 (1923); Scharpf, *supra* note 3, at 555-58, 566-73.

As acknowledgments of the institutional limitations of the judicial process and its

is therefore closely associated with the Article III ingredient[49] insuring "concrete adverseness which sharpens the presentation of issues."[50] These cases, Professor Bickel argues, involve "impure standing . . . in which adjudication of the merits was declined despite the presence of an adversary case. . . . Pure standing ensures a minimum of concreteness; the other, impure elements of standing and the concept of ripeness seek further concreteness in varying conditions that cannot be described by a fixed constitutional generalization."[51] Professor Scharpf adds that impure standing is a technique by which the Court selects cases to ensure itself of an adequate record and sufficient exploration of the merits.[52]

The premise of this argument, that Article III or pure standing assures the adequate presentation of issues, is doubtful; the requirement of a party with an interest at stake allows for minimal concreteness but not informed presentation.

An examination of *Tennessee Electric* and *Perkins* reveals that there were no conceivable institutional or process factors reflecting discretionary refusals to decide cases. The plaintiffs represented large segments of the affected industry[53] and were intensely interested in the subject matter of the litigation; injury from the challenged action was neither contingent nor speculative. The issue in *Tennessee Electric* did not present reviewability problems. On the constitutional level it concerned the disposition of electric power as an incident to the federal government's powers over navigation, war, or commerce.

dependency on knowledge that is not always available, these doctrines are designed to defer rather than resolve the merits of a claim. The claim provides a basis for characterizing an issue, but it remains undecided. Hence, greater access to necessary information at a later date would permit resolution of either a political question or ripeness case. Though usually a more permanent form of abstention, the political question ruling is a refusal to apply legal principles because competency exists elsewhere. It is, quite literally, a determination of no jurisdiction to decide. Unlike standing, neither disposes of a claim, though some argue that prejudgment has its own objectionable consequence. *See* Vining, *supra* note 3, at 1522-23.

49. In *Perkins* the Court asserted that the decision "rest[s] . . . upon reasons deeply rooted in the constitutional divisions of authority in our system of government and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public." 310 U.S. 113, 132 (1940). At several points the Court characterized the interest of complainants as the "public's interest in the administration of law." *Id.* at 125, 127, 129. There are similar statements and reasoning in the power cases. *See* Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

50. Baker v. Carr, 369 U.S. 186, 204 (1961).

51. BICKEL, *supra* note 2, at 122-24.

52. Scharpf, *supra* note 3, at 529. *See also* Lewis, *supra* note 6, at 447-81.

53. In *Tennessee Electric* the complainants were 19 public utilities operating under charters from Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia. 306 U.S. at 134-35. Data concerning the size and output of the complainants in *Perkins* may be found in the Complaint for Injunction and Declaratory Judgment, Civil Action File No. 1839, U.S. District Court for the District of Columbia, at 2-6 (filed Feb. 25, 1939).

Whether a government function is necessary and proper to the exercise of enumerated powers is not an easy question, but it is a question with which the Court had grappled for over a century.[54] Indeed a similar issue had been adjudicated shortly before in *Ashwander v. T.V.A.*, in which the private law was seen to be satisfied[55] although the litigating circumstances were more questionable.

The determination in *Perkins* involved a construction of an act of Congress for which there were ample indicia of legislative intent.[56] The task can hardly be said to be a nonjudicial one. If these were cases of discretionary denials of adjudication, and there is not a clue to support that in the decisions, the bases for the exercise of that discretion are mysterious.

2. *Private Law Rules as Applied to Private Cases*

Private litigation in denying relief despite injury and unlawful conduct[57] entails the use of rules that deal with the same elements of a claim as common law standing. Such rules are among the laws governing claims and, because they are not subsumed under the rubric of standing, clearly express the kind of substantive reasons for which relief is denied: that the defendant owes no "duty" to the

54. *See, e.g.*, McCray v. United States, 195 U.S. 27 (1904); Luxton v. North River Bridge Co., 153 U.S. 525 (1894); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

55. In Ashwander v. T.V.A., 297 U.S. 288 (1936), the Court upheld the standing of preferred shareholders of the Alabama Power Company to sue to enjoin the performance of a contract between the company and the TVA. The agreement was for the purchase by the TVA from the company of certain transmission lines and property, an interchange of power, and mutual limitations on the sale of power. The primary claim was that the contract was void because the proposed activity of the TVA was beyond the power of the federal government and that the contract intrinsically or because of its illegality would harm the company's interests.

The Court, over dissents, upheld the right of shareholders to seek to restrain the execution of the contract:

> To entitle the complaints to equitable relief, in the absence of an adequate legal remedy, it is enough for them to show the breach of trust, or duty involved in the injurious and illegal action.

Id. at 319. *See also* Frankfurter & Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 623 (1938).

56. There was a considerable amount of legislative history behind this provision. 310 U.S. at 128. The plaintiffs were challenging a construction of the Public Contracts Act, 41 U.S.C. §§ 35-45 (Supp. IV 1936). For a general compilation of congressional discussion concerning this bill, see Brief for Petitioner and App. to Brief for Petitioner 20-64.

57. The notion of proximate cause in tort law offers a rich variety of cases illustrating such rules. *See, e.g.*, Diamond State Tel. Co. v. Atlantic Refining Co., 205 F.2d 402 (3d Cir. 1953); Palsgraff v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928); Dahlstrom v. Shrum, 368 Pa. 423, 84 A.2d 289 (1951). Similarly, interference with contract is not recoverable if the interference is either unintentional or too remote. *See, e.g.*, Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); Northern States Contracting Co. v. Oakes, 191 Minn. 88, 253 N.W. 371 (1934); Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (C.A. Ohio 1946).

plaintiff, that the defendant's conduct is not the "legal" cause of plaintiff's injuries, or that the plaintiff's interest is not one which the law protects. However expressed, the determination is not a matter apart from the merits of a claim; the purposes or goals of the particular area of law involved are best effectuated by denying relief.

Among the cases in which private law rules operate to deny what is termed standing in judicial review proceedings, there is the common class of tort suits in which a plaintiff alleges that the breach of a statutory norm has caused him injury. If the plaintiff is not within the "ambit of risk," either because he is not within the protected class or his harm is not one the statute was designed to prevent, recovery is usually denied.[58] If breach of the statute—concededly illegal conduct—is viewed separately from the right to recover it may be said that the plaintiff is without standing. But relief is denied because of the line in tort law between compensating accident victims and limiting liability to fault and foreseeable harms; the result is attributable to common law fault principles as these interact with legislation.[59] The determination is no less substantive, on the merits, than if we had found the plaintiff within the ambit of risk and then found no violation of the statute. There too principles of fault liability prevent recovery.

Similarly the substantive policies underlying fault liability may be seen in a difficult common law tort case, *Ultra Mares v. Touche*,[60] in which a creditor who had lent money to an insolvent corporation in reliance on negligently prepared financial statements was unable to recover against accountants responsible for the statement. Although there was unlawful conduct and foreseeable harm, the ramifications of liability were too great.[61] A claimant in these circumstances might be said to be without standing to sue, but he is for reasons that are among the basic policies of tort law.

58. *See, e.g.*, Gorris v. Scott, L.R. 9 Ex. 125 (Ex. Cham. 1874); Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Kansas, Oklahoma & Gulf Ry. v. Keirse, 266 P.2d 617 (Okla. 1954); *cf.* Erickson v. Kongsli, 40 Wash. 2d 79, 240 P.2d 1209 (1952).

59. In Clinkscales v. Carver, 22 Cal. 2d 72, 136 P.2d 777 (1943), Justice Traynor observed:

> When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them except where they would serve to impose liability without fault.

Id. at 75, 136 P.2d at 778. *See also* Tedla v. Ellman, 280 N.Y. 124, 19 N.E.2d 987 (1939); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEXAS L. REV. 143 (1949).

60. 255 N.Y. 170, 174 N.E. 441 (1931).

61. *Id.* at 179-80, 174 N.E. at 444.

The law of contract also provides examples where breach and injury do not suffice for recovery. Unintended or incidental beneficiaries of an agreement may not recover for willful nonperformance, notwithstanding reasonable reliance or expectations on their part.[62] A party to an agreement suffering special losses may not recover for them unless he brought them to the attention of the promisor at the time of making the contract.[63] These also are substantive rules of decision related to the goals of contract law.

A recent colloquy illustrates the vagaries engendered in seeking to relate the rules of claims in these private cases to a threshold or nonmerit concept of standing. Professor Davis has long advocated that the only proper requirement of standing is injury in fact from government action, which he bases on an "elemental principle of justice" expressed for centuries in the common law governing private relationships: if *A* hurts *B*, *B* has standing to get a determination of the legality of *A*'s action. Therefore where "the government has hurt B[,] [a]part from all statutes and all constitutional provisions, B has a common-law action for damages and a right to sue in equity for an injunction."[64] He adds that: "[I]f judges' power to create new rights must be continued, their smaller power to do something less than that—recognize that some new interests suffice for standing—must likewise be continued."[65] But harm and illegality without proof of standing—duty or legal cause—do not allow *B* to recover at common law. Therefore there is no principle entitling *B* to an adjudication of legality and the recognition of new interests for standing is the creation of a right, not the exercise of a lesser power.

62. *See* Diggs v. Pacific Gas & Electric Co., 57 Cal. App. 57, 206 P. 765 (1922); Ball v. Cecil, 285 Ky. 438, 148 S.W.2d 273 (1941); Witzman v. Sjoberg, 164 Minn. 411, 205 N.W. 257 (1925); Silverman v. Food Fair Stores, 407 Pa. 507, 180 A.2d 894 (1962). *See generally* 4 CORBIN ON CONTRACTS §§ 779C, G (1951); 2 WILLISTON ON CONTRACTS §§ 402-03 (3d ed. 1959); RESTATEMENT OF CONTRACTS § 147 (1932).

63. *See* Hadley v. Baxendale, 9 Exch. 341 (1854); Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903).

64. DAVIS TEXT, *supra* note 1, § 22.07, at 432-33. This principle, he notes, is the same "whether B's interest is in land, business, religion, health, aesthetics, recreation, or any other interest of which the law takes cognizance." *Id. See also* Davis, *supra* note 1, at 468, where he adds:

> The only problems about standing should be what interests deserve protection against injury, and what should be enough to constitute an injury. Whether interests deserve legal protection depends upon whether they are sufficiently significant and whether good policy calls for protecting them or for denying them protection. The common law usually provides remedies for slight injuries to small interests . . . .

The assumption is that the determination of what interests deserve protection is to be made without regard to the particular context in which they are asserted. Interest in this usage seemingly refers to the injury being inflicted on the plaintiff, which leads him to complain, but not to the legal limitations on which he relies. The latter appears to be generally irrelevant to standing. *But see* note 313 *infra*.

65. 3 DAVIS TREATISE, *supra* note 1, § 22.00-3, at 711 (Supp. 1970).

In responding to Professor Davis' characterization of the natural common law method in private law suits—injury plus alleged illegality equals a common law claim entitling one to an adjudication—Professor Jaffe argues that *"that is not the common law.* Rather, it is well established that if A alleges that B is violating a statute and the court concludes that the statute was not designed to protect A's interest *the court will not determine the validity of A's claim."*[66]

Although his conclusion is correct, Professor Jaffe's threshold characterization of the common law basis for legal interest is inaccurate.[67] Its essential premise is that decision in statutory tort cases is not on the merits and that they do not involve "judicial intervention and judgment." He observes that such cases can be dismissed on the pleadings. But adjudication on the pleadings, without trial, is the normal way of deciding the case on the merits where the pleadings raise only a question of law.[68]

Professor Jaffe's description confuses an effect of applying substantive rules with the purposes behind them. To characterize the outcome of the competitor and statutory tort cases by saying that the plaintiff "may not sue" or that "the court will not determine the validity of A's claim" is misleading. A court has adjudicated the claim and has said that the plaintiff may not recover. These rules are not designed to determine when a plaintiff may sue or when a court may intervene,[69] any more than rules imposing liability seek to determine when a defendant may defend. One might say that where the rules of substantive law provide recovery, the defendant may not assert his defenses or the court will not determine their validity. But this would be a curious if not inaccurate way of describing the operation of substantive rules of law.

In sum, one cannot transform substantive rules of law, elements of a cause of action, into procedural or preliminary principles of

66. Jaffe, *Standing Again, supra* note 1, at 636 (emphasis in original).

67. Professor Davis now seems to agree with this explanation. He recently stated that "[i]n the case of statutes, Professor Jaffe's old authorities were once the law, but they have not necessarily survived the liberalization of the law of standing." DAVIS TEXT, *supra* note 1, § 22.07, at 432 n.4.

68. FED. R. CIV. P. 12(c); 6 MOORE'S FEDERAL PRACTICE ¶ 56.09 (2d ed. 1972).

69. Cases in which a plaintiff outside the ambit of risk may recover reveal that these rules are concerned with substantive tort policy and not judicial intrusiveness or natural principles of justice. *See, e.g.,* Kernan v. American Dredging Co., 355 U.S. 426 (1958); Louisville & N. R.R. v. Layton, 243 U.S. 617 (1917); Osborne v. Van Dyke, 113 Iowa 557, 85 N.W. 784 (1901); Koonovsky v. Quellette, 226 Mass. 474, 116 N.E. 243 (1917). These are instances where the fault principle is relaxed in favor of other policies, such as risk spreading or apportioning blame. For substantive rules governing competitor claims see 3 RESTATEMENT OF TORTS §§ 708-10 (1938).

access to a court. The natural common law method simply reveals that rules of standing are an integral part of a claim for relief.

C. *Costs of the Threshold View of Standing*

The plaintiffs without standing in the cases described in the previous two sections were not denied a day in court. They had their day and lost for the most traditional of reasons: they had no claim. But the resolution of elements of a claim under a threshold rubric had a number of significant consequences. Because courts did not realize that they were directly confronting and deciding a cause of action, standing decisions failed to articulate and apply principles and policies. Treating the question as a threshold one limited the source of rules to statutory policy or the private law, depending upon whether a statute authorized review. Where review was not statutory, a court could enlarge standing only by fashioning a principle of private rather than public law.[70] The refusal to act upon statutory policy in such cases was not examined. A disposition to generalize about the adequacy of interests apart from the circumstances in which they were asserted[71] led to the development of over-broad rules, such as "the law favors competition."[72] Related to this was a tendency to decide standing in a summary or cursory manner, befitting a pre-

70. *See* pp. 435-36 *supra*. The Court stressed the inconvenience in the private sector that would result from upholding standing in Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

71. In City of Atlanta v. Ickes, 308 U.S. 517 (1939) (per curiam), the Court relied on the competition rule in holding that a city consumer of coal had no standing to challenge an order increasing the minimum price for coal. It also invoked other cases whose relevance to the standing issue was obscure. Although Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), dealt with the standing of a prospective bidder to challenge a wage provision in one procurement statute, it became the authority for the vastly broader assertion that bidders on particular government contracts have no standing to make any challenge to the conduct of the bidding or the award. *See* p. 461 *infra*. *See, e.g.*, United States v. Grayline Water Tours, 311 F.2d 779 (4th Cir. 1962); Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955); Walter P. Villere Co. v. Blinn, 156 F.2d 914 (5th Cir. 1946). Perhaps the rule of substantive law relied on in *Perkins*—that third parties may not hold an agent accountable for failure to follow instructions—is broad enough to cover some of these suits. But the question was never asked. Instead courts relied on the somewhat meaningless proposition that bidders had no legal interest in the administration of government purchasing, which is not a rule of private law. Courts also did not take note of the fact that *Perkins* was reversed by legislation, *see* Fulbright Amendment, § 301 of Defense Production Act of 1952, 66 Stat. 308 (1952) (codified at 41 U.S.C. § 43(a) (1970)).

72. *See, e.g.*, Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969), *cert. denied*, 397 U.S. 923 (1970) (statutory purpose to protect must be explicit, "there ordinarily being no right to be free from competition," 417 F.2d at 176); Arnold Tours, Inc. v. Camp, 408 F.2d 1147, 1149 (1st Cir. 1969), *vacated and remanded per curiam*, 397 U.S. 315, *aff'd*, 428 F.2d 359 (1st Cir.), *rev'd and remanded per curiam*, 400 U.S. 45 (1970). *See also* Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955), and cases cited note 71 *supra*. *But cf.* Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77, 83-84 (1958).

liminary inquiry.[73] Further, in light of the vagueness of standing and its purposes, there was the danger that its consideration would be blended with judicial doubts about the asserted claim of invalidity or skepticism over the propriety of judicial intervention, thus resulting in ill-focused and poorly considered decisions.[74]

The most severe costs of the threshold view of standing stemmed from reliance on inadequate private law rules of decision. The private law rules may appear to provide a checklist which qualifies persons with interests worthy of protection for judicial review,[75] but because their use entails adjudication of a claim against an official as if he were a private individual, an intelligible accommodation of the relevant interests in a case has not been reached. By substituting inappropriate principles underlying private rules, courts have failed to determine statutory and constitutional purposes and thus inadequately resolved claims founded on them. The necessity of initially deciding the private law standing claim distracts attention from the main claim in the case and delays its resolution. In addition, the emphasis upon private common law rights and duties inherent in the practice impedes recognition of statutory claims based upon narrower interests in administrative programs.

At the most general level, rules of private law not only order relationships between private individuals and groups, but also reflect a considered adjustment of their conflicting and competing interests. Behind these accommodations are assumptions and assessments of the purposes, aspirations, motives, and interests that are associated

73. *Compare* the circuit courts' opinions in Association of Data Processing Service Orgs. v. Camp, 406 F.2d 837, 842-43 (8th Cir. 1969), finding no statutory intent to protect against competitive harm, *and* Barlow v. Collins, 398 F.2d 398, 401 (5th Cir. 1969), finding no intent to protect tenant farmers, *with* the Supreme Court's examinations of the statutes and rulings on intent to protect, 397 U.S. 150, and 397 U.S. 159 (1970). *See also* Harrison-Halsted Community Group v. Housing & Home Finance Agency, 310 F.2d 99 (7th Cir. 1962).

74. *See* Johnson v. Redevelopment Agency, 317 F.2d 872 (9th Cir.), *cert. denied*, 375 U.S. 915 (1963); Harrison-Halsted Community Group v. Housing & Home Finance Agency, 310 F.2d 99 (7th Cir. 1962); Berry v. House & Home Finance Agency, 233 F. Supp. 457 (N.D.N.Y. 1964). *See also* Barlow v. Collins, 397 U.S. 159, 167-70, 176-78 (1970) (Brennan, J., concurring and dissenting); JAFFE, JUDICIAL CONTROL, *supra* note 1, at 503; Scott, *supra* note 1, at 683-90.

75. *See* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 511-13; P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS IN THE FEDERAL SYSTEM 151-54 (2d ed. 1973). *But see* Jackson, *supra* note 30, at 46-47. Recent judicial reliance on private rules appears to occur in cases where they serve to confer standing. *See, e.g.*, Jenkins v. McKeithen, 395 U.S. 411 (1969); Bantam Books Inc. v. Sullivan, 372 U.S. 58 (1963).

It has been appreciated in other contexts that private analogy and private law rules are not generally a helpful basis for defining government duties and obligations. *See, e.g.*, Perry v. Sinderman, 408 U.S. 593 (1972); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); Thorpe v. Housing Auth., 393 U.S. 268 (1969).

with individual and institutional private conduct. Utilizing these rules to resolve claims against government officials cannot reflect the same social ordering because a federal agency, unlike an ordinary private company, wields the power of government whether it acts lawfully or not.[76] Ordinarily the interests and purposes behind government activities and the harms they produce do not correspond with those of private persons.[77] Thus, government and its officials are subject to special restraints and they enjoy privileges and immunities from liability for harmful conduct that private persons do not.[78] Similarly common law limitations on liability or remedy do not necessarily apply when the defendant is a government official.

