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# Standing and Administrative Agencies - Expanding Concepts of Judicial Review

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premise that civil rights are not a proper area for abstention may soon be re-evaluated.

Other problems remain unsettled in this area. The Court has yet to authoritatively rule on whether the Civil Rights Act (section 1983) is an exception to the Anti-Injunction Statute. Because Harris raised this issue in *Younger*, the Court had the opportunity to decide it, but apparently the Court chose to avoid this issue in order to clarify *Dombrowski*. There is finally the problem of *Samuels*—does it overrule *Koota* so that considerations for rendering a declaratory judgment are now the same as those for ordering an injunction in *threatened* as well as *pending* prosecutions? The answers to these questions await clarification by the Supreme Court.

S. Gene Fendler

#### STANDING AND ADMINISTRATIVE AGENCIES— EXPANDING CONCEPTS OF JUDICIAL REVIEW

Administrative agencies are a relatively recent innovation, and their exact function in the governmental process is still being defined. At the same time, they continue to increase in both number and authority. On the federal level, recent laws such as the Wilderness Act<sup>1</sup> and the National Environmental Policy Act<sup>2</sup> have added a new dimension of responsibilities to the agencies' concerns.

In the wake of these new laws has come the question of what parties may invoke the aid of the courts in order to compel adherence to these new enactments. Thus, the recurring problem of standing to invoke judicial review of administrative actions has arisen once more in a dramatically different context. Old notions of legal and economic injuries appear incapable of solving aesthetic and environmental problems. Yet, old notions sometimes die slowly. While some courts have perceived that new weapons must be fashioned if these public rights are to be upheld, others cling tenaciously to traditional concepts in dealing with this "complicated specialty of federal jurisdiction."<sup>3</sup> It is

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1. 16 U.S.C. §§ 1131-1134 (1970).

2. *Id.* §§ 4321-4347.

3. *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153, 156 (1953). In this case, the Secretary of the Interior and a cooperative electrical association sought to set aside a license granted to a private util-

the purpose of this Comment to analyze these new approaches to standing forged by some courts, and to examine the underlying values in the judicial system which have caused others to take a more conservative view.

### *History of Judicial Review*

It cannot be doubted that the contours of standing have been largely redrawn in the past decade. However, this change has not been the result of legislative fiat, but the product of gradual evolution within the judicial system. Thus, in order to understand the significance of modern trends, it is essential to trace these concepts to their source. The unavoidable constant in this area is the "case or controversy" requirement of article III of the Constitution;<sup>4</sup> situations not presenting a justiciable controversy within the traditional adversary system cannot be resolved in a federal court.

In the early days of administrative agencies, the chief concern of the courts was that the plaintiff seeking review had to possess a clearly discernible legal right. This requirement is most clearly indicated by the Supreme Court's opinion in *Tennessee Electric Power Co. v. TVA*:

"The appellants [private electric producers challenging government subsidization of competition] 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*

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ity by the FPC for the construction of a hydroelectric plant. Standing was based on the Flood Control Act of 1944, § 5, 16 U.S.C. § 825(s) (1970), which directed the Secretary to dispose of power by the most efficient and economical means. In upholding standing of plaintiffs to sue, the Supreme Court clearly indicated the confusion that surrounds this area of law: "We hold that petitioners have standing. Differences of view, however, preclude a single opinion of the Court as to both petitioners. It would not further clarification of this complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations, to set out the divergent grounds in support of standing in these cases." *Id.*

4. U.S. CONST. art. III, § 2.

*invasion, or one founded on a statute which confers a privilege.*"<sup>5</sup> (Emphasis added.)

