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STANDING: A LEGAL PROCESS APPROACH

by

Wallace M. Rudolph* and Janet L. Rudolph**

Many articles have been written about standing and most have complained that the standing cases cannot be understood on a rational basis.¹ The purpose of this Article is to explain the nature of the doctrine of standing within the legal process and to propose how standing can be fairly and consistently applied.

In order to understand the concept of standing, its purpose must be discovered. The purpose of standing lies in the nature of the legal process and the function of our judiciary. In Marbury v. Madison² Justice Marshall discussed the judicial function in terms of the Court's authority to declare unconstitutional a statute enacted by Congress. Marshall's discussion serves as a fair description of the nature of judicial power in general, since any court's power to act arises from its constitutional grant of authority to decide cases and controversies between parties.³ Because courts are designed to settle specific disputes, they are not competent to deal with generalized grievances against society. Neither can courts give advisory opinions. Hence, the classic example: Even though Secretary of State Jefferson asked the United States Supreme Court to answer certain legal questions concerning the British blockade of French ports, Chief Justice Jay respectfully declined, since to do so was beyond the reach of judicial power.⁴

The constitutional and judicial rejection of authority to deal with generalized grievances, as well as the rejection of authority to grant advisory opinions, arises from judicial recognition that a court's essential function is dispute settlement in accordance with legal principles, not law declaration. In the dispute-settlement process, legal principles are applied to a known,

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² 5 U.S. (1 Cranch) 137 (1803).
³ U.S. Const. art. III, § 2: "The judicial Power shall extend to all cases [and] controversies . . . ."
fixed set of facts, and the decision is thus limited to the application of that principle to that set of facts. Under this system, the parties come to the court with a specific claim of right (either statutory or customary)\(^5\) and argue that, under the peculiar facts of the case, their claim of right should be upheld. The court then chooses one of the claims of right and explains how under the facts of the particular case the appropriate claim of right was chosen. Without particular facts and without particular claims of right before the court, a decision of the court is not compelled by the judicial decisionmaking process.\(^6\) An existing conflict is required because each individual's liberties or claims of right are defined in terms of every other individual's liberties or claims of right.\(^7\) Consequently, if persons other

\(^5\) Customary rights are rights based on common law rules of decision rather than specific statutory rights.

\(^6\) H. Hart & A. Sacks, Legal Process 422-23 (tentative ed. 1958), in which they quote from "The Forms and Limits of Adjudication" (an unpublished paper presented by Prof. Lon L. Fuller to a group of Harvard University faculty members on Nov. 19, 1957). Prof. Fuller stated as follows:

I have said previously that adjudication is most effective in determining the issues presented by (1) a claim of right made by one party upon another, and (2) questions of responsibility, including under that term the accentuated responsibility we call fault or guilt.

It is clear, I believe, that any claim of right necessarily implies a principle or rule. If I say, "Give me that, I want it," I do not by implication assert any principle which justifies my demand; I am merely expressing a desire and perhaps a threat to use whatever means are available to me to effectuate that desire.

On the other hand, if I say, "Give that to me, I claim it as a right," or, "I claim it because it is due me, or because it is mine," then by necessary implication I imply some rule or principle by which my claim may be judged.

It is important to note that the rule or principle implied in a claim of right need not have antedated the claim itself. If one boy says to another, "Give me that catcher's mitt," and answers the question, "Why?" by saying, "Because I am the best catcher on the team," he asserts a principle by which the equipment of the team ought to be apportioned in accordance with ability to use it. He necessarily implies that, were the respective abilities of the two boys reversed, the mitt should remain where it is. But he does not, by necessary implication, assert that the principle by which he supports his claim is an established one. Indeed, up to the time this claim was made, the right to be catcher might depend, not on ability, but on ownership of the catcher's mitt. In that event the claim based upon the new principle of ability might, in effect, propose a revolution in the organization of the team. At the same time, this claim does not necessarily imply a principle which can give meaning to the demand that like cases be given like treatment.

Similarly any determination of human responsibility necessarily implies some standard that has not been met, but this standard may receive its first articulation in the decision applying it.

We have now asserted two general propositions: First, adjudication is most effective in deciding the validity of asserted claims, and in deciding questions of human fault or responsibility. Second, a decision of either of these questions necessarily implies some standard or principle, though not necessarily one that was established or articulated before the case came to judgment.

\(^7\) Hohfeld, Some Fundamental Legal Conceptions As Applied in Judicial Reasoning, 23 Yale L.J. 16, 30 (1913). The famous exposition of the interrelationship appeared as a chart: The strictly fundamental legal relations are, after all, sui generis; and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of "opposites" and "correla-
than those making a claim of right were allowed to raise issues, a court could in effect issue general reviews of governmental action, give advisory opinions on governmental action, or change the substantive claim of right of a person affected by governmental action. The appropriate analysis would recognize that standing decisions can be made only within a framework of legal rights and duties. This analysis, however, assumes that rights and duties may exist between the state and the public at large as well as between private parties. Thus such rights and duties are functions of public as well as private law.

The law of standing is presently in a confused state because the Supreme Court has never fully understood that the concept of standing must relate to the nature of the individual rights claimed. The common law, state and federal statutes, and the Constitution protect and define many rights. Some of these rights are property rights, while others include the right of association, the right to petition, and the right to have input into the decisionmaking process. Property rights may be divided into rights held individually and those held in common. Decisions concerning property rights depend upon basic legal concepts concerning the duties of public officials as they extend to particular segments of the public. Confusion exists in this area because standards of injury in fact were inappropriately applied to cases involving political rights or common property rights. For example, a series of cases in which federalism was the key issue were instituted by plaintiffs who did not have standing to raise that issue.

In each of these cases, the question was not whether the federal act or regulation violated a constitutional right of the plaintiff, usually his fifth amendment right not to have his property taken without due process of the law, but whether the federal act violated the state's rights under the tenth amendment.
That is, the Court ignored the federalism issue and focused instead upon the right of any citizen to have his government act within its grant of power.

The inappropriateness of allowing standing to individuals in such cases is evident from the Supreme Court decisions of *Massachusetts v. Mellon* and *Frothingham v. Mellon*. In *Massachusetts v. Mellon* the Court held that the State of Massachusetts had standing to raise the issue of states' rights, but that an individual citizen, Mrs. Frothingham, did not. Further, the Court held that even though Massachusetts had standing, the case was not appropriately before the Court because it involved a political question. The Court characterized the issue as a political question because the particular tax act in question did not involve a direct conflict between the exercise of state and federal power, thus requiring a judicial decision, but involved instead a possible infringement upon the state's prerogatives. In effect, the Court held that unless a direct conflict of authority existed between the state and federal governments, the state could not raise the issue of whether Congress had exceeded its powers. Strangely enough, in earlier decisions the Court had held that the owner of property affected by federal law could judicially raise the issue of whether the federal government had invaded the province of the state.

By contrast, in *Frothingham v. Mellon* the Court clearly stated that the plaintiff, an individual, had no standing to raise the issue of states' rights in a similar context since that privilege belonged solely to the state. As to the states' rights issue, the plaintiff was, of course, in no better or no worse position than owners of property who claim that a federal law is unconstitutional because it implicates the state's power. Only when one examines the second issue, whether the plaintiff's interest was sufficient, is any contrast with owners of property evident. Since the Court had already decided that the plaintiff in *Frothingham v. Mellon* did not have standing to

11. Id. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
12. 262 U.S. 447 (1923) (both cases decided in same opinion). In the consolidated cases, the State of Massachusetts and an individual taxpayer attacked the constitutionality of a federal statute, which provided federal monies to each state that complied with its provisions to reduce maternal and infant mortality.
13. Standing was implicitly granted to Massachusetts because a political question arises only after standing is recognized.
14. 262 U.S. at 483.
15. Id. at 482-83.
17. The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained some direct injury as the result of the enforcement. The only claim of invalidity made by either Massachusetts or Mrs. Frothingham is that "[r]educed to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution, and within the field of local powers exclusively reserved to the states." 262 U.S. at 482. Thus Mrs. Frothingham's complaint was not that the activity was illegal as to her personal interest either as a taxpayer or a property holder, but that it infringed on the political rights of Massachusetts.
raise the federalism issue, the taxpayer issue was a dictum. Why, then, did the Court feel compelled to discuss taxpayer standing? The Court was well aware that in a series of previous cases standing had been granted to property owners to raise federalism issues even though these plaintiffs were not asserting their own constitutional rights, but rather the right of the states (or of the public) to keep the federal government within its constitutional limits. In these cases the Court had decided that the property owners, rather than the taxpayers or the states themselves, were the appropriate parties to bring the issue of federalism before the Court.

The only explanation for this apparent contradiction is that in the era of substantive due process, when the judiciary was resisting the extension of governmental power to control private property, the Court felt a need to fashion any tool that could prevent such regulation. But to grant standing to property owners as private attorneys general so that they might represent the states' interests when the Court had previously held that the states could not represent themselves in nonconflict cases seems a clear violation of the basic principle of standing, which is that one plaintiff cannot assert the rights of another. If federalism is a value that must have adherents in court to insure proper compliance with the Constitution, however, then that value should more properly be represented by the states or by the people in a class action since federalism is clearly a general political right rather than a property right. The difficulty, of course, is that the people had already been represented in the decisionmaking process through their representatives in Congress, and thus only the states themselves remained as proper plaintiffs. Yet, if in *Massachusetts v. Mellon* the Court was correct in holding that unless a direct conflict exists the issue of whether a federal regulation violates the tenth amendment is a political question, then one has difficulty perceiving how the issue becomes a justiciable question merely because the regulation impacts private property. Since the underlying legal concepts of substantive due process and federalism have now somewhat lost their bite, one has equal difficulty perceiving

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18. See supra note 9. In *United States v. Darby*, 312 U.S. 100 (1941), the employer raised the issue of whether the police power of the federal government could replace state police power. In *E.C. Knight* the sugar trust again raised the issue of state jurisdiction rather than its own rights against regulation. In *Frothingham* the Court concluded that:

> In the last analysis, the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political, and not judicial, in character, and therefore is not a matter which admits of the exercise of the judicial power.


19. By using tenth amendment grounds, the courts avoided the more difficult question of determining whether the exercise of governmental authority was justified when balanced against private rights. Limiting federal authority may have been more difficult than limiting state authority because under Justice Marshall's expansive view of the commerce clause in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), private rights were fully subject to federal economic regulation whereas state power was limited by the contracts clause.

20. 262 U.S. 447, 482-83 (1923).
how in the future the Court can allow attacks on federal legislation by private property owners through the tenth amendment.

How, then, should the assertion that any citizen has the right to insist that the government act within its powers be handled? Obviously, the United States Supreme Court rejected this assertion in *Frothingham v. Mellon.* Implicit in that rejection is the recognition that the Constitution grants the power to Congress to spend for the general welfare and that any attack on congressional spending must claim that the appropriation was not for the general welfare. Justice Harlan's distinction in his dissent in *Flast v. Cohen* is thus a useful one. In that dissent he wrote:

The national legislature is required by the Constitution to exercise its spending powers to "provide for the common Defence and general Welfare." Art. I, § 8, cl. 1. Whatever other implications there may be to that sweeping phrase, it surely means that the United States holds its general funds, not as stakeholder or trustee for those who have paid its imposts, but as surrogate for the population at large. Any rights of a taxpayer with respect to the purposes for which those funds are expended are thus subsumed in, and extinguished by, the common rights of all citizens.

Justice Harlan is clearly correct in concluding that taxpayers qua taxpayers have no greater interest in governmental expenditures than anyone else. On the other hand, that conclusion does not support Justice Harlan's argument that congressional violations of the first amendment are not reviewable. Justice Harlan admitted as much when he conceded that non-Hohfeldian plaintiffs, who act as private attorneys general, are not constitutionally excluded from challenging governmental actions. Under an Hohfeldian analysis, there is a distinction between public rights and common rights. Furthermore, granting standing to private attorneys general would lead to violations of the basic principle behind the standing requirement that a plaintiff cannot assert the rights of another.