In actions between officials and private persons the rules governing the claim and defining the contours of the protected interest must differ from private ones if the relevant interests are to be coherently accommodated. For example, a private citizen does not commit a trespass if he demands and is granted admission to one's home, since the homeowner may lock the door or call the police.[79] This immunity, however, cannot be extended to consent extracted by a police officer in this manner. In addition the measure of damages in a private trespass action is based upon actual monetary injury to property,[80] but unlawful search of one's home by an official, although a trespass, requires considerably different treatment for appropriate redress. The invasion of privacy and security usually involves humiliation and suffering rather than damage to property.

76. *Cf.* Monroe v. Pape, 365 U.S. 167, 183-87 (1961); Screws v. United States, 325 U.S. 91, 107-11 (1945); Weeks v. United States, 232 U.S. 383, 397-98 (1914).

77. *See* pp. 445-49 *infra*. Where the purposes behind private activity are important and can be expressed with sufficient generality, the activity is deemed privileged and the interests it injures are unprotected (*e.g.*, one's right to compete with others); where the activity and its purposes must be treated with greater particularity, the matter becomes one of defense and the interest invaded is protected (*e.g.*, privileged interference with contract relations). These allocations are normally of no great importance. But in determining common law standing, the most general expressions of private purposes are the ones that are operative to deny protection against harms worked by the government.

78. *See, e.g.*, Barr v. Matteo, 360 U.S. 564 (1959); Heine v. Raus, 399 F.2d 785 (4th Cir. 1968); Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965); Bershad v. Wood, 290 F.2d 714 (9th Cir. 1961); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

79. *See* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.11 (1956); W. PROSSER, THE LAW OF TORTS § 18, at 101-02 (4th ed. 1971).

80. Wyant v. Crouse, 127 Mich. 158, 86 N.W. 527 (1901); Lee v. Stewart, 218 N.C. 287, 10 S.E.2d 804 (1940). Where there is no pecuniary loss, nominal damages may be awarded to vindicate the possessory interest in land. Giddups v. Rogalewski, 192 Mich. 319 (1916); Dougherty v. Steep, 18 N.C. 371 (1835). *See generally* W. PROSSER, *supra* note 79, § 13, at 66-67. Occasionally punitive damages may be awarded, but these must bear a relationship to the actual damage to land. *See* Wolf v. Colorado, 338 U.S. 25, 41-44 (1949) (Murphy, J., dissenting); Taylor v. Fine, 115 F. Supp. 68 (S.D. Cal. 1953). *See generally* MCCORMICK ON DAMAGES § 78 (1935); Foote, *Tort Remedies For Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 497-99, 513 (1955); Morris, *Punitive Damages in Torts Cases*, 44 HARV. L. REV. 173 (1931).

The recognition that private rules should not govern these relationships between an individual and the government[81] is broadly applicable to the more complicated government activities characteristic of administrative action. For example, the private law rule used in *Perkins v. Lukens Steel Co.* provided inapposite reasons for denying relief and distorted the purpose of the relevant statute, the Walsh-Healey Act.[82] This rule immunizes an agent from liability to third parties for breach of his principal's instruction, even where the breach is willful and the instructions confer a benefit upon the complaining third parties. Because the principal may adequately supervise his agent's activities and at any time revoke the agency or alter the instructions, the arrangement is too fluid to allow actions against the agent.[83]

This rationale cannot justify denying a claim against a public official; statutory requirements, like those of the Walsh-Healey Act, are not too unstable a base for adjudication. Moreover, it is question-begging to conclude from private agency relationships that Congress is the body to supervise administrative wage determinations under the Act. It is no more appropriate a forum for review here than elsewhere; viewing the Secretary as purchasing agent does not alter institutional competencies. Most important, the assumption from agency law that the statute was intended to benefit the government or the public illustrates a tendency to construe statutes and programs in ways that distort statutory purpose by substituting the understandings of private relationships for ordinary statutory construction. The result is to ignore legislative purposes to protect or bestow benefits on favored groups because the common law would not manifest such a purpose in the analogous private circumstance.

Secretary Perkins was obliged to establish minimum wages by as-

81. The Court recently recognized and acted on this principle in creating a federal cause of action independent of the incidents of the private tort against federal officers for unlawful arrest. It explained:

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 391-92 (1971).

82. Perkins v. Lukens Steel Co., 310 U.S. 113, 129 (1940); the Walsh-Healey Act of 1936, 49 Stat. 2036, is codified at 41 U.S.C. §§ 35-45 (1970). Although the opinion has several themes, this one greatly influenced the Court's conclusion that the companies were without standing.

83. CORBIN ON CONTRACTS § 779E (1950); RESTATEMENT (SECOND) OF AGENCY § 342 (1957).

sessing those prevailing in the "locality" in which the goods were to be manufactured or furnished.[84] The controversy was over the extent to which "locality" required the Secretary to take account of regional differences in prevailing wages. Resolution should have turned on an analysis of statutory purposes. The Court noted the central ones—to impose obligations upon government contractors and to prevent national expenditures from "offending fair social standards of employment."[85] But it ignored that the further definition of "social standards of employment" qualified the overall statutory goals and established a distinct purpose as well. The "locality" formula restricted the Secretary's discretion and, while proscribing a limited form of wage competition as a factor in bidding, it sought to preserve both regional differences in wage payments and the prevailing rate within a locality. At perhaps the cost of the fairest minimums, these goals were designed to benefit management prerogative and control in covered industries. Thus a violation was a disregard of a rule enacted for the protection of companies seeking to sell to the government.[86] But this claim was not addressed in *Perkins* because the common law of agency obscured the statutory purpose and thus distorted resolution of the claim.

This distortion of statutory protections caused by reading into governmental arrangements the purposes associated with private ones is endemic to the private law approach. The refusal to derive protections for private interests from legal restraints is evident in a number of later cases, particularly challenges to the use of federal funds under the rural electricity and urban renewal programs. Limitations

84. The Act provided in part:
(b) That all persons employed by the contractor in the manufacture or furnishing of the materials . . . used in the performance of the contract will be paid, . . not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract.
Public Contracts Act of June 30, 1936, ch. 881, 49 Stat. 2036-37, *as amended* 41 U.S.C. § 35(b) (1970).

85. 310 U.S. at 128. Aside from mention of these overall purposes of the Walsh-Healey Act, the Court does not examine or mention the purposes of the statutory provision in issue.

86. *See* note 56 *supra*. Subsequent legislation confirms the point. The Fulbright Amendment, § 301 of Defense Production Act of 1952, 66 Stat. 308 (codified at 41 U.S.C. § 43a(a) (1970)), provides in part that "any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including but not limited to wage determinations and the interpretation of the terms 'locality,' 'regular dealer,' 'manufacturer,' and 'open market.'" The amendment also made clear that review of a wage determination could be had by "any manufacturer . . . who is in any industry to which such wage determination is applicable." Senator Fulbright explained: "It is our purpose by this Amendment to overturn that [*Perkins*] decision." 98 CONG. REC. 6531 (1952). *See also* Wirtz v. Baldor Electric Co., 337 F.2d 518 (D.C. Cir. 1963).

in such programs favoring designated groups were interpreted to serve public purposes, not to confer private benefits. Hence the restriction on rural electricity grants to areas without adequate private utility service was to maximize subsidies for rural areas by conserving federal funds and not to protect private companies.[87]

Limitations on governmental authority often are expressive of purposes from which the existence of private interests are inferred and protected. Because of the elaboration and application on behalf of private parties of constitutional provisions that distribute and limit governmental competency, our legal system recognizes and acts upon purposes behind legal restraints.[88] There are, for example, countless instances in which a private litigant may invoke the allocation of state and federal power in the Constitution to challenge legislative competence by claiming that price or wage regulation is not within the national commerce power,[89] or that social welfare expenditures are beyond the federal spending power,[90] or that a state health or

87. In the rural electric cases, private utilities, challenging federal grants to cooperative power producers, invoked a statute and administrative bulletin restricting subsidies to areas not receiving reasonable service from private utilities. Act of May 20, 1936, ch. 432, § 4, 49 Stat. 1365, *as amended* 7 U.S.C. § 904 (1970); REA Bulletin 111-3. Legislative history also supported the claim. *See* 80 CONG. REC. 2751-53, 2823, 5283, 5295, 5307 (1936). *See generally* Comment, 49 B.U.L. REV. 154 (1969). Courts uniformly dismissed, stating that the injury was merely competitive, that the statute was not "regulatory," and that the restriction was solely to channel subsidies to areas with the greatest need. *See, e.g.*, Alabama Power Co. v. Alabama Elec. Cooperative, 394 F.2d 672 (5th Cir.), *cert. denied*, 398 U.S. 1000 (1968); Rural Elec. Admin. v. Northern States Power Co., 373 F.2d 686 (8th Cir.), *cert. denied*, 387 U.S. 945 (1967); Rural Elec. Admin. v. Central Louisiana Elec. Co., 354 F.2d 859 (5th Cir. 1966), *cert. denied*, 385 U.S. 815 (1967). For examples of the urban redevelopment cases see Berry v. Housing & Home Finance Agency, 340 F.2d 939 (2d Cir. 1965), in which a hotel attacked the plan for including a competing hotel, in violation of 42 U.S.C. § 1456(g) (1964), forbidding such construction unless the local supply of transient housing were inadequate. Finding that the provision was intended to limit expenditures on nonresidential buildings, the court ruled that it conferred no protection and observed that "some statutes create merely public rights, enforceable only by the agency charged with their administration," *id.* at 940. *Accord*, Johnson v. Redevelopment Agency, 317 F.2d 872 (9th Cir. 1963), *cert. denied*, 375 U.S. 915 (1964); Pittsburgh Hotels Ass'n v. Urban Redevelopment Authority, 309 F.2d 186 (3d Cir. 1962); *cf.* Harrison-Halsted Community Group v. Housing & Home Finance Agency, 310 F.2d 99 (7th Cir. 1962).

88. *E.g.*, Powell v. McCormack, 395 U.S. 486 (1969) (congressional exclusion of an elected congressman); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (presidential seizure of steel mills without statutory authorization); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (presidential removal of Federal Trade Commission member contrary to statute); Myers v. United States, 272 U.S. 52 (1926) (presidential removal of postmaster without satisfying statute requiring consent of Senate). *See also* Corwin, *Constitution v. Constitutional Theory*, 19 AM. POL. SCI. REV. 290, 291 (1925); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1, 38-40 (1968).

89. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *cf.* Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918).

90. *See, e.g.*, Helvering v. Davis, 301 U.S. 619 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); United States v. Butler, 297 U.S. 1 (1936); Child Labor Tax Case (Bailey v. Drexel Furniture Co.), 259 U.S. 20 (1922).

safety measure is in conflict with Congress's authority over commerce.[91] In comparison, the purposes of the statutory provisions in *Perkins,* among others, are far more easily established, with far less judicial lawmaking, than the matrix of limitations embodied in the Constitution.

The government enterprise or subsidized competition cases also substitute private for public purposes in their reliance on the common law rule which bars recovery for injuries to one's business inflicted by competitors through ordinary trade practices. In light of the free market one's inability to compete is merely a sign of inefficiency.[92] But government or subsidized enterprise, financed mainly out of tax revenues, is not simply an ordinary business.[93] Its ability to compete effectively cannot be read as an indication of the inefficiency of complaining competitors. The government is not subject to the discipline of the market in raising capital or in setting prices.[94]

An example of the refusal to credit purposes behind legal provisions occurred in *Tennessee Electric,*[95] in which the companies' invocation of constitutional limits on national authority was treated as a derivative claim of the states under the Tenth Amendment. The tradition of litigating claims against federal competence, however, was precisely the opposite: Individuals harmed by an assertion of

91. *See, e.g.,* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); The Passenger Cases, 74 U.S. (7 How.) 283 (1849).

92. *See* Mogul Steamship Co. v. McGregor, Gow & Co., 23 Q.B.D. 598 (C.A. 1889); 1 F. HARPER & F. JAMES, *supra* note 79, § 6.13; 3 RESTATEMENT OF TORTS § 708, Comments c & d (1938). The Robinson-Patman Act, antitrust laws, and the tort of interference with contractual or advantageous relationships demonstrate that the private freedom to compete is hedged with restrictions. *See, e.g.,* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Charles Broadway Rouss, Inc. v. Winchester Co., 300 F. 706 (2d Cir. 1924); Standard Oil Co. v. Doyle, 118 Ky. 662, 82 S.W. 271 (1904). *See generally* 1 F. HARPER & F. JAMES §§ 6.5-.13; 4 RESTATEMENT OF TORTS §§ 763-65, 768 (1939).

93. Cases challenging government enterprise or sponsorship also invoke the common law rule that persons outside a corporation, particularly competitors, may not challenge corporate action as being beyond the authority of its charter. *See, e.g.,* Railroad Co. v. Ellerman, 105 U.S. 166, 173 (1881). Another line of cases holds that a company's franchise, exclusive or restrictive, affords a legal property interest sufficient to challenge others competing without a proper franchise. *See, e.g.,* Conway v. Taylor's Ex'r, 66 U.S. (1 Black) 603 (1861); *cf.* Frost v. Corporation Comm'n, 278 U.S. 515 (1929).

94. *See geuerally* TVA: THE FIRST TWENTY YEARS (R. Martin ed. 1956).

95. 306 U.S. 118 (1939). Lewis' characterization of a challenge to federal competency as a Tenth Amendment claim is a curious proposition since the Amendment is only declaratory. *See* Lewis, *supra* note 6. It describes but adds nothing to the distribution of federal and local power. *See* United States v. Darby, 312 U.S. 100 (1941). It also does not sort out state from private claims, since it reserves undelegated powers "to the States respectively, or to the people." U.S. CONST. amend. X. Lewis does not explain why the power at issue in *Tennessee Electric* belonged to states rather than the people.

federal power, unlike states,[96] may question whether it is within the constitutional distribution. The premises behind this allocation are not changed because injury arises from competition.[97]

The conspiracy, coercion, and malice claims in the competition cases illustrate another irrelevancy of private law rules and also another cost of using them—the pursuit and sometimes trial of issues peripheral to the main claim in the case.[98] In *Joint Anti-Fascist Refugee Committee v. McGrath*,[99] for example, the plaintiffs' principal claim was that they had been denied procedural due process by the Attorney General's summary designation of their organization as subversive. After a protracted wrangle through the federal courts, the common law standing issue finally was thought to concern the tort of group defamation,[100] an issue at most peripherally related to procedural due process. But a trial on defamation and several appeals on a matter irrelevant to the merits might have been required before getting to the dispositive issue.

96. For examples of private challenges to federal authority see Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (taxing and spending); Hauenstein v. Lynham, 100 U.S. 483 (1880) (treaty power); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (commerce power).

Until Massachusetts v. Mellon, 262 U.S. 447 (1923), states apparently had not brought suits directly challenging federal competency. There the Commonwealth, along with Mrs. Frothingham, a federal taxpayer, attacked a federal grant-in-aid program for maternal health and child welfare as beyond federal cognizance. *See* p. 486 *infra*. A unanimous Court held that the state's objection in its own behalf was nonjusticiable: "[W]e are called upon to adjudicate, not rights of person or property, nor rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened but abstract questions of political power, of sovereignty, of government." *Id.* at 484-85. The objection as *parens patriae* in behalf of its citizens fared no better: "[I]t is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government." *Id.* at 485-86. *Accord,* Jones *ex rel.* Louisiana v. Bowles, 322 U.S. 707 (1944) (per curiam); Florida v. Mellon, 273 U.S. 12 (1927); *cf.* Massachusetts v. Laird, 400 U.S. 886 (1970). *See generally* Bickel, *The Voting Rights Cases,* 1966 SUP. CT. REV. 79, 80-93.

97. For instance, had the legislation provided the TVA with an exclusive franchise to operate in the area served by Tennessee Electric, the plaintiff could have challenged federal authority to establish TVA as well as the franchise; *cf.* Ashwander v. T.V.A., 297 U.S. 288 (1936).

98. *See* note 46 *supra*.

99. 341 U.S. 123 (1951).

100. The Attorney General's motion to dismiss was granted by the district court. The Court of Appeals for the District of Columbia Circuit affirmed, Joint Anti-Fascist Refugee Comm. v. Clark, 177 F.2d 79 (1949). The Supreme Court reversed on standing, 5-3. Six opinions were filed in the case, one by each member of the majority and one by the three dissenters. Four Justices in the majority joined in the idea that the defamatory character of the listing afforded standing.

The case began in 1948 and was decided by the Supreme Court in 1951. Three years later the committee was still engaged in unsuccessful litigation to obtain a judgment on the merits of its claim that being listed as subversive was violative of its constitutional rights. Joint Anti-Fascist Refugee Comm. v. Brownell, 215 F.2d 870 (D.C. Cir. 1954). On February 15, 1955, the committee announced that "it had dissolved because of inability to function in the face of continuing government 'persecution.'" W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS 146 n.1 (5th ed. 1970).

When the Court feels that the private analogue is unacceptable, it has ignored the private rules and granted standing.[101] Alternatively, where the private rules do not mesh well with regulatory arrangements, the Court has denied relief to persons seemingly entitled under the private law.[102]

II. Toward a Theory of Claims in Suits Against Administrative Agencies

It should be apparent that the rubric of standing is misleading. Standing serves to sort out the elements of a cause of action. These are issues better addressed under the law governing claims for relief. The variables of interest, harm, duty, and protection remain relevant, but they go directly to whether a litigant has stated a claim for relief. The relevant principles and precedents are not confined to cases dealing with standing, but are a part of an older and broader framework in which courts formulate rules to resolve claims. Without seeking overall solutions the following sections of the article examine several areas that have been or are troublesome in the law of standing to show that the law of claims offers criteria and justifications that are pertinent to the resolution of these problems.

101. *See* pp. 460-61 *infra; cf.* Leedom v. Kyne, 358 U.S. 184, 188-91 (1958); Shields v. Utah Idaho Cent. R.R., 305 U.S. 177 (1938).

102. In Alexander Sprunt & Son v. United States, 281 U.S. 249 (1930), the Court never considered the private tort of interference with advantageous business relationships, the conditions for which would have been met by the ICC's alteration of the preexisting rate relationship between the shipper and railroad, absent lawful justification. Under such a common law tort analysis, the ICC as a third party could be seen to have intervened to alter the preexisting relationship between the complainant and the railroad by increasing the rate formerly charged. If the former rate were not preferential, the intervention was gratuitous and actionable as an unjustified interference, even though the railroad might have increased the charge on its own. Professor Jaffe notes that the tort requires an intentional interference, which perhaps was lacking here because the ICC was concerned with the welfare of others, the in-town sellers. JAFFE, JUDICIAL CONTROL, *supra* note 1, at 512. This is not persuasive, however, for such a concern is not inconsistent with an intent to alter the relationship between the railroad and the complainant. Indeed it includes just such an intent. Liability does not require "malice." *See generally* 1 F. HARPER & F. JAMES, *supra* note 79, §§ 6.11-.12, at 510-17; RESTATEMENT OF TORTS §§ 766-67 (1939). But, in the strikingly similar case of Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143 (1923), the requisite conditions for the tort were not met and standing could not be established under any analysis since the ICC reduced the rate paid by the competing shipper rather than increase that of the complainant. Yet any realistic appraisal of the concerns of the Transportation Act or of the complaining shippers would not distinguish these cases as this tort analysis does. Unlawful interference did, however, confer standing in C.B.S. v. United States, 316 U.S. 407 (1942). This tort has become a convenient basis for standing in some modern cases. *See* Air Reduction Co. v. Hickel, 420 F.2d 592 (D.C. Cir. 1969); *cf.* Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970), *cert. denied,* 401 U.S. 950 (1971).