In another case, the Court also made it clear that the right to be asserted had to rest in a particular person or group of persons, rather than society as a whole.<sup>6</sup>

It soon became apparent that a broader basis for standing than the "legal right" theory was necessary if agency action was to be effectively controlled. In *FCC v. Sanders Brothers Radio Station*,<sup>7</sup> the Supreme Court toppled the first pillar of the "legal right" temple. Holding that a broadcast station had standing to protest the granting of a license to a competitor, despite the lack of a legal right, the Court noted that the Communications Act of 1934 contained express provisions for judicial review. From this, they reasoned:

"[Congress] may have been of opinion [*sic*] that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal."<sup>8</sup>

*Sanders* thus made it clear that, at least in some circumstances, Congress could create new statutory rights that would satisfy the "case of controversy" requirement. Its full significance did not become clear until two years later, when the Court decided *Scripps-Howard Radio, Inc. v. FCC*.<sup>9</sup> On facts similar to *Sanders*, the Court held that private litigants in such cases had

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5. 306 U.S. 118, 137-38 (1939). The inconsistencies in the legal right doctrine soon became apparent. See, e.g., *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249 (1930), in which Mr. Justice Brandeis held that appellant had standing to be a party to an administrative proceeding before the ICC because it had a "distinct interest in the proceeding," but that it did not have standing to appeal the Commission's order because it was not "subjected to or threatened with any legal wrong." *Id.* at 254 and 257 respectively. (Emphasis added.)

6. *Massachusetts v. Mellon*, 262 U.S. 447 (1922). To quote the Court: "The party who invokes the power [of review] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 488. The theory of this case was largely overruled in *Flast v. Cohen*, 392 U.S. 83 (1968).

7. 309 U.S. 470 (1940).

8. *Id.* at 477.

9. 316 U.S. 4 (1942).

standing "only as representatives of the public interest."<sup>10</sup> Thus fell the other pillar of the "legal right" doctrine; private litigants could, in some circumstances, stand as representatives of common public interests.

But as the dust of one doctrine settled, it was uncertain what would rise to take its place. Under what circumstances could a private litigant represent public interests? If no legal right is necessary, what manner of injury will suffice? How must Congress' intent to create standing be determined? The first question was partially resolved in *Associated Industries v. Ickes*.<sup>11</sup> In *Ickes*, a group of private coal consumers sought review of an order which substantially raised the price of coal. Standing for the group was upheld on the theory that Congress can delegate to non-official persons or groups the right to act as private Attorney Generals in furtherance of the public interest. Thus, the theory behind such semi-public actions became relatively clear, at least where the statutes involved evidenced a congressional intent to allow review to aggrieved parties. However, the definition of "aggrieved" remained uncertain.

In 1965, the concept of who might be an aggrieved party took what appeared to be a monumental leap forward. In *Scenic Hudson Preservation Conference v. FPC*,<sup>12</sup> an unincorporated association of conservationist groups was granted standing to protest the granting of a license to a utility company for the construction of a hydro-electric project. Although the FPC vigorously asserted that plaintiff association had "no claim to any personal economic injury,"<sup>13</sup> the court noted that in granting licenses the FPC was to consider other beneficial public uses, including recreational purposes. Thus, the conservationist groups had standing to guard their special interest in the locale, which Congress had evidently intended to be protected. *Scenic Hudson* quickly became a powerful weapon of groups seeking to preserve

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10. *Id.* at 14.

11. 134 F.2d 694 (2d Cir.), *vacated on suggestion of mootness*, 320 U.S. 707 (1943). The language of the court should be carefully considered: "[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy [to determine the scope of powers conferred by a statute], even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals." *Id.* at 704.

12. 354 F.2d 608 (2d Cir. 1965).

13. *Id.* at 615.

aesthetic or environmental interests, and, as will be seen, its full impact is not yet understood.