The purpose of the standing requirement derives from the legal process itself. Within the legal process one person's rights can be described only in terms of another person's rights; thus the Hohfeldian analysis exists in which one person's right is another person's duty. Under this approach, discussing a particular right except in terms of a particular duty is useless. In negligence law, for example, only those persons whose risk of injury is increased by a negligent act have a cause of action against the alleged negligent actor. Accordingly, Mrs. Palsgraf's injury was not compensated,
because in terms of standing, she had no right to complain of the possible negligence of the Long Island Railroad Company toward the person carrying the explosives.

In *Palsgraf v. Long Island Railroad*, as in all standing cases, analysis begins with the question of whether the complaining party's interest is within the zone of interests meant to be protected by the rule claimed to be violated. Justice Harlan's *Flast v. Cohen* dissent and the basic historical standing approach used by the Court provide a statement of how standing is to be decided in public rights cases, that is non-Hohfeldian, nonprivate property cases. According to Justice Harlan:

> It does not, however, follow that suits brought by non-Hohfeldian plaintiffs are excluded by the "case or controversy" clause of Article III of the Constitution from the jurisdiction of the federal courts. This and other federal courts have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as "representatives of the public interest." *Scripps-Howard Radio v. Comm'n*, 316 U.S. 4, 14. See also *Commission v. Sanders Radio Station*, 309 U.S. 470, 477; *Associated Industries v. Ickes*, 134 F.2d 694; *Reade v. Ewing*, 205 F.2d 630; *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608; *Office of Communication of United Church of Christ v. F.C.C.*, 123 U.S. App. D.C. 328, 359 F.2d 994. Compare *Oklahoma v. Civil Service Comm'n.*, 330 U.S. 127, 137-139. And see, on actions qui tam, *Marvin v. Trout*, 199 U.S. 212, 225; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546. The various lines of authority are by no means free of difficulty, and certain of the cases may be explicable as involving a personal, if remote, economic interest, but I think that it is, nonetheless, clear that non-Hohfeldian plaintiffs as such are not constitutionally excluded from the federal courts. The problem ultimately presented by this case is, in my view, therefore to determine in what circumstances, consonant with the character and proper functioning of the federal courts, such suits should be permitted.27

The difficulty with both the typical Supreme Court majority analysis and with Harlan's dissent is the assumption that a coherent analysis in public law cases can be developed without reference to the same kind of analysis in fifth amendment cases.

The two leading cases cited by Justice Harlan in *Flast v. Cohen* are examples of the confusion inherent in the current judicial treatment of private attorneys general who represent the interests of others. In both *Federal Communications Commission v. Sanders Brothers Radio Station*28 and *Scripps-Howard Radio, Inc. v. Federal Communications Commission*29 the Supreme Court gave a confused analysis of standing because it failed to recognize that public or common rights may exist either by statute or constitutionally. Thus, in *Sanders* the Court held that the Communications Act of 193430 did not protect the interest of a broadcasting competitor

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in being free of competition.31 The Court nevertheless allowed Sanders Brothers Radio Station to represent the public.32 The Court made a specific finding that the purposes of the Communications Act of 1934 did not include the radio station’s interest within the zone of interests meant to be protected, and further, that the common law granted no protection against fair competition. The Court made these findings by giving some meaning to section 402(b)(2) of the Communications Act of 1934, which grants the right of appeal to “any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.”33 At the same time, the Court naively said that the radio station must be given standing, otherwise section 402(b)(2) would have no reference.34 This assertion is, of course, untrue. The major purpose of Federal Communications Commission (FCC) licensing is to confine clear channel broadcasting and to prevent interference of signals.35 Thus section 402(b)(2) refers to any existing station that believes that an assignment to a new station on the radio spectrum will interfere with its existing broadcasting signal. Hence, finding in section 402(b)(2) a congressional desire to allow a competitive station to raise any question of law relevant to an FCC order seems completely inappropriate to normal judicial supervision. The justification given by the Court is that only a competitive station has sufficient interest to attack the FCC’s order.36 This justification is valid only if the real parties in interest are prevented from representing themselves. Moreover, if the issue is whether the new station can adequately serve the public, then depending upon a party whose interest is adverse to the public’s to represent the public is inappropriate. Similarly, when a class action can be filed, calling instead upon an existing monopolist to represent consumers is extraordinary, since consumers normally are satisfied to have additional services granted. Further, if other broadcasters who wish to serve the community have been refused permission to broadcast, they clearly can appeal under section 402(b)(1).37

The only conclusion that can be drawn from this sleight of hand is that because of the Frothingham requirements, the Court could not conceive of the public representing itself. Hence, the Court felt obligated to provide a substitute plaintiff, albeit a clearly inadequate one. The Court did not consider allowing the public to represent itself even though: (1) the licensing standard under the Communications Act of 1934 is to provide the best practical service to the public,38 and (2) the purpose of a three-year license is to give the public ample opportunity to remove inadequate broadcast-

31. 309 U.S. at 475.
32. Id. at 477.
34. 309 U.S. at 477.
36. 309 U.S. at 477.
38. Id. § 307(a).
ers.\textsuperscript{39} Certainly, a class or an organization could raise these issues, if the Court had recognized a common right to such service. Assuredly, a class can more adequately represent the needs of the public than can an existing competitor interested in retaining its monopoly position. Instead, what the Court did was change a statute that allowed for competitive entry, limited only by physical necessity, to a system of limited entry based upon a showing of substantial economic injury to the existing competitor. Thus the case that is heralded as a reform that allows public representation against government action is, in reality, a change in the substantive law that allows a competitor in the broadcasting industry to raise the issue of his economic viability in terms of overall service to the public. What is difficult to perceive is how a procedural section, such as section 402(b)(2) can properly give rise to such a substantive right.

Unlike Sanders, the plaintiff in Scripps-Howard was not suing as a competitor in the same market, but brought suit only to protect its space on the radio dial, the very purpose of section 402(b)(2).\textsuperscript{40} Hence, this case cannot in any way support the concept of private attorneys general. In Scripps-Howard public rights were implicated only because the Court did not conceive of the right to a frequency as a private right, since the airwaves are public. In contrast to Sanders, the station in Scripps-Howard was representing its own interest in broadcasting free from radio interference rather than the public's interest in receiving service from a particular station.

Again in Associated Industries v. Ickes\textsuperscript{41} the plaintiff, an association of coal consuming industrial and commercial firms, was seeking to protect its own interest, not that of the public, in the price of coal. The public interest concept was used simply to avoid the argument that consumers of coal had no standing to object to government price fixing.\textsuperscript{42} Clearly, the interest of a consumer in a free market system is protected by the common law and by the antitrust laws. The Court had never previously held that the mere fact that all consumers of a particular commodity were injured equally by an agreement in restraint of trade, or injured by a monopoly, prevented such consumers from having a cause of action, either as a class or individually. Hence, if a statute that reduced consumer choices were passed for the benefit of producers, the minimum expectation is that injured consumers would have standing to attack the statute. Allowing some other party with a different interest, such as one of the members of the conspiracy, to


\textsuperscript{40} 316 U.S. at 19. Put another way, Scripps-Howard Radio, Inc. was a "person aggrieved" by the FCC's application of the law, since the purpose of the law was to protect Scripps-Howard's interest. Its interest, however, was a mere license, and not a property interest in terms of Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939).

\textsuperscript{41} 134 F.2d 694 (2d Cir.), rev'd on other grounds per curiam, 320 U.S. 707 (1943). For further discussion of this decision, see infra notes 54-55 and accompanying text.

\textsuperscript{42} See City of Atlanta v. Ickes, 308 U.S. 517 (1939), a similar case decided without reason or opinion, in which the Court upheld a denial of standing for consumers.
bring the action on behalf of the consumers is nonsensical. Thus, although the Ickes opinion uses the public interest garb, it really stands for the concept that persons directly affected by a statute (in this case, their ability to shop in a free market) have standing to object to a price fixing scheme.

The problem of recognizing a claim of right that is indistinguishable from all other claims of right is endemic to any analysis of interests other than those protected by the fifth amendment. The analytical difficulty occurs because of a failure to recognize that article III, section 2 of the Constitution grants to courts the power to settle disputes, thus limiting the court's power to issues that are appropriate to judicial decision. Article III, section 2, however, does not limit review to a particular kind of claim. Furthermore, in section 2, "cases" refers to subject matter without regard to parties, whereas "controversies" refers to parties without regard to subject matter. Thus, as far as the federal courts are concerned, any person may bring an action under the Constitution and laws of the United States if his claim is a claim that is appropriate for judicial decision. In order to determine that issue, which is the standing issue, one must determine whether any particular claim is ordinarily cognizable in court.

The most obvious claims that are cognizable are those that were traditionally decided in common law actions. In these cases the plaintiff would allege that the defendant had breached a duty and that the breach of duty had caused damage to the plaintiff. In answer to the complaint, the defendant could demur, claiming either that he did not have such a duty or that the facts alleged did not show a causal connection between the breach of duty and the injury claimed. The second issue is implicated in standing. The Restatement (Second) of Torts refers to this issue as legal cause, and in many tort cases, it is called proximate cause.

The demurrer is a preliminary motion that if granted, avoids a determination of whether an alleged duty of the defendant was in fact breached. A decision on this issue is not a decision on the merits; whether in fact the defendant did violate a particular duty or, in some cases, whether a duty existed is simply not determined. Instead, the decision is a determination that on the facts alleged by the plaintiff a duty may have existed and although the defendant may have breached that duty, the purpose of the

43. The only argument for denial of standing is that the government's actions were part of its normal operations and, therefore, private interests had no standing to complain about the effect of ordinary governmental operations. In Ashwander v. TVA, 297 U.S. 288 (1936), a case concerned with the sale of surplus government property, the purpose of the governmental action was clearly regulatory (an assurance of a return to producers) and therefore properly reviewable under a person aggrieved standard.
44. For similar cases, see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), and Warth v. Seldin, 422 U.S. 490 (1975), discussed infra notes 159-60, 162-64 and accompanying text.
45. See supra note 10.
46. See supra note 3 and accompanying text.
47. RESTATEMENT (SECOND) OF TORTS § 9 (1965).
duty was not to protect the plaintiff's interest. The conclusion, therefore, is that the plaintiff has no right to have a court determine whether the alleged duty existed or whether it was breached, since under the given circumstances a court may not grant him compensation.

This analysis is in essence the standing analysis. In this analysis, the court cannot avoid construing the nature and breadth of the alleged legal duty to determine whether the plaintiff has made a colorable claim that comes within the court's protection. This concept is what Justice Douglas described in *Association of Data Processing Service Organizations, Inc. v. Camp* as the "zone of interests to be protected." Whether the claim arises under the common law, a statute, or the Constitution is irrelevant; the analysis remains the same. In each instance, the court must determine the greatest possible protection that the duty might confer and then consider whether the plaintiff can allege facts that would colorably bring him within the zone of protection. Under the common law, this analysis may at different times involve different zones of protection. At one point, for example, trespassers were not granted standing to determine whether the acts of landowners were negligent, since at that time the calculus used to determine negligence of landowners was based upon their duty to business invitees. In statutory cases, a newly imposed duty may very well devolve upon groups that were previously excluded from the reach of the common law rule. Similarly, licensees may at times be considered beneficiaries of statutory standards imposed upon landowners. Analysis must, however,

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In many cases the evident policy of the legislature is to protect only a limited class of individuals. If so, the plaintiff must bring himself within that class in order to maintain an action based on the statute. Thus a factory act providing that dangerous machinery, or elevators, must be guarded, may be clearly intended only for the benefit of employees, and so afford no protection to others who enter the building. Statutes requiring railroad trains to whistle for crossings are to protect those who are about to cross, and not parallel traffic, and the ordinary rules of the highway are not for the benefit of those on the sidewalk. It is generally agreed that regulations governing the condition of land or buildings are to protect only those who are rightfully upon the premises, and not trespassers. The class of persons to be protected may of course be a very broad one, extending to all those likely to be injured by the violation. Thus a statute requiring druggists to label poisons, a pure food act, a law prohibiting the sale of firearms to minors, or an ordinance against leaving horses unattended in the street, must clearly be intended for the benefit of any member of the public who may be injured by the act or thing prohibited. Sometimes the courts have disagreed over a broad and a narrow construction of similar statutes, as where a provision requiring that parked cars shall be locked has been held to be intended, and not to be intended, for the protection of a person run down by a thief escaping with a stolen car.