A. *Judicial Power and Statutory Claims for Relief*

The first area for examination is the adjudication of claims founded on a statute which delegates enforcement and administration of a regulatory program to a public agency. The lack of a provision for judicial review or standing[103] negates a legislative intent to establish new private interests that can be vindicated through the judicial process. The Government has argued recently that a discernible intent to protect particular persons or groups does not automatically confer judicial review, since the intent by itself does not establish that protection should be effectuated through the provision of judicial remedies at the request of private persons.[104] Instead, the absence of statutory review provisions indicates that the interests are committed to the safe-keeping of the agency.[105] There is, how-

103. *See* p. 429 *supra.*

104. Brief for United States at 13-22, Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968). The Court rejected this argument in upholding a claim by a private utility company that a proposed TVA expansion was in violation of a statutory limitation in the TVA charter restricting it to the area "for which the Corporation or its distributors were the primary source of power supply on July 1, 1957." The company alleged that it already served the proposed area and would suffer a loss of business from the expansion. The Court predicated standing on its finding that the primary objective of the area limitation was "the protection of private utilities from TVA competition," and did not address the government's argument on statutory review except to cite two statutory review ICC cases as authority for basing standing on protective intent. The Court still recognizes that there is a distinction, Sierra Club v. Morton, 405 U.S. 727, 732 (1972), though it is doubtful that it has any consequences, *see* note 105 *infra.* The lack of a statutory review provision formed the basis for Mr. Justice Frankfurter's well-known dissent in Stark v. Wickard, 321 U.S. 288, 311 (1944), a case in which the Court upheld standing without a review provision for the plaintiff and without clearly finding a private law interest.

105. This view contributed to the Court's refusal to look to statutory protective purposes in cases of nonstatutory review. The Court now seems to have narrowed or obliterated the distinction between statutory and nonstatutory review, but without explanation for the change. *See, e.g.,* Hardin v. Kentucky Utilities Co., 390 U.S. 1, 6 (1968). *See also* references to the APA in Sierra Club v. Morton, 405 U.S. 727, 732 (1972); Barlow v. Collins, 397 U.S. 159, 165 (1970); and Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 153 (1970). The reference is to § 10 of the APA, 5 U.S.C. §§ 701-02 (1970), *amending* 5 U.S.C. §§ 1009-09(a) (1964), which provides:

> [E]xcept to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law . . . [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 thereof.

Though a source of controversy, the section has not explicitly been construed by the Court. The general understanding until recently was that it summarized the categories of standing familiar in 1946, the time of enactment. Hence "legal wrong" refers to the private law standard used in nonstatutory review cases. "Adversely affected or aggrieved . . . within the meaning of a relevant statute" refers to the statutory policies relied on in statutory review proceedings. *See* Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied,* 350 U.S. 884 (1955); S. Doc. No. 248, 79th Cong., 2d Sess. 230, 413, 415 (1946) (views of then Attorney General Clark); JAFFE, JUDICIAL CONTROL, *supra* note 1, at 528-30. The contrasting view, advocated mainly by Professor Davis, would restrict "within the meaning of a relevant statute" to persons "aggrieved"; "adversely affected," would thus refer to persons adversely affected or injured in fact. The statute does not support this reading and the change entailed in it would have been a remarkable alteration of existing law.

The Court has suggested a third alternative. It seems to have assumed that "within

ever, an adequate rationale for judicial recognition of these claims in another area of judge-made law. This is the implied cause of action in private lawsuits—the judicial practice of affording civil remedies to persons within the protections of and injured by the breach of statutes and regulations which do not provide for private remedies.[106] This tradition demonstrates that there is no antithesis between public mechanisms of enforcement and protected private interests and that legislative silence is not an obstacle to the application of judicial principles of redress. This reservoir of judicial power stems from jurisdiction over a case and from an allegation that an interest protected by a legislative policy has been disregarded.[107]

At one time this doctrine primarily operated in tort actions, particularly negligence suits, in which the common law rules apparently provided the basis for the claim and the statute merely supplied a standard of conduct.[108] In the twentieth century, especially in federal courts, it spread to fields in which the conduct was not actionable under common law principles.[109] In these areas broad federal regulatory programs, such as securities legislation, had been enacted specifically to remedy common law deficiencies.[110] Indeed, as Judge

the meaning of a relevant statute" does not refer to or require a statutory review provision, but goes directly to the policy and purposes of the statute authorizing agency action. *See* Sierra Club v. Morton, 405 U.S. 727, 732 (1972); Barlow v. Collins, 397 U.S. 159, 165 (1970). This interpretation does away with any distinction between statutory and nonstatutory review proceedings in respect to standing, except where a public statutory standing provision such as that in F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), is invoked. In that case the standing provision, not statutory policy, confers review.

The latter approach is not an unreasonable construction of the Act, though it was not the law of 1946. But the view that § 10 incorporates the understanding of 1946 is not persuasive. Standing law in 1946 was largely judge-made, a product of common law elucidations. And its boundaries were neither fixed nor frozen. Section 10, like most standing and review provisions, appears to leave the ground rules of court-agency relationships to judicial development. *But cf.* Scott, *supra* note 1, at 659, 668.

106. *See generally* Hill, *supra* note 27, at 1119-22, 1135-40; Katz, *supra* note 88, at 8-29; Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); O'Neil, *Public Regulation and Private Rights of Action*, 52 CALIF. L. REV. 231 (1964); Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MOD. L. REV. 233 (1960); Note, *Implying Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

107. This judicial action has ancient common law roots. *See* Katz, *supra* note 88, at 8-29; Landis, *supra* note 29, at 213-22.

108. *See* Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

109. *See, e.g.*, Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 192 (1944); Steele v. Louisville & Nashville R.R., 323 U.S. 210 (1944) (black railroad workers entitled to an injunction and damages against a labor union for breach of a statutory duty to represent all members of the craft); Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956) (airline discrimination against passenger); Reitmaster v. Reitmaster, 162 F.2d 691 (2d Cir. 1947) (publication of an intercepted communication); Neches Canal Co. v. Miller & Vidor Lumber Co., 24 F.2d 763 (5th Cir. 1928) (obstruction of stream in violation of Rivers and Harbors Act).

110. Cases in the securities field reveal an initial dependence on common law principles of liability and a steady growth toward less restrictive concepts formulated especially for the statutory action. *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S.

Friendly has observed, the case for implication is now strongest when the statute imposes an explicit duty unknown to the common law, since in these circumstances alternative theories of relief are not available.[111]

Absent contrary legislative intent, courts have allowed private actions by those whom the statute was designed to protect when there has been a breach of a statutory command or duty,[112] except where such actions are inconsistent with the basic design or implementation of a program.[113] The intricate administrative and regulatory factors in these cases, the comprehensiveness of agency authority, and established notions of enforcement discretion would appear strongly to militate against the creation of private actions. Instead, there is a marked presumption in favor of implying such actions.[114] In establishing such actions courts have not relied upon congressional intent as derived from ordinary canons of statutory construction, since any legislative purpose in regard to these actions is unclear, particu-

375 (1970); Herpich v. Wallace, 430 F.2d 792, 805 n.12 (5th Cir. 1970); Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969); S.E.C. v. Texas Gulf Sulfur Co., 401 F.2d 833 (2d Cir. 1968); Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967); Rogen v. Ilikon Corp., 361 F.2d 260, 266-67 (1st Cir. 1966); List v. Fashion Park, Inc., 340 F.2d 457, 462-63 (2d Cir. 1965); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952); Joseph v. Farnsworth Radio & Television Corp., 99 F. Supp. 701 (S.D.N.Y.), *aff'd*, 198 F.2d 883 (2d Cir. 1952). *See generally* Loss, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041 (1960).

111. Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 182 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966). *See also* Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); O'Neil, *supra* note 106, at 259; Note, *supra* note 106.

112. *See* cases cited notes 109-10 *supra*. Federal securities legislation also has been a prolific source of implied claims. *See, e.g.*, Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970), *cert. denied*, 401 U.S. 1013 (1971); Baird v. Franklin, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944); 5 L. Loss, SECURITIES REGULATION 3299-3310 (Supp. 1969). *See also* Superintendent of Insurance v. Bankers Life & Casualty, 404 U.S. 6 (1971) (§ 10(b) of the Securities Exchange Act of 1934); GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971) (registration requirements in § 13(d) of the 1934 Act); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) (Investment Company Act); A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967) (stockbroker can sue customers under § 10(b)); cases cited note 110 *supra*. *See generally* 2 L. Loss, *supra* at 937-40; 3 *id.* chs. 11 & 12; 5 *id.* 2892-2905; 6 *id.* chs. 11 & 12 (Supp. 1969). The Aid to Dependent Children title of the Social Security Act, 42 U.S.C. § 601 (1970), has given rise to a multitude of suits in the last decade. *See, e.g.*, Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968).

113. *See, e.g.*, J.I. Case & Co. v. Borak, 377 U.S. 426 (1964); Hewitt-Robins, Inc. v. Eastern Freightways, Inc., 371 U.S. 84 (1962); T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951); *cf.* Wyandotte Transp. Co. v. United States, 389 U.S. 91, 201-04 (1967). *See generally* O'Neil, *supra* note 106, at 264-69.

114. *See* Rosado v. Wyman, 397 U.S. 397, 420-22 (1970), and the dissenting opinion of Mr. Justice Black, *id.* at 430-35; Brown v. Bullock, 194 F. Supp. 207, 224 (S.D.N.Y.), *aff'd on other grounds*, 294 F.2d 415 (2d Cir. 1961), *quoted with approval in* Wheeldin v. Wheeler, 373 U.S. 647, 661-62 (1963) (Brennan, J., dissenting). *See also* Hill, *supra* note 27, at 1121.

larly where the civil remedy created may be in addition to a number of explicit statutory ones.[115]

Two variables suggest the basis for this vast growth of federal decisional law at the periphery of federal statutes. The first is a discernible intent to protect or benefit a class of persons; the second is the inadequacy of other administrative or judicial remedies to prevent or redress the harm. The more clearly it is established that alternative remedies fail in theory and practice, the stronger the case for implying private actions.[116] These variables are crucial, because the practice is built on a judicially perceived principle of justice—to provide effective redress for injuries flowing from violations of legislative and administrative commands. Instrumentalist goals, such as deterrence or effectuating regulatory policy, are secondary.

A recent Supreme Court case illustrates this process of implication. In *J.I. Case v. Borak*,[117] shareholders alleging violation of the disclosure requirements of § 14(a) of the 1934 Securities Exchange Act,[118] sought rescission or damages for a merger consummated with the use of proxies. The Supreme Court observed that § 14(a) was designed to "prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation" in recognition of "fair corporate suffrage."[119] Although the statute made no reference to a private right of action, "among its chief purposes [was] the 'protection of investors,' which certainly [implied] the availability of judicial relief where necessary to achieve that result."[120] Despite its broad enforcement power, the Court found that the Securities and Exchange Commission could not before distribution determine the truth of the facts set out in all the proxy statements filed with it.[121] A private remedy was supplied because federal courts must " 'adjust their remedies so as to grant the necessary relief' when federally secured rights are invaded."[122]

115. *See* Hill 1120-21.

116. The obstacles to recovery on the basis of common law fraud were an important factor in decisions implying federal remedies to purchasers and sellers under the federal securities acts. 3 L. Loss, Securities Regulation 1683 (2d ed. 1961). The absence of other effective remedies can be seen in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 404 U.S. 388 (1971); J.I. Case & Co. v. Borak, 377 U.S. 426 (1964); Reitmaster v. Reitmaster, 162 F.2d 691 (2d Cir. 1947).

117. 377 U.S. 426 (1964).

118. 15 U.S.C. § 78n(a) (1970).

119. 377 U.S. at 431.

120. *Id.* at 432.

121. *Id.*

122. *Id.* at 433. In Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), the Court ruled that federal remedies for violations of § 14(a), such as rescission, were not to be governed by the restrictive common law principles of damage and proximate cause used in fraud and deceit actions.

Similarly, in an action involving administrative conduct, the complainant often invokes a protective intent underlying a regulatory provision and claims that it has been disregarded to his detriment. Although the statute may be silent on remedies, the plaintiff is calling upon the judicial power over a case to make principled choices among traditional remedies to redress injury to a protected interest. Moreover, when an agency is the defendant, the administrative-regulatory difficulties in private lawsuits are largely eliminated. Other doctrines—exhaustion, ripeness, and finality—insure that the agency has acted on the subject matter of the litigation and that its views are before the court.[123]

Significantly, the plaintiff seeking relief from agency disregard of a protected interest is in the same position of distress as a plaintiff in a private lawsuit. He is maintaining that a rule, enacted for the benefit of persons in his situation, has been disregarded and that a court is the only available forum for effective relief.[124] Furthermore, given the catch-all judicial review provision in the Administrative Procedure Act,[125] legislative silence should count for no more here than in regard to private claims. The presumption of private remedies has a powerful counterpart in the law of judicial review, since "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[126] Calling an interest protected, however, in controversies with administrative agencies masks a variety of degrees of protection. These may range from a clear-cut legislative command to heed the interest in particular circumstances—the right to full and truthful disclosure in corporate proxies—to a highly relative and contingent mandate to consider the interest as one among many in reaching determinations—the recreational and ecological values of an area in planning highways.[127]

123. *See generally* DAVIS TREATISE, *supra* note 1, at §§ 19.01-21.10 (Supp. 1970). Primary jurisdiction requires that issues within an agency's specialized field must initially be decided by the agency rather than the court. At one time primary jurisdiction provided a reason for not allowing private causes of action under a regulatory statute. *See* T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959). It is no longer a rigid obstacle, though perhaps still a factor in implying private actions. *See* Hewitt-Robins, Inc. v. Eastern Freightways, Inc., 371 U.S. 84 (1962). *See generally* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 121.

124. JAFFE, JUDICIAL CONTROL 475.

125. Section 10(c), 5 U.S.C. § 704 (1970), provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

126. Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). *See also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Tooahnippah v. Hickel, 397 U.S. 598 (1970). *See generally* JAFFE, JUDICIAL CONTROL 336-37, 339.

127. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967).

A variety of modern planning and allocation programs necessarily affect many interests and call for a balancing and an attempt at harmonizing them.[128] Thus the narrower protections in such programs are not a product of diminished legislative regard and should not count for less because they are relative to other values. There is no legislative mandate nor are there appropriate judicial standards for ranking protected interests. Contingent interests are not less important to protected groups and their disregard may be as frequent and as harmful as violation of broader protections.[129] Consistent remedial policy calls for redress whenever a protected interest is disregarded. Thus, the principles applied in the private cases are relevant to these interests too.

There is another difference between private lawsuits and suits against agencies which might be thought to restrict judicial power. Since agency litigation involves inspection of the acts of another branch of government, judicial intrusion in the public or political domain should counsel greater restraint in establishing remedies.[130] Judicial review of administrative agencies, however, has long prevailed as the norm.[131] The general risks have been thought justified by the functions of review and minimized by understandings about its scope.[132] Accordingly, intrusiveness cannot be an objection to review generally.

B. *Judicial Power and Nonstatutory Claims for Relief*

Intervention on behalf of a protected statutory interest reduces the risk of judicial lawmaking. Instead of authoring a rule governing primary duty, courts work out the remedial implications of legislative standards in accordance with judicial principles of redress.[133] But in the arena of judicial review, as in other areas, there are situations

128. *See, e.g.*, Udall v. F.P.C., 387 U.S. 428, 450 (1967); Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Calvert Cliffs' Coordinating Comm. v. A.E.C., 449 F.2d 1109 (D.C. Cir. 1971); Palisades Citizens Ass'n v. C.A.B., 420 F.2d 188 (D.C. Cir. 1969); Fuel Research Council, Inc. v. F.P.C., 374 F.2d 842 (7th Cir. 1967); Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966); City of Houston v. C.A.B., 317 F.2d 158 (D.C. Cir. 1963); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967); Vegetable & Melons Transcontinental Eastbound, 335 I.C.C. 798 (1970); Firestone Tire & Rubber Co., 27 AD. L. 2D 877 (FTC 1970). *See generally* T. LOWE, THE POLITICS OF DISORDER (1971), *reviewed*, Jaffe, 24 STAN. L. REV. 587 (1972); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1245-51, 1265-70 (1966).

129. *See* Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966); J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 51-107, 231-44 (1971); Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069, 1074-77, 1092-98 (1971); Reich, *supra* note 128, at 1247-57.

130. *See* Scott, *supra* note 1, at 683-90; *cf.* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 1475-76.

131. *See* JAFFE, JUDICIAL CONTROL 320-42.

132. *See* 4 DAVIS TREATISE, *supra* note 1, at 31.

133. *See* H. HART & A. SACKS, *supra* note 28, at 488-500, 577.

where it is appropriate for courts to formulate substantive rules governing claims,[134] although the statute authorizing agency action does not itself confer protection. Judicial power in such circumstances is not restricted to borrowing the private rules of actionability; courts may formulate and apply principles appropriate for challenges to agency action.

The statute under which an agency acts is the primary source of law for resolving conflicts over the exercise of its authority, but other statutes in the United States Code also may be applicable. Thus in *Southern Steamship Co. v. N.L.R.B.*,[135] involving dismissal of seamen for striking, the Court admonished the Board for "single-mindedly" applying the unfair labor practice provisions of the National Labor Act without accommodating the anti-mutiny policy of the Mutiny Act.[136] Similarly, would-be competitors may rely upon national antitrust policy in challenging agency authorization of an exclusive long-term maritime terminal or other venture with monopolistic implications.[137] Judicial review, in such cases, permits the broader perspective of a generalist tribunal to complement the narrower view of the specialist agency pursuing a defined mission.[138] In charging a court with integrating inconsistent or conflicting national policies, the function provides a broad array of national programs as a relevant source of law for private claims.

In addition, courts apply public common law formulated to deal specifically with agency action and judicial review. These include familiar principles that govern the scope of review on questions of law and fact, the boundaries of agency discretion, primary jurisdiction, and numerous other incidents of judicial agency relationships, which are rarely specified by statute.[139] The rules dealing directly

134. The development of federal common law since *Erie* has been considerable, *see* Friendly, *supra* note 111.

135. 316 U.S. 31 (1942).

136. *Id.* at 47.

137. Marine Space Enclosures v. F.M.C., 420 F.2d 577 (D.C. Cir. 1969); *cf.* United States v. R.C.A., 358 U.S. 334 (1959); N.B.C. v. United States, 319 U.S. 190, 222-24 (1943).

138. *See* M. SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 52 (1968).

139. Instead of deciding de novo on all matters of law, courts have worked out intricate rules for determining which questions are subject to a full measure of review and which ones are within agency discretion. This is a large part of the common law of review. *Compare* Grey v. Powell, 314 U.S. 402 (1941), *and* N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944), *with* Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485 (1947), *and* Board of Governors of Fed. Reserve System v. Agnew, 329 U.S. 441 (1947). *See also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). *See generally* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 556-85. The doctrines governing the timing of review, exhaustion of administrative remedies, primary jurisdiction, and finality are entirely judge-made. *See* F.P.C. v. Louisiana Power & Light Co., 406 U.S. 621 (1972) (primary jurisdiction); National Laundry Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971) (ripeness); Nor-Am Agr. Products v. Hardin, 435 F.2d 1133, 1151 (7th Cir. 1970) (finality and exhaustion).

with claims, however, are scattered and piecemeal, since they developed as ad hoc responses to cases involving principles of fairness and legality. Not conceived of by courts or commentators as a systematic or comprehensive body of law,[140] their nonconstitutional and nonstatutory character is rarely recognized or articulated. Private law standing formulations have been antithetical to the conception of a common law of claims against the government and our tendency to think of claims against officials in constitutional terms has shadowed this area of judicial lawmaking. Constitutional courts are, however, "the acknowledged architects and guarantors of the integrity of the legal system,"[141] responsible for the effectuation of values upon which unity and coherence rest. This requires judicial formulation of nonstatutory criteria of validity. Such reasoned elaboration from principles of legality rather than from explicit statutory commands is an affirmative lawmaking exercise. But the courts are the most suitable institution for elaborating the values of a legal system in particular cases.[142]

Their power is most operative in cases dealing with fundamental aspects of legality: retroactive sanctions and application of legislative rules,[143] unequal imposition of sanctions on persons similarly situated,[144] unjustifiable inequality in treatment of taxpayers,[145] prevention of unconscionable injury from reliance on official advice,[146] essentials of fair procedures in hearings,[147] bias and agency mixture of functions,[148] avoidance of ad hoc impositions of sanctions without rules,[149] ethical conduct of lawyers,[150] and agency duties to persons

140. *See* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 591.

