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### Standing for the Public: A Lost History

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## ARTICLES

### STANDING FOR THE PUBLIC: A LOST HISTORY<sup>†</sup>

*Elizabeth Magill\**

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TODAY’S treatises tell us that in order to have standing to challenge government action in federal court, a challenger must establish an “injury in fact.”<sup>1</sup> This is a constitutional requirement, which means that Congress cannot authorize those without it to bring suit in federal court.<sup>2</sup> The trick, of course, is identifying what counts as an injury in fact—and here the doctrine is widely regarded to be a mess.<sup>3</sup> The injury must be individual,<sup>4</sup> imminent,<sup>5</sup> and concrete<sup>6</sup> (although it can be widely shared<sup>7</sup>). It must be caused by the defendant’s actions,<sup>8</sup> and the court’s judgment must be capable of redressing that injury.<sup>9</sup> It is much easier to identify what does *not* count as an injury in fact. All seem to agree that injury to

<sup>1</sup> 3 Richard J. Pierce, Jr., *Administrative Law Treatise* §§ 16.2–16.4 (4th ed. 2002).

<sup>2</sup> *Massachusetts v. EPA*, 549 U.S. 497, 516–18 (2007); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>3</sup> See Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1, 15–17 (1984); William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 221–24 (1988); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 276 (2008); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. Rev. 612, 612–14 (2004); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Pa. L. Rev. 613, 639–41 (1999); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1464 (1988).

<sup>4</sup> *Sierra Club v. Morton*, 405 U.S. 727, 735–36 (1972).

<sup>5</sup> *Lujan*, 504 U.S. at 564; *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983).

<sup>6</sup> *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club*, 405 U.S. at 740 n.16 (1972).

<sup>7</sup> *FEC v. Akins*, 524 U.S. 11, 24 (1998).

<sup>8</sup> *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976).

<sup>9</sup> *Id.*

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the general interest we all have in seeing the government abide by the law *cannot* constitute an injury in fact.<sup>10</sup>

But the truth is, for several decades in the middle of the last century, Congress was allowed to authorize legal challenges to government action by parties whose only cognizable interest was just that: that the government abide by the law. These legal challenges were mostly (though not exclusively) brought by those who competed economically with regulated parties. As Part I of this Article will explain, these challengers had no legally cognizable basis to object to the government's action. In the language of the doctrine at that time, these parties had no "legal rights" and, as a consequence, they would not have had standing in the absence of action by Congress. Congress, however, was permitted by statute to authorize these parties to bring before the court allegedly illegal action by government actors.

In its cases, the Supreme Court acknowledged that these parties had no legally cognizable injury—no legal rights—but it held nonetheless that Congress could authorize such parties to, as the Supreme Court itself said, bring the government's "legal errors" to the attention of the federal courts "on behalf of the public." There were doubters and dissenters who questioned the constitutionality of this arrangement. Those doubts were expressed in the pages of law reviews, dissents in the Supreme Court, and, as the archival materials on the cases reveal, in private correspondence between a prominent jurist and Justice Douglas. Despite these doubts, the Supreme Court unquestionably sanctioned this "standing for the public" regime as constitutional.

Ironically, this mid-century approach to the vindication of public rights in the courts disappeared in the very period that is best

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<sup>10</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 516–17 (2007) ("We will not, therefore, entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.") (internal citation omitted); *Akins*, 524 U.S. at 24 ("[I]njury to the interest in seeing that the law is obeyed . . . deprives the case of the concrete specificity that characterized those controversies which were the traditional concern of the courts at Westminster.") (internal citation omitted); *Lujan*, 504 U.S. at 573–74 ("We have consistently held that a plaintiff raising only a generally available grievance about . . . every citizen's interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy."); *Lyons*, 461 U.S. at 111 ("[A] federal court may not entertain a claim by any or all citizens who no more than assert that certain practices . . . are unconstitutional.").

known for its doctrinal innovations that liberalized the law of standing. While the Supreme Court and lower courts did expand standing in important respects between the middle of the 1960s and the 1970s, they simultaneously retreated from the standing for the public approach of the previous decades. This retreat happened in fits and starts in the lower courts and the Supreme Court. It is a complicated story that will be set forth in Part II of this Article, which relies on analysis of both the key cases and the internal papers of the Supreme Court Justices where available. While the story of the erasure of the standing for the public principle is complicated, it had straightforward consequences for the relationship between Congress and Article III courts. After the fall of this principle, Congress was less free (than it had been before) to structure the judicial enforcement of legal obligations imposed on government actors.