... A much more reasonable attitude is that of the New York court in a decision holding that an act requiring elevator shafts to be guarded covered the risk of objects falling down the shaft, to the effect that the accident need only be included within the same general risk, or class of risks, at which the statute is directed. Thus in the absence of any other guide, a statute may well be assumed to include all risks that may reasonably be anticipated as likely to follow from its violation. There are, however, occasional cases which have
consider the purpose and extent of the statutory protection.

_Data Processing_, of course, laid the groundwork for the approach suggested in this Article. In _Data Processing_ Justice Douglas finally gave meaning to the words person "aggrieved by agency action within the meaning of a relevant statute." What Douglas meant is that if a government official has discretion or is granted authority to issue an authoritative construction of a regulation, statute, constitutional provision, or act, and a party has an interest that will be diminished by the official's action or by his authoritative construction, then that person is aggrieved by such action or construction. Such interests are divided from legal interests, because in most cases individual interests arise solely out of the claimed construction of the statute. Thus if the judicial determination is that the official's interpretation is correct, then, following the interpretation, the losing party has no interest. A legal interest arises, therefore, only after a judicial determination that the party's construction is correct. For this reason, Douglas said in _Data Processing_ that the legal interest goes to the merits of the case.

The term legal interest, however, did not originate in _Data Processing_. Instead, it originated in cases involving judicial review of the exercise of the police power or of other delegated governmental powers, powers that infringe upon existing legal and constitutional rights. In the latter cases, courts were asked to test the legitimacy and need for the government's exercise of power by balancing it against the loss or restriction of private rights. Standing to demand this balancing arose from the existence of a private right. These cases are the familiar fourth and fifth amendment cases. They are quite distinct from cases in which the claimed rights exist only in the statute or constitutional provision being interpreted, or in which the issue is whether the government is acting within the confines of due process or equal protection. Procedural due process and equal protection claims fit into the latter category of cases if the person is aggrieved because under an official interpretation he is not entitled to the particular process claimed or assignment to a particular category. For the purposes of article III, section 2, the issue is appropriate for judicial resolution and does not result in an advisory opinion. In many cases, a decision that the person aggrieved does not have a legal or constitutional interest will foreclose others from continually raising the same issue (stare decisis) just as Justice Cardozo's opinion in _Palsgraf_ foreclosed other plaintiffs from making claims based solely upon injury in fact.

Although in _Data Processing_ the Court seemed to expand standing radi-

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Id. (footnotes omitted).

51. Standing in police power cases is limited to persons holding existing legal interests because the nature of the police power regulations is to limit such interests in the interest of the public's health, welfare, or safety. Others may not object because they could not object to other persons doing the same thing as the government proposes to do. By its very nature, the police power limits existing legal rights.
cally, the Court in fact simply recognized that the rules of standing as applied to legislatively enacted laws cannot appropriately be applied to an administrative agency's rules. Conceptually, every person has input into the political process. Hence, when a law is passed, only persons whose constitutional rights of life, liberty, and property are affected can constitutionally complain. Persons who are merely disadvantaged or injured in fact rather than in law do not have standing to declare the law unconstitutional. By contrast, when the lawmaking function is delegated to an administrative agency to make rules according to some general guideline and posited upon some particular finding of fact, the nature of the input by the affected parties differs greatly.

In the political process, parties can lobby for a particular law, whereas in the administrative process, the parties are restricted to presenting evidence and arguing that some rules fulfill legislative purposes better than others. Standing in an administrative law context, then, is standing to object to the decisions of the administrator as contrary to law because the rules adopted do not carry out the alleged legislative purpose, or because on the facts, the evidence does not support the finding.

A person aggrieved by an administrative decision is a person who was contemplated either to be helped or regulated by the agency and who is adversely affected by the processes of the agency. In administrative law the person is aggrieved rather than legally injured because if a court upholds the agency determination, then the person has no claim that his legal rights (his constitutionally protected rights) are violated. A person aggrieved is claiming that the agency was in truth acting illegally in making its decision and that he in fact had a legal right, granted by the very statute in issue, to have the agency act according to law. This is true only if the agency's action will affect his rights as granted by the particular statute or his prior rights as redefined by the statute.

This distinction is most easily discerned in rate regulation of businesses affecting the public interest. If the legislature sets a utility rate, the utility has standing to attack the legislation as confiscatory and violative of the utility's just compensation rights under the fifth amendment. On the other hand, if after a hearing, a public service commission is granted power to set compensatory rates, the sole issues are whether the rates are indeed compensatory and whether the facts found by the commission are supported by evidence. Furthermore, if the statute is construed to be for the benefit of consumers, the consumers can appeal the same administrative decision as inconsistent with a law protecting their interests. Thus although both parties have no legal right to object to a utility rate set by a

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52. See, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Kansas-Nebraska Natural Gas Co. v. City of Sidney, 186 Neb. 168, 181 N.W.2d 682 (1970); In re Towne Hill Water Co., 139 Vt. 72, 422 A.2d 927 (1980).

legislature, they have a right as persons aggrieved to object to a comparable decision of a government agency as not in conformity with a law passed for their benefit. A gas company, however, cannot object to the processes of arriving at the electric rate, unless the statute can colorably be construed as intended to protect competing sources of energy. For the purposes of article III, this definition of a person aggrieved insures that the party who raises a legal issue is claiming a legal right, which is that an agency deciding a question that will effect the party will do so in accordance with law.

Under this analysis, one other group is granted standing to challenge the utility rate even though to some extent its interests would not be within the zone of interests protected by a particular statute. For example, in *Associated Industries v. Ickes* purchasers were granted standing to attack a statute setting minimum prices. The purchasers had previously been protected from free market competition by a producers' firm agreement on a minimum price. The new law removed that protection and provided that a government agent could now set the price, which producers were thereafter prohibited from setting. Under similar circumstances, at least for the purpose of testing the constitutionality of a statute or an alleged extension of the operation of a statute, a person whose existing statutory or common law rights have been curtailed or destroyed by a statute has standing to attack the validity and breadth of application of the statute. This attack is essentially a one-shot assault, since once the statute has been authoritatively construed and rights have been found to be extinguished by the statute, the interest claimed usually can no longer support standing for further attacks. Under circumstances such as those in *Ickes*, however, the statute itself might grant standing (of course, not to attack the statute) if the purpose of the statute is to fix reasonable rates or otherwise to protect the consumer as well as the producer. In such cases, the only reason not to grant standing is that the statute provides for an inconsistent method of enforcement. Thus if a statute either creates new rights or modifies existing rights, by its own terms it may also designate how those rights should be determined. In such cases, both standing and the interest to be protected are controlled by the statute.

54. 134 F.2d 694, 705-06 (2d Cir.), rev'd on other grounds per curiam, 320 U.S. 707 (1943).

55. Confusion arises from the fact that the courts do not distinguish situations in which the government is carrying on its own business and those in which the government is acting as a regulatory agency. In the first situation, the government may decide to sell surplus property as it did in *Ashwander v. TVA*, 297 U.S. 288 (1936). In such cases, others in the market cannot complain about the competition. On the other hand, the government may decide to sell for the purpose of regulating private rights as it did in *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939). The purpose of that sale was regulatory. Because the regulation affected private rights, standing should have been granted to private parties, since unlike the government, no private party can legally engage in regulatory activities. When economic regulation benefits one group to the detriment of another, the regulation can at least be attacked on the grounds that no justification exists for the regulation or that the means chosen are not properly tailored to the legislative ends.

56. In administrative law, the person aggrieved falls in this category.
The problem of deciding standing in cases involving the exercise of governmental power, as opposed to cases involving the modification of private rights by statute, has been compounded by the Supreme Court's failure to understand the nature of the claimed rights. The Court has assumed that only rights or interests protected by the fifth amendment are worthy of protection. Under that assumption, the Court has excluded from protection those interests affected by governmental action that is normally shielded by sovereign immunity. Thus the rights accorded protection are the liberty interests of contract and property affected by the police power, as opposed to rights related to reputation and competitive interests protected only by tort law. What has happened, especially on the federal level, is a retreat by the federal courts from reviewing exercises of state police power. Hence, after *Ferguson v. Skrupa*, no one has standing to raise the issue of substantive due process. The explanation for this phenomenon is simple.

The fifth amendment uses words that are clearly translatable to the ordinary experience of courts. Life, liberty, and property are all concepts that exist at common law. Furthermore, the courts recognized from the beginning that the danger from the state was through invasion of these basic rights. The way in which these rights were ordinarily invaded was with the state as plaintiff. Thus liberty was normally at issue in a criminal case and property in an eminent domain case. The courts found no difficulty in drawing analogies between interests protected by the fifth amendment in cases brought by the government and interests of a similar nature in cases brought by individuals. For example, liberty was analogized to the writ of habeas corpus, and property was analogized to the action of eviction or of trespass against a government official. The desire and need for this kind of review increased during the nineteenth and twentieth centuries. Hence, fifth amendment substantive due process review replaced all other approaches to limiting governmental power. The courts perceived that only claims bottomed in a taking of property without substantive due process were sufficient to allow an action against a government. To meet this requirement, the interest had to be unique to the individual (otherwise no fifth amendment taking) and preemptively protected by the fifth amendment. All other incursions by the government were not actionable, since the government was protected by the doctrine of sovereign immunity. Exceptions to this rule related, of course, to actions against individual government agents. Such actions could raise the constitutionality of the laws under which the agents were acting, but only when the agents were acting in furtherance of such laws. In *Tennessee Electric Power Co. v. TVA*, for

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58. The Civil Rights Act of 1871, 42 U.S.C. §§ 1981-1985 (1976 & Supp. IV 1980) provides a cause of action for damages for certain acts that, if authorized by law, would be subject to the defense of sovereign immunity. Without the Civil Rights Act, a plaintiff would be limited to the declaratory or injunctive actions listed in *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939), in cases in which the action was authorized by state law, or to a cause of action directly against the official. The latter alternative would be limited by
example, the Supreme Court said:

The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.59

The essential issues in cases cited by the courts in support of this proposition were those involving the impairment of state or municipal contracts or title disputes between government and private parties.60 Some cases directly involving the application of the equal protection clause were also cited. The thrust of this proposition was that outside a claim of a specific constitutional violation of one's property rights under the fifth or fourteenth amendments, or a violation under the contracts clause of the Constitution, no remedy was available against the government for injury to the plaintiff's interest. Thus the normal rules of sovereign immunity applied, unless a particular constitutional violation occurred. This approach does not allow most persons injured by public action to bring the state into court.61

With the decline of substantive due process and judicial expansion of the commerce clause, the possible range of review over state police power regulations and claims under the tenth amendment shrunk while the breadth of both state and federal activities increased. Meanwhile, changes in the common law and statutory modifications of existing legal relationships occurred in such areas as consumer protection, nuisance, and land use. In all of these areas, new rights and obligations were created and, in many cases, these were common rights and obligations. Further, with the expansion of administrative agencies and governmental regulation, the legislature granted standing in these areas partially to replace the old po-

60. See supra note 7. Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939), for example, involves impairment of state and municipal contracts, title disputes between government and private parties, and equal protection issues.
61. Another explanation of these cases is that when performing its governmental operations (i.e., in disposing of property, operating the police, licensing the airways, managing government land) the government is protected by sovereign immunity and cannot injure anyone, because no one can expect not to be affected by the normal operations of government just as no one can expect not to be affected by the legal actions of a competitor. See The Case of the Schoolmasters, Y.B. 11 Hen. 4, f. 47, pl. 2f (1410). What the Court missed was that the purpose of the TVA was to regulate the industry by limiting pricing rather than by merely selling surplus electricity as in Ashwander. The Court was not yet ready for a doctrine that provided that the government should not prefer one group of citizens over another for irrational reasons and that persons aggrieved by such governmental actions should have standing to contest those actions. The issue, therefore, was not simply whether the government could sell electricity, but whether the government should use its authority to sell electricity effectively to set the rates of its private competitors through a willingness to sell to its customers at prices that might be below cost.
lice power review and partially to allow affected persons to have input into 
the process that defined their interest. Even on a constitutional level, the 
degree of citizen input increased as the power of the state increased, and 
virtual representation by property holders seeking to limit state power di-
minished. The courts were asked to decide cases based not upon the 
interests of the state or the interests of private parties, but upon the issue of 
citizen input into legislative decisionmaking and citizen access to informa-
tion necessary for the intelligent exercise of political rights. Whether the 
question arises under the common law, a statute, or under the Constitu-
tion, therefore, problems of standing are essentially the same, because the 
essence of standing is rooted in the judicial process.