141. JAFFE, JUDICIAL CONTROL 589. Professor Jaffe does not, however, articulate this role of a court in regard to the function of formulating claims; he discusses it in connection with review of questions of law but does not mention it in regard to private standing.

142. *Cf.* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 HARV. L. REV. 1 (1957).

143. *See, e.g.,* Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370 (1932); N.L.R.B. v. Guy Atkinson Co., 195 F.2d 141 (9th Cir. 1952); *cf.* N.L.R.B. v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966).

144. *See, e.g.,* C.E. Nichoff & Co. v. F.T.C., 241 F.2d 37 (7th Cir. 1957), *rev'd sub nom.* Moog Industries v. F.T.C., 355 U.S. 411 (1958).

145. *See, e.g.,* I.B.M. v. United States, 343 F.2d 914 (Ct. Cl. 1965), *cert. denied,* 382 U.S. 1028 (1966).

146. *See, e.g.,* Moser v. United States, 341 U.S. 41 (1951). *But cf.* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).

147. *See, e.g.,* Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945); Wirtz v. Baldor Electric Co., 337 F.2d 518 (D.C. Cir. 1963); N.L.R.B. v. Fulton Bag & Cotton Mills, 175 F.2d 675 (5th Cir. 1949).

148. *See, e.g.,* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Cinderella Career & Finishing Schools, Inc. v. F.T.C., 425 F.2d 583 (D.C. Cir. 1970); American Cyanamid Co. v. F.T.C., 363 F.2d 757 (6th Cir. 1966).

149. *See, e.g.,* Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964).

150. *See, e.g.,* S.E.C. v. Cogan, 201 F.2d 78 (9th Cir. 1952).

who are the subjects of adverse administrative action.[151] Although some of these determinations might have been predicated on the Constitution, many of the situations do not lend themselves to the generality and ramifying effects of constitutional rules. The Constitution is a backdrop for the exercise of this power, as it often is for statutory interpretation,[152] but the power is seen more clearly as developing a common law rather than a constitutional law of judicial review.

A few of these areas mentioned above warrant explication. There is an unbroken series of cases in which the Court has insisted that an agency adhere to its procedural regulations, even when they are merely gratuitous rather than required by statute or the Constitution.[153] Agency action in violation of a regulation is held to be "lawless."[154] Equal treatment and administrative regularity are at the bottom of these rulings. But it is decidedly not equal protection. Rule deviation is not transformed into constitutional error without a showing of purposeful discrimination.[155]

Another line of cases in the courts of appeals establish that despite broad discretionary authority to choose among remedies and modify substantive rules, an agency may not retroactively impose sanctions for conduct that was lawful or otherwise socially approved.[156] The

151. *See, e.g.,* Harmon v. Brucker, 355 U.S. 579 (1958); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

152. *See, e.g.,* International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Kent v. Dulles, 357 U.S. 116 (1958); United States v. Rumely, 345 U.S. 41 (1953). *See generally* Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson,* 72 YALE L.J. 1547, 1560-61 (1963).

153. *See, e.g.,* Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Accardi v. Shaughnessy, 347 U.S. 260 (1954); N.L.R.B. v. Carpenters, 261 F.2d 166 (7th Cir. 1958); McKay v. Wahlenmaier, 226 F.2d 34 (D.C. Cir. 1954). *But cf.* McKenna v. Seaton, 259 F.2d 780 (D.C. Cir.), *cert. denied,* 358 U.S. 835 (1958).

154. Estep v. United States, 327 U.S. 114, 121 (1946). *See generally* Berger, *Do Regulations Really Bind Regulators?,* 62 NW. L. REV. 137 (1967).

155. Snowden v. Hughes, 321 U.S. 1 (1944): "The unlawful administration by state officers of a state statute fair on its face resulting in unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Id.* at 7. The meaning of purposeful is not uniform, but depends on the context of the equal protection challenge. In the above formulation purposeful is used in a weak sense to require proof that the violation of state law was not solely due to inadvertent error. Challenges to discretionary state choices, such as sentencing of recidivists, require a demonstration that invidious criteria have been employed. Oyler v. Boles, 368 U.S. 448 (1962). For yet other kinds of state practices, such as a systematic failure to provide free appeals to indigents, the effects alone are sufficient to show purposeful discrimination. Griffin v. Illinois, 351 U.S. 12 (1956). *But cf.* Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205, 1287-89 (1970).

156. *See, e.g.,* Retail & Wholesale Union v. N.L.R.B., 466 F.2d 380 (D.C. Cir. 1972); N.L.R.B. v. E & B Brewing Co., 276 F.2d 594 (6th Cir. 1960); N.L.R.B. v. International Bhd. of Teamsters, 225 F.2d 343 (8th Cir. 1955). *Compare* N.L.R.B. v. Guy Atkinson Co., 195 F.2d 141 (9th Cir. 1952), *with* Leedom v. International Bhd. of Elec. Workers, 278 F.2d 237 (D.C. Cir. 1960).

scope of protected conduct is determined by the extent to which reliance was reasonably founded upon existing rules of law, statutory purposes, or social mores.[157] Protection of these reasonable expectations is not an application of due process or the ex post facto provision in a civil context. Rather, it is sufficient that the retroactive application is "altogether out of proportion to the public ends accomplished. It is the sort of thing our system abhors."[158]

Most of these public common law rulings concern the validity of agency action, but some adjudicate other aspects of a claim, such as agency duty to a complainant. Thus there are several older standing cases that do not use the established categories of protective statutory intent or private law actionability. An example is *School of Magnetic Healing v. McAnnulty*.[159] The Postmaster General determined that the complainant's business of curing disease by mental exercise was fraudulent and thereupon barred his use of the mails. The statute did not prescribe procedures for judicial review. The appropriate private action was unclear and the Court did not look for it. Referring to itself as a court of equity, it invoked the broad principle that the acts of officials must be justified by some law: "[I]n case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."[160]

Harmon v. Brucker[161] involved a challenge to the Secretary of the Army's power to issue a dishonorable discharge based upon conduct occurring before entry into the armed forces. The claim for relief was discussed in much the same terms as *McAnnulty*, which provided the principal authority for the decision: "Generally judicial relief is available to one who has been injured by an act of a government official which is in excess of his expressed or implied powers."[162]

157. *Compare* H & F Binch Co. Plant v. N.L.R.B., 456 F.2d 357 (2d Cir. 1972), *with* Retail & Wholesale Union v. N.L.R.B., 466 F.2d 380 (D.C. Cir. 1972). In the latter case Judge McGowan noted the relevant factors:

> Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. at 390. *See also* S.E.C. v. Chenery Corp., 332 U.S. 194, 209 (1947) (Jackson, J., dissenting).

158. N.L.R.B. v. Guy Atkinson Co., 195 F.2d 141, 149 (9th Cir. 1952).

159. 187 U.S. 94 (1902).

160. *Id.* at 108.

161. 355 U.S. 579 (1958).

162. *Id.* at 581-82. *See also* Leedom v. Kyne, 358 U.S. 184 (1958); Stark v. Wickard, 321 U.S. 288 (1944).

In *Gonzalez v. Freemen*,[163] the most recent case in this area, the plaintiff had been debarred for five years from contracting with the government for alleged falsification of official certificates. Although he was thus seeking government contracts and fell within the no protected interest tradition of *Perkins*, the Court of Appeals by then-Judge Burger enjoined the order. "Considerations of basic fairness" prohibited debarment on a case-by-case basis without regulations prescribing offenses and standards and without procedures guaranteeing a hearing and findings based on the record.[164] As for *Perkins* the court merely noted that "[a]n allegation of facts which reveal an absence of legal authority or basic fairness in the method of imposing debarment presents a justiciable controversy . . . ."[165]

The need for and appropriateness of the exercise of judicial power over claims is well illustrated in a special group of recent cases in which injury to the complainant was highly particularized and personal, but no statute afforded protection against it. The plaintiffs were disappointed bidders for government contracts who challenged the manner and circumstances surrounding bid solicitation and contract award.[166] Until recently bidders were without standing because they had no legal interest in obtaining a government contract. The network of procurement statutes and regulations structuring and defining methods of awarding government contracts was said to promote efficiency of the government and hence benefit the public. They therefore conferred no protections upon private business.[167]

163. 334 F.2d 570 (D.C. Cir. 1964).

164. *Id.* at 578.

165. *Id.* at 574-75.

Professor Davis regards these cases as precedents for his proposition that injury in fact confers standing to sue. DAVIS TREATISE, *supra* note 1, at 712-13, 727 (Supp. 1970). There is such a right to relief in these cases because the direct injury sustained is a key part of the claims for relief entitling the claimants to procedural fairness or administrative regularity under principles formulated by the court. Contrary to Professor Davis' generalization, however, the rules establishing agency duty as part of these claims for relief do not mean that injury combined with alleged invalidity confers a right to a hearing, published regulations, or other relief in different circumstances. Principles of legality are not that broad.

166. *See, e.g.*, Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970); Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137 (D.C. Cir. 1970); Keco Indus. v. United States, 428 F.2d 1233 (Ct. Cl. 1970); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). *But see* Merriam v. Kunzig, 347 F. Supp. 713 (E.D. Pa. 1972); Gary Aircraft v. United States, 342 F. Supp. 473 (W.D. Tex. 1972). *See generally* Grossbaum, *Procedural Fairness in Public Contracts: The Procurement Regulations*, 57 VA. L. REV. 171 (1971); Speidel, *Judicial and Administrative Review of Government Contract Awards*, 47 LAW & CONTEMP. PROB. 63 (1972).

167. *See, e.g.*, Edelman v. Federal Housing Admin., 382 F.2d 594 (2d Cir. 1967); United States v. Gray Line Water Tours, 311 F.2d 779 (4th Cir. 1962); Woaldridge Mfg. Co. v. United States, 235 F.2d 513 (D.C. Cir. 1956); Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955); Fulton Iron Co. v. Larson, 171 F.2d 994 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 903

This analysis and its effect on judicial review was turned about in *Scanwell Laboratories Inc. v. Thomas,*[168] where the court of appeals ruled that doubts should be resolved in favor of affording standing to bidders who, although without a protected private interest, seek to litigate cases in which the public interest demands a hearing on the merits. Subsequent cases in the District of Columbia Circuit, including some decided after *Association of Data Processing Service Organizations v. Camp,*[169] have accepted this explanation of bidder standing and the importance of review in serving "the public interest in having agencies follow the regulations which control government contracting."[170]

The avoidance of costly disruptions and delays in the expeditious flow of the procurement process from judicial interventions, however, has recently emerged as a competing public interest. This interest imposes severe restraints upon review and especially upon declaratory and equitable relief, the remedies most disruptive of quick and final purchases and also most effective for the challenging bidder.[171]

Significantly the opinions striking the balance between the public interest in procedural regularity and government efficiency do not seem to recognize any competing private interest in the complaining bidder; the judicial vision is restricted to operation of the system in conformity with rules and regulations and the costs of disruption. The general interest in abstract legality, however, is not likely to

(1949). For recent reliance on *Perkins* see Gary Aircraft Corp. v. United States, 342 F. Supp. 473 (W.D. Tex. 1972). *See generally* Note, *Standing to Challenge Agency Action by Bidders on Government Contracts,* 19 U. KAN. L. REV. 558, 559 (1971).

168. 424 F.2d 859 (D.C. Cir. 1970). In this case the second lowest bidder on an advertisement for instrument landing systems challenged the award on the ground that the winning bidder had not complied with an eligibility condition that the contractor have operational systems already installed and tested by the FAA.

169. 397 U.S. 150 (1970), *rev'g* 406 F.2d 837 (8th Cir. 1969). *See* discussion pp. 494-96 *infra.*

170. 424 F.2d at 861. *See* Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137, 1141 (D.C. Cir. 1970). *See also* Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971); M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971); Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970); *cf.* Keco Industries v. United States, 428 F.2d 1233 (Ct. Cl. 1970). Merriam v. Kunzig, 347 F. Supp. 713 (E.D. Pa. 1972), denied standing on the ground that *Scanwell's* private attorney-general concept was inconsistent with the formulation in Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150 (1970), decided shortly after *Scanwell. See* 347 F. Supp. at 723.

The court in *Scanwell* also relied on § 10 of the APA to reject the defense of sovereign immunity, a view that is frequently advocated but without clear support in the APA or its history. *See* Byse and Fiocca, *supra* note 13, at 326-31; Crampton, *supra* note 13, at 428-36. For a rejection of this view see Cotter Corp. v. Seaborg, 370 F.2d 686, 692 n.15 (10th Cir. 1966).

171. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971), demonstrates this conflict; *cf.* Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971). *See also* Simpson Elec. Co. v. Seamans, 317 F. Supp. 684, 687-88 (D.D.C. 1970).

outweigh a vivid demonstration of the actual costs from delay, such as a rapid need for the commodity.[172]

This approach gives insufficient weight to a private interest worthy of recognition under judicially-formulated principles governing claims. Bidders are asserting a substantial and costly reliance on the system of procurement rules. Departures not only defeat such reliance, but also disappoint reasonable expectations of a profitable contract. The action challenged entails unequal treatment and preferences in a setting controlled by the government that would seem particularly to call for scrupulous fairness. Since they concern sensitive aspects of the legal order, the elements of induced reliance and profit expectations in a system promising equality of access place the bidder's claim within an area of judicial scrutiny. The reasonable expectation interest is like that in retroactivity cases;[173] the equal treatment claim is quite similar to cases insisting on adherence to regulations.[174] Recognition of this private interest may make out a private claim for relief; it does not solve the problems of timing and form of relief. Interventions still involve costs, but recognition that there is a private claim for relief at least reveals that there is more than an abstract public interest to be balanced against the costs.

Judicial authority over claims can also be compared with the failure of standing to take account of all the pertinent variables in cases in which commercial establishments seek to challenge variances and waivers granted under zoning legislation to other commercial operations. Most courts agree that a business in a business district is without standing to challenge a variance afforded a competing business to operate in a residential area.[175] These cases are celebrated as instances where illegality and harm do not confer standing.[176] Focusing on the avoidance of competition as the only relevant factor, the reasoning fails to account for the fact that statutorily protected or not, people do in fact place reliance on legal arrangements and

172. *See, e.g.*, Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971); Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971). *See generally* Speidel, *supra* note 166, at 63-69, 87-94; Note, *The New Law of Threshold Standing: The Effect of* Sierra Club *on Jus Tertii and on Government Contracts*, 1973 DUKE L.J. 218, 240-50.

173. *See* notes 156-58 *supra*.

174. *See* notes 153-55 *supra*. Those cases establish that the violation of a regulation need not be deliberate to be actionable.

175. The general rule is that a "mere" competitor cannot sue to enjoin a nonconforming use or appeal from a variance or change in zoning. *See, e.g.*, London v. Planning & Zoning Comm'n, 149 Conn. 282, 179 A.2d 614 (1962); Cord Meyer Development Co. v. Bell Bay Drugs, Inc., 20 N.Y.2d 211, 229 N.E.2d 44, 282 N.Y.S.2d 259 (1967); 2 A. RATHKOPF & C. RATHKOPF, THE LAW OF ZONING AND PLANNING 40-14, 40-16 (3d ed. 1956).

176. *See* Jaffe, *Standing Again*, *supra* note 1, at 637.

that in some instances that reliance is worthy of respect. Of course legal arrangements are subject to all manner of change, but these challenges are to allegedly improper alterations under stable and unmodified legal programs.

More concretely, business *A*, at a large investment, establishes a restaurant on a traffic circle. There is no other site available on or near the circle for another business except for one that is in a residential zone. Some years later another restaurant obtains a variance to operate on the site in the residential zone and *A* sues.[177] *A*'s reliance on the zoning law and regular administration of that law, as manifested in his investment, is a private interest worthy of some protection. It certainly warrants a better response than the assertion that the statute on which he relied was not intended to protect him and that the common law favors competition. Interestingly enough, when courts are not transfixed by the private common law preference for competition, they do perceive and credit the precise form of reliance on rules and regular administration which is involved here. Hence, challenges by homeowners under the same zoning laws are upheld on the ground that people do and should reasonably rely on the guarantee of arrangements in zoning legislation.[178] This reasoning makes plain that a legal system that promises some amount of regularity cannot wholly ignore the reliance it induces even where such reliance is not invited. Here, as in other situations, there is ample judicial power to vindicate such claims.

C. *Third-Party Claims for Relief*

Interests protected under administrative programs are often multitudinous and diffuse. Although a number of the many identifiable groups affected by agency programs are organized for the purpose of representation, many are not in a position to undertake litigation, individually or collectively. Indeed, such classes may be unaware of legislation or of administrative action affecting their interests. Therefore, their acquiescence in agency action is not approval.[179] In the past, left to the safekeeping of an agency, these passive interests were

177. The example is from Circle Lounge & Grill, Inc. v. Board of Appeal, 324 Mass. 427, 86 N.E.2d 920 (1949).

178. Special damage arising from reliance on existing zoning arrangements is the rationale in cases upholding suits by neighbors within the zoning district for injuries to their property from zoning modifications and variances. *See, e.g.*, Garner v. City of Carmi, 28 Ill. 2d 560, 192 N.E.2d 816 (1963); Hartnet v. Austin, 93 So. 2d 86 (Fla. 1956); Page v. City of Portland, 178 Ore. 632, 165 P.2d 280 (1946).

179. *Cf.* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 479-83; Jaffe, *Standing Again*, *supra* note 1, at 637-38.

likely to receive limited consideration and solicitude in the administrative process.[180] Because agency action often has a direct impact on persons seemingly outside the circle of protected interests, third-party standing practices—by which a court acts upon policies favoring persons and groups not before it[181]—provide a significant source of rules of decision for resolving claims against agencies. Such third-party principles not only permit adjudication of the claims of affected third-party groups but also provide criteria for establishing protected interests in the litigants before the court. Although third-party standing may involve a preliminary determination of the occasions in which one may litigate the rights of others, it is often a decision on whether the litigant in his own right has protected interests derived from a policy favoring others. As such, it is not preliminary but a decision on the merits of a litigant's claim. Recognition of this distinction is thus important for the appropriate treatment of litigants.

1. *Third-Party Claims Based on Derivative Rights*

Cases of constitutional adjudication, where these issues have been confronted, provide a basis for flexible practices to effectuate third-party interests. Many of these cases, indeed most of the classic ones,[182] have failed to see that the question of third-party standing was really an issue of one's own claim for relief. They do not distinguish between invocation of the interests of others as part of one's own claim and the assertion of a claim of right belonging to others. The cases, properly viewed, entail a claim by *A*, the litigant, that implementation of a legal policy favoring *B* requires protection of *A* in his out of court relationship with *B*. This does not involve *A*'s ability to represent and litigate the rights of *B*; it involves adjudication of a claim that belongs to *A*. Its resolution turns on whether the scope and purposes of *B*'s protection give rise to derivative protections for the relationship with *A*. That, of course, is a matter of claim to be answered in the ordinary way of resolving the merits, by examination of the scope of and purposes behind constitutional or statutory protections. Characterizing the issue as third-party standing imports a presumption against adjudication by virtue

180. *See* pp. 481-82 *infra*.