Why courts were comfortable with standing to raise the rights of the public conferred by statutes in the middle of the last century, and then retreated from this approach, is not easy to explain. Any legal change is difficult to explain persuasively and here the difficulty is multiplied because of the cross-currents in the evolving law. Part III of this Article will seek to understand the Court's retreat from the standing for the public principle by first providing some context for it. The Article will examine developments outside the Court that had an effect on the sorts of cases that came into federal courts. In this period, a new model of reformist politics emerged with full force. That model treated litigation as a central tool in the effort to advance social reform. Not coincidentally, this is the era when the number of lawyers devoted to public interest causes exploded. Congress fully embraced this model of reformist politics as it created a new generation of regulatory agencies. Congress carved out a role for public interest lawyers to bring suit to force government to do its job and, in some cases, to stand in for the government and enforce legal obligations imposed upon private parties.

Part III will close by suggesting that this context provides a credible explanation for why the Court retreated from its earlier embrace of the standing for the public principle. Those standing for the public between the 1940s and the early 1960s were mostly economic competitors, but in the middle of the 1960s and 1970s, those

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challenging the government's compliance with the law were part of the explosion in public interest law that occurred in that era. Instead of economic competitors, the courts confronted civil rights groups challenging the Federal Communications Commission and environmentalists challenging the Federal Power Commission and the National Park Service. Such public interest lawyers were familiar from the civil rights movement, of course, but their interest in bringing litigation to challenge the behavior of regulatory agencies was new. While the political branches embraced this model of reformist politics, the story in the Supreme Court was altogether different. These "ideological" litigators quite clearly discomfited the Court. That discomfort, it seems fair to speculate given the key Supreme Court opinions, played a role in the demise of the standing for the public principle.

I. STANDING PRIOR TO 1970: LEGAL RIGHTS AND STANDING FOR THE PUBLIC

Prior to 1970, the Supreme Court's approach to standing in cases challenging agency action proceeded along two tracks.<sup>11</sup> One track applied when the source of law giving rise to the challenger's claim did not identify who could challenge administrative action. A statute might authorize a court to set agency action aside,<sup>12</sup> but would not specify which parties were permitted to bring such actions. In such cases, the challenger had to identify injury to a "legal right" (sometimes called a "legal wrong") to establish standing to challenge administrative action. The other track applied when, in an agency-specific statute, Congress identified which parties could challenge administrative action. These provisions—commonly known as "special statutory review" provisions—varied from statute to statute, but a standard formulation was that those who were "adversely affected" or "aggrieved" by agency action could chal-

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<sup>11</sup> See 3 Kenneth Culp Davis, *Administrative Law Treatise* §§ 22.03–22.04 (1958); Louis L. Jaffe, *Judicial Control of Administrative Action* 505–31 (1965).

<sup>12</sup> See, e.g., Act of Oct. 22, 1913, ch. 32, 38 Stat. 208, 212 ("No interlocutory injunction suspending . . . any order made or entered by the Interstate Commerce Commission shall be issued or granted . . . unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application.").

lunge it in court.<sup>13</sup> As this part will demonstrate, the legal right test contemplated that only legally recognized individual rights could be adjudicated by courts, but the courts permitted those proceeding under “party aggrieved” provisions to bring what judges themselves called “public rights” to courts for their adjudication.

### A. *Legal Wrongs*

The first track required a party to identify a legal wrong in order to challenge governmental action.<sup>14</sup> An exemplary legal wrong was an alleged infringement of a common law right. Government action that allegedly constituted a tort, an infringement of property, or a breach of a contract clearly qualified.<sup>15</sup> Even in the absence of the violation of a common law right, a statute could create a right or privilege in particular parties, the alleged denial of which would be sufficient to establish standing.<sup>16</sup> To determine whether a party had asserted injury to a legal right, courts would survey the relevant sources of law to see whether the challenger to government action had a legally protected interest that had allegedly been disregarded.<sup>17</sup>

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<sup>13</sup> Davis, *supra* note 11, at 215; Food, Drug and Cosmetic Act, ch. 675, 52 Stat. 1055 (1938) (“In a case of actual controversy as to the validity of any order . . . any person who will be adversely affected by such order . . . [may] file a petition with the United States court of appeals . . . .”); Federal Water Power Act, ch. 687, 49 Stat. 860 (1935) (“Any party . . . aggrieved by an order issued by the Commission . . . may obtain a review of such order in the United States Court of Appeals . . . by filing in such court . . . a written petition . . . .”); National Labor Relations Act, ch. 372, 49 Stat. 449, 455 (1935) (“Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States court of appeals . . . by filing in such court a written petition . . . .”); Communications Act, ch. 652, 48 Stat. 1064, 1093 (1934) (“Appeals may be taken . . . (1) By an applicant . . . whose application is refused . . . (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission . . . .”); Securities Act, ch. 38, 48 Stat. 80 (1933) (“Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals . . . by filing in such court . . . a written petition . . . .”).

<sup>14</sup> *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 256–57 (1930).

<sup>15</sup> *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137–38 (1939); see Jaffe, *supra* note 11, at 511–12.

<sup>16</sup> *Tenn. Elec. Power*, 306 U.S. at 137 (holding a “legal right” can be “founded on a statute which confers a privilege”).