At the inception of our judicial process, the Constitutional Convention 
rejected the model of the privy council, a structure that could invalidate 
colonial legislation on the grounds that it was inconsistent with English 
law, and established instead a judicial power extending to cases arising 
under the Constitution and laws of the United States and to controversies 
between certain parties. Judicial power is thus based upon the right of 
one party to bring another into court. This arrangement is not like volun-
tary arbitration in which the parties must agree to the nature of the contro-
versy and the jurisdiction of the court. Neither is it like a rulemaking 
procedure in which persons gather together to suggest a solution to a prob-

62. The theory of virtual representation was developed in England to justify "rotten 
boroughs" and was used as well to justify not granting representation to the colonies. The 
theory is based upon the concept that persons holding similar interests will adequately rep-
resent the interests of others not before the court.

63. These concepts came to fruition in administrative law through the Administrative 
Through these statutes, the interests affected were given the right to submit information and 
the concomitant right to have such information considered in rulemaking. Standing de-
pend, therefore, upon the right of input rather than upon the effect of a regulation upon 
property interests. Rights based upon these statutes belonged to the public generally. See, 
e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), in which Justice White wrote:

Since virtually any document not privileged may be discovered by the appro-
priate litigant, if it is relevant to his litigation, and since the Act clearly in-
tended to give any member of the public as much right to disclosure as one 
with a special interest therein . . . it is reasonable to construe Exemption 5 to 
exempt those documents, and only those documents, normally privileged in 
the civil discovery context.

Id. at 148-49 (footnote omitted).

64. S. PRESSER & J. ZAINALDIN, LAW AND AMERICAN HISTORY 56-57 (1980):
At this time the activities of the colonial legislatures were circumscribed by the 
"Instructions" to the "Royal Governors," the Chief Executives of the colonies. 
These Instructions were written directions given by the King to his appointed 
governors, and, because they set certain limits on what the Governors and 
Colonial Legislatures could do, they were primitive analogues of our modern 
State and Federal Constitutions. See Generally L. Labaree, Royal Instruc-
tions to British Colonial Governors (2 vols., 1935). The King also had the 
power of "Disallowance," the right to set aside any law passed by the assem-
bley of one of the colonies. When the King formally approved of an Act, it was 
said to be "confirmed." In deciding whether to confirm or to disallow an Act 
the King was advised by various officials, including the Privy Council and a 
special committee for the colonies, the "Board of Trade."

65. See supra note 3 and accompanying text.
The judicial power arises from a court's obligation to settle a dispute appearing as a plaintiff's claim that the defendant has failed to grant the plaintiff his legal due and a denial by the defendant of the plaintiff's claim. The declaration of law by the court arises only because of its power to settle disputes according to claims of right.

Other entities settle disputes, but such entities need not declare who is right and who is wrong. Mediators, for example, settle disputes by bringing the parties to an agreement. The requirement that courts make decisions in accordance with claims of right leads to the standing requirement. As noted above, this aspect of the judicial process was recognized by Justice Marshall in *Marbury v. Madison* when he acknowledged that his power to declare unconstitutional a statute of Congress arose solely in the context of a dispute in which he was obligated to determine what law applied. Marshall had two sources of law: an act of Congress and article III, section 2 of the Constitution. The plaintiff's claim arose out of the statute and thus would have to be granted if the statute were valid. Declaring a statute invalid, without a claim that the statute infringes upon some right, is not an exercise of the court's power to settle disputes. Such a declaration would have to be bottomed upon some other grant of power. Only the explicit grant of dispute settlement power allows a court to review a legislative act. Without that grant of power, courts cannot claim the superior competence or wisdom requisite to support a power of review. Only absolute necessity justifies the exercise of such power, and the standing requirement can assure proper application of that power.

Within the legal process very few clear rights and duties exist. As Hohfeldian analysis illustrates, every right assumes a duty, but the lines between these rights and duties are not self-executing. The factual context of any particular problem may require different answers without any change of principles. Hence, before a court can authoritatively decide an issue, the real parties in interest must appear to present the court with the facts. Moreover, sources of law are found in the practices and the expectations of the parties, and rights not asserted in a particular case may be deemed waived and lost forever. For one person to presume to assert the rights of another is, therefore, generally inappropriate, because that other person may not wish to assert his rights or because without the appropriate

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67. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 Law & Soc. Rev. 63, 69 (1974). Felstiner's article points out that the difference between mediation and a judicial resolution is that in the former the parties compromise and neither party is considered right, whereas in a judicial resolution one party is found to be right, since resolution depends upon a claim of right.
68. 5 U.S. (1 Cranch) 137, 176 (1803).
69. Admittedly, Justice Marshall substituted one separation of powers argument for another. The government's position was that the executive was immune from a court mandamus order in the granting of commissions whereas the Court determined that the statute authorizing the commissions violated the Constitution by imposing jurisdiction upon the courts. *Id* at 175. Thus the tribunal itself raised a claim of right in dealing with its jurisdiction.
70. Hohfeld, *supra* note 7, at 31-34.
interest before the court, the court cannot accurately gauge the right asserted except in light of the defendant's arguments. The power of a court to determine a case according to a claim of right is basic to the exercise of judicial power; hence, the only persons who may assert such rights are the persons who claim those rights for themselves.

The grant of standing for one issue cannot become a grant of standing for all possible issues. In Village of Arlington Heights v. Metropolitan Housing Corp., for example, the plaintiff builder could not raise the rights of minority purchasers simply because he had standing to raise questions of substantive due process concerning the denial of a rezoning request. On the other hand, a person does not lose a right simply because he holds that right in common with many other persons. A person has the right to object to a curfew or to martial law even though the regulation affects every other person in the community. A person also has the right to attend public trials, to examine public records, to vote, to speak, and to be considered for employment, even though all other persons similarly situated have the same right. In this sense, the distinction that the Supreme Court attempted to articulate in its dictum in Frothingham v. Mellon does not go to the existence of common rights. Instead, the distinction goes to the review of government action based on general claims of illegality that do not relate to any particular violations of a plaintiff's individual or common rights. The plaintiff's objection to the particular expenditure in Frothingham v. Mellon, for example, was based on the tenth amendment, a claim determined to belong to the state or to the community and not to the plaintiff as a common right. Thus to have the expenditure rescinded, the plaintiff's only recourse was to act within the political community.

The distinction between legal and political rights, therefore, does not relate to whether such rights are held in common or held individually. Rather, the distinction relates to whether the political bodies or the courts are assigned the job of ascertaining those rights and whether the decision is based upon policy or a claim of right. The typical political reapportionment problem will serve to clarify this distinction. If the question goes to the appropriate structure of government, the issue is clearly a political one, since the majority of voters has no right to any particular policy formulated by the government. Thus, were the United States Senate to establish a two-thirds requirement for cutting off Senate floor debate, such a rule would at times frustrate the majority even as it protected the minority and prevented hasty action. Likewise, if a political body decided that certain decisions, such as issuing bonds binding on the government by amend-

ment, should require an extraordinary majority,\textsuperscript{74} that requirement would clearly violate the theory of majority rule. Yet, it would properly be considered a policy question and not a question subject to a claim of right to be asserted in court. In designing such procedures, various interests are being served. What, then, is the rationale for granting individual voters standing to attack malapportionment?

The right in question is the individual right to have input into government. Based upon the white primary cases and other voting cases,\textsuperscript{75} each citizen clearly has such a right. Certainly the rationale behind the free speech clause\textsuperscript{76} is that people must speak so that an informed electorate can make responsible and intelligent decisions. If one has a right to input into the governmental system, then the equal protection clause\textsuperscript{77} can colorably be used to argue that everyone has a right to equal input into the system and that any distinction must be justified by rational governmental policy. The grant of standing to voters in the reapportionment cases, therefore, is not based upon any theory that reapportionment is appropriate, but on the notion that the equal protection clause prevents the government from granting more voting rights to one person than to another.\textsuperscript{78}

In \textit{Flast v. Cohen}, then, Justice Harlan is clearly correct in arguing that the plaintiff had standing to bring suit as a citizen, but not as a taxpayer.\textsuperscript{79} The issue in \textit{Flast v. Cohen} was the meaning of the Constitution's establishment clause: "Congress shall make no law respecting an establishment of religion . . . ."\textsuperscript{80} The plaintiff's colorable claim was that the particular appropriation was an establishment of religion. Even Justice Harlan admitted that the issue of a direct religious tax could be raised by taxpayers as taxpayers. The difference between \textit{Flast v. Cohen} and \textit{Massachusetts v. Mellon}, however, is that the beneficiaries of the establishment clause are clearly the residents of the United States who do not belong to the preferred religion. The right to the benefit is not based solely upon being taxed for the support of a religion in which one does not believe, but upon the promise to preserve a secular state that does not in any way prefer one religion over another and indiscriminately allows all religions. Thus a resident can object to public support of a particular religion whether or not money is involved.