181. *See generally* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

182. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Barrows v. Jackson, 346 U.S. 249 (1953); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Truax v. Raich, 239 U.S. 33 (1915).

of the general rule restricting a litigant to his own claims,[183] implies a vague judicial discretion to deny this special standing and therefore the claim,[184] and makes resolution turn on whether it is impractical for third parties with the protected interest to litigate their own claim.[185] This approach is misleading and inappropriate in passing on a litigant's own claim for relief.

The abortion controversy, in which the Court ruled that women had a constitutional right to an abortion during a period of pregnancy, offers an example of derivative rights or protection of a relationship.[186] Their right to privacy confers upon others, namely physicians, a dependent right to perform abortions during this protected period.[187] But physicians do not enjoy an independent constitutional right to privacy or freedom to practice medicine generally; they have a protected interest in performing abortions by virtue of the policy toward women. Although derivative, physicians may resist interferences with this interest in their own right.

The scope and character of the third-party protection is not as obvious in other cases, but the claim and inquiry are the same. Thus, in *Barrows v. Jackson*[188] the only issue was whether the established constitutional right of black buyers to be free from racial convenants implied or necessitated derivative protections in white sellers to be free from damages for breach of the covenant by selling to blacks. Whether protection extended to this relationship was a function of the purposes behind the policy favoring blacks and the impact of damage suits on those purposes. The relationship was protected because the policy implied collateral protections for white sellers and not, in standing terminology, because black buyers cannot assert their own rights.[189]

In the famous birth control controversies, *Griswold v. Connecti-*

183. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 429 (1961); United States v. Raines, 362 U.S. 17, 22-24 (1960); Tileston v. Ullman, 318 U.S. 44 (1943).

184. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 105-10 (1961); United States v. Raines, 362 U.S. 17, 22-24 (1960); Barrows v. Jackson, 346 U.S. 249, 260 (1953).

185. Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972); N.A.A.C.P. v. Alabama, 357 U.S. 449, 458-60 (1958).

186. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

187. The Court upheld the standing of physicians to challenge abortion statutes without recognizing that there was a third-party issue. Doe v. Bolton, 410 U.S. 179 (1973).

188. 346 U.S. 249 (1953).

189. In explaining the appropriateness of third-party standing, the Court established a right in third-party purchasers and an impact on that right from damage suits. Given this formulation of standing, there were no issues left to decide on the merits. *See id.* at 257.

cut[190] and *Eisenstadt v. Baird*,[191] suppliers of contraceptive materials to married and unmarried purchasers were prosecuted under statutes forbidding use in Connecticut and distribution to single persons in Massachusetts. The issue was posed in terms of whether the suppliers might litigate the rights of consumers of birth control devices, an approach which raises formidable questions about the ability of consumers to assert their own rights and the impact of the litigation on them. A realistic inquiry would have denied standing—potential litigants were plentiful and their rights unaffected by the litigation before the Court.[192]

The cases, however, should be viewed as posing two distinct questions going to the merits: whether the Constitution protected married and unmarried persons in their use of contraceptives and if so, whether the reasons behind that protection further required or guaranteed a right of access to contraceptive material. The distributors were entitled to an adjudication of these contentions. The basic inquiry—the relationship between enjoyment of a constitutional protection and guarantees of access—is strikingly similar to the abortion case. Depending on the scope and purposes behind the constitutional protection, the answer might be as clear. If, for example, the Court ruled that forbidding the use of contraceptives by single persons was a denial of equal protection or a protected liberty,[193] a distributor would enjoy a derivative constitutional protection in his dealings

190. 381 U.S. 479 (1965).

191. 405 U.S. 438 (1972). See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 75, at 90, for an interpretation similar to the one offered here.

Another commentator has observed that there is something different about cases involving regulation of a relationship to which one party has constitutional protection. JAFFE, JUDICIAL CONTROL, *supra* note 1, at 514 & n.50.

192. The Court often speaks of the impact of the litigation on the interests or rights of absent third parties. In Griswold v. Connecticut, 381 U.S. 479 (1965), it noted that "the rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." *Id.* at 481. If the convictions of the birth control clinic or contraceptive distributor were sustained, married couples and single people would not be in a worse position than they were before the litigation. Absent parties may be better off if the Court does hear and sustain their claim, but assuming no adverse stare decisis effect, they may not be adversely affected. *See also* Eisenstadt v. Baird, 405 U.S. 440, 445-46 (1972).

193. *Cf.* Eisenstadt v. Baird, 405 U.S. at 452-55. The Court reversed the conviction and invalidated the statute on the ground that it denied equal protection by forbidding distribution to single persons only. The Court reasoned that if Griswold v. Connecticut, 381 U.S. 479 (1965), forbade a ban on distribution to married persons, the underlying right of privacy would prevent restricting access of single persons. Alternatively, if *Griswold* did not forbid restrictions on access, then equal protection forbade a restriction limited to single persons. The decision does establish derivative rights in persons distributing contraceptives, but the Court described this in the traditional manner: "We think, too, that our self-imposed rule against the assertion of third-party rights must be relaxed in this case, just as in *Griswold v. Connecticut, supra.*" 405 U.S. at 444.

with single persons and a state could not bar distribution to them.[194]

Although not clearly articulated in suits against administrative agencies, there are numerous statutory policies which confer or imply collateral protections upon persons challenging agency action. Such protections, for example, may be implied from provisions whose overall purpose relates to the national welfare. The process of establishing claims for relief is the same as in cases involving constitutional litigation. Thus, in *Curran v. Laird*[195] there were several statutes which together required that the government ship all its cargo on American ships manned with American seamen to promote the vitality and emergency availability of American ships in time of war or other distress. Although this did not specifically establish protections for private interests, it implied collateral protections sufficient to afford American shipowners and seamen a claim against deviations from the requirement. Certainly a concern with their well-being could be derived from the overall purpose. Indeed the court did find standing for seamen.[196]

2. *Third-Party Claims Based on Asserting the Rights of Others*

The parties in these cases are not seeking to litigate the rights of others, though these bear closely upon their own claim. There are situations, however, in which the rubric of third-party standing or jus tertii is more appropriate, because the litigants are directly asserting the interests of third parties,[197] rather than seeking to pro-

194. *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925), in which two private schools challenged a statute requiring parents to send their children to public schools. A proper analysis would recognize that the constitutional right of parents to direct the education of their children and to choose among schools implies a further constitutional protection for private schools against statutes threatening their survival. Although upholding the claim of the schools, the Court may have rested its holding on the schools' property interest.

195. 420 F.2d 122 (D.C. Cir. 1969).

196. *Id.* at 124-28. *See also* N.L.R.B. v. Highland Park Mfg. Co., 341 U.S. 322 (1951). The National Labor Relations Act once denied the services of the Board to a union whose officers had not filed noncommunist affidavits. The primary purpose—to prevent the possibility of political strikes—supports a derivative interest in employers not to deal with noncomplying unions, or more narrowly, to be free from unfavorable Board orders issued in proceedings initiated by a noncomplying union. The Court so held, but on a different theory. *Id.* at 325-26.

197. At one time the most common instance was where a party claimed that a statute, though valid as applied to him, was invalid as applied to third parties or situations coming within its terms. Such on-the-face attacks were once upheld with some frequency. *See* Wuchter v. Pizzuti, 276 U.S. 13 (1928); Trade-Mark Cases, 100 U.S. 82 (1879); United States v. Reese, 92 U.S. 214 (1875). But the principle of severability—that a statute, invalid as to some applications, may be validly applied on other occasions—and narrowing statutory construction account for the disappearance of these claims. *See* United States v. Raines, 362 U.S. 17 (1960); Carmichael v. Southern Coal Co., 301 U.S. 495 (1937); United States v. Wurzbach, 280 U.S. 396 (1930). *See generally* Sedler, *supra* note 181.

tect a relationship with them. This is commonly seen in attacks upon statutes which regulate expression or other fundamental liberties. Doctrines of vagueness and overbreadth allow a variety of vicarious claims premised upon the hypothetical impact of the statute on third persons without regard to the actual conduct of the person objecting.[198] Operative here is a premise that other persons—the third parties whose protected interests are adjudicated—may not be willing or able to bear the burdens of litigation. Therefore normal rules of standing are relaxed to accommodate these protected interests.

No fixed generalization about third-party claims is possible, because the result depends on the scope of constitutional protections and the impact of challenged action on these policies. But the cases express a flexible principle allowing one with a stake in the proceedings to invoke and rely upon protected interests of others where that is a necessary or appropriate way of implementing protection of such interest. Impracticality of assertion by the class with the interest, including the burdens of litigation, is plainly relevant to appropriateness.[199] Thus in *Bantam Books Inc. v. Sullivan*[200] the Court supported the conclusion that a book publisher could sue to enjoin informal pressures on book distributors with the statement that "the distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to seek judicial vindication of his rights."[201]

3. *Third-Party Principles in Review of Administrative Action*

A number of factors suggest an expansive application of third-party principles in review of administrative action on nonconstitutional grounds. Foremost there is the clear practical need arising from the number of classes and groups affected by agency action that are not in a position to undertake litigation. Second, the determination of third-party claims, like statutory review generally, primarily involves judicial development of the remedial consequences of protective legislation. This is also true of implying collateral protections from statutory policies. In contrast, constitutional adjudication involves the judicial formulation of primary rules that often

198. *See* Plummer v. City of Columbus, 94 S. Ct. 17 (1973); Gooding v. Wilson, 405 U.S. 518 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). *But cf.* Younger v. Harris, 401 U.S. 37 (1971).

199. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Pierce v. Society of Sisters, 268 U.S. 510 (1925); *cf.* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

200. 372 U.S. 58 (1963).

201. *Id.* at 65 n.6.

supersede legislation. The role of the claimant in statutory review proceedings also differs substantially from his constitutional counterpart. In many constitutional cases courts seeking to formulate narrow rules are concerned with the plaintiff's circumstances and the impact of the challenged action on him.[202] Statutory review does not involve rule formulation; inquiry most typically involves determining whether the asserted protected interest should have been considered by the agency and in fact was not, and whether there is substantial evidence supporting the other interests that were favored.[203] Or a court may confront a question of statutory interpretation in deciding whether the major purposes of the statutory scheme were contravened by agency action.[204] These issues rarely, if ever, turn on particulars of the claimant; informed resolution does not require a specially situated plaintiff. Indeed the irrelevancy of individual plight to these class claims contributes to categorizing them as public claims.[205] Hence adequate third-party representation or presentation is not a major problem in statutory review.

Further, there has been a great deal of derivative representation in administrative proceedings. Traditional participants in the administrative process—producers, broadcasters, and power companies—have generally asserted the unrepresented interests of various groups.[206] Television stations seeking license renewals ritualistically invoke the protected listener interest in good broadcasting.[207] Although not recognized as such, a kind of jus tertii was a part of the Court's public interest theory in *F.C.C. v. Sanders Brothers Radio Station*,[208] authorizing persons without a protected private interest to appeal.

202. *See, e.g.*, United States v. Raines, 362 U.S. 17, 21 (1960); Ashwander v. T.V.A., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). *See generally* BICKEL, *supra* note 2, at 122-25, 135-43, 169-90.

203. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Udall v. F.P.C., 387 U.S. 428 (1967); Scenic Hudson Preservation Conf. v. F.P.C., 453 F.2d 463 (2d Cir. 1971); N.L.R.B. v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967).

204. *See, e.g.*, Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485 (1947); Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607 (1944); Calvert Cliffs' Coordinating Comm. v. A.E.C., 449 F.2d 1109 (D.C. Cir. 1971). *See generally* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 556-77.

205. *See* Sedler, *supra* note 1, at 488-89, 497-98, 506-12.

206. *See, e.g.*, Arrow Trans. Co. v. Southern Ry., 372 U.S. 658, 660-61 n.2 (1963) (barge line, municipality, and grain purchaser may argue the interests of small grain purchasers and consumers); I.C.C. v. J.T. Trans. Co., 368 U.S. 81 (1961) (motor carriers can argue the needs of shippers); Air Reduction Co. v. Hickel, 420 F.2d 592 (D.C. Cir. 1969) (helium producers may enjoin Secretary from requiring government contractors to purchase their helium needs from him); *cf.* Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953) (dealer in regulated product may argue as a consumer).

207. *See, e.g.*, Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966).

208. 309 U.S. 470 (1940). The case is discussed more extensively at pp. 476-78 *infra*.

The approaches, however, differ. Third-party principles vindicate or extend the protected interests of an identifiable group not before the Court. Public interest standing looks to the "public" nature of the issue presented and the general social interest in resolving it.

It is not possible to determine how often jus tertii arises in statutory review or might arise if endorsed. But the fear of crowds that is sometimes invoked against relaxation of standing doctrine seems chimerical; the mass of irresponsible litigants which haunts some older opinions and government briefs has not been found in the courtroom. In some recent cases[209] injured property owners who relied on environmental protections have been viewed skeptically by some courts which believed they were not truly motivated by a concern for the environment. As long as there is no conflict between a litigant's interest and that which he seeks to represent, there is no reason why his unprotected interest should disqualify him. His interest makes him an effective advocate for protected third parties.

In *Investment Company Institute v. Camp*,[210] the Court afforded relief without inquiring into whether the plaintiff had a protected legal interest. Since injury and illegality, without requirements of agency duty or obligation to the plaintiff, appeared to be sufficient, the case suggests an important redefinition of the essentials of a claim against the government. In this view adjudication is based on the public interest in vindicating legality because nothing in particular entitles the litigant to relief.[211] Third-party principles offer an explanation of the case that is more consistent with the customary conception of private claims.

The plaintiff mutual fund enterprises challenged the Comptroller of the Currency's ruling allowing commercial banks to operate an investment fund which would be competitive with mutual funds. The authorization allegedly contravened the Glass-Steagell Act of 1933,[212] whose overall objective was to prevent commercial banks—those that receive deposits, lend money, and discount notes—from engaging on their own account, or through affiliates, in certain in-

209. *See, e.g.*, Pizitz v. Volpe, 4 ERC 1195, 1196 (M.D. Ala. May 1, 1972), *aff'd per curiam*, 467 F.2d 208 (5th Cir. 1972) (action under NEPA deemed "spurious" because financial rather than environmental interest at stake); Zlotnick v. D.C. Redevelopment Fund Agency, 2 ELR 20235 (D.D.C. March 3, 1972) (plaintiff's interest financial and therefore beyond zone of interest of NEPA); *cf.* Higgonbotham v. Barrett, 473 F.2d 745 (5th Cir. 1973). *But see* Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Daly v. Volpe, 326 F. Supp. 868 (W.D. Wash. 1971) (both allowing area residents to contest federal highway funding).

210. 401 U.S. 617 (1971).

211. *See* Jaffe, *Standing Again*, *supra* note 1, at 634-35.

212. Glass-Steagell Act of 1933, ch. 89, 48 Stat. 162.

vestment activities.[213] Although the merits were subtle, the Court found that the purposes of the Act required a broad reading of its prohibitions which "reflected a determination that policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business were outweighed by the 'hazards' and 'financial danger' that arise when commercial banks engage in" investment activities. The promotional incentives of the investment business and a pecuniary stake in the success of investment opportunities were "destructive of prudent and disinterested commercial banking."[214] As Mr. Justice Harlan noted in his dissent limited to standing, these purposes afforded mutual fund companies no protection from competitive injury. Indeed the Act was "adopted despite its anticompetitive effects rather than because of them,"[215] and the Court explicitly agreed with the proposition.[216]

But the conditions for third-party principles were well satisfied. The plaintiffs were members of the class most directly affected by the ruling and their stake in the controversy was greater than any possible litigant. The Glass-Steagell Act plainly created protected interests favoring bank depositors, customers, and perhaps investors in securities who might be subject to some of the hazards from banks engaging in the investment business. These groups constituted an identifiable but unorganized class which was not likely to undertake litigation to protest this ruling. Because members of the class were not likely to have been aware of the ruling or of any actual harm from it, it cannot be implied that there was none. Conflict of interest legislation, such as this, deals with the mixture of functions that are seen to pose a danger and not with the harms that may ensue from the mixture. The protected interest inheres in the functions being separate, and it is infringed when they are not.[217] So viewed, there was no conflict between the interests of the protected class and of the plaintiff companies.

In these circumstances it is not a large step to find a derivative

213. 401 U.S. at 629.
214. *Id.* at 630, 634.
215. *Id.* at 640.
216. *Id.* at 630, 636. The Court granted zone of interest standing in light of the decision in Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150 (1970). 401 U.S. at 620-21. This ruling would seem to equate standing with a complaint presenting an arguable claim of administrative invalidity. *See* p. 496 *infra*. The circuit court had considerable difficulty in finding standing. Camp v. Investment Co. Inst., 420 F.2d 83 (D.C. Cir. 1969). *See id.* at 98-100 (Bazelon, C.J., concurring); *id.* at 107 (Burger, J., concurring).
217. *Cf.* Board of Governors of Fed. Reserve System v. Agnew, 329 U.S. 441 (1947).

protection for the mutual fund companies from a statute which seeks to keep two industries entirely separate in the interest of the customers of each. Such a protection would imply a right in investment companies to be free from competition from banks in the offering of investment services.[218] Even without such a derivative interest, the situation is appropriate for the companies to assert the protected interest of customers who had a claim for relief and a need for an interested party to assert it. Hence the public function of judicial review is neither necessary nor helpful in justifying relief in the case. The far-reaching suggestion that the case, in providing relief upon a showing of invalidity and injury, has redefined for all cases the essentials of a claim against agency action is inappropriate. The Court has done no more than recognize and vindicate a widely-shared private interest under established principles relating to claims and third-party practice.

III. Recent Developments in Standing and the Law of Claims

Viewing standing as an aspect of the law of claims is particularly pertinent to two significant developments in the law of judicial review.

First, during the last decade there has been a revolution in the scope of participation in the administrative process. Individuals and groups presenting novel interests and claims are now entitled to be heard in federal courts.[219] While some courts have merely liberalized

218. *See* 12 U.S.C. §§ 24, 378 (1970). Section 24 prohibits national banks from underwriting securities; § 378 prohibits securities underwriters and dealers from also engaging in commercial or deposit banking. *See also* Scott, *supra* note 1, at 665.

219. A series of decisions, primarily in the circuit courts, established the right of groups representing a variety of interests to participate in administrative proceedings and to challenge administrative action. *See* especially Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966) (organization of listeners entitled to be heard in license renewal proceedings on a claim of racially biased broadcasting); Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (conservationist organizations and local towns entitled to demand that the FPC explore the environmental implications of a proposed hydroelectric project). *See also* N.W.R.O. v. Finch, 429 F.2d 725 (D.C. Cir. 1970) (national organization of welfare recipients, state affiliate organization, and individual recipients entitled to intervene as parties in HEW conformity proceeding to consider whether state welfare practices are consistent with standards of the Social Security Act). Perhaps because the scope of judicial review of agency action remains limited, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); *but cf.* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971), and agencies continue to exercise the lion's share of policymaking responsibility, much of the literature focuses on participation at the administrative level. *See, e.g.*, J. SAX, *supra* note 129; Crampton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972); Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702 (1972).

the law of standing to accommodate consumers, environmentalists, and listeners,[220] others, perhaps impatient with the standing barrier and responsive to widespread dissatisfaction with agency performance, have determined that these litigants have standing as representatives of the "public interest" and that judicial review serves a "public function" in the protection of "public values."[221] This concept of public interest standing focuses on the importance of the issues to be adjudicated, not on the litigant who presents them. Hence in the extreme case, public interest standing—"private attorneys general" in Judge Frank's memorable phrase[222]—would totally do away with personal requirements for standing; courts would decide if the case called for public interest vindication.[223]

It is doubtful that such a grandiose and indiscriminate idea is necessary or helpful in thinking about broadened participation. Public interest standing is derived from the recognition that the new litigants are not within the universe of protected private interests established by older rules of standing. But their interests and claims are similar to private ones long vindicated in judicial pro-

220. *See, e.g.*, Peoples v. Department of Agriculture, 427 F.2d 561 (D.C. Cir. 1970); Air Reduction Co. v. Hickel, 420 F.2d 592 (D.C. Cir. 1969); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968). *See also* note 224 *infra*. Other barriers, especially ripeness and reviewability, have also been relaxed. On ripeness *see* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971); *cf.* Port of Boston Marine Terminal Ass'n v. Rederiaktiebdaget Transatlantic, 400 U.S. 62, 70-71 (1970). *See generally* Vining, *supra* note 3. On reviewability, *see* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1971); Abbott Laboratories v. Gardner, *supra* at 140-41; Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1098 (D.C. Cir. 1970). *See generally* 4 DAVIS TREATISE, *supra* note 1, § 28.01-.21; DAVIS TREATISE, *supra* note 1, § 28.01-.21 (Supp. 1970). *But cf.* High Ridge Lumber Co. v. United States, 443 F.2d 452 (9th Cir. 1971).