Finally, the two most recent Supreme Court pronouncements in this area should be noted. In *Association of Data Processing Service Organizations v. Camp*<sup>14</sup> and *Barlow v. Collins*,<sup>15</sup> the Court reconsidered the meaning of section 10 of the Administrative Procedure Act,<sup>16</sup> which provides the general framework for judicial review of agency action. This section provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."<sup>17</sup> From its inception, the meaning of this statute has been uncertain. Although the legislative history of section 10 seems to indicate that injury in fact is the sole criterion of standing,<sup>18</sup> the Attorney General stated that it only reflected existing law.<sup>19</sup> Under the latter view, a clear indication of Congressional intent to allow standing must be found in a relevant statute.

In *Data Processing*, the majority sought some middle ground between these two views. The plaintiffs, suppliers of data processing equipment, had suffered clear economic injury because of a ruling of the Comptroller of Currency allowing banks to make certain of their equipment available to customers and other banks. This appeared to be a direct violation of section 4 of the Bank Service Corporation Act<sup>20</sup> which provided: "No bank service corporation may engage in any activity other than the performance of bank services for banks." However, the majority felt that something more than injury was required; the plaintiff had to be arguably within the zone of interest of a relevant statute.<sup>21</sup> Although the Bank Service Corporation Act did not

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14. 397 U.S. 150 (1970).

15. 397 U.S. 159 (1970).

16. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (1970).

17. *Id.* § 702.

18. In both the House and Senate committee reports, the statement is found that "[t]his section confers a right of review upon any person adversely affected *in fact* . . ." S. Doc. No. 248, 79th Cong., 2d Sess., 212, 276 (1946) (Emphasis added.) This language was deleted from the statute as passed.

19. *Id.* at 310.

20. 12 U.S.C. § 1864 (1970).

21. The exact language used by the Court should be carefully considered: "The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or

clearly give a competitor standing to protest this action, the majority granted standing on the theory that the question of legal interest went to the merits of the case and plaintiffs should be allowed to prove they were protected under the statute.

In the companion case of *Barlow v. Collins*,<sup>22</sup> Justices Brennan and White concurred in the result of both cases, but dissented from the reasoning stating:

"My view is that the inquiry in the Court's first step [injury in fact] is the only one that need be made to determine standing. I had thought we discarded the notion of any additional requirement when we discussed standing solely in terms of its constitutional content in *Flast v. Cohen* [citations omitted]. By requiring a second, nonconstitutional step, the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests."<sup>23</sup>

Not since *Data Processing* and *Barlow* has the Supreme Court reviewed the question of standing. The recent cases in the lower courts seem to indicate that injury in fact is the only prerequisite needed to satisfy the constitutional requirement of a justiciable case or controversy, and some courts have accepted that view outright.<sup>24</sup> Others, however, adhere to the second *Data Processing* requirement and require, in addition to injury

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constitutional guarantee in question." *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 153 (1970).

Application of this test has already led to inequitable results. In *Rasmussen v. United States*, 421 F.2d 776 (8th Cir. 1970), members of the Wisconsin Public Service Commission, charged with maintaining public transportation, were held to be without standing to challenge an order of the Postmaster General which suspended mail transport on certain lines within the state. This, they alleged, would ultimately result in the termination of passenger service. Although the clear probability of injury was acknowledged by the court, it found that the statute under which the action was taken, 19 U.S.C. § 6205 (1970), evidenced no concern for this matter. In *Intercontinental Placement Serv., Inc. v. Hodgson*, 52 F.R.D. 376 (E.D. Pa. 1971), the operator of an employment agency for entering aliens was held to be without standing to protest the discontinuation by the Secretary of Labor of certain informational forms on which his work depended.

22. 397 U.S. 159 (1970).

23. *Id.* at 168 (footnote omitted).

24. See *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). The writer highly recommends the opinion of Judge Tamm at 861-73 as a comprehensive treatment of the history of standing.

in fact, that the plaintiff's case be arguably within the zone of congressional interest or regulation.<sup>25</sup>

It cannot be denied that the law of standing today is far sounder than in the past, but several recent cases show that its foundations are weak indeed. An examination of them will show that the tools are still not present that can successfully deal with the problems of aesthetic injury and public interest litigation central to environmental protection actions.