The theory of the lawsuit in \textit{Flast v. Cohen} was that the activity was

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\footnote{74. For an example, see Gordon v. Lance, 403 U.S. 1 (1971).}
\footnote{75. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).}
\footnote{76. U.S. \textsc{const}. amend. I provides: "Congress shall make no law . . . . abridging the freedom of speech, or of the press . . . ." \textit{See also} Williams v. Rhodes, 393 U.S. 23 (1968).}
\footnote{77. U.S. \textsc{const}. amend. XIV, § 1 provides: "[N]or shall any State . . . . deny to any person within its jurisdiction the equal protection of the laws."}
\footnote{78. Gray v. Sanders, 372 U.S. 318, 379 (1963). \textit{See generally} Rudolph, \textit{supra} note 73. How then is the unequal representation of voters in the United States Senate justified? Originally, the purpose was equal representation of political communities rather than of individual voters. In the various reapportionment cases, the Court rejected that concept within the states, but upheld it in limited federated governments based upon a metropolitan area or an interstate compact.}
\footnote{79. 392 U.S. 83, 119-20 (1968).}
\footnote{80. U.S. \textsc{const}. amend. I.}
\end{footnotes}
ultra vires. The issue to be resolved by the Court was solely whether that theory was valid. The anology made by the Court focused upon the right of a stockholder to question an action of a corporation or to the right of the member of an association to object when the association enters fields that are not specified in the charter. The issue is not whether the corporation or the association is spending money improperly, for it may in fact be making money, but whether it is acting beyond the scope of the purposes of the organization. 81

An even better analogy is to the settlor of a trust. The settlor does not have any interest if money is lost in fulfillment of the purposes of the trust, since he has given up all claim to the money. On the other hand, he does have an interest that the trustee spend the money for the purposes of the trust, and the settlor has standing to object if the trustee attempts to use the funds for purposes clearly outside the purposes of the trust. 82 Similarly, if the people of the United States are perceived as settlors of a trust upon the government, and the Congress and other members of the government are perceived as trustees with wide discretion to govern for secular purposes in the public interest, standing could be granted to any citizen to hold the government to those secular purposes but standing could be denied to that same citizen on the issue of whether a particular secular purpose is in the public interest. The reason for this distinction is that the government is given discretion to determine what is in the public interest, but not to determine what is religious. The same issue could arise, for example, in a charitable trust whose purpose is to care for the poor youth of Philadelphia. In such a case, the method and means of providing for poor youth would not be subject to judicial attack by the settlor, but a decision to establish an old people's home with the earmarked funds would be so subject. 83

This discussion is based upon a traditional exercise of judicial supervision relating to the jurisdiction of governmental bodies. Historically, the King's courts issued writs of prohibition to other courts to insure that those courts would stay within their jurisdiction, and it has been tradition that courts exercise this supervisory power to keep agencies within their jurisdictional limits even when the courts are not empowered to review the operation of those agencies. Flast v. Cohen clearly comes within this tradition. The only unusual thing about the case was the person who brought the action. As pointed out above, however, the establishment clause is colorably for the benefit of any citizen who wishes to insure that the United

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82. 2 RESTATEMENT (SECOND) OF TRUSTS § 200(b) (1959); see Stanley v. Colt, 72 U.S. (5 Wall) 119 (1867).

83. See E. FREUND, STANDARDS OF AMERICAN LEGISLATION 36 (1917): "The jurisdiction exercised over charitable trusts was avowedly limited to maintaining the original purposes of the founder unimpaired . . . ." Id.; see Estate of Jackson, 92 Cal. App. 3d 486, 155 Cal. Rptr. 380 (1979).
States remain a secular state rather than for the benefit of one who objects merely to having his money spent for religious purposes.

Because of Justice Harlan's dissent in *Flast v. Cohen*, a discussion of standing must include a discussion of taxpayer standing. As Justice Harlan stated, a federal taxpayer lacks standing because he has no more interest in the federal treasury than has any other person. 84 Indeed, with the growth of entitlements nontaxpayers as well as taxpayers have claims upon the United States Treasury. By contrast, in nongovernmental law a creditor does not have standing to object to spending by his debtor unless the expenditure will impair some contractual security. 85 In corporate law, a stockholder does not have standing until a demand for action is made upon the directors and refused. In such cases, standing may yet be forestalled by the business judgment rule, and thus the wisdom of corporate policy, as opposed to the legality of such policy, is precluded from attack. 86

The only proper analogy to the taxpayer suit, therefore, is to the actions of a beneficiary of a trust. The beneficiary's claim is based upon the theory that if illegal or improper payments are made, he will have less valuable property for himself. The theory of the taxpayer's suit is almost the same. Since the government's obligations are generally on a cash basis, any improper payments would require an increase in taxes. Why states and special and local governments have this rule is obvious. Governments usually must function on a balanced budget. 87 In the case of special and local governments, moreover, financial objectives are minutely detailed and nondiscretionary. The persons who must finance these objectives usually do so because of a direct or nearly direct benefit to themselves. Thus expenditures by a drainage district for nonrelated activities could and should be much more clearly monitored than state expenditures for the general welfare. In the realm of local government, then, every action may be perceived as a jurisdictional question, that is, whether the activity was within the specific, narrow grant of power. The separation between payors and

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85. For example, the only interest a mortgage lender has is his security. If money is deposited to cover his security, a sale may take place.
86. Stockholders have no rights in the legal disposition of corporate property. *See* First Nat'l Bank v. Maine, 284 U.S. 312 (1932). Outside the ultra vires claim, stockholders may attack or attempt to recover illegal payments in suits filed under the name of the corporation only after a demand has been made upon the corporation and the corporation has refused. *See* Hyams v. Old Dominion Co., 113 Me. 294, 93 A. 747 (1915). In secondary stockholders' suits, the rights of stockholders are restricted by the business judgment rule. Hence, suits can be brought to recover only clearly illegal payments (*i.e.*, payments that are clearly ultra vires). *See* Abbey v. Control Data Corp., 603 F.2d 724 (8th Cir. 1979). The business judgment rule is based upon the concept that directors who are unbiased and who know all pertinent information have the right to control the corporation. The rule does not authorize ultra vires or illegal acts.
87. Two examples of this process are the constitutions of Nebraska and Wisconsin. Both constitutions place a specific limit on general obligation bonds that may be used for cash flow purposes only. The state must maintain a balanced budget; hence, every expenditure requires a tax. Because an illegal expenditure would also require imposition of a tax, taxpayers have standing to attack such illegal expenditures. *See* NEB. CONST. art. XIII, § 1; WIS. CONST. art. VIII, § 6.
beneficiaries is much narrower than the separation between federal taxpayers and the national government. Moreover, local governments generally have little or no separation of powers and no official body capable of checking improper behavior within the government.\textsuperscript{88}

In light of this narrow delegation of power and the trust theory of government, that courts have granted standing to taxpayers to challenge expenditures by state and local governments is not surprising. On the state level, comparable grants of standing have led to anomalous and divergent results. Challenges to similar governmental activities have been treated differently solely on the basis of whether or not an expenditure was involved.\textsuperscript{89} For a more coherent result, standing should be granted on the same basis as has been outlined above for federal cases. Thus when a plaintiff is attacking state legislation, he should be required to claim not only that the act was unconstitutional, but that the constitutional provision claimed to be violated was for the purpose of protecting the plaintiff's interest. The state taxpayer's suit should be limited to cases in which a special fund has in fact been created for special purposes, and standing should be limited to persons both paying for and benefitting from the special use. In cases involving local governments, standing should be determined as for administrative agencies, that is, either according to the statute creating the agency or according to the statutory provisions requiring citizen input.

The approach outlined in this Article can also be used to deal with recent cases concerning standing in separation of powers cases. In these cases, the issue is the distribution of powers between the Congress and the President, or the Senate and the President. The real party in interest is the constitutional body itself and not a member of that body. Thus the members of the body have no standing to object to a failure of the body to assert its rights. A member of the constitutional body is analogous to a stockholder who objects to a failure by the corporation to assert its rights in a possible claim against a third party. Under the business judgment rule, these claims would be rejected. The stockholder action, if any, would have to be against the board of directors claiming that the board has a duty to act. The action would be in the nature of a mandamus; otherwise no cause of action exists. Similarly, when a disagreement arises between the legislature and the executive branch, the issue is a political question, as it was in \textit{Massachusetts v. Mellon}, unless the legal implications of the decision by one body are in conflict with the legal implications of the decision by the other body. Under this approach, no standing exists, unless the independent bodies have made irrevocable decisions.

\textsuperscript{88} When the delegation of authority to spend money is very specific, any expenditure other than those specified is considered to be ultra vires.

\textsuperscript{89} New Hampshire Wholesale Beverage Ass'n v. New Hampshire State Liquor Comm'n, 100 N.H. 5, 116 A.2d 885 (1955) (taxpayer granted standing even though no expenditure involved); Baltimore Retail Liquor Package Stores Ass'n v. Kerngood, 171 Md. 426, 189 A. 209 (1937) (taxpayer standing denied on basis that no expenditure was involved in governmental decision under attack).
In *Kennedy v. Sampson*, a United States Senator filed suit against the Administrator of the General Services Administration and the Chief of White House Records seeking a declaration that a particular bill had become a validly enacted law and an order requiring defendants to publish the bill as a validly enacted law. The duties of the defendants were clearly ministerial and subject to a mandamus action. The issue for the court, therefore, was simply whether the law had been legally enacted under the Constitution of the United States and whether the defendants should be required to publish it. The standing issue concerned who had the right to request that the court decide the matter. In this case, the court granted standing to the Senator and did not discuss his possible claim to standing as a citizen. A concurring opinion pointed out that the Senator was an elected representative bringing this action for his constituents. Since the Senator had voted for the unpublished bill, there could be no question that the necessary adversity existed. The real issue, however, was the identity of the proper party. Congress had done everything legally necessary to enact the law; either the act was law, or it was not. In that sense, Congress had no discretion left. Moreover, acts of Congress are not for the benefit of Congress as such; hence, the institution itself cannot be a proper party in a judicial forum. On the other hand, the duty to enforce the laws is placed upon the President, and the remedy for his inaction is not through the courts but through the impeachment process. In addition, the officers of Congress, even after being directed by resolution, have no greater interest in a purported law than any senator or the public at large. Finally, for the two coordinate branches to appear as litigants in court would be unseemly if not unconstitutional. In fact, sections 8 and 9 of article I seem to indicate that bringing court actions is not part of congressional power.

In *Reuss v. Balles*, by contrast, the injury, if any, was to Congress or the President. In *Reuss* a United States Congressman brought suit for declaratory and injunctive relief from the allegedly unconstitutional composition of the Federal Open Market Committee (FOMC) of the Federal Reserve System. The Congressman was also the owner of certain marketable bonds. Since Congress had enacted legislation setting up the FOMC, the issue was not whether congressional power had been lost, but rather whether legislative power had been improperly delegated to a private or partially private group. Based upon this Article's analysis, standing for injury in fact would lie in the plaintiff as a bondholder. The court, however, rejected this contention on the basis that as a bondholder the plain-

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90. 511 F.2d 430 (D.C. Cir. 1974).
91. Id. at 435.
92. Id. at 446.
93. Id.
94. Article III does not seem to contemplate congressional actions in court. See U.S. CONST. art. III.
95. See id. art. I, §§ 8, 9.
96. 584 F.2d 461 (D.C. Cir. 1978).
tiff’s complaint was no different from that of any other citizen. This contention was a dictum in *Frothingham v. Mellon* and is clearly inappropriate. If the asserted rights were common rights or public rights, however, the injury claimed (the loss of the value of the funds) was not causally related to the alleged illegality. No evidence indicated that the decisions of the FOMC would have been different, or that less rather than more inflation would have resulted, if the nonappointed member had been appointed by the President rather than elected. The court was correct in pointing out that the injury, if any, was to Congress or to the President rather than to the public or a member of the House. Close analysis shows that the purported injury was to the President, since it was his appointive power that was eliminated by the statute.