221. Cases in which the plaintiff is designated or allowed to act as private attorney-general and review is maintained in the public interest include Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); Izaak Walton League v. St. Clair, 313 F. Supp. 1312, 1317 (D. Minn. 1970). The literature includes Jaffe, *The Citizen as Litigant*, *supra* note 1; Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 774 (1972); Monaghan, *supra* note 1; Sedler, *supra* note 1; Vining, *supra* note 3, at 1471-75. For historical perspectives see JAFFE, JUDICIAL CONTROL, *supra* note 1, at 459-500; Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

222. Associated Industries v. Ickes, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

223. JAFFE, JUDICIAL CONTROL, *supra* note 1, at 486-94, 530-31; Jaffe, *The Citizen as Litigant*, *supra* note 1, at 1038. Congressional authorization as a prerequisite for adjudication of public interest cases has been suggested. *See* Flast v. Cohen, 392 U.S. 83, 197 (1968) (Harlan, J., dissenting); Monaghan, *supra* note 1, at 1371-79.

ceedings in which restrictive standing rules for review of agency action are not employed. By recognizing that standing deals with a question of claim for relief, these interests can be adjudicated in a manner consistent with the traditional role of courts.

The second development is represented by a recent series of standing decisions in which the Court reformulated standing doctrine.[224] In *Association of Data Processing Service Organizations v. Camp*[225] and *Barlow v. Collins*,[226] the Court rejected the "protected legal interest" test because it "goes to the merits" and was therefore thought inappropriate for the threshold matter of standing.[227] The Court prescribed a new two-part test of standing: "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."[228] The second is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[229]

The Court's new test is not a significant barrier to challenging administrative action, despite difficulty in applying the zone of interest standard,[230] but it may be inconsistent with some accepted purposes behind awarding relief to a particular plaintiff.[231] By deemphasizing inquiry into the personal interests of the complainant

224. Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) (per curiam); Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150 (1970). Other courts had led the way in expansive standing decisions. *See* cases cited note 219 *supra;* Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137 (D.C. Cir. 1970); Peoples v. Department of Agriculture, 427 F.2d 561 (D.C. Cir. 1970); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Carrington v. City of Fairfield, 414 F.2d 687 (5th Cir. 1969); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

225. 397 U.S. 150 (1970).

226. 397 U.S. 159 (1970).

227. 397 U.S. at 153.

228. *Id.* at 152.

229. *Id.* at 153.

230. It appears rare when one affected by administrative action is denied standing to sue. Often the matter is relegated to a footnote in cases, such as competitor suits, that would have been troublesome before the Court's decisions. *See* Ramapo Bank v. Camp, 425 F.2d 333, 345 n.33 (3d Cir.), *cert. denied,* 400 U.S. 828 (1970); *cf.* P.A.M. News Corp. v. Hardin, 440 F.2d 255 (D.C. Cir. 1971) (wire service in agricultural data news may challenge competition by the Dep't of Agriculture); Armco Steel Co. v. Stans, 431 F.2d 779 (2d Cir. 1970) (domestic steel producer entitled to review of decision of Foreign Trade Zones Board granting port power to create customs-free area in which vessels were to be built with duty-free imported steel). For the occasional judicial doubt, see, *e.g.,* Allen M. Campbell Gen'l Contractors, Inc. v. Lloyd Wood Constr. Co., 446 F.2d 261 (5th Cir. 1971). *See generally* cases collected in DAVIS TEXT, *supra* note 1, § 22.07; Sedler, *supra* note 1, at 479.

For some zone of interest difficulties, see, *e.g.,* Shannon v. Department of H.U.D., 436 F.2d 809 (3d Cir. 1970); Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970); Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137 (D.C. Cir. 1970); Northwest Residents Ass'n v. Department of H.U.D., 325 F. Supp. 65 (E.D. Wis. 1971).

231. *See* pp. 496-97 *infra.*

and granting unexplained relief without inquiry into legal interest, the Court has indirectly endorsed public interest standing.[232] And in affirming that standing is or should be a threshold inquiry unconcerned with the merits, and by rejecting legal interest on that basis, the Court has perpetuated the inappropriate notion of access standing.

A. *Public Standing and Claims for Relief*

In the seminal case *F.C.C. v. Sanders Brothers Radio Station*[233] the Court introduced the notion of "public interest" standing. A licensed station sought review of authorization of a new competitive station. As the Court saw the issue, neither the Federal Communications Act nor common law standards afforded existing stations a "right" to be free from new competition. It would easily follow that Sanders was without standing. The Act, however, provided for review by a "person aggrieved or whose interests are adversely affected."[234] This led the Court to its conclusion that Congress in passing this review section

> may have been of opinion that one likely to be injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license.[235]

Neither the legislative history behind the standing provision in the Act[236] nor the substantive claims made by the complainant invited this novel ruling. Rather, the holding was a result of the Court's refusal to recognize Sanders' own interest as a broadcast licensee, an interest far more focused and related to the Act than the public interest. The station asserted that insufficient advertising and talent created the possibility that both stations would fail or provide inadequate service. The Court recognized this as a factor related to the public interest in broadcasting and thus for the FCC to consider.[237] But it failed to draw the proper conclusion that Sanders

232. Jaffe, *Standing Again*, *supra* note 1, at 634; Monaghan, *supra* note 1, at 1368-71, 1380-83; Vining, *supra* note 3, at 1469-87.

233. 309 U.S. 470 (1940). *See also* Scripps-Howard v. F.C.C., 316 U.S. 4 (1942); Associated Industries v. Ickes, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

234. Communications Act of 1934, § 402(b)(2), ch. 652, 48 Stat. 1064, 1092, *as amended* 47 U.S.C. § 402(b)(6) (1970).

235. 309 U.S. at 477. Elaboration was soon forthcoming in Scripps-Howard v. F.C.C., 316 U.S. 4 (1942), in which a licensed station was given public standing to complain of electrical interference from an authorized change of frequency of another station: "The Communications Act of 1934 did not create new private rights; these private litigants have standing only as representatives of the public interest." *Id.* at 14.

236. *See* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 522 n.81.

237. 309 U.S. 470 (1940).

asserted an interest protected by statute. Apparently, the anticompetitive statutory interest in this case was considerably narrower and more contingent than the ones which were familiar to the Court—the common law right of an exclusive franchisee to be free from new competitors and the similar, but more limited, common carrier right requiring a showing of need for new service.[238] The most Sanders could claim was a "right" to have its interest in avoiding destructive competition considered and passed upon by the FCC as one of the factors to be addressed.[239]

Although protected, this is a relative and contingent interest, entitled to no more than consideration and articulation as a factor in the regulatory process. These "factor interests" are thus protected in that they must be weighed in conjunction with other interests and a reason offered for their disregard. But they are obviously not the kind of legal interests that easily fit into Hohfeldian categories of right, duty, and privilege—broader protections reflected in older common law arrangements.[240] And the Court, while searching for statutory rights comparable to common law relationships, failed to recognize these factor interests as private ones. Since they did not measure up to familiar common law rights, they were deemed to be a part of the public interest and the plaintiffs held to be without a private interest of their own.[241]

238. In the Court's view the choice was either treating broadcasters as common carriers, affording them a property right in the license, or adhering to the principle of free competition. It concluded that "Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public." *Id.* at 475.

239. *See also* F.C.C. v. National Broadcasting Co. (KOA), 319 U.S. 239 (1943); Scripps-Howard Radio v. F.C.C., 316 U.S. 4 (1942). The FCC in *Scripps-Howard* had granted a license to WCOL without a hearing, an action which had the effect of reducing the coverage of the complainant, WCPO. The issue on appeal was whether WCPO was entitled to a hearing under the Act before a de facto modification of its license. It sought a stay pendente lite and the circuit court certified the question whether it had the power to issue a stay. The Court answered positively on the ground that such power was "firmly embedded in our judicial system," *id.* at 13, and was essential to avoid irreparable injury "to the public interest." Without creating new private interests, "the purpose of the Act was to protect the public interest in communications. . . . That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights." *Id.* at 14-15.

240. *See* W.N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923); Jaffe, *The Citizen as Litigant, supra* note 1.

241. The Court in *Sanders* and *Scripps-Howard* was opposed to interpreting the Communications Act as creating new private rights. It feared that such a construction would introduce notions of vested property rights in licenses and substantial immunity from competition into the field of broadcasting. The Act and its legislative history did indeed view these as undesirable. Concerned with these effects from broad private rights, and thinking of private rights as necessarily broad, the Court did not entertain the alternative of more limited statutory interests. Instead it chose to regard the

A cause of action yardstick substituted for standing illuminates that the general characteristics of the interests relied on by Sanders and the more recent litigants are like those of any group presenting a private claim for relief. Furthermore, the tradition of injury associated with Article III standing does not warrant a new understanding for this litigation. In short, the "public standing" cases are not exceptions to the judicial role of resolving private actions.

A public action theory, on the contrary, entails a broad and indiscriminate rationale for judicial intervention which presents a host of theoretical and practical difficulties. First, it involves a departure from a tradition in which judicial power has not been directed at expounding the law in favor of the interest in executive or administrative legality.[242] Reflecting this tradition, Article III standing has required something more than a litigant's interest in getting the law declared and clarified.[243] The public action, by implicitly accepting this interest,[244] removes most limits on litigation and involves courts in an undertaking similar to rendering "advisory" opinions. Public interest standing can skirt the Article III problem, but at some cost to the choice of public champions and the function of the action.[245] There are also tensions with other practices developed in private litigation, such as agency enforcement discretion[246] and the rule restricting a litigant to his own or some related claims.[247]

In addition, the simplicity of public interest standing may be illusory. It dispenses with rules for determining claims and litigants, but substitutes others for determining the legal issues deemed im-

Act as a public statute. For a similar nonrecognition of statutory interest, see Atchison, T. & S.F. Ry. v. United States, 130 F. Supp. 76 (E.D. Mo.) (plaintiff without a "'definite legal right' to be immune from . . . competition"), *aff'd mem.*, 350 U.S. 892 (1955).

242. *See* BICKEL, *supra* note 2, at 120-23; H. WECHSLER, *supra* note 7, at 4-15.

243. *See* pp. 481-88 *infra.*

244. Jaffe, *The Citizen as Litigant, supra* note 1, at 1043-46.

245. *See* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 484-85, 528-31; Monaghan, *supra* note 1, at 1380-83.

246. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 182 (1967); Moog Industries v. F.T.C., 355 U.S. 411 (1958); Amalgamated Workers v. Consolidated Edison Co., 309 U.S. 261 (1940); F.T.C. v. Klesner, 280 U.S. 19, 25 (1929); Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 87 (2d Cir. 1972); *cf.* Office Employees Union v. Labor Bd., 353 U.S. 313 (1957); Marco Sales v. F.T.C., 453 F.2d 1 (2d Cir. 1971). There is, however, a clear trend toward review of administrative discretion not to exercise its jurisdiction. *See, e.g.*, Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Medical Comm. for Human Rights v. S.E.C., 432 F.2d 659 (D.C. Cir. 1970), *cert. granted*, 401 U.S. 973 (1971), *dismissed as moot*, 404 U.S. 403 (1972); Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Trailways of New England v. C.A.B., 412 F.2d 926 (1st Cir. 1969).

247. *See* pp. 465-66 *supra.*

portant enough to warrant this special form of review.[248] Hence it requires a court to articulate why environmental or consumer complaints present such issues, while other grievances do not. Finally, viewing claims involving a broad social interest as public ones may diminish regard for the impact of the challenged action on individuals or groups and induce narrower requirements of standing or claims in private litigation.[249] Public standing is also a denial of any relationship between a protected interest and the litigant asserting it. Indeed a virtue of the concept is that it allows courts to determine if the occasion demands judicial intervention, a discretion which is not possible when a litigant seeks his own remedy as of right.[250] Although public standing protects important interests, it does so with uncertain and vulnerable judicial power.

In spite of these difficulties, public standing, limited in its use for several decades after *Sanders*,[251] took on renewed vigor with the increase in participation in the administrative process. Since this movement began before liberalization of private standing rules, it perhaps represents a way around restrictive barriers. Thus, the celebrated breakthroughs of the 1960's upholding the standing of certain television consumers and environmental groups to participate in administrative proceedings and to seek judicial review were made under the auspices of standing to vindicate the public interest.[252]

248. *See* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 486-94, 530-31; Jaffe, *The Citizen as Litigant, supra* note 1, at 1038. *See also* Monaghan, *supra* note 1, at 1371-79.

249. One commentator has noted this experience in other countries, especially where the attorney general's consent is necessary for the public action. S. THIO, *supra* note 2, at 9-10.

250. *See* JAFFE, JUDICIAL CONTROL, *supra* note 1, at 485-86; Jaffe, *Standing Again, supra* note 1, at 637-38.

Judicial review in the public interest may also distort or alter the customary scope of review. J. SAX, *supra* note 129, at 140-52; Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970); Vining, *supra* note 3, at 1475, 1496; Jaffe, Book Review, 84 HARV. L. REV. 1562 (1971).

251. Public standing was used to confer standing under several acts with statutory standing provisions very similar to the one in the Communications Act. *See, e.g.*, Philco Corp. v. F.C.C., 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959); Pittsburgh v. F.P.C., 237 F.2d 741 (D.C. Cir. 1956); Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953); National Coal Ass'n v. F.P.C., 191 F.2d 462 (D.C. Cir. 1951). The FCC sought to restrict *Sanders* by insisting on a specific showing of "new injury," meaning harm from newly authorized competition, not merely modifications, transfers, or renewals of a license. The courts were not receptive, since there was also a public interest in review of the latter determinations. *See, e.g.*, Tupelo Broadcasting Co., 12 P & F RADIO REG. 1250b (1955), *rev'd*, Granik v. F.C.C., 234 F.2d 682 (D.C. Cir. 1956); Alvarado Broadcasting Co. (KOAT), 10 P & F RADIO REG. 382a (1954), *rev'd*, Metropolitan Television Co. v. United States, 221 F.2d 879 (D.C. Cir. 1955); Leo Howard, 9 P & F RADIO REG. 359 (1953), *rev'd*, Camden Radio v. F.C.C., 220 F.2d 191 (D.C. Cir. 1954).

252. *See, e.g.*, Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). *See also* Note, *Expansion of Public Interest Standing*, 45 N.C.L. REV. 998 (1967).

These cases supplied the keynote for a multitude of cases accommodating new challenges to administrative action, not only by listeners and conservationists, but also by bidders for government contracts, consumers, communities seeking airline service, and persons seeking to avoid dangers from atomic energy facilities.[253] Relying on the logic of public interest standing, some courts dropped or deemphasized the requirement of a particularized injury from the challenged action in favor of a bona fide organizational interest in a problem.[254] Although the Supreme Court did not accept this development in *Sierra Club v. Morton*,[255] the concept of public standing survived that case as an embracing rationale for judicial review.[256]

An understanding of the earlier treatment of widely-shared interests in the administrative process, the related usages of public interest and rights, and the dynamics of the new representation do not offer support for regarding these interests as public ones. In the halcyon days of untarnished agencies with new missions, the public interest was that which agencies pursued and effectuated,[257] a goal that was separate and apart from the clamor of selfish private interest. Knowledge and technology rather than interest groups would produce the proper decision.

Characterizations of public statute and public right provided a judicial rationale for severely restricting participation in the administrative process and judicial review. This dichotomizing of public-private led the Court to rationalize denial of procedural rights to unions on the theory that the National Labor Relations Act, a public statute, conferred no protections upon the private interests of

253. *See, e.g.*, Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 104 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); Scanwell Laboratories v. Thomas, 424 F.2d 859 (D.C. Cir. 1970); Palisades Citizens Ass'n v. C.A.B., 420 F.2d 188 (D.C. Cir. 1969); Citizen Ass'n v. Simonson, 403 F.2d 175 (D.C. Cir. 1968); Upper Pecos Ass'n v. Stans, 328 F. Supp. 332 (D. N. Mex. 1971); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Ala. 1971); Coalition for United Community Action v. Romney, 316 F. Supp. 742 (N.D. Ill. 1970); Izaak Walton League v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970); Crowther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970); Powelton Civic Home Owners Ass'n v. H.U.D., 284 F. Supp. 809 (E.D. Pa. 1968).

254. *See, e.g.*, Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970); Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608, 615 (2d Cir. 1965); Nader v. Volpe, 320 F. Supp. 266 (D.D.C. 1970).

255. 405 U.S. 727 (1972).

256. *See* note 221 *supra*.

257. J. LANDIS, THE ADMINISTRATIVE PROCESS 1-30 (1938); Kaufman, *Power For the People—and by the People: The Utilities, the Environment and the Public Interest*, 88 PUB. UTIL. FORT. 90, 94 (1971); Reich, *supra* note 128. *See generally* Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319 (1964).

unions.[258] Insulating agencies from pressure groups excluded less organized and less traditional interests, such as consumers under a pricing scheme[259] and listeners in broadcasting regulation,[260] but did not exclude the well-organized, regulated economic interests.

In a highly pluralistic society with many interest groups, however, there is no "unitary public interest." Agencies must deal with a constellation of interests which often compete with each other.[261] The ones primarily accounted for are those pressed upon agencies by the parties, especially those with a large economic stake who continuously appear before the agencies.[262] While some think agencies are too responsive to these interests,[263] others see this system as affording cohesively-organized groups with power their due.[264] Commentators also have recognized that agencies and their staffs cannot be relied upon to delineate forcefully or present forcefully the positions of unrepresented interests. Institutional habits of compromise as well as staff perceptions of agency priorities render arguments for unrepresented interests bland or adulterated.[265] Further, there is no one position which best advances an interest affected by a decision; there are various positions and perspectives that accommodate consumer, environmental, or producer interests.[266] This development recognizes that none of the interests relevant to an administrative

258. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 266 (1940). A significant change of perspective can be seen in Local 283, U.A.W. v. Scofield, 382 U.S. 205, 218 (1965).

259. *See, e.g.*, City of Atlanta v. Ickes, 308 U.S. 517 (1939), *aff'g* City of Atlanta v. National Bituminous Coal Comm'n, 26 F. Supp. 606 (D.D.C.); *cf.* Wright v. Central Ky. Natural Gas Co., 297 U.S. 537 (1936); City of New York v. New York Telephone Co., 261 U.S. 312 (1923). *But cf.* United States v. Public Utilities Comm'n, 151 F.2d 609 (D.C. Cir. 1945).

260. *See, e.g.*, Lamar Life Broadcasting Co., 38 F.C.C. 1143 (1965), *rev'd sub nom.* Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966). *See also* American Communications Ass'n v. United States, 298 F.2d 648 (2d Cir. 1962); 107 U. PA. L. REV. 551 (1959).