### *Recent Cases, Rediscovered Problems*

Environmental advocates are now discovering to their chagrin that the sweeping language of the landmark opinions in *Scripps-Howard* and *Scenic Hudson* is perhaps not as important as what was left unsaid. *Scripps-Howard* does recognize the right of a private person to litigate in the public interest, but the fact that the plaintiff therein stood to suffer personal economic loss has gone virtually unnoticed. Likewise, in *Scenic Hudson*, despite the broad exposition of aesthetic injury, it cannot be ignored that several of the local conservation organizations owned trailways in the area that was to be inundated, and that the plaintiff towns would suffer a drastic loss of tax revenues. Thus, at least one of the plaintiffs in each case faced economic injury as a result of the agency action; in almost all the cases following these, there can be found one or more plaintiffs who allege a destruction of property or a loss of livelihood because of the agency action.<sup>26</sup>

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25. See note 21 *supra*.

26. Cape May County Chapter, Inc., Izaak Walton League of America v. Macchia, 329 F. Supp. 504 (D. N.J. 1971) (property owners adjoining proposed fill of coastal wetlands); Upper Pecos Ass'n v. Stans, 328 F. Supp. 332 (D. N.M. 1971) (property owners and residents along proposed highway right of way); Federation of Homemakers v. Hardin, 328 F. Supp. 181 (D. D.C. 1971) (consumers of allegedly mislabelled food product); National Helium Corp. v. Morton, 326 F. Supp. 151 (D. Kan. 1971) (government contractor also alleged breach of contract); Environmental Defense Fund v. Corps of Eng'rs of United States Army, 325 F. Supp. 728 (E.D. Ark. 1971) (local farmer whose property adjoined river to be dammed); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971) (trail guide facing removal of timber in hunting area); Environmental Defense Fund v. Corps of Eng'rs, 324 F. Supp. 878 (D. D.C. 1971) (plaintiff benefitted and desired to benefit from hunting, fishing and other recreational endeavors); Delaware v. Pennsylvania N.Y. Central Transp. Co., 323 F. Supp. 487 (D. Del. 1971) (property owners adjoining proposed coastal landfill); Citizens to Preserve Overton Park v. Volpe, 309 F. Supp. 1189 (W.D. Tenn. 1970), *rev'd on merits*, 401 U.S. 402 (1971) (residents and business owners adjoining right of way for interstate highway); Parker v. United States, 307 F. Supp. 685 (D. Colo. 1969) (trail guides, property

Also, in *Scenic Hudson*, the standing of the National Sierra Club as a co-plaintiff was upheld without question. It is the common pattern in environmental litigation for national organizations such as the Sierra Club, the Audubon Society, and the Izaak Walton League to join with local organizations and residents, one or more of whom are threatened with economic injury, in prosecuting the suit. Their function is both crucial and obvious; through their greater economic and informational resources they are the only parties practically able to press suits in an area of the law that is distinctly unrewarding from a pecuniary viewpoint. The purpose of the local co-plaintiffs is to identify threatened injury and to assist in developing the local issues. This joinder has become the common design of environmental actions. Although the viability of public suits to protest aesthetic injuries was readily acknowledged, these issues were commonly intermeshed with more traditional ones. However, in *Sierra Club v. Hickel*,<sup>27</sup> they were presented to an appellate court (unclouded by other issues) for the first time.

It was probably unintentional that they were so presented, but the facts of the case left no real alternative. The Secretary of the Interior had granted a permit to Walt Disney Productions, Inc., for the construction of a ski resort. The park was to be located in the vast Sequoia National Forest which lay in a remote and uninhabited wilderness area of southern California. Not only were there no local plaintiffs to join in the action, but also no economic injury could be alleged since the activity was isolated within a government reservation.