Two recent Supreme Court cases illustrate how application of this Article’s analysis would give clear answers to the standing issue without raising the question of whether the plaintiff’s injury was common to others. In both cases, standing was denied: once correctly and once incorrectly. In *Schlesinger v. Reservists Committee to Stop the War* the complaint alleged that certain members of the House and Senate were holding reservist commissions in the armed forces and were, therefore, violating the dual office provision of the Constitution. Rather than analyze whether that provision of the Constitution was for the general protection of citizens, the Court denied standing on the basis that the injury was not unique to any particular plaintiff. Clearly, the provision is not designed as a direct protection of citizens, since it mandates a separation of powers. The purpose of the provision is to insure that the President cannot control the legislative branch through the power of appointment and that members of the legislative branch cannot use their positions to increase the “emoluments” of any office to which the President might appoint them. A similar issue was raised and decided by the Senate in a confirmation hearing on Senator William B. Saxbe as Attorney General. The hearing was on a bill to reduce Senator Saxbe’s pay until his former term as Senator had expired. The bill added a rider granting standing to any person aggrieved by actions of Saxbe as Attorney General to challenge his appointment. The appointment of Saxbe as Attorney General was, however, never judicially attacked. In both *Schlesinger* and the Saxbe hearing, the issue was eligibility for office, not the policies of the individual after taking office. For that

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97. *Id.* at 469-70.
98. *Id.* at 469.
100. U.S. CONST. art. I, § 6, cl. 2 provides:
    No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a Member of either House during his Continuance in office.
101. 418 U.S. at 220.
103. *Id.*
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matter, a close reading of Schlesinger indicates a narrow discretion to exclude properly elected representatives. Thus Congress as an institution, rather than the courts, is clearly expected to maintain the separation of powers required by the dual office provision. As to Schlesinger, Congress had already acted in a number of different instances to provide legislatively that membership in the Reserves did not constitute dual office. Hence, the issue for the Court in construing the dual office provision was whether someone other than Congress could have standing to attack Congressmen for holding reserve commissions.

Since Congress clearly takes its separate power seriously, and since the purpose of the dual office provision is to protect Congress rather than the people, no one other than Congress should have standing. Furthermore, the authority granted by the constitutional provision is not to be used in court, but in the ordinary exercise of congressional power. Any other conclusion on standing would have contradicted the concepts that one person cannot assert the constitutional rights of another and that a citizen qua citizen does not have standing to question whether the Constitution has been properly enforced. The Schlesinger Court actually rejected this latter concept, not the concept that citizens having interests in common have no standing. Moreover, the case was clearly filed against the wrong defendant. The illegality, if any, was not in holding the position of an officer in the Reserves, but in holding the congressional seat. If anyone else wished to raise the issue, he would have to have done so in a quo warranto action when the particular individual filed for election. Convicted felons have been removed from the ballot by similar actions. Otherwise, the question of the eligibility of elected Congressmen to take their seats or to remain in their seats is committed to Congress rather than to the public in general.

In United States v. Richardson the Court denied a taxpayer standing to object to the Central Intelligence Agency’s alleged failure to account to Congress according to the terms of article I, section 9, clause 7 of the Constitution: “No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law; and a regular Statement and

105. A recent case, McClure v. Carter, 513 F. Supp. 265 (D. Idaho 1981), has an especially muddled opinion. It sets out a requirement that to have standing the plaintiff must be injured in fact rather than in law. Id. at 269. If the court means what it says, then virtually all third-party actions against defendants who have violated a statutory duty would have to fail, since the plaintiff’s right to sue derives from a statutory grant, not from an injury in fact. The court posited this standing requirement either to avoid declaring that the special jurisdictional statute was an unconstitutional bill of attainder, or to decide on constitutional grounds that Congress was the final arbiter of the meaning of the dual office provision of the Constitution. Although avoiding decisions on constitutional issues is normally appropriate, for the court to do so by proclaiming that to bring an action under article III, clause 2, a plaintiff must show personal injury even though that plaintiff has statutory authority to bring the action seems inappropriate.
106. The assumption in this case was that most persons held the commissions when elected.
Account of the Receipts and Expenditures of all public money shall be published from time to time." Although no taxpayer has standing to object to the actual expenditures, this particular provision is colorably, if not explicitly, designed to assure the public's right to know. This provision restricts Congress for the benefit of the public in the same manner that the establishment clause restricts Congress as to the establishment of religion.

Standing has traditionally been granted to guarantee the public's right to know. In *Nebraska Press Association v. Stuart*, for example, the Court closed a preliminary hearing in supposed violation of the public trial rules. The standing of the press in that case is certainly no different from the standing of a citizen who seeks to require that public acts be performed publicly by Congress. Arguably, the public had a greater right in *Richardson* than in *Nebraska Press* because the purpose of article I, section 9, clause 7 is to make public officials accountable for their acts in the political process. The basic genius of our free government is that public officials are required to act publicly. In the trial situation, by contrast, the public character is arguably for the benefit of the defendant rather than the public, and when judges are not elected, little reason to subject them to close public scrutiny exists. Notwithstanding that the right to a public trial is for the benefit of the defendant, the Supreme Court has held that the public has standing to object to the closure of the trial. If the public has this right as secondary beneficiary of a defendant's right to a public trial, then a fortiori the public has a primary right of access to the information necessary for the intelligent exercise of its political rights. This policy of assuring public access to information is the basis of the various freedom of information acts and of the Court's interpretation of the first amendment.

In *Valley Forge Christian College v. Americans United For Separation of Church & State* the Supreme Court recently demonstrated its continuing failure to comprehend the doctrine of standing. The Third Circuit Court of Appeals had correctly held that respondents, the original plaintiffs, lacked standing as taxpayers to challenge a conveyance of surplus government property under article IV, section 3, clause 2, but that respondents did have standing as citizens claiming "injury in fact" to their shared individuated right to a government that "shall make no law respecting the establishment of religion." The conveyance was to an educational institution operated by a religious order that trains people for the ministry and for the spreading of Christian doctrine. By reversing the

111. 102 S. Ct. 758 (1982), rev'g Americans United for Separation of Church & State, Inc. v. HEW, 619 F.2d 252 (3d Cir. 1980).
112. 619 F.2d at 260; see infra note 122.
113. 619 F.2d at 261 (quoting U.S. Const. amend. 1).
114. It may be proper and within the implied powers for the United States to incorporate a bank, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), or by a parity of reasoning, to establish a university. But the United States can not charter a church even if federal funds are not involved.
court of appeals, the Supreme Court revealed its inability to distinguish between fifth amendment property rights and first amendment establishment rights. Notwithstanding the reapportionment cases and Fast v. Cohen, the Court assumed that for the purposes of article III no rights can be held in common. The Court also forgot that in Richardson it had admitted that Congress could grant standing if it granted a legal right to the public, a concept completely at odds with the idea that standing in common rights cases is prohibited by article III. If article III really does prohibit Congress from granting standing in common rights cases, then under the direct holding in Marbury v. Madison, Congress cannot grant standing as suggested in Richardson, nor can it grant standing to the general public in cases arising under the Freedom of Information Act.

The paucity of the Court's reasoning is self-evident:

Were we to recognize standing premised on an "injury" consisting solely of an alleged violation of a "'personal constitutional right' to a government that does not establish religion," 619 F.2d, at 265, a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative action program on the basis of a personal right to a government that does not deny equal protection of the laws, to choose but two among as many possible examples as there are commands in the Constitution.

Clearly, the Court does not understand that certain provisions of the Constitution protect individual rights, other provisions protect institutional rights by insuring separation of powers, while still others protect political or religious rights. In addition, the Court does not understand that a standing decision requires the person claiming standing to show the nexus between the violation of the Constitution and the right violated. Granting standing in an establishment clause case because a colorable construction of the first amendment includes a personal right in every citizen not to have a religion governmentally established is quite distinct from the right of one citizen to appeal the death sentence of another because he opposes the death penalty. Standing does not depend upon whether the person claiming standing can be distinguished from the general public, but

115. 418 U.S. at 193.
117. 102 S. Ct. at 767, n.26.
118. See Gilmore v. Utah, 429 U.S. 1012 (1976). In this case the Court denied standing to Gilmore's mother to represent either Gilmore or the public even though substantial questions concerning the legality of the execution remained unresolved.
119. As noted previously, injury in fact does not in itself justify standing. In Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 489 (1977), for example, the Court held that a corporation owning existing bowling alleys did not have standing under the vertical integration prohibitions of § 7 of the Clayton Act to object to Brunswick's acquisition of financially troubled bowling alleys owned by the plaintiff's competitors. The Court found that the purpose of § 7 was to protect other equipment manufacturers from having their market foreclosed rather than to protect competitors of the acquired bowling alleys. Id. at 487. Section 7 is designed to prevent mergers among competitors so as to limit competition for their services and under the Kefauver Amendment to prevent vertical mergers if such
upon whether the legal norm claimed to be violated was designed to protect the claim he asserts. What is now clear from the Court's opinion is that Congress can declare the establishment of a religion, as long as no tax money is directly appropriated, and provide for the appointment of ministers without being subject to challenge by citizens who object. If in this circumstance the political process is to be the public safeguard, then the various otherwise useful provisions of the Constitution are not needed. Finally, by again magnifying the requirement of individual harm, the Court continues to allow standing to persons who cannot make the claim that a particular constitutional provision was designed to protect their particular interest. One can only hope that an appropriate exegesis of standing can convince at least one member of the majority to rethink the entire issue.

The inconsistency in the Supreme Court's application of standing rules cannot long endure. Courts cannot continue to grant standing in public trial cases and deny standing in cases concerning access to information. Courts cannot insist in one case that Congress may grant standing to the public and in another contend that standing is a question of constitutional law. Neither can courts continue to grant standing arbitrarily to persons who have an economic, aesthetic, or health interest, but who have no stake in the outcome. Courts must instead seek to determine (1) the purposes of the standard claimed to be violated (i.e., what interests can the standard legitimately protect); (2) whether the interest of the attacking party can be protected by a different constitutional interpretation; and (3) whether judicial review is appropriate. For these purposes, the Constitution is no different than a statute; therefore, the same analysis applies to the various provisions of the Constitution.

An examination of the leading standing cases shows how a consistent approach can solve the problems of standing. *Ashwander v. Tennessee Valley Authority*, a case in which the decision on standing is clearly wrong, provides the starting point. In that case two preferred stockholders brought a secondary stockholder suit to prohibit the purchase of certain territorial rights from the company. The suit was brought on the basis that the property was under threat of eminent domain and that the Tennessee Valley Authority (TVA) itself was illegally constituted. The plaintiffs made no showing that the company was ill advised or that its board of directors was not capable of making an appropriate decision. Under the business judgment rule, such a showing is mandatory if standing is to be granted to stockholders. Moreover, since these particular stockholders were preferred, their interests would not be diminished in any way by the sale. If on the other hand the company had in fact resisted the takeover, the issue would have been simply whether the United States, through Congress, could dispose of its excess electricity. The authority of Congress to

mergers foreclose the market to competitors of the acquiring firm. For a full discussion, see Rudolph, *The Rationale Behind the Foreclosure Doctrine*, 46 Neb. L. Rev. 605 (1967).

120. 297 U.S. 288 (1936).
121. *See supra* note 86.
do so is clearly granted under article IV, section 3, clause 2 of the Constitution, and this disposition is peculiarly within the competence of Congress. Moreover, article IV, section 3, clause 2 exists solely to assign a particular responsibility to a particular branch of government, not to protect citizens.

Once standing was improperly granted in Ashwander, therefore, the effect was to allow persons with no economic interest to raise the issue of whether Congress had power to dispose of its own property. In effect, the Court was asked to give an advisory opinion when the only legitimate issue for the Court was whether the company was entitled to just compensation. Since the United States had already paid just compensation, however, there remained no right in the company to bring its case before the Court. In terms of the standards prescribed by Data Processing or those proposed in this Article, the company was not within the zone of interests meant to be protected by article IV, section 2, clause 2. The company could not, therefore, make a colorable claim that Congress's disposition of legally acquired property implicated whatever rights were retained under the ninth amendment.

In Tennessee Electric Power Co. v. Tennessee Valley Authority the decision on standing was equally wrong. In that case the TVA was interfering with existing franchise relationships not for the purpose of selling surplus government electricity, but for the alleged purpose of regulating electric rates through yardstick pricing. As framed by the plaintiff power companies, the issues were whether as a matter of policy the national government could regulate local electric rates in derogation of state police power or regulate local electric rates of existing competitors through yardstick pricing when such pricing might be below cost in violation of the ninth, or possibly the fifth amendment.