261. *See* Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1183, 1188-97 (1954). *See generally* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES (1962).

262. *See* Crampton, *supra* note 219, at 526-30; Reich, *supra* note 128, at 1238-44. Knowledgeable agency members have written on the subject. *See* Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777 (1971); Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869 (1971). *See also* P. MCAVOY, THE CRISIS OF THE REGULATORY COMMISSIONS (1970).

263. *See, e.g.*, Moss v. C.A.B., 430 F.2d 891, 893 (D.C. Cir. 1970); R. FELLMETH, THE INTERSTATE COMMERCE COMMISSION 15-22 (1970); J. SAX, *supra* note 129, at 61; Johnson, *supra* note 262, at 895; Reich, *supra* note 128, at 1234-35.

264. *See, e.g.*, Jaffe, *supra* note 261.

265. *See* Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 543 (1970); Elman, *supra* note 262, at 789-90; Johnson, *supra* note 262, at 873.

266. R. WINTER, THE CONSUMER ADVOCATE VERSUS THE CONSUMER 14-15 (American Enterprise Inst. Analysis No. 26, 1972); Reich, *supra* note 128, at 1234; Comment, *supra* note 219, at 731-32.

decision so clearly captures the common good that it can properly be regarded as public and left exclusively to an agency.

This should lead to discarding the dichotomy which classified interests as public and private, with its corollary that individuals and groups favored by statutory protections were merely incidental beneficiaries of a public right. Instead, participation by organizations of consumers or conservationists is now encouraged because they may better represent these interests than a public agency.[267] Such representation is necessary not because these interests are identified with the public interest, but because they, like other factor interests, are among the constellation of interests entitled to consideration.

One argument against this proposition is based on the widely-shared and diffuse character of environmental or consumer interests. It is observed that unlike the traditional plaintiff who seeks to protect his own economic welfare, litigants advancing these claims, often represented by subsidized organizations and law firms,[268] are ideological—they challenge government action in order to protect certain shared values and prevent harm to the general good. That they are pursuing a cause and avoiding injury to individuals is secondary, perhaps alleged only to satisfy technical requirements.[269] These litigants represent open-ended classes to which everyone may belong—consumers, television listeners, or users of the environment.[270]

This well-known and interesting viewpoint is built on some misunderstandings about the nature of private claims in our legal system. Legal interests are viewed as personal and private despite the fact that the interest is widely-shared and that each individual's own stake is small. This is because of a pervasive belief, or perhaps bias,

267. *See, e.g.*, N.W.R.O. v. Finch, 429 F.2d 725 (D.C. Cir. 1970); Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966). *See also* Gellhorn, *supra* note 219, at 372-83; Comment, *supra* note 219, at 704-23.

268. See Jaffe, *The Citizen As Litigant*, *supra* note 1, at 1044, where he points out that the conservation group in Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608 (2d Cir. 1965), was "heavily financed by a public spirited citizen," which allowed it to function effectively as a litigant; Sedler, *supra* note 1, at 488-89, 497, 506-10; Comment, *supra* note 219, at 730-35; Note, *Citizen Organizations in Federal Administrative Proceedings: The Lingering Issue of Standing*, 51 B.U.L. REV. 403, 404 (1971).

269. *See* Jaffe, *The Citizen as Litigant*, *supra* note 1, at 1044; Monaghan, *supra* note 1, at 1380-81; Sedler, *supra* note 1, at 488-89, 497.

270. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (preservation of public parkland); Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973) (enjoin permits for construction of the Alaska oil pipeline); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971) (prevent dangers from storage and transport of nerve gas); Environmental Defense Fund v. H.E.W., 428 F.2d 1083 (D.C. Cir. 1970) (avoidance of harmful effects from DDT in the atmosphere); Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966) (intervention to assure responsible unbiased broadcasting); JAFFE, JUDICIAL CONTROL, *supra* note 1, at 500; Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 282 (1961).

that private responsibility for vindication of self-interest fractionalizes power and promotes independence, and that law is basically designed with the welfare of the individual and groups in mind.

Many familiar private claims present interests and injuries that are widely-shared and diffuse. The list includes a taxpayer's attack on a federal tax as beyond national powers,[271] a voter's challenge to a burden on the franchise,[272] or to malapportioned districting,[273] an individual's attack on the validity of Reconstruction governments in the South,[274] a pupil's attack on prayers in the public schools[275] or on a system of segregated education,[276] a shopkeeper's challenge to Sunday closing laws,[277] a pregnant woman's attack on abortion statutes,[278] an institution's challenge to the President's impoundment of appropriated funds,[279] and a claim that the President has no inherent authority to discharge employees,[280] seize private property,[281] or send troops to Vietnam.[282] These are asserted as individual claims, but the interests are shared with a universe of taxpayers, voters, soldiers, females, and so forth.

Familiar procedural devices and judicial rulings are designed to facilitate private litigation involving commonly-held interests. The

271. *See, e.g.,* Knowlton v. Moore, 178 U.S. 41 (1900); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

272. *See, e.g.,* Cipriano v. City of Houma, 395 U.S. 701 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

273. *See, e.g.,* Swann v. Adams, 385 U.S. 440 (1967); Reynolds v. Sims, 377 U.S. 533 (1964).

274. *See, e.g.,* Texas v. White, 74 U.S. (7 Wall.) 700 (1869); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1868); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868). Courts refused to hear such claims where a state was the complaining party. Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 77 (1868).

275. *See, e.g.,* Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

276. *See, e.g.,* Wright v. Council of the City of Emporia, 407 U.S. 451 (1972); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971).

277. *See, e.g.,* Braunfeld v. Brown, 366 U.S. 599 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

278. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

279. *See, e.g.,* Campaign Clean Water v. Ruckelshaus, 41 U.S.L.W. 2675 (E.D. Va. June 5, 1973); American Fed. of Gov't Employees v. Phillips, 41 U.S.L.W. 2542 (D.D.C. April 11, 1973); State Highway Comm'n v. Volpe, 347 F. Supp. 950 (W.D. Mo. 1972), *aff'd,* 479 F.2d 1099 (8th Cir. 1973). *See also* Note, *Protecting the Fisc: Executive Impoundment and Congressional Power,* 82 YALE L.J. 1636 (1973).

280. *Compare* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), *with* Meyers v. United States, 272 U.S. 52 (1926).

281. *See, e.g.,* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *cf.* New York Times Co. v. United States, 403 U.S. 713 (1971).

282. *See, e.g.,* Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971) (recognizing standing on the part of private plaintiffs serving in Vietnam, but not on the part of the state); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971). The holdings are not uniform, United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied,* 386 U.S. 972 (1967), and the Court has refused to hear cases challenging the constitutionality of the war. *See, e.g.,* Da Costa v. Laird, 448 F.2d 1368 (2d Cir. 1971), *cert. denied,* 405 U.S. 979 (1972). Justiciability rather than standing appears to be the more important issue in these cases.

class action mechanism, especially for cases involving common questions of law or fact, reflects this objective. Although originally a permissive joinder device by which parties who wished could have such cases tried together, it was amended in 1966 to make judgments in this class of cases binding on all members of the class who did not request exclusion.[283] The rationale was to encourage lawsuits and adequate legal representation where the conduct complained of extracts a small toll from a large number of persons.[284]

Similarly liberalized intervention practices and consolidation of multi-district litigation are methods of accommodating the complexity and multiplicity of interests in modern claims for relief.[285] Constitutional rulings protecting the litigating functions of organizations, acceptance of their representative role,[286] and the trend toward awarding counsel fees to lawyers in class suits[287] reflect a recognition of the need for sponsored litigation on behalf of claimants having common interests and shared claims. These developments are antithetical to a proposition that such interests are properly left to the discretion of public tribunals.

Despite this background of adjudications of shared interests in

283. FED. R. CIV. P. 23. *See* Advisory Committee Note to the 1966 Amendment to Rule 23, *reprinted in* 39 F.R.D. 98, 109. *See also* Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970).

284. As Professor Kaplan, a drafter of the rule, put it, "For them [small claims] the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the government." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I*, 81 HARV. L. REV. 356, 398 (1967); Note, *Parties Plaintiff In Civil Rights Litigation*, 68 COLUM. L. REV. 893, 899-905 (1968). Courts have generally construed Rule 23 liberally in cases involving small monetary claims and civil rights actions. *See, e.g.*, Wilczynski v. Harder, 323 F. Supp. 509 (D. Conn. 1971); Moss v. Labe Co., 50 F.R.D. 122 (D. Va. 1970).

285. *See* FED. R. CIV. P. 24. Rule 24(a)(2) was also amended in 1966 to expand the occasions for intervention as of right. Consistent with efficiency and manageability, there is liberal allowance of intervention. *See* Smuck v. Hobson, 408 F.2d 175, 178 (D.C. Cir. 1969); Atlantis Development Corp. v. United States, 379 F.2d 818, 822 (5th Cir. 1967); Burney v. North American Rockwell Corp., 302 F. Supp. 86 (C.D. Cal. 1969). *See generally* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1908-31 (1972); Kaplan, *supra* note 284, at 401-04.

On multiple and multi-district litigation, see MOORE'S FEDERAL PRACTICE: MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION (2d ed. 1969). *See generally* Note, *Observations on the Manual for Complex and Multidistrict Litigation*, 68 MICH. L. REV. 303 (1969).

286. *See, e.g.*, United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia Bar, 377 U.S. 1 (1964). On organizational representation, see Sierra Club v. Morton, 405 U.S. 727, 739 (1972); *cf.* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1970).

287. *Compare* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967), *with* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392-95 (1970). *See also* Brewer v. School Bd., 456 F.2d 943 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971). *See generally* M. DERFNER, ATTORNEY'S FEE IN PRO BONO PUBLICO CASES (1972), and cases cited *id.* at i-vii.

private claims for relief, some commentators see standing for consumers and environmentalists as being outside the scope of Article III standing. In this view tangible injuries shared by many do not qualify as a private action within the Article III tradition of case or controversy. The plaintiffs are ideological ones and their interest is likened to the public interest in lawful government. Litigation over such interests is thus analogized to the citizens' suit, the paradigm of the public action which seeks to prevent harms to the public from unlawful government action. Cases adjudicating widespread undifferentiated harms are believed to work a modification of the Article III barrier to the public action[288] and to signal its demise.

The comparison of recent litigants with citizens as a whole vastly overstates the scope of the claims which are often quite particularized. For example, in the celebrated broadcasting challenge, *Office of Communications of the United Church of Christ v. F.C.C.*,[289] a class of listeners in Jackson, Mississippi, protested the license renewal of a local station on the ground of a pattern of racial bias in broadcasting. More fundamentally, the equation of consumer and environmental interests with citizen interest in lawful government is based upon a misunderstanding of Article III as a limit upon private actions.

The tradition of standing as an element of Article III case or controversy is itself in flux,[290] sharing in the complexities and va-

288. *See* Jaffe, *The Citizen as Litigant*, *supra* note 1, at 1044-45; Monaghan, *supra* note 1, at 1379-82; Sedler, *supra* note 1, at 488-89, 497-511.

289. 359 F.2d 994 (D.C. Cir. 1966).

290. The requirement of injury has long been attributed to Article III as a fairly fixed requisite of case or controversy. *See* Baker v. Carr, 369 U.S. 186, 199 (1962). Recently, however, the Court has emphasized that prior invocations of Article III standing have often been blended with other self-imposed limitations and has agreed that Frothingham v. Mellon, 262 U.S. 447 (1923), can be read as announcing a nonconstitutional rule of restraint. Flast v. Cohen, 392 U.S. 83, 92-94, 97-99 (1968).

Flast v. Cohen introduced a further change in its holding that a federal taxpayer had standing to challenge federal expenditures to parochial schools on the ground that the expenditures constituted an establishment of religion prohibited by the First Amendment. *Flast* purported to adhere to the tradition of requiring private injury, but the problem is to locate the injury. The Court stressed that the challenge was based on a specific limitation on the spending power. But it also suggested that injury may be derived from the particular history behind the Establishment Clause. Its concern with the evils from government aid to religious institutions creates a protected legal interest in taxpayers which, like other protected interests, provides a basis for finding injury. But it is difficult to see how a taxpayer or citizen is injured by such expenditures or, more particularly, how the injury differs from the affront to citizen interest that may result from unlawful government action. In other words, saying that taxpayers have a protected interest against expenditures in violation of the First Amendment does not seem different from saying that they have such an interest against a particular illegality because it is illegal. The interest is in the rule of law, the enforcement of limits.

Compare with this problem the Court's recent decision in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), where two white tenants of an apartment complex sought to challenge their landlord's racial discrimination under the Civil Rights Act of 1968. In comparison to *Flast*, however, there were no injury problems. The statute

garies of standing lore generally. Certainly, however, constitutional standing requires a showing of tangible harm to the litigant from the action he seeks to challenge. This rule operates to disqualify litigants whose only stake is the desire to obtain regularity of law and administration.[291] This is not merely a method of avoiding or restricting decisions on constitutional questions; one may not prevail in ordinary litigation without having something at stake.

The classic expression of this requirement is found in *Frothingham v. Mellon*,[292] in which Mrs. Frothingham, suing as a federal taxpayer, claimed that the Maternity Act of 1921 which authorized federal expenditures for reduction of maternal and infant mortality, was in the words of Mr. Justice Sutherland, a "usurpation of power not granted to Congress by the Constitution."[293] Unable to show that were the act held invalid, either the federal tax burden or her own tax bill would be diminished, she sued as a good Federalist who objected for reasons of political conscience to federal expenditures shaping local programs. The Court dismissed the action, stating that "[t]he party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained . . . some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[294]

The Court reached the same conclusion in the recent environmental case, *Sierra Club v. Morton*.[295] The Sierra Club, a prominent conservation organization, sought to enjoin the granting of federal permits authorizing construction by Walt Disney Enterprises of a $35 million ski resort in Mineral King Valley, a semi-wilderness area in the Sequoia National Forest. Although the Club might

can be said to create recognizable interests in white residents as well as black applicants for housing. These interests are injured by discriminatory practices; deprivation of the benefits from integrated living are both identifiable and tangible. Hence, injury is clearly distinguishable from citizen aggrievement over unlawful practices.

Mr. Justice White's concurrence refers to an emerging viewpoint that standing, including injury, is not an essential component of Article III case or controversy. 409 U.S. at 212. The view was seemingly approved by the Court in Sierra Club v. Morton, 405 U.S. 727 (1972), in which the Court stated that "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue' . . . is one within the power of Congress to determine." 405 U.S. at 732 n.3. *See* text accompanying note 295 & p. 487 *infra*.

291. *See, e.g.*, Doremus v. Board of Educ., 342 U.S. 429 (1952); Frothingham v. Mellon, 262 U.S. 447 (1923); *cf.* Baker v. Carr, 369 U.S. 186, 204 (1962). *See generally* BICKEL, *supra* note 2, at 119-22.

292. 262 U.S. 447 (1923).

293. *Id.* at 479.

294. *Id.* at 488.

295. 405 U.S. 727 (1972). Noting that the petitioner sought judicial review of administrative action, the Court did not rely on Article III. The inquiry was whether the Administrative Procedure Act authorized review in the circumstances. *Id.* at 732.

have specified injuries to its members who used the area, it chose to represent the public interest in conservation by describing itself as an experienced organization with a special and informed interest in the preservation of national parks and wilderness areas, especially the Sierra Nevada mountains. A divided Court held that this failed to satisfy the requirement of injury in fact. The Court clearly acknowledged that impairment of the ecology of a park is a "type of harm" upon which standing could be based and that the Club could represent members who might suffer injury from the project. But the Club's offended value preference or its interest in the problem would not suffice.[296] The case has been criticized on functional grounds; an established organization has greater expertise and resources for litigation than any user of the area.[297] But insistence on some nexus beyond concern is a concomitant of the line between private and public actions. The Club's interest, as set forth, was aggrievement over legality and the Court closed by invoking "De-Tocqueville's . . . observation that judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury."[298]

Thus it is injury to a recognizable interest that distinguishes litigants with private claims from the public litigant who sues to vindicate lawful government. Operative in this tradition is the special status of the interest in legality, not the fact that cognizable injury is widely shared. Nothing in the requirement of injury specifies that harms to tangible interests be highly particularized or that collective harms fail to qualify. The size of the injured group is no more relevant to satisfaction of the requirement than the severity or kind of injury.[299] Conceivably, a potential plaintiff class could include the entire population, if, for example, the claim were that an

296. *Id.* at 739.

297. Mr. Justice Blackmun dissented, arguing in the alternative for acceptance of the Court's opinion, with the condition that the Club be allowed to amend the complaint (suggested but not guaranteed by the Court), or for an "expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues." *Id.* at 756-57. Mr. Justice Brennan joined in this last alternative. Mr. Justice Douglas, in an opinion reflecting his deep concern for environmental problems, argued that such cases should be brought in the name of the natural object "about to be despoiled, defaced, or invaded" and litigated by qualified representatives who are able to speak for the values at stake. *Id.* at 741-43. *See also The Supreme Court, 1971 Term,* 86 HARV. L. REV. 51, 234-41 (1972). On remand the Sierra Club was allowed to amend and allege that its members use the Mineral King Valley. 348 F. Supp. 219 (N.D. Cal. 1972).

298. 405 U.S. at 740-41 n.16.

299. *See, e.g.,* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Engel v. Vitale, 370 U.S. 421 (1962); Baker v. Carr, 369 U.S. 186, 207 (1962); International Ass'n of Machinists v. Street, 367 U.S. 740, 790 (1961). *See generally* DAVIS TREATISE, *supra* note 1, § 22.09-5 (Supp. 1970).

atomic energy facility failed to meet certain statutory safety requirements. Everyone in the zone of danger would have a sufficient stake in the controversy, a protected private interest, and therefore a claim against the AEC.[300] This may make an unwieldy case, but it is a case or controversy.

While the purposes behind the case or controversy requirement may be the subject of debate, they do not support analogizing shared injuries with the interest in legality.[301] First, the injury requirement provides a minimal guarantee of adequate conditions for decision. It assures two adverse parties providing both sides of a case and contributes toward the presentation of concrete facts. Second, it serves to define and fortify the institutional role of courts by combining judicial lawmaking with the ordinary business of judging. Further, Professor Bickel notes that the case requirement creates a time lag between legislation and adjudication which minimizes and softens conflict.[302] Ultimately the justification for not acting on the interest in legality may be symbolic, a part of the institutional identity of courts necessary for widespread consent and support. Regardless of how well the requirement of injury implements these purposes, they are not undermined by the adjudication of widely-shared injuries as the subject of private claims.

Confusion may arise from the manner in which courts refer to the interest in legality. Upon finding a litigant to be without any other interest, courts have said that he "suffers in some indefinite way in common with people generally" or that the cause is one of public concern.[303] To infer from this that the collective character of an interest is relevant to its insufficiency for private standing would be error. A litigant's interest in the lawfulness of particular government action may be shared with others but whether it is or

300. *See* Mink v. E.P.A., 464 F.2d 742 (D.C. Cir. 1971), *rev'd*, 410 U.S. 73 (1973); Committee for Nuclear Responsibility, Inc. v. Schlesinger, 463 F.2d 783 (D.C. Cir.), *motion for injunction denied*, 404 U.S. 917 (1971).