Suit was brought under section 10 of the Administrative Procedure Act<sup>28</sup> which required all federal agencies to coop-

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owners); *Citizens Comm. for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D. N.Y. 1969) (town facing expropriation of tax-productive property); *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650 (S.D. N.Y. 1967) (property owners facing expropriation for highway use).

It should be noted that in *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), standing was granted to a group representing only the listening audience. This case should be viewed as relying largely on the fact that entry into the broadcast field is limited by licenses issued in the public interest. It is also significant that the court felt constrained to note the investment by the listening audience in \$40 billion of electronic reception equipment. *Id.* at 1002, n.17.

27. 433 F.2d 24 (9th Cir. 1970), *cert. granted sub nom. Sierra Club v. Morton*, 401 U.S. 907 (1971), *noted in* 71 *COLO. L. REV.* 172 (1971).

28. 5 U.S.C. § 702 (1970). In contrast, the particular provisions of the National Environmental Policy Act should be noted. 42 U.S.C. § 4331(a)

erate with concerned private organizations in determining the environmental impact of agency actions. Standing for the Sierra Club was upheld by the district court; on appeal, the decision was reversed on two grounds. First, the court stated that the Sierra Club had alleged no element of a legal wrong inflicted upon it and it was not aggrieved within the meaning of any relevant statute. The court continued:

"It does not allege that it is 'aggrieved' or that it is 'adversely affected' within the meaning of the rules of standing. Nor does the fact that no one else appears on the scene who is in fact aggrieved and is willing or desirous of taking up the cudgels create a right in appellee. The right to sue does not inure to one who does not possess it, simply because there is no one else willing and able to assert it."<sup>29</sup>

The court then acknowledged that the Sierra Club had been a party to past actions, but found this fatal distinction:

"In . . . these cases, however, the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action. No such person or organizations with a direct and obvious interest have joined as plaintiffs in this action. The question of standing here must be decided from the facts in this action. We hold that they do not establish the interest necessary for that purpose."<sup>30</sup>

*Sierra Club v. Hickel* apparently prompted a major re-evaluation of the concept of standing, at least within its own circuit. Shortly thereafter, the theory of aesthetic injury underwent a further emasculation in *Alameda Conservation Association v. California*.<sup>31</sup> The suit in that case was brought by a non-profit corporation, whose purpose was the protection of the waters of

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(1970) provides: "The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . ."

29. *Sierra Club v. Hickel*, 433 F.2d 24, 32 (9th Cir. 1970).

30. *Id.* at 33.

31. 437 F.2d 1087 (9th Cir. 1971), *cert. denied*, 91 S. Ct. 1380 (1971).

San Francisco Bay, to enjoin the filling of portions of the bay under a permit issued by the Corps of Engineers. Eight members of the organization also joined as co-plaintiffs; four of these owned property along the bay, and all lived within six miles of it. Standing was denied to the organization<sup>32</sup> and upheld for all the individual members by a divided court.

In the majority opinion, standing was denied to the organization since

"[it] does not allege that it owns land bordering or near the bay or at all. It does not assert that it has any property interests of any kind real or personal which would sustain 'injury in fact,' economic or otherwise, as a result of any of the defendants' activities."<sup>33</sup>

Although the standing of the four bayside plaintiffs was admitted, the standing of the other four was not explored under the principle of judicial restraint.<sup>34</sup>

The writer questions what factors might have caused this abstention. As the majority opinion indicates, an injury in fact may be "economic or otherwise." Then, why cannot those who live at least in the area of the bay object to illegal actions which interfere with their use and enjoyment of it as well? Certainly they have the geographic proximity which was absent in *Sierra Club v. Hickel*. The answer to this probably lies in deeper, unarticulated concerns of the courts. Faced with several overcrowded dockets, courts are naturally reluctant to open the floodgates to countless more suits. Standing has proven to be a particularly useful control device in cutting off suits at the threshold, and in limiting the number of parties.