Obviously, the electric companies had no standing to raise tenth amendment claims since that right belongs to the states. Moreover, the companies admitted that they were subject to regulation. What they objected to, however, was the regulation of their rates by the novel method of yardstick pricing rather than by direct regulation. The government's claim did not here rest upon article IV, section 3, clause 2, but rather must have rested upon the commerce power.

122. U.S. Const. art. IV, § 3, cl. 2 provides: “The Congress shall have Power to dispose of . . . other Property belonging to the United States . . . .”
123. See supra text accompanying notes 49-50.
124. U.S. Const. amend. IX provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”
125. 306 U.S. 118 (1939).
126. Yardstick pricing was a concept developed by Harole Ickes to limit the prices charged by private public utilities to consumers. The government would sell the product as an example of prices private public utilities should charge; if compliance by offering lower prices by the private utilities was not forthcoming, the government would offer the private utility customer the lower priced product.
127. See supra note 11.
128. U.S. Const. art. I, § 8, cl. 3 provides: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian
islation is to control the rates charged by private utilities, recognizing that the law directly affected the utilities' interests and that the proper interpretation and implementation of that law were, therefore, subject to judicial review according to judicial standards should not have been difficult. Further, the constitutional question of whether the commerce power included the power to regulate indirectly through competition rather than directly through rate regulation was certainly judicially determinable at the instance of the targeted companies.

The difference between these two cases is obvious: The general disposal of governmental property, like going-out-of-business sales in the private sector, is not for the purpose of affecting others, even when it has that result. Under the law both the disposal of governmental property and the going-out-of-business sales are justified as necessary to carry out lawful pursuits and are not subject to judicial review, even when they have serious effects on others. By contrast, private parties generally do not attempt to enter business in order to regulate other businesses, and when the main thrust of a private business is to injure or destroy another business, its efforts are actionable. Similarly, because governmental attempts to regulate business do to some extent injure or destroy businesses, that the nature and extent of the regulation must be justified in terms of furthering some public interest is generally recognized. Hence, a decision on standing requires at least a preliminary inquiry as to whether the plaintiff's interest is targeted by the government or whether the invasion of the plaintiff's interest is merely incidental to a legitimate government purpose.1

Summarizing these two cases in terms of the methodology proposed, the
standard claimed to be violated in *Ashwander*, article IV, section 3, clause 2, does not implicate private rights, but speaks only to the government’s right to sell its property. That such a sale would result in injury in fact is, therefore, irrelevant, since the interest of the attacking party could not be protected by a different interpretation of article IV, section 3, clause 2. As for judicial review, Congress’s discretion to dispose of surplus property under article IV is not otherwise limited by the Constitution (except in some circumstances by the establishment clause or the equal protection clause), and therefore, no standards are available for judicial balancing of interests.

By contrast, *Tennessee Electric* is a clear exercise of the regulatory power targeted at the plaintiffs. The Court’s assumption in *Ashwander* that the ninth amendment right to do business free from government competition could mean in *Tennessee Electric* that the government can regulate business through competition is clearly a jump in logic. In *Tennessee Electric* the applicable constitutional provision was the commerce clause, not article IV, section 3, clause 2. Accordingly, the legitimacy of the governmental regulation had to be justified by balancing the evil to be eradicated against the company’s reasonable expectations. Such balancing had been the staple of courts reviewing regulatory statutes. Thus, although the interest impacted was exactly the same in both cases, the decision to deny standing was wrong in *Tennessee Electric* because it did not relate to the government’s constitutional power to act, but focused instead on the interest impacted.

The classic case of denial of standing in the latter situation is *Perkins v. Lukens Steel.* At the time *Perkins* was decided, the Court’s decision on standing was correct because bidding laws were for the benefit of the bidder, not the person bidding. For example, if a company like Sears, Roebuck issued a bidding manual to its buyers, a potential seller to Sears had no legal complaint if the manual was not followed. Sears management might fire the buyer, but the disappointed seller could not claim the profits from the lost sale. Government procurement laws and regulations were viewed in the same manner: to deal with internal matters, Congress passed general laws for the instruction of its agents only. In *Perkins* the government’s laws had one additional purpose: the laws affected wage rates generally through a yardstick approach. The beneficiaries of these laws were intended to be the workers on government projects, not the contractors. The complaint, however, was that for the purposes of determining minimum wages, the Secretary of Labor assigned particular contractors, pursuant to statutory authority, to particular localities that might be disadvantageous on a cost basis in preparing bids. The issue was whether potential bidders had standing to object to the rates proposed by the Secre-

130. 310 U.S. 113 (1940).
131. Under § 90 of THE RESTATEMENT (SECOND) OF CONTRACTS (1981), one possible claim could be out-of-pocket expenses incurred while preparing a bid in reliance upon the bidding manual.
tary. The decision by the Court in Perkins was that the Walsh-Healey Act was legally irrelevant to the bidders who brought the action, even though they were injured in fact.\textsuperscript{132} In comparison, tariff laws are legally irrelevant to buyers of imported goods, even though their businesses may be injured.

For these buyers, standing could arise only from the legal concept that each potential seller to the government has a right to equal access, that is, access on the same terms as other potential sellers to the government. Under this approach, those same sellers would have standing to object as well to an erroneous statutory interpretation by the Secretary of Labor. Moreover, if the decision in Perkins had been that the Secretary had misinterpreted the application of the statute, and that the statute was an internal document only and not for the benefit of the bidders, it would clearly have been advisory since no judgment could issue. This would be the case even though the Secretary might feel morally bound to follow the Court's interpretation. Perkins again clearly illustrates why the decision on standing must include a preliminary analysis of the legal standard involved and cannot be decided in the abstract.\textsuperscript{133}

In cases like Perkins the standing issue could not be resolved until the Court determined who was the beneficiary of the applicable procurement laws and the Walsh-Healey Act. When the privilege doctrine relating to government contracting and government employment was subsequently replaced by application of the due process and equal protection clauses, a blacklisted bidder who had not been given a hearing was granted standing to object to debarment,\textsuperscript{134} and a government employee whose dismissal was due to his political affiliation was granted standing to object to the spoils system.\textsuperscript{135} Under these clauses, the plaintiffs in Perkins would not have standing to object to the Secretary of Labor's decision, not because she made a mistake about the locality rule, but because she arbitrarily denied Lukens Steel the right to bid in violation of its due process and equal protection rights.

In two later cases, standing was improperly extended solely on the basis of injury in fact. The first case is United States v. SCRAP\textsuperscript{136} in which a claim was brought under the National Environmental Protection Act (NEPA),\textsuperscript{137} although the NEPA does not grant standing to anyone. The

\textsuperscript{132} 310 U.S. at 113.
\textsuperscript{133} The recent constitutional crises in Canada produced a similar result. The Supreme Court of Canada held that the Canadian Parliament could legally request the British Parliament for a change in the British North American Act, 1871 without the concurrence of the Provinces, but that the Canadian Parliament was morally bound by convention to obtain concurrence from the Provinces. Reference Re Amendment of the Constitution of Canada, 125 D.L.R.3d 1, 1-2 (1981). This holding led Prime Minister Pierre Trudeau to compromise his case with the Provinces even after a legal decision in his favor. If a similar issue, which asked merely whether Parliament was morally bound, were raised in the future, any opinion would clearly be advisory.
\textsuperscript{134} See Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964).
\textsuperscript{136} 412 U.S. 669 (1973).
plaintiffs, including various environmental groups, alleged that a railroad shipping surcharge would discourage the use of recyclable materials. The NEPA is simply a congressional directive to all governmental agencies to consider certain environmental factors when making decisions. Thus the NEPA is like the Administrative Procedure Act, the procurement regulations, or the equal protection clause of the fourteenth amendment. Under the NEPA, only persons directly controlled or affected by agency action have standing to raise NEPA-related issues. For example, in an action between two parties concerning construction of a waste disposal plant, a federal judge might consider whether the provisions of the NEPA were incorporated into the contract between the parties. The judge, however, would never allow intervention in that suit by other persons who might be affected if those standards were engrafted onto the contract. Interstate Commerce Commission (ICC) ratemaking is similarly used to determine the rights of shippers and carriers. For example, in an ICC hearing regarding rate increase for transporting scrap metal, the ICC, like the court, could consider NEPA standards if the shipper could show that a rate increase would make transporting scrap uneconomical for him. Adoption of the NEPA thus did not give standing to persons whose only economic interest in ratemaking is the fallout from higher or lower rates.

The problem in *SCRAP* is that the Court considered the wrong statute when it applied the *Data Processing* formula. The complaining party's interests would have to have been within the zone protected by the ICC statute, not the NEPA. Standing to object to an ICC determination must be based upon an analysis of who is regulated by the ICC once one is given rights by the organic ICC Act. An agency's failure to consider the NEPA, just as its failure to consider the APA, would not result in standing unless the party's claim arose from the organic statute under which the particular agency was operating. Thus if a regulation by a government agency grants standing, there must be a specific provision in the organic statute authorizing such standing.

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140. The NEPA is a general directive relating to the environment, just as the APA is a general procedural directive for administrative agencies and the equal protection clause is a generalized concept applicable to government operations. None of these directives decides standing issues in themselves on a claim of violation by the agency involved. The persons who have standing are those aggrieved by the particular agencies acting under their particular authority.
142. By contrast, when Congress wished to grant standing to workers or communities in decisions concerning termination of services, standing was explicitly granted by statute. Standing was granted explicitly because such standing is the exception rather than the rule. *See* Interstate Commerce Act, 49 U.S.C. §§ 18-20, *repealed by* Pub. L. No. 95-473, § 4(b), (c), 92 Stat. 1466-70 (1978); *see also* ICC v. Railway Labor Executives Ass'n, 315 U.S. 373 (1942); Colorado v. United States, 271 U.S. 153 (1925).
143. *See supra* text accompanying notes 49-50.
144. The organic act here is the general statute setting up and defining the power of the ICC. *See generally* Interstate Commerce Act, 49 U.S.C. §§ 10101-10125 (1976).
agency directly affects the interests of a party specifically protected by the
organic statute under which the agency operates, and if that regulation
violates the APA, the NEPA, or the equal protection clause, then that
party would have standing to attack the regulation. This interpretation of
the NEPA would have avoided the seemingly absurd pleading require-
ment in *Sierra Club v. Morton*. Using this interpretation, the Sierra
Club could have pleaded that it was the beneficiary of the statute, which
mandates mixed uses of national forests, and that the proposed use would
have affected its rights as established by that statute. The artificial in-
jury claimed in the actual case could then have been replaced by the rea-
sonable claim that the Sierra Club and others similarly situated were the
intended beneficiaries of the statute that regulates the management of the
national forests. Thus legal analysis of the statute, rather than a particular
injury, would have determined whether standing should have been granted
to the group attacking the government action in the name of NEPA.

The other major case that improperly extended standing on the basis of
injury in fact is *Duke Power Co. v. Carolina Environmental Study Group,
Inc.* In this case the Court granted standing so that it could review
the political wisdom of a statute whose operation did not legally affect the
complaining party in a manner distinct from that in which it affected every
other United States citizen. The statute was the Price-Anderson Act, which
limited liability for nuclear plant accidents. The plaintiffs' standing
derived entirely from an injury-in-fact, "but-for" analysis. As contiguous
landowners the plaintiffs feared the prospect of uncompensated injury to
their land by a privately built nuclear plant. If the nuclear plant was a
nuisance or if it reduced the value of their land or caused environmental
damage, these landowners could have objected to the granting of building
permits or to the waiver of zoning ordinances in their area. Their objec-
tion, however, was to a general governmental subsidy of the nuclear power
industry through the Price-Anderson Act. The Court construed the
complaint as an action against the Nuclear Regulatory Commission
(NRC) for passing a statute limiting liability.