<sup>17</sup> See *Stark v. Wickard*, 321 U.S. 288, 289–90, 305 (1944) (granting standing to milk producers to challenge price levels set by Secretary of Agriculture and War Food Administrator); *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 422 (1942) (granting standing to radio network to contest a regulation which “purport[ed] . . . to

The legal wrong test was developed in a series of cases involving challenges to decisions of the Interstate Commerce Commission (ICC). In each, the Court confronted challengers to administrative action who were not the objects of the ICC orders (they did not pay the rate; they were not denied ownership) but rather parties whose competitive positions were affected by an ICC decision. In a 1923 case, manufacturers of lumber complained about an ICC order that required a railroad to eliminate a storage charge on lumber that remained in railcars after they reached their destination. The charge had been imposed during the war because of a car shortage, and the ICC eliminated it once the rail car shortage ended. Lumber manufacturers who had not needed to pay the charge did not want to lose the advantage they had over manufacturers who did need to pay the charge. They challenged the legality of the ICC's order—arguing that it deprived the railroads of their property without due process—but the Supreme Court said they had no standing because they could not allege that the order subjected them to “legal injury.”<sup>18</sup> The challenger's legal right, said the Court, was “limited to protection against unjust discrimination.”<sup>19</sup>

Exactly what the Court meant by legal right was further elaborated in two more cases, one in 1924 and one in 1930. The first involved a challenge to the ICC's decision to permit one railroad to acquire control of a crucial and previously independent rail terminal in Chicago.<sup>20</sup> Before the ICC order, the terminal was not controlled by any carrier, and it was used by all railroads entering Chicago. Rival railroads that had used the terminal intervened in the ICC proceedings and, when they lost, challenged the ICC decision in court, arguing that there was no evidence to support the ICC finding that the acquisition was in the “public interest.” The Supreme Court held that these competitors had a “legal interest” and therefore had standing to challenge the ICC's decision. The Court's analysis revealed that this “legal interest” was based on the

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alter and affect adversely appellant's contractual rights . . . with station owners.”); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) (denying standing to contest administrative minimum wage determination affecting contractual bidding process); *Ala. Power Co. v. Ickes*, 302 U.S. 464, 479–80 (1938) (denying standing to petitioner objecting to disbursement of federal assistance to competitor power companies).

<sup>18</sup> *Edward Hines Yellow Pine Trustees v. United States*, 263 U.S. 143, 148 (1923).

<sup>19</sup> *Id.*

<sup>20</sup> *The Chicago Junction Case*, 264 U.S. 258, 259–62 (1924).

statutes administered by the ICC. Distinguishing the 1923 cases, the Court noted that the parties were not complaining of more effective competition; the relevant statutes did not require the ICC to consider the maintenance of their competitive position. Instead, they were complaining that they had not been treated equally. Under the Act, they were entitled to be so treated.<sup>21</sup> That is, the statute required the ICC to consider the interests of all parties equally as it considered whether to grant a monopoly to one: the challengers' claim was that the ICC did not do so, and they thus alleged a violation of a legal right.<sup>22</sup>

The trilogy of cases was completed in the 1930 case of *Alexander Sprunt & Son, Inc. v. United States*.<sup>23</sup> The pattern was familiar. The ICC had eliminated a two-tiered rate structure for the shipment of cotton. Although the railroads subject to the rate structure as well as the shippers who had benefited from the previous two-tier rate structure challenged the ICC's decision, only the shippers—whose competitive advantage over other shippers had been eliminated by the ICC's new single rate—sought Supreme Court review of the agency's decision. The shippers had intervened in the ICC's proceeding, but the court nonetheless held that they had no standing because they had no legal right. According to the Court, the shipper was permitted to intervene in the proceeding because it was threatened with a loss of "an advantage," but that by itself did not mean it had a legal right sufficient to confer standing. The shippers had "no independent right which is violated by the order."<sup>24</sup> As shippers, they were entitled "only to reasonable service at reasonable rates and without unjust discrimination."<sup>25</sup> The elimination of the competitive advantage they enjoyed had compromised neither of these legal rights and thus they had no standing. As the contrast between *Sprunt* and its predecessors makes clear, the cases apply-

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<sup>21</sup> Id. at 267.

<sup>22</sup> The Court bolstered its holding with two points. The parties had been permitted to intervene in the agency proceeding, indicating that the ICC thought they had a legally protected interest. More than that, the Court noted that if those who had participated in the proceeding had no standing, "there would in some cases be no redress for the injury inflicted by an illegal order." Id. at 268.

<sup>23</sup> 281 U.S. 249 (1930).

<sup>24</sup> Id. at 255.

<sup>25</sup> Id.