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32. Portions of the opinion indicate that much of the concern as to the organization's standing was related not to what injuries it had received, but rather the question of *res judicata*. As noted by Judge Merrill in a concurring opinion: "The joining of an association as party can hardly give such assurance as to those it purports to represent since the rights of its members are not tendered for adjudication. Individual members are free to relitigate so long as imaginative counsel can find an escape from *stare decisis*." *Id.* at 1097-98.

33. *Id.* at 1090.

34. It was felt that the four bayside plaintiffs were sufficient representatives to litigate the issues for all concerned parties. However, in a separate opinion representing the majority on this point, Judge Hamley noted that *all* the plaintiffs sought to prosecute an action for their individual damages as well and should be granted standing. *Id.* at 1095.

Beyond this, adequate standing is necessary to insure that the issues are presented in the traditional framework of a true adversary proceeding. In *Baker v. Carr*,<sup>35</sup> the Supreme Court articulated these standards as "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

*Sierra Club v. Hickel* can be more properly understood in terms of adversity than standing. As was noted earlier, in previous cases the club had joined with local parties who could demonstrate an economic injury.<sup>36</sup> Perhaps, then, the courts still doubt that a purely aesthetic injury can provide the requisite personal stake in the outcome of the controversy. An economic injury, on the other hand, is more tangible and more familiar to the experience of the bench; men kill far more often for money than love. Thus, economic injury remains synonymous with injury in fact to many courts. It can be seen as the last vestige of the legal right theory.

Are such concerns valid in fact? If so, do they afford just grounds for the courts to close their doors to those groups? A look at the experience of the state courts sheds a great deal of light on the fear of countless waves of litigation. In the state courts, the complexities of the federal law of standing have generally been rejected in favor of a more practical test based on injury in fact.<sup>37</sup> Despite this relaxation of standards, the anticipated swell of litigation has never arisen.

In the area of environmental protection, the prospects of a deluge of suits is even less likely. The field promises little in the way of pecuniary reward, and the complexity of this area of the law acts as a deterrent in itself. The practicality of this view is pointed out in *Sierra Club v. Hardin*,<sup>38</sup> a post-*Hickel* case in which the national club was joined by several local organizations:

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35. 369 U.S. 186, 204 (1962).

36. See note 26 *supra*.

37. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.18, at 291-92 (1958). For an excellent example of the way these problems are handled in the state courts, see *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 N.J. 98, 275 A.2d 433 (1971).

38. 325 F. Supp. 99 (D. Alaska 1971).

"The fact that a victory in suits of this nature usually does not result in an award of damages means that even if successful the attorney who initiates the suit will probably have to look to the parties of record for reimbursement. Few members of the general public will have the resources or courage to face such odds for the sake of vindicating a right to which all are entitled as a matter of law."<sup>39</sup>

Further, standing is not the only control device which the courts have at their command. In *Sierra Club v. Hardin*, the suit was converted into a class action under rule 23 of the Federal Rules of Civil Procedure.<sup>40</sup> Also, the concept of standing should not be merged with that of reviewability.<sup>41</sup> As the Supreme Court has held, standing should be decided solely on the basis of the status of the parties.<sup>42</sup> Reviewability should be confined to determining what actions are left to the discretion of the agency.

It cannot be denied that the present environmental fervor can and will lead to wholly spurious suits. Yet, this should not be allowed to result in wholesale antagonism toward this area of litigation. As one judge has pointed out:

"Of course it is true that the grant of standing must be carefully controlled by the exercise of judicial discretion in order that completely frivolous lawsuits will be averted. There must be a practical separation of the meritorious sheep from the capricious goats . . . . However, responsible federal judges will be able to discern a case in which there is injury in fact, a sufficient adversary interest to constitute a case or controversy under Article III, and an otherwise reviewable subject matter to prevent the dockets from becoming overcrowded."<sup>43</sup>

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39. *Id.* at 111.