An analysis of the subsidy argument indicates that by using this argu-

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145. 405 U.S. 727 (1972). In *Sierra Club* the Court required that persons attacking the
proposal indicate in their pleading that they had a personal stake in the outcome because
they used the park. Standing should have been resolved on a determination of whether the
plaintiffs were among the legal beneficiaries of the acts controlling the national forests and
parks.


148. *Id.* at 81.


150. *Id.* § 2210(c).

151. 438 U.S. at 69 n.13. To the extent that Congress limits liability, it may for national
purposes be seen as a taking. Hence, an attack on the limitation would not arise under the
due process clause, but under the just compensation clause. This distinction was clearly
out that the interest of the claimants is in their recovery and not in the operation of foreign
policy. The Court's reference to just compensation rather than due process is, therefore,
appropriate.
ment, anyone with land contiguous to a subsidized activity could attack the subsidy on the basis that "but for" the subsidy, either the activity would not exist, or it could not physically be increased. Under a parity of reasoning, a landowner near a newly built or a proposed steel mill could attack a law restricting the importation of steel. Similarly, developers could complain that their ability to buy agricultural land was inhibited by agricultural price supports artificially keeping up the price of land.

As to three of the injuries alleged in *Duke Power*, the release of small quantities of radiation, a sharp increase in the temperature of two lakes, and a fear that the closeness of the nuclear plant would have adverse genetic effects, these injuries would have occurred had any nuclear power plant been built. Thus the claims should more properly have been referred to a zoning board. Moreover, similar claims arise any time the government subsidizes an activity that may impact contiguous landowners. Yet on the basis of these "but-for," injury-in-fact arguments, the Court granted standing to plaintiffs to attack a political decision to subsidize nuclear power even though the injury, to the extent any injury occurred, arose from the existence of nuclear power and not from the subsidy itself.

Had the government decided to build a nuclear plant itself rather than to subsidize private builders, the issue would have been whether doing so would constitute reverse condemnation. Litigation on that issue is comparable to suits attacking any governmental subsidy that cannot be enjoined as a private nuisance, but which results in substantial externalities. In such cases the claim is not that the activity or the law authorizing the activity is unconstitutional, but that the activity is in fact a taking and subject to just compensation.152

If the nature of the subsidy (the limitation on liability) is considered, the conclusion is the same. Standing should not be granted to a taxpayer to attack a nuclear power subsidy. As Justice Harlan pointed out in *Flast v. Cohen*, a taxpayer has no more interest in federal monies than anyone else, and federal expenditures are left to the discretion of Congress.153 On the other hand, standards of liability and limitations on damages impact individuals differently. The Price-Anderson Act, for example, limits liability in an area of law generally conceived as belonging to the states: private tort law. The issue in *Duke Power*, then, was federalism: Whether under the supremacy clause the federal government may alter legal rights between private parties, or whether this alteration of legal rights is a matter reserved to the states. Clearly, the federal government can subsidize companies or when subsidizing is insufficient, it can enter the business directly. In these situations the issue is to what extent sovereign immunity can be

152. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981). Reference here is to the Court's statement that to the extent the petitioner believed it had suffered an unconstitutional taking by the suspension of claims, no jurisdictional obstacle existed to an appropriate action in the United States Court of Claims under the Tucker Act. *Id.* at 689. Thus the Court recognized that the parties were to be compensated if the exercise of foreign police prerogatives involved personal losses.

153. 392 U.S. at 118-20.
limited either by the Federal Tort Claims Act\textsuperscript{154} or the taking clause of the fifth amendment.\textsuperscript{155} The issue may be brought to a head by an exercise of the state's police power requiring greater security than that required by the federal act. That issue is appropriate for adjudication. The issue can also properly arise in a negligence or strict liability action for damages actually incurred when the defense in the action derives from the limitation on liability. Again, the Court would be asked to determine whether under the commerce clause or the supremacy clause federal law can modify state law. In these examples, contiguous landowners would be appropriate plaintiffs only in the last case, and in that situation, they would be in the same position as any other injured person. In effect, the Court's decision in \textit{Duke Power} is an advisory opinion on the right of states to legislate in this area and on the extent to which parties actually injured can have their damages reduced. According to the Court, the issue was whether the possible damage to contiguous landowners was sufficient to impede an authorized government program. The issue in \textit{Duke Power}, however, was never that issue. Rather, the issue was whether the government can subsidize an industry by changing state tort laws. The result of \textit{Duke Power} should not have been the prevention of plant construction as desired by the plaintiffs, but a requirement that the government indemnify the plaintiffs against excessive losses.\textsuperscript{156}

Thus in \textit{Duke Power} the Court validated an act without having before it the proper parties or interests. By relying entirely on one side of the equation, the injury to property, rather than requiring a nexus between the injury and the source of power, the Court left the law of standing without a rationale. As a result, the Court must now create rules of standing for cases in which no particular injury to discrete property exists. In \textit{Duke Power} those rules were called prudential,\textsuperscript{157} and no guidelines were provided for their use. In our hierarchial legal system, the Court of last resort should provide these guidelines.

In the majority opinion in \textit{Duke Power} Justice Burger acknowledged that the Court does not have a consistent theory of standing, but that it imposes standing limitations on the basis of "prudential concerns" about the proper and properly limited role of courts in a democratic society. What the Chief Justice failed to recognize, however, is that granting unlimited standing to property interests to question governmental policy interferes with the functioning of the other branches of government as much as does granting standing to undifferentiated interests. Moreover, failure

\begin{itemize}
\item \textsuperscript{155} U.S. CONST. amend. V; \textit{see supra} note 10.
\item \textsuperscript{156} \textit{See} Mountain Timber Co. v. Washington, 234 U.S. 219 (1917); New York Central R.R. v. White, 243 U.S. 188 (1917). The imposition of strict liability in exchange for a limitation on damages would not be a violation of the taking clause if the limitation were reasonable, for example, as with the workers' compensation laws. This fact does not, however, resolve the federalism issue.
\item \textsuperscript{157} 438 U.S. at 80.
\end{itemize}
to apply properly the rules of standing violates article III, section 2 whether standing is denied or granted.

In *United States v. Richardson*158 and *Warth v. Seldin*159 the Court ex-tolled the prudential considerations that resulted in denial of standing to consumers and citizens. In contrast, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*160 and *Richmond Newspapers, Inc. v. Virginia*161 the Court granted standing to those very interests. In both *Virginia Pharmacy* and *Richmond Newspapers*, as in *Warth* and *Richard-son*, there was a clear nexus between the violation claimed and the interest alleged. In each case, however, the interests of each individual were undif-ferentiated from that of the others. In *Virginia Pharmacy* a group of con-sumers was granted the right to contest a restriction on the advertising of products sold by prescription.162 The group had sought the information in order to exercise intelligently their right to buy products in the market place. In *Warth* a similar group was denied standing to contest a zoning ordinance that prevented developers of land from building high density, low-cost housing within a city.163 In the former case, the argument for restriction was that advertising would be unprofessional and unreliable and that the restriction limited the evils that would result from cut-throat competition. In the latter case, the argument for the prohibition against high density housing was that it protected existing residents from the problems of servicing large populations and preserved property values.

In both cases the legislative entity responded to an entrenched group at the expense of possible consumers. The plaintiffs in *Virginia Pharmacy* had less of a claim than the plaintiffs in *Warth*, since the *Virginia Phar-macy* plaintiffs had access to the legislative process. The plaintiffs in *Warth* had no access to the political process because they were nonresi-dents. Yet in the former case, the Court had no difficulty in assuming that without the restriction the market would supply the advertising, whereas in the latter case, the Court demanded proof that the market would supply the housing.164 If, however, proof that the market would supply low den-sity housing could have been provided, then no zoning was necessary. Yet, the very existence of the zoning law was based upon the legislative deter-mination that without the restriction high density housing would be built.

These two decisions indicate either that the Supreme Court is unable to reason by analogy, or that by some undefined process it picks and chooses which legislative efforts may be challenged in court. A free market in drugs is preferred to a free market in housing either because the consumers of drugs are better organized or because the evils of a drug cartel are better

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159. 422 U.S. 490 (1975).
162. 425 U.S. at 757.
163. 422 U.S. at 508.
164. 422 U.S. at 503 n.14.
stood than the market effects of housing restrictions. In a legal system, such distinctions can hardly be credited.

In *Richardson* a citizen challenged Congress for failure to comply with article I, section 9, clause 7 of the Constitution, which provides: "[A] regular statement and account of the receipts and expenditures of all public money shall be published from time to time." The purpose of this provision is to supply the public with the information necessary for an intelligent exercise of its political rights. The impact of this provision, like the first amendment right to know, is certainly on a higher level than the right of consumers to know where to buy prescription drugs. Yet, the Court failed to recognize either the purpose of the constitutional provision or the right of the citizen to know.

By contrast, in *Richmond Newspapers* the Court first performed an historical exegesis to prove that trials at common law were public. Based upon this proof, the Court then granted standing to the public to raise the issue of whether trials can be closed. The Court neither referred to the rules of standing nor explained why the plaintiffs in *Richardson* did not have a similar right to contest the closing of accounts by Congress. The opinion shows a general consensus that the first amendment is implicated by the public trial provision of the fifth amendment. In addition, although standing was not specifically addressed, the Court was eminent aware that the public has standing to demand access to a trial. For example, Justice Brennan writes in his concurring opinion:

A conceptually separate, yet related, question is whether the media should enjoy greater access rights than the general public. See, e.g., *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 834-835 (1974). But no such contention is at stake here. Since the media's right of access is at least equal to that of the general public, see ibid., this case is resolved by a decision that the state statute unconstitutionally restricts public access to trials. As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the "agent" of interested citizens, and funnels information about trials to a large number of individuals.166

Because any citizen has standing to seek review of a trial closure, the logical implication is that any citizen has standing to seek review of the closure of other governmental acts required by law to be public. The public's right to demand review of a trial closure is thus no different from the public's right to demand an accounting for governmental expenditures when by law that accounting is required to be public. The fact that the public has standing, however, does not preclude closure under appropriate circumstances. That the public has standing means merely that closure must be justified in terms of other values. For example, in the trial situation closure may be justified to preserve the defendant's right to a fair trial;

165. U.S. Const. art. I, § 9, cl. 7.
166. 448 U.S. at 586.
in the accounting situation, closure may be required for national security. In light of the development of parliamentary government, however, no one can seriously contend that the public has less interest in where its money goes than in what happens in a criminal trial. Yet, amidst all the paean to the public's right-to-know in Richmond Newspapers, not one Justice made reference to the Court's refusal to protect that right in Richardson or drew any analogy between the right of access to trial information and the right of access to other information required by law to be public. After Richmond Newspapers and Virginia Pharmacy, the Court's failure to recognize that rights held jointly and severally by the public may be a basis for standing is remarkable.

Applying the analysis suggested in this Article to the above public law cases indicates that the standing should have been granted in Warth and Richardson, as it was in Virginia Pharmacy and Richmond Newspapers. In Richardson and Richmond Newspapers the standard derived from two separate constitutional provisions, both of which were arguably for the purpose of insuring public disclosure. In both cases the government's actions cut off the public's right to know, and public's request was that the courts consider a different interpretation of the particular constitutional provision. Similarly, in Virginia Pharmacy and Warth the governmental entity exercised its police power to protect the public from an alleged evil. In these cases the government limited the ability of consumers to obtain goods in the market place. In both cases the function of the courts was simply to review whether the police power was legitimately exercised.

Use of the suggested analysis disposes of prudential limitations and magic talismans describing particular injuries. This analysis recognizes that standing decisions can be made only within a framework of legal rights and duties. These rights and duties exist between both the state and the public at large, and between private parties. Accordingly, such rights and duties are functions of public as well as private law. One need only understand the legal process and the necessity for restricting courts to cases and controversies based upon the parties claims of right to apply this analysis effectively.