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ing the “legal wrong” test were sometimes difficult to reconcile.<sup>26</sup> But the inquiry was straightforward: has the challenger asserted that the law requires the agency to take account of his interest and that agency has failed to do so?<sup>27</sup>

*B. Standing for the Public*

In 1940, the Supreme Court embraced a different approach to standing. This approach allowed Congress to authorize challenges to administrative action by those who did not have legal rights. As these challengers had no cognizable rights of their own, they had standing—and the courts were explicit about this—to raise the rights of the public. The case in which this approach was born, *FCC v. Sanders Brothers Radio Station*,<sup>28</sup> involved a familiar pattern. An economic competitor to the object of regulatory action (the present holder of a broadcast license near Dubuque, Iowa) complained about a regulatory action (FCC permitting a newspaper company to construct a broadcast station in Dubuque) that harmed its competitive position.

The Supreme Court’s twin holdings in the case made clear its departure from the “legal right” test. The Court first held that economic injury to a rival was not in and of itself an element that the FCC was obliged to consider as it determined whether its action would satisfy the “public interest, convenience, and necessity” standard of the Communications Act. In other words, the challenger had no legal right. The Court then asked whether—“since absence of right implies absence of remedy”—the party had standing to challenge the FCC’s action.<sup>29</sup>

But, according to the Court, it did not follow from the non-existence of a legal right that the challenger had no standing. The Communications Act permitted judicial review by “any . . . person aggrieved or whose interests are adversely affected” by certain FCC decisions.<sup>30</sup> As the Court saw it, if it applied the legal right test, the Court would deprive that statutory provision of any effect.

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<sup>26</sup> See Jaffe, *supra* note 11, at 510–12.

<sup>27</sup> See *id.* at 507.

<sup>28</sup> 309 U.S. 470 (1940).

<sup>29</sup> *Id.* at 477.

<sup>30</sup> Communications Act of 1934, 47 U.S.C. § 402(b)(2) (1940).

It read “aggrieved” parties to be those without legal rights who were nonetheless permitted under the statute to bring a challenge to agency action. The message here was clear: the legal right test was a court-constructed doctrine that Congress could override by statutorily authorizing a legal challenge. In *Sanders Brothers*, the Court went on to explain that Congress might have good reason for doing just that. The Court speculated that, although competitors did not have legal rights at common law or conferred by the statute, Congress might have “been of opinion 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.”<sup>31</sup>

This holding was not some slip of a 1940 typewriter. It is clear that the key words just discussed in *Sanders Brothers* were carefully considered. This is because the final opinion printed in the U.S. Reports contained two changes from the slip opinion and both of these changes were relevant to the key language cited here. First, the slip opinion had initially explained that Congress might have wanted to allow a party who was “injured” to bring errors of law before the courts, but the final version added the qualifier that Congress may have wanted one who was likely to be “*financially injured*” to bring errors before the courts.<sup>32</sup> Second, the opinion was amended to take out entirely the following sentence: “In this view, while the injury to such person would not be the subject of redress, that person might be the instrument, upon an appeal, of redressing an injury to the public service which would otherwise remain without remedy.”<sup>33</sup> While this author has found no further explanation for these amendments to the opinion, the very fact of their existence confirms that the words were not used casually.

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<sup>31</sup> *Sanders Bros.*, 309 U.S. at 477.

<sup>32</sup> 309 U.S. 642 (No. 499) (emphasis added) (“The opinion in this case is amended by inserting the word ‘financially’ between the words ‘be’ and ‘injured’ in the last line on page 5 . . . .”); *FCC v. Sanders Bros.*, No. 499, slip op. at 5 (U.S. Mar. 25, 1940).

<sup>33</sup> 309 U.S. 642 (No. 499) (referring to the striking of a sentence in the opinion that starts “In” and ends in “remedy”). The full sentence that was struck is discussed in a letter from Judge Jerome Frank to Justice Douglas dated March 31, 1942 and contained in Justice Douglas’ case files on *Scripps-Howard Radio, Inc. v. Federal Communications Comm’n*, No. 41-508. See *FCC v. Sanders Bros.*, No. 499, slip op. at 6 (U.S. Mar. 25, 1940).

These amendments to the opinion notwithstanding, courts and commentators read *Sanders Brothers* to allow those without legal rights to sue on behalf of the public. Indeed, some judges and commentators found it constitutionally troublesome for just this reason. In the immediate aftermath of the case, some commentators asked whether allowing a challenger who had no legal right to challenge administrative action could be squared with Article III's requirement of a case or controversy.<sup>34</sup>

Supreme Court Justices themselves were soon debating the legitimacy of the arrangement the *Sanders Brothers* Court had sanctioned. Two years later, in 1942's *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, the Supreme Court considered whether a Court of Appeals could stay the enforcement of an FCC order pending the determination of an appeal brought under the statutory review provision at issue in *Sanders Brothers*. That provision did not explicitly authorize the issuance of such an order, and, by contrast, judicial review obtained under other provisions of the statute did do so. Justice Frankfurter, writing for the Court, held that appellate courts did have the power to issue a stay of an agency order pending an appeal under the "party aggrieved" provision.<sup>35</sup> In the course of doing so, the majority and the dissent engaged in a debate about whether the fact that the review provision permitted parties to bring "public rights" before the courts meant anything about the power of courts to issue a stay of proceedings.