301. *See* Moore v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 47 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Flast v. Cohen, 392 U.S. 83, 111 (1968). *See also* Frankfurter, *Note On Advisory Opinions*, 37 HARV. L. REV. 1002 (1924). In Baker v. Carr, 369 U.S. 186, 204 (1962), the Court overstated the contribution of injury to the presentation of issues. Commentators have pointed out that ideological litigants as a class may have no less of a concern with the outcome or issues and further that the costs of litigation itself assure a commitment to the proceeding. Moreover, the competent presentation of cases or issues is probably better assured by institutional litigants with institutional lawyers than by parties with a stake in the outcome. *See* Jaffe, *The Citizen as Litigant*, *supra* note 1, at 1037. *See also* DAVIS TREATISE, *supra* note 1, § 22.04 (Supp. 1970); Monaghan, *supra* note 1, at 1372-74. There might be cases in which a plaintiff's particulars are vital to informed adjudication, but they provide dubious support for this generalization. The justification cannot be solely this instrumentalist one.

302. *See* BICKEL, *supra* note 2, at 111-98.

303. Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

not is immaterial to the ruling that he is without standing. Thus, these expressions do not provide a reason for the finding of no standing; they describe the result. Attribution of the interest to the public is a figure of speech, expressing the conclusion that general law enforcement must be left to public officials or the public in its political capacity.

The interests of consumers and environmentalists, while held in common with many, are plainly not equivalent to a citizen's interest in good government. To the contrary, such interests, going to matters that affect the quality of life, leisure, and health, are as tangible and palpable as the typical fare for adjudication. People are injured in real and recognizable ways when action despoiling parks and woodlands is authorized, when a licensee with a poor or discriminatory broadcasting record is renewed, or when an agency fails to act upon unsafe regulated products. Vindication of these interests in the judicial process does not require modification of claims for relief or Article III demands. If litigants presenting these claims, as in *Sierra Club*,[304] do not show injury to themselves from government action, Article III is a barrier. But there is nothing inherent in the nature of the interests or their shared character that raises problems under Article III.

The sequel to *Sierra Club, United States v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)*,[305] however, suggests several difficulties in applying the injury requirement to uncertain environmental harm and in administering it as a threshold inquiry isolated from other issues in the case. Five law students, forming an unincorporated association, SCRAP, attacked the ICC's failure to suspend a temporary railroad surcharge of 2.5 percent on national freight rates. SCRAP, claiming major environmental damage from the new charges, sought to require the ICC to file an environmental impact statement. Mr. Justice Stewart for the Court set forth a "line of causation" "far more attenuated" than that in *Sierra Club* regarding the environmental impact and injury: "a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area."[306] SCRAP alleged that its members would suffer

304. 405 U.S. 727, 734-35 (1972).
305. 412 U.S. 669 (1973).
306. *Id.* at 688.

recreational and aesthetic harm as users of the natural resources in the Washington area.

A divided Court upheld these as sufficient allegations of injury. Geographically widespread injury was no obstacle; a contrary rule "would mean that the most injurious and widespread government actions could be questioned by nobody."[307] And the "attenuated" causation did not justify dismissal on the pleadings. The assertions of perceptible harm were neither inconceivable nor disproven in the court below. In contrast, Mr. Justice White in dissent found the injuries "remote, speculative and insubstantial," indistinguishable from a taxpayer's interest in government expenditures or a citizen's in litigating government decisions of concern to him.[308]

Because it was a dispute over pleading allegations, *S.C.R.A.P.*'s implications for evolving rules of standing are probably limited. But one of its recurrent difficulties, possibly contributing to the divergent views of the Court and the dissent, is the seeming disproportion between the slight amount of plaintiff's injury and the nationwide scope of the claim. This may suggest that the plaintiff's purpose is to vindicate a cause rather than to prevent harm and that a court is called upon to decide a legal question, not a case. Neither should figure in determination of minimal Article III injury. Litigants often believe in the cause they present and perhaps that society will be better off if they prevail, but such beliefs are irrelevant for Article III standing. Motivation analysis has played no part in that determination.[309] Similarly the judicial role in resolving claims has not been a pure one, since there is an element of law clarification or vindication in the ordinary case.[310] Article III simply insures that it is not the only element.

The major difficulty in *S.C.R.A.P.*[311] stems from the attempt to isolate injury for threshold adjudication. The amount of injury, if any, largely depended on the environmental impact of the surcharge, and its proof therefore required findings on the effect of the rates on recyclable goods, which the Court viewed as the merits. Doubtless it was more tolerant on standing because the district court had not resolved this issue, finding only that the impact was sufficiently

307. *Id.*
308. *Id.* at 723.
309. *See* Doremus v. Board of Educ., 342 U.S. 429, 434-35 (1952). For a suggested classification of individual plaintiffs by their presumed motivation, see Sedler, *supra* note 1, at 488.
310. Mr. Justice Marshall recognized this in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
311. 412 U.S. 669 (1973).

probable to enter preliminary relief. Denying sufficiency of standing allegations in these circumstances would have appeared to resolve the merits by supposition and to abridge a litigant's day in court.[312] Although the issues are intertwined, the attempt to bifurcate them into threshold standing and the merits produces confusion and piecemeal litigation. Both of these issues are components of a claim for relief and they are confronted in a more orderly and direct manner if they are so considered.

S.C.R.A.P. manifests a more general problem in its approach to injury as a separate item in a lawsuit. Increasingly litigants challenge administrative action or legislation in anticipatory proceedings, before actual harm has been realized. Whether there is cognizable injury and sufficient indicia of it in these circumstances requires reference to a set of norms. These are usually the legal provisions relied on in the claim for relief,[313] as the Court acknowledged in *Flast v. Cohen*[314] when it stressed that "inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party." Determination of injury therefore anticipates the merits, although under the guise of a threshold inquiry. Thus it is inconceivable that environmental damage to parks or wilderness areas would be recognized as harms to users without the prevailing array of protective statutes. Similarly, harm to rival business from increased competition,[315] or injury to white tenants when a landlord excludes blacks,[316] is more easily established when a statute protects against such injuries. As the Court has observed, Congress, by means of legislation,

312. The main claim on the merits was that the ICC had failed to prepare a detailed environmental impact statement, required because of the adverse effect of a freight surcharge on the movement of recyclable goods. The lower court had issued preliminary relief ruling that "the danger of an adverse impact [was] sufficiently real to require an impact statement in this case." *Id.* at 682. Moreover, the pleadings in this case had been drafted to satisfy the recent guidelines of Sierra Club v. Morton and the Court was aware of this. *Id.* at 683-87. It can be inferred that dismissal on the ground of standing would have manifested more hostility to environmental litigation than the Court wished to convey. The standing ruling was also immaterial to the outcome, since the case was dismissed on the ground that the ICC's suspension power was not reviewable. *Id.* at 690-96.

313. *See* Dugan, *Standing to Sue: A Commentary on Injury In Fact,* 22 CASE W. RES. L. REV. 256 (1971). For a particularly good illustration of the relationship between legal norms and the recognition of injury, see Barlow v. Collins, 397 U.S. 159 (1970); pp. 494-95 *infra. See also* Benn, *Interests In Politics,* in 60 (n.s.) PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 123, 130 (1960).

314. 392 U.S. 83, 102 (1968).

315. *See* Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150 (1970); pp. 494-95 *infra. See also* Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969); Dugan, *supra* note 313.

316. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). *See* note 290 *supra.*

may establish the conditions for injury in fact and therefore for Article III standing.[317]

The Constitution also may establish the appropriate conditions. Hence, the linkage of injury and legal provisions in *Laird v. Tatum*,[318] in which the Court dismissed the First Amendment claims of persons subject to army surveillance and data-gathering because they were unable to show harm from the operation. As the Court explained, their allegations of a "subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."[319] This proposition was based upon a construction of the scope of the First Amendment and not a detached or abstract inquiry into injury.

Determining cognizable injury and the necessary indicia from the policy of statutory and constitutional guarantees is not objectionable. It is the usual way of resolving a claim. But to do so under a misleading procedural label of injury in fact fails to require focus on relevant legal provisions and to clarify what is being decided. Use of a threshold rubric thus entails the general problems of using procedural labels for complex substantive inquiries. Instead, a law of claims, by requiring satisfaction of the elements of a claim for relief including some form of harm to the complainant, renders separate and threshold investigation of the injury element superfluous. The requirement of a claim also assures a case or controversy. The problem of the type, degree, and directness of injuries do not disappear, but it is confronted as the gist of the complaint, not as some distracting and detached side-issue.

Article III aside, there is a distinction in the literature between legislative protections for narrow and for broad classes of beneficiaries. Where the law imposes duties for a defined and narrow class of beneficiaries who view themselves as victims of wrongful conduct, their complaints regarding administrative remedies should be heard as of right. But as the class of beneficiaries becomes broader and less differentiated, administrative enforcement may more properly be

317. Linda R.S. v. Richard D., 411 U.S. 614, 617 n.3 (1973). The Court stated, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." This has been read to mean that Congress may wholly dispense with the injury requirement, *see* Monaghan, *supra* note 1, at 1381, which confuses two distinct views of Congress' authority. On another occasion the Court has suggested that injury is not an essential of case or controversy and therefore Congress may authorize litigation without it. *See* note 290 *supra*. But this statement merely signifies that statutes create interests which establish the conditions for cognizable injury.

318. 408 U.S. 1 (1972).

319. *Id.* at 13-14.

seen as promoting a legislative norm, not as redressing individual wrongs. Therefore, a court feels less obliged to intervene and accordingly judicial review is discretionary.[320] Not only is this distinction difficult to apply but psychological aggrievement, the sense of being wronged, is an inadequate basis for courts to determine the existence of claims. It is likely to lead a judge to vindicate harms that are familiar or resemble common law wrongs, and to reject those that are solely the product of twentieth century legislation.

Furthermore, it is questionable to assume that harms caused by disregarding protective provisions that benefit large classes are either not wrongs or are too modest. The vigor with which environmental and consumer interests are pursued in litigation and the enormous organizational activity in areas threatened by proposals with environmental impact testify to actual aggrievement. For example, a dedicated conservationist would not regard action despoiling his favorite trail as merely a modest wrong to an undifferentiated group. Others might differ but personal evaluations cannot be used to create a hierarchy among interests which are concededly protected by legislation. There are not protections and super-protections or claims and super-claims. And there is no need for public interest standing since the proper adjudication of claims for relief adequately implements legislative protections and also guarantees responsive agency action.

B. *Zone of Interest Standing and Claims For Relief*

Assessed from the framework of the law of claims, the new tests of standing set out in the recent Supreme Court cases[321] are as unnecessary and productive of confusion and litigation as the older ones. Additionally they perpetuate some old difficulties and introduce several new ones. As previously discussed, two problems in legal interest standing were acceptance of inappropriate private law rules[322] and the use of a threshold concept to consider questions more properly confronted as aspects of a claim.[323] Both figured in the cases in which the Court announced the zone of interest test of standing.

320. Jaffe, *The Individual Right To Initiate Administrative Process*, 25 IOWA L. REV. 485, 528-29 (1940).

321. *See* Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

322. *See* pp. 443-50 *supra*.

323. *See* pp. 442-43 *supra*.

Association of Data Processing Service Organizations v. Camp[324] and *Barlow v. Collins*[325] were challenges by persons suffering economic injury from government action alleged to be in violation of federal statutes which had no provision for judicial review. In the former, data processing companies attacked a ruling of the Comptroller of the Currency allowing national banks to offer data processing services to their customers under a provision affording national banks "all such incidental powers as shall be necessary to carry on the business of banking."[326] In *Barlow* tenant farmers receiving federal farm subsidies challenged a recent regulation authorizing assignment of the subsidy to their landlords to secure cash rent for land. They argued that this expansion of assignability made them dependent on their landlords for all their supplies and that it was contrary to a statute restricting assignments to "cash or advances to finance making a crop."[327] Noting that the common law did not protect against competition or against the mere economic consequences of government action, the lower courts dismissed the suits. Both added some abbreviated doubts about the statutory claims.[328]

These cases used improper rules of decision for standing, combined with an offhand treatment of the merits. Instead of employing rules associated with the components of a claim and an appropriate rubric for such questions, the Court chose to alter the test of standing that operated on the merits. As a preface to the newly formulated zone of interest standard as the proper threshold test, it observed that protected legal interest "goes to the merits" and asserted that "the question of standing is different."[329] The new test of standing, after injury in fact, was "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[330] The protected legal interest standard was apparently left unmodified for application after the standing issue is decided.

Although intended not to implicate the merits of a claim,[331] the zone of interest test in these two cases deals with merit issues. Canvassing the entire statute and legislative background for indicia of

324. 397 U.S. 150 (1970).
325. 397 U.S. 159 (1970).
326. Association of Data Processing Service Orgs. v. Camp, 397 U.S. at 157 n.2.
327. Barlow v. Collins, 397 U.S. at 160.
328. Barlow v. Collins, 398 F.2d 398, 401 (5th Cir. 1968); Association of Data Processing Service Orgs. v. Camp, 279 F. Supp. 675, 678 (D. Minn. 1968), *aff'd*, 406 F.2d 837, 843 (8th Cir. 1969).
329. Association of Data Processing Service Orgs. v. Camp, 397 U.S. at 153.
330. *Id.*
331. *Id.* at 153, 156.

protective intent[332] necessarily involved a preliminary examination of the merits and a forecast of the strength of the claims, points objected to by Mr. Justices Brennan and White in their dissent from the zone of interest standard.[333] The provisions invoked by the Court for standing,[334] though not the ones authorizing the challenged action, were of crucial significance in establishing statutory protection. Since they were central to actual protective intent as part of the claim, they of course also satisfied arguable intent or arguable presence in the zone of interest.

This indicates that the Court has not exorcised the spirit of the merits from the threshold inquiry. On the contrary it has reintroduced the ghost in the more troublesome wrapping of prejudgment. It has authorized a new preliminary proceeding in which a court surveys the relevant legal materials for a zone of interest before focusing upon the claims for relief. Such initial inquiries separated from the merits pose a series of hazards: the risk of an impressionistic or summary survey of the merits influencing the seemingly threshold decision or, alternatively, prejudicing the later exploration of the claims on the merits; the danger of ill-focused or undeliberated determina-

332. In both cases establishing protective intent was complicated because the statutory provisions directly in issue were unrevealing. In *Data Processing* the incidental powers clause under which the Comptroller had acted had survived intact from the original Bank Act of 1864 and provided slim support for protective intent. Act of June 4, 1864, ch. 106, § 8, 13 Stat. 101. The Court found the necessary concern instead in the legislative history of § 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864 (Supp. IV 1968). Similarly in *Barlow*, the assignment provision was old and cryptic; the Court primarily found the intent in another provision which instructed the administrator to "provide adequate safeguards to protect the interests of tenants." 7 U.S.C. § 1444(d)(10) (Supp. IV 1968).

333. Mr. Justice Brennan, joined by Mr. Justice White, dissented from the Court's two-part test for standing in favor of confining the standing inquiry to actual harm or injury in fact, referred to as the constitutional standard. All other references to a plaintiff's interest and protective legislative intent were relevant to reviewability and the merits. "Before the plaintiff is allowed to argue the merits, it is true that a canvass of relevant statutory material must be made . . . . But the canvass is made, not to determine *standing*, but to determine an aspect of *reviewability*, that is, whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff." 397 U.S. 159, 169 (1970) (emphasis in original). They explained that reviewability is concerned with not only whether agency action is entirely conclusive but "whether the *particular* plaintiff then requesting review may have it." *Id.* at 169 n.2 (emphasis in original). While seemingly relying on congressional intent as to reviewability, the dissenters invoked as the "governing principle" the presumption articulated in Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967), that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." The rest, a protected legal interest and agency invasion, are for the merits. This alignment of factors, they argued, would minimize prejudgment and ambiguity "by clearly severing, so far as possible, the inquiries into reviewability and the merits from the determination of standing." 397 U.S. at 174-76.

The approach recommended in this article is consistent with many of the arguments in this dissent. The point of departure, however, is its endorsement of a preliminary inquiry attached to reviewability. *See* pp. 496-97 *infra*.

334. *See* note 332 *supra*.

tion due to the vagueness of the standard; and the breeding of appeals on preliminary issues with the consequent premature termination of the judicial process and long delays in deciding the merits. In sum, there is, as Mr. Justice Brennan expressed it, "the possibility that judges will use standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claim."[335]

The Court has sought to obviate these dangers and to attenuate the relationship to the merits by redefining the zone standard in later cases to require little more than a statement of an interest and illegality which are arguable from the face of the statute. It has ruled out references to legislative history in determining the zone[336] and has manifested a presumption in favor of standing. Whether seen as a standard of arguable claims or as a preview of the merits, zone of interest standing appears to serve no intelligible function. Indeed it is its cloudy purpose that renders application uncertain and difficult, so much so that one commentator has asserted that many courts have given up the attempt.[337]

It has, moreover, created confusion over what is required for prevailing on the merits. Satisfaction of legal interest standing entitled one to relief upon proof that administrative action was invalid. Since legal interest is replaced by the zone standard as the test of standing, courts might conclude that satisfying its requirements should have the same effect. Thus, the only issue on the merits would be validity of administrative action. Since a minimal showing of arguable statutory protection is sufficient for zone standing, this view would alter claims against agencies by eliminating legal interest requirements, such as actual protective intent. This unique principle of liability for administrative agencies does not have a counterpart in any area of private or public claims for relief. By affording relief to most persons affected by invalid agency action, it authorizes purposeless and, in view of the many impacts of agency action, practically boundless interferences with agency decisionmaking.[338] Without a more

335. 397 U.S. at 178 (Brennan, J., dissenting). *See also* Vining, *supra* note 3, at 1522-36.

336. Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) (per curiam). After remand for reconsideration in light of *Data Processing* and *Barlow*, 397 U.S. 315 (1970), the First Circuit reaffirmed its previous denial of standing: "Under any standard, plaintiffs have no standing. They have produced no scintilla of evidence tending to show that Congress was specifically concerned with the competitive interests of travel agencies." 428 F.2d 359, 361 (1st Cir. 1970). In reversing, the Court explained that legislative history was not relevant and that § 4 was not limited to protection of data processors. 400 U.S. 45, 46 (1970).

337. Sedler, *supra* note 1, at 486-94, 511. *See also* DAVIS TEXT, *supra* note 1, § 22.07.

338. *See* M. SHAPIRO, *supra* note 138, at 123; Jaffe, *Standing Again*, *supra* note 1, at 636-37.

explicit mandate for this result than the Court has afforded, zone standing should not relieve a litigant from proving legal protection in addition to the arguable variety.

The proper initial inquiry is into a litigant's legal interest under principles of claim and not merely arguable presence in a zone. In view of familiar procedural motions for testing claims,[339] neither a standard of arguable claims nor preview of protective intent is a helpful substitute for the determination of legal interest at an early and appropriate stage of a lawsuit. Utilizing such motions for issues of claim does not entail needless determinations of administrative legality nor dismissals on preliminary grounds or multiplicity of issues. Since these determinations are openly on the merits, there is no danger of prejudgment or of abbreviated, ill-focused consideration. In short, zone of interest standing is not a screen that serves any purpose that is not better served by the requirement of protected legal interest as part of a claim for relief. Persons favored by statutory protections, those representing them under principles of jus tertii and persons entitled to protection under judicially formulated principles are assured their day in court.

Conclusion

We have long thought it necessary to create special procedural rules for judicial review of agency action, while, paradoxically, uncritically applying substantive rules of decision derived from quite different areas of litigation. Consequently, the development of a corpus of public common law governing claims against the government has been impeded by the failure to recognize its appropriateness in suits against agencies.

This article has argued that clarity would be served if we conceived of standing as involving the recognition of claims against the government. It might then be appreciated that familiar rules of actionability and notions of legality, in conjunction with ordinary procedural practices, render a need for such opaque concepts as standing highly questionable. A proper incidence of judicial intervention and relief is better achieved through the elaboration of claims against agencies.

339. FED. R. CIV. P. 12(c) (motion for judgment on pleadings); 12(b) (motion to dismiss for failure to state a claim upon which relief can be granted); 56 (motion for summary judgment).