40. See note 32 *supra*. It should be noted that if this device had been used in *Alameda*, much of the doubt as to the organization's standing would have been resolved, since any judgment would then have been binding on its members.

41. See *Barlow v. Collins*, 397 U.S. 159, 169 (1970) (dissenting opinion).

42. *Flast v. Cohen*, 392 U.S. 83, 99 (1968): "Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."

43. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 872 (D.C. Cir. 1970).

On the other hand, the possibility that court dockets may swell cannot be totally disregarded. Yet, that fear should not be allowed to block otherwise valid suits. One judge has seen this problem clearly:

"We do not share the fear of some earlier decisions that liberalized concepts of 'standing to sue' will flood the Courts with litigation. However, if that should be the price for the preservation and protection of our natural resources and environment against uncoordinated or irresponsible conduct, so be it."<sup>44</sup>

In addition to the problem of increased litigation, the credibility of the doctrine of aesthetic injury must be considered. As has been noted, this presents a twofold problem. In what sort of action and under what type of statute does an aesthetic injury create a right to invoke review? On a deeper level, does an aesthetic injury create such an adversary interest in the party aggrieved that he is likely to seek redress with appropriate resolution?

It should first be noted that the Supreme Court's decision in *Sierra Club v. Hickel*, currently pending on certiorari,<sup>45</sup> will be of crucial importance to the future success of national conservation groups in environmental litigation. In the past, they have long enjoyed full party status when they joined with local plaintiffs. This writer can see no logical reason why they should be denied standing when they attempt to prosecute an action on their own behalf. Clearly, the case of each plaintiff should stand or fall on its own merits; one plaintiff cannot derive standing through an injury to another. Thus, if the Supreme Court finds that this purely aesthetic injury to the national club does not grant standing, logic dictates that in all cases of interest to such national groups, their posture cannot be more than that of *amicus curiae*.

It is to be hoped that the Supreme Court will recognize and squarely hold that an aesthetic interest per se can give rise to standing. The Supreme Court has recognized in the past that

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44. Cape May Counter Chapter, Inc., Izzak Walton League of America v. Macchia, 329 F. Supp. 504, 513 (D. N.J. 1971).

45. 433 F.2d 24 (9th Cir. 1970), *cert. granted sub nom.* Sierra Club v. Morton, 401 U.S. 907 (1971).

Congress can create new legal interests, provided they are not wholly foreign to the common law.<sup>46</sup> Statutes such as the National Environmental Policy,<sup>47</sup> the Multiple Sustained Yield-Use Act,<sup>48</sup> and the Wilderness Act<sup>49</sup> clearly recognize a public concern for the preservation of the quality of our natural environment. It is only reasonable to suppose that those groups which have shown a historic and vital concern for the preservation of the environment were intended to be the primary beneficiaries of these acts.

Since the Supreme Court decision in *Hardin v. Kentucky Utilities Co.*,<sup>50</sup> it is settled that there is no necessity for a specific statutory grant of standing. This theme was echoed in the Supreme Court's decision in the *Data Processing* case: "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend."<sup>51</sup>

This trend of enlargement has often led to dramatic expansions in the concept of standing. Most notably, in *Scanwell Laboratories v. Shaffer*,<sup>52</sup> standing was allowed to an unsuccessful bidder for a government contract to protest statutory irregularities in the bid of the successful party. Although the statutory provisions indicated that the interest to be preserved was the public interest in the propriety of government contracts and not the protection of competitive interests, standing was granted under a "pure injury in fact" rationale.<sup>53</sup> The court reasoned that unsuccessful competitors would be the most likely parties to protect the public interest in the regularity of government contracts. The simple adversity factor seems quite clear under this rationale.

A fortiori, the standing of conservation groups should ap-

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46. *Muskrat v. United States*, 219 U.S. 346 (1911).

47. 42 U.S.C. §§ 4321-4347 (1970). See note 23 *supra*.

48. 16 U.S.C. §§ 528-531 (1970).