Justice Frankfurter relied heavily on the traditional power of courts to issue stays pending appeals. But to Justice Douglas, writing in dissent, this history was irrelevant because of the kind of legal rights that aggrieved parties were presenting. As he put it, "All constitutional questions aside, we should require explicit, unequivocal authorization before we permit[] an appellant who has no individual substantive right at stake in the litigation to obtain a

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<sup>34</sup> Harry P. Warner, Some Constitutional and Administrative Implications of the *Sanders* Case, 4 Fed. Comm. B.J. 214, 217–30 (1940); see also Edwin Borchard, Challenging "Penal" Statutes by Declaratory Action, 52 Yale L.J. 445, 451 n.16 (1943); Comment on Recent Decisions, Administrative Law—Federal Communications Commission, 26 Wash. U. L.Q. 121, 122 (1940); Recent Cases, Administrative Law—Judicial Review of Decisions Under the Communications Act of 1934, 8 Geo. Wash. L. Rev 1106, 1107 (1940).

<sup>35</sup> *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11–13 (1942).

stay to protect the public interest.”<sup>36</sup> Justice Frankfurter responded that the nature of the rights did not matter:

The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By [the judicial review provision] Congress gave the right of appeal to persons “aggrieved or whose interests are adversely affected” by Commission action. But these private litigants have standing only as representatives of the public interest. That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights. . . . An historic procedure for preserving rights during the pendency of an appeal is no less appropriate—unless Congress has chosen to withdraw it—because the rights to be vindicated are those of the public and not of the private litigants. . . . To [withhold this power] would stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest.<sup>37</sup>

The striking point here is the Court’s understanding of what Congress has done—permitting aggrieved private parties to vindicate the public’s interest in court—and its easy acceptance of that arrangement.

Justice Douglas’ papers reveal that his dissent in *Scripps-Howard*<sup>38</sup> was informed by two letters to the Justice from Judge Jerome N. Frank of the Second Circuit. Those letters are especially revealing about the meaning of *Sanders Brothers*.<sup>39</sup> Judge Frank wrote the letters (marked private) in response to a request from Justice Douglas.<sup>40</sup> In the first letter, he explained that “some language” in *Sanders Brothers* could be understood to permit parties

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<sup>36</sup> Id. at 20 (Douglas, J., dissenting) (citation omitted).

<sup>37</sup> Id. at 14–15 (citations omitted).

<sup>38</sup> 316 U.S. at 18–22.

<sup>39</sup> Letter from Jerome N. Frank to Justice Douglas (Mar. 31, 1942) (William O. Douglas Papers, Files on Scripps-Howard Radio, Inc. v. Federal Communications Comm’n, No. 41-508, Box 65, Library of Congress, Manuscript Division, Washington, D.C.) [hereinafter Frank Letter 1]; letter from Jerome N. Frank to Justice Douglas (April 1, 1942) (William O. Douglas Papers, Files on Scripps-Howard Radio, Inc. v. Federal Communications Comm’n, No. 41-508, Box 65, Library of Congress, Manuscript Division, Washington, D.C.) [hereinafter Frank Letter 2].

<sup>40</sup> Frank Letter 1, supra note 39, page 1 (marked “*Personal*”; “Dear Bill: Responding to your request, I write the following in haste.”).

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without a proper injury to challenge government action. The language in *Sanders Brothers* that could be so construed, Frank wrote, was the language that indicated that one likely to be injured would have a “sufficient interest” to bring the government’s errors before the courts. Here is how Judge Frank (colloquially) explained it:

In view of the *decision*, that language can be regarded as dictum. If not so regarded, it is fundamentally at variance with the cases I’ve cited above.<sup>41</sup> See, for instance, how *Sanders* has been interpreted by Edgerton, J. . . . He says that the Supreme Court held that the intervening competitor may appear “as a kind of King’s proctor, to vindicate the public interest” Gosh! Can a provision, couched in general terms, in an “appeal” section of a statute, constitutionally confer on the federal courts a power to pass upon the validity of official action where no case or controversy exists, although a statute specifically and expressly so providing is unconstitutional, as the Court held in *Muskrat v. United States*? Where is there any constitutional power to confer on any citizen the power, as a sort of “King’s proctor,” to vindicate the public interest?”<sup>42</sup>

In a follow-up letter, Judge Frank made the same point more precisely. Because the challenger in *Sanders Brothers* had no legal injury, he wrote, “he had no cause of action and there was no case or controversy before the court,” and if the statute meant that such a person “showing no case or controversy could nevertheless call on the courts to consider such an issue, then that statute was, *pro tanto*, unconstitutional.”<sup>43</sup>

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<sup>41</sup> Footnote not in original text. In the first paragraph of the letter, Judge Frank had noted that “[u]nless there is an invasion of the citizen’s individual interest, of a recognized character, any financial loss he suffers is *damnum absque injuria*.” Frank Letter 1, *supra* note 39, at 1. Judge Frank provided the following citations for that proposition:

“*Massachusetts v. Mellon*, 262 U.S. 447; *Ala. Power Co. v. Ickes*, 302 U.S. 464; *Tenn. Elec. Power Co. v. T.V.A.*, 306 U.S. 118; *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125, 129; *Atlanta v. Ickes*, 308 U.S. 517; *Muskrat v. United States*, 219 U.S. 346; *Stearns v. Wood*, 236 U.S. 75, 78; *Radio Comm. v. General Electric Co.*, 281 U.S. 464, 469; *Radio Comm. v. Nelson Bros.*, 289 U.S. 266; *Fairchild v. Hughes*, 258 U.S. 126; *Hayburn’s Case*, 2 Dall. 409; *Coleman v. Miller*, 307 U.S. 433, at 460–66.” *Id.*

<sup>42</sup> Frank Letter 1, *supra* note 39, at 2 (citation omitted).

<sup>43</sup> Frank Letter 2, *supra* note 39.

Judge Frank did not miss the significance of *Sanders Brothers*. Writing to Justice Douglas in 1942, Frank unquestionably viewed this reading of *Sanders Brothers* as both plausible and problematic. In his letter, he offered a way of reading the case that would avoid the difficulty.<sup>44</sup> Something remarkably similar to that view did appear in the United States Reports, but it appeared in Justice Douglas' dissent in *Scripps-Howard*.<sup>45</sup> After these cases were decided by the Supreme Court, with Judge Frank's view of the matter not carrying the day, it was none other than Judge Frank who attempted to come to terms with the meaning of this line of cases in a well-known appellate court decision. In that decision, discussed shortly, Judge Frank offered a now famous term to reconcile the requirements of Article III and the *Sanders Brothers* line of cases. He explained that the *Sanders Brothers* line of cases allowed Congress to deputize "private Attorney Generals" to bring cases before the federal courts that would not otherwise be cognizable.

But the Supreme Court was not yet finished with its discussion of the standing for the public principle. Just one year later, in 1943's *FCC v. NBC (KOA)*,<sup>46</sup> the Supreme Court again opined on *Sanders Brothers*' meaning. The relevant question in the case was whether a broadcaster who alleged that an FCC action might lead to interference with its frequency was an aggrieved party within the statutory review provision. Based on *Sanders Brothers*, the majority's answer was a simple yes; an allegation of electrical interference, just like competitive injury, could make a party "aggrieved."

What is most telling about *KOA* are the dissents. Justice Frankfurter, who primarily dissented on another matter, reviewed the meaning of *Sanders Brothers*. According to Frankfurter, *Sanders Brothers* meant that, while injury to a competitive position was not a ground for setting aside an FCC action, it did create standing to attack the FCC's action on other grounds, namely, "to vindicate the public interest."<sup>47</sup> He then observed that the constitutionality of

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<sup>44</sup> Frank Letter 1, supra note 39, at 3–4.

<sup>45</sup> Compare 316 U.S. at 20–21 (Douglas, J., dissenting) (noting that *Sanders Brothers*, properly construed, means that the Court of Appeals has jurisdiction, but that does not mean the litigant has a cause of action), with Frank Letter 1, supra note 39, at 3–4 (suggesting that the best reading of *Sanders Brothers* is that the provision confers jurisdiction but does not provide a cause of action).

<sup>46</sup> 319 U.S. 239 (1943).

<sup>47</sup> Id. at 259 (Frankfurter, J., dissenting).

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this arrangement was settled: “Whatever doubts may have existed as to whether the ingredients of ‘case’ or ‘controversy[]’ . . . are present in this situation were dispelled by our ruling in the *Sanders* case . . . .”<sup>48</sup> But, Frankfurter continued, it could not be just any party who is “aggrieved” and, in his view, the challenger’s allegations about injury were too speculative.<sup>49</sup>

Although more grumpy about it, Justice Douglas, who wrote his own dissent, accepted this same view of *Sanders Brothers*. Douglas noted that he had doubts about whether *Sanders Brothers* was correct as a matter of statutory interpretation and, more than that, was concerned about the “constitutionality of a statutory scheme which allowed one who showed no invasion of a private right to call on the courts” to review the action of the agency.<sup>50</sup> “But,” he continued, “if we accept as constitutionally valid a system of judicial review invoked by a private person who has no individual substantive right to protect but who has standing only as a representative of the public interest, then I think we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate.”<sup>51</sup> Why was this necessary? Otherwise, he wrote, “we will most assuredly run afoul of the constitutional requirement of case or controversy.”<sup>52</sup> When Douglas applied his own test of who counted as aggrieved, the challenger flunked.