49. *Id.* §§ 1131-1134.

50. 390 U.S. 1 (1968). Another case has further enlarged this concept: In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), it was held that judicial review of agency action would not be precluded unless "there is persuasive reason to believe that such was the purpose of Congress." *Id.* at 140.

51. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 154 (1970).

52. 424 F.2d 859 (D.C. Cir. 1970).

53. *Id.* at 872.

pear even clearer under the recent series of environmental acts. Not only has Congress recognized the public interest in this field, but the interest of these same groups is clearly within the zone of congressional intent. Thus, even under the two-pronged test of *Data Processing*,<sup>54</sup> the standing of these groups should be clear.

There remains, finally, the question of whether an aesthetic injury can create a sufficient adversary interest. Much of the uncertainty here probably lies in the fact that the concept of an aesthetic injury is basically amorphous. Its impact is difficult to measure, and the parties truly aggrieved are often difficult to identify. Indeed, it is primarily an injury to the public as a whole. Who, then, should speak for the public? Commenting on this point, one author has written:

"In the past, we have often accepted the non sequitur that where all are the intended beneficiaries of an interest, none has standing to protect it. The dangers inherent in this philosophy are now apparent: Both logic and experience support the emerging view that an interest so fundamental that all are within the protected class must be permitted its champion. The National Environmental Policy Act has created such an interest."<sup>55</sup>

At least one other author has suggested that in cases involving the public interest, the champion should not even need to allege any special kind or degree of interest of his own.<sup>56</sup> Practical advocacy, however, would suggest it is wise to have as plaintiff he who has the greatest personal stake in order to present the issues within the adversary framework of *Baker v. Carr*.<sup>57</sup>

Under this concept, it is suggested that conservation groups are the most practical plaintiffs in the field of environmental litigation. Their interest is deep, abiding, and truly adversary. As was pointed out in *Izaak Walton League v. St. Clair*:<sup>58</sup>

"The League has a long history of activity in conservation matters and natural resources preservation. It has been

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54. See note 21 *supra*.

55. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 *RUTGERS L. REV.* 230, 248 (1970).

56. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 542-43 (1965).

57. See note 35 *supra* and accompanying text.  
58. 313 F. Supp. 1312, 1316-17 (D. Minn. 1970).

active for many years in urging congressional and other legislative action. . . .

“ . . . .

“The Izaak Walton League is not a ‘johnny-come-lately’ or an *ad hoc* organization and its interest in the wilderness movement is continuing, basic and deep. It therefore has an ‘aesthetic, conservational and recreational’ interest to protect.”

Clearly, cases such as *Sierra Club v. Hickel* raise unique problems when national groups descend upon a problem unaided by local plaintiffs. Even courts that freely accept the idea of private attorney generals may reasonably balk at the spectre of peripatetic attorney generals ranging across the nation. Although the desirability of local plaintiffs cannot be denied, the right of national groups to bring suit should not be cut off merely because they are not the best of all possible plaintiffs. In all cases, the inquiry should be directed to the interest of the plaintiff in the subject matter and the likelihood that he will pursue his case with adequate vigor.

### *Conclusion*

The federal courts have rid themselves of many of the inequitable notions that have plagued this complicated specialty of federal jurisdiction since its inception. Yet, standing remains today one of the most frequently abused weapons in the judicial armory. This has become most apparent in the area of environmental litigation. It can be expected that the public concern in this area will eventually impress itself on the reasoning of the courts, and the artificial restrictions on standing will gradually fall away.

Still, judicial reasoning should not blow like chaff in the winds of public sentiment. The concept of standing clearly serves an integral and essential function in our legal system. With the erosion of the “legal right” concept, it is to be hoped that the courts will come to realize that the true purpose of standing today is in assuring the concrete adversity of the parties. Viewed in this light, standing will be neither an artificial barrier nor a meaningless concept, but a valid technique in analyzing the posture of the parties.

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