One of the best-known explanations of *Sanders Brothers* was offered by Judge Frank of the Second Circuit. As described earlier, Judge Frank had corresponded in 1942 with Justice Douglas about the *Scripps-Howard* case, explaining that *Sanders Brothers* could and had been read to authorize suits by those who did not have a proper injury. After seeing his own view of the matter endorsed only in dissent, Judge Frank then authored an opinion that explained *Sanders Brothers* as permitting suits by those without legal injuries.

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<sup>48</sup> Id. at 259–60.

<sup>49</sup> Id. at 260 (stating that the challenger failed to show that “its interests were substantially impaired”).

<sup>50</sup> Id. at 265 (Douglas, J., dissenting).

<sup>51</sup> Id. (citation omitted).

<sup>52</sup> Id.

The case was *Associated Industries v. Ickes*,<sup>53</sup> where coal consumers sued the Secretary of the Interior, challenging a twenty-cent-per-ton price increase on bituminous coal sold in New York State.<sup>54</sup> The consumers alleged that the agency had exceeded its statutory authority and that its findings of fact were not supported by the record. Under the relevant statute, any party that participated in the agency proceeding and was “aggrieved” by a subsequently issued order could challenge the order in an appellate court. The agency asserted that consumers did not have standing because they were not “aggrieved.” The relevant statute, the agency admitted, did safeguard the interests of consumers, but consumers’ interests were represented by a government official—called “Consumers’ Counsel”—that the statute authorized to seek judicial review of agency action but had not elected to do so. Thus framed, the question was clear: Were consumers “aggrieved” by the agency action such that they could challenge that action in court on behalf of the public’s interest, an interest that was specifically vested in a government official to safeguard?

According to Judge Frank, *Sanders Brothers* meant that the answer was “yes.” Without the statutory review provision, Judge Frank said it was clear that the consumers would not have standing because they could not point to the invasion of a legal interest.<sup>55</sup> But the statutory review provision granting the right of review to any aggrieved party changed this. As Judge Frank put it:

The court, in the *Sanders* and *Scripps-Howard* cases, as we understand them, construed the “person aggrieved” review provision as a constitutionally valid statute authorizing a class of “persons aggrieved” to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded. . . . If, then, one is a “person aggrieved,” he has authority by review proceedings under §6(b), to vindicate the public interest involved in a violation of the Act by

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<sup>53</sup> 134 F.2d 694 (2d Cir. 1943).

<sup>54</sup> Interior’s rate-setting functions were performed pursuant to the Bituminous Coal Act of 1937. Those functions were initially performed by the Bituminous Coal Commission, but the Commission was abolished in 1939, and its authority was then transferred to the Bituminous Coal Division of the Department of Interior. *Id.* at 697.

<sup>55</sup> *Id.* at 700–01.

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respondents, even if he can show no past or threatened invasion of any private legally protected substantive interest of his own.<sup>56</sup>

The consumers, according to Judge Frank, were clearly “aggrieved.” Given that a competitor threatened with financial loss was an aggrieved party, “a consumer threatened with financial loss by a Commission’s order, which fixes prices and prevents competition among those from whom the consumer purchases, is also a ‘person aggrieved.’”<sup>57</sup>

It was in *Ickes* that Judge Frank coined the term that came to describe this arrangement: the private attorney general.<sup>58</sup> As Judge Frank tried to reconcile *Sanders Brothers* and the constitutional requirement of a case or controversy, he reasoned that, because Congress could authorize the Attorney General to bring cases to vindicate the interests of the public, it could also permit private individuals to vindicate the interests of the public. As he put it: “Such persons, so authorized, are, so to speak, private Attorney Generals.”<sup>59</sup>

Frank was not alone in his view of the meaning of the *Sanders Brothers* line of cases. Two dominant scholars of administrative law in the period agreed.<sup>60</sup> In 1951, in his first treatise on administrative law, Professor Kenneth Culp Davis read *Sanders Brothers* this way: “The new development [in the *Sanders* case] is that the person with standing (1) represents the public interest and (2) does not represent his own private interest, and that (3) the interests asserted on

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<sup>56</sup> Id. at 700, 705 (defining legal interest either as one of “‘recognized’ character, at ‘common law’ or a substantive private legally protected interest created by statute”) (citations omitted).

<sup>57</sup> Id. at 705.

<sup>58</sup> Id. at 704. See William B. Rubenstein, On What A “Private Attorney General” Is—And Why it Matters, 57 Vand. L. Rev. 2129 (2004).

<sup>59</sup> *Associated Industries*, 134 F.2d at 704.

<sup>60</sup> *Sanders Brothers* and its progeny are treated very briefly in the first Hart & Wechsler federal courts casebook. The cases are discussed, under the heading “Actions by competitors,” with no reference made to the potentially broader significance that the cases apparently had outside the limited context of competitor suits. See Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 163–64 (1953).

the appeal may be different from those which confer standing to appeal.”<sup>61</sup>

Professor Louis Jaffe of Harvard Law School, in his landmark 1965 text, *Judicial Control of Administration*, had this to say about Judge Frank’s reading of *Sanders Brothers*:

Judge Frank . . . believed, correctly in my opinion, that under *Sanders* as reinforced by *Scripps-Howard* it is not a necessary element of the constitutional requirement of case or controversy that the plaintiff have any interest. It is enough that the statute authorizes him to represent the public interest as a “private Attorney General.” We have seen that in the common law both in England and the United States permits any citizen to enforce public rights. It seems to follow that Congress may authorize any individual to attack an administrative order.<sup>62</sup>

Assuming that the Constitution permitted this arrangement, Professor Jaffe then went on to consider the consequences of *Sanders Brothers*, discussing, as a policy matter, what the right approach would be to the vindication of public rights in the courts.<sup>63</sup>

### C. Reconciling *Sanders Brothers*

From today’s vantage point, the *Sanders Brothers*’ standing for the public principle seems inconsistent with several Supreme Court precedents, some of them decided prior to the *Sanders Brothers* line of cases. But in the middle of the twentieth century, *Sanders Brothers* stood as good law alongside those earlier cases.<sup>64</sup> One line of cases was relatively simple to reconcile. In 1923’s *Frothingham v. Mellon*,<sup>65</sup> the Court held that a taxpayer could not challenge the Maternity Act of 1921, but the case was easily distinguished because the challenger in *Frothingham* could not point to a statutory

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<sup>61</sup> Kenneth Culp Davis, *Administrative Law* 698 (1951) (citing *W. Pac. Cal. R.R. Co. v. S. Pac. Co.*, 284 U.S. 47 (1931)). Professor Davis noted in his 1958 treatise that subsequent cases had confirmed this understanding. Davis, *supra* note 11, at 223.

<sup>62</sup> Jaffe, *supra* note 11, at 517.

<sup>63</sup> *Id.* at 517–24.

<sup>64</sup> This is a fair characterization of judicial opinions that explain the matter. But Judge Jerome Frank’s letters to Justice Douglas about *Sanders Brothers* indicate that Judge Frank perceived a real conflict between the *Sanders Brothers* line of cases and earlier cases. See notes 39–45 and accompanying text.

<sup>65</sup> 262 U.S. 447, 363 (1923).

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provision that authorized the taxpayer to bring suit. As one commentator explained in the middle of the 1950s:

The Court in *Massachusetts v. Mellon* was not faced with a statutory authorization allowing suit. The Court did not hold that it was beyond the power of Congress to authorize taxpayer suits, and the subsequent decisions in the *Sanders Brothers* and *Scripps-Howard* cases where such a statute was upheld would seem to answer any objection on this point.<sup>66</sup>

The second case, *Muskrat v. United States*, could not be distinguished on the same ground because, in *Muskrat*, Congress had authorized the suit and, even so, the Supreme Court held that it did not have jurisdiction to hear the case.<sup>67</sup> Occasionally, but only in dissents, members of the Court acknowledged the potential conflict, but only by asserting that *Sanders Brothers* itself had “dispelled” any concern that the standing for the public principle was inconsistent with *Muskrat*.<sup>68</sup>

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<sup>66</sup> James R. Baird, Jr., *The Right to Judicial Review: An Analysis of Section 701(f)(1)*, 10 *Food Drug Cosm. L.J.* 286, 294 (1955). Justice Harlan made a similar point in his dissent in *Flast v. Cohen*, decided in 1968. See *infra* notes 120–122 and accompanying text.

<sup>67</sup> 219 U.S. 346, 363 (1911); see also *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 21 (Douglas, J., dissenting) (“Congress could have said that the holder of a radio license has an individual substantive right to be free of competition . . . . In that event, unlike the situation in *Muskrat* . . . there would be a cause of action for invasion of a substantive right.”).

<sup>68</sup> Dissenting in *KOA*, Justice Frankfurter put it this way: “Whatever doubts may have existed as to whether the ingredients of ‘case’ or ‘controversy,’ as defined, for example, in *Muskrat v. United States* . . . are present in this situation were dispelled by our ruling in the *Sanders Brothers* case . . . .” 319 U.S. 239, 259–60 (Frankfurter, J., dissenting) (citation omitted). Justice Douglas put it slightly differently. He noted that he had doubts about “the constitutionality of a statutory scheme which allowed one who showed no invasion of a private right to call on the courts to review an order of the Commission” and then cited *Muskrat*. *Id.* at 265 (Douglas, J., dissenting). In his next sentence, he observed, “But if we accept as constitutionally valid a system of judicial review invoked by a private person who has no individual substantive right to protect but who has standing only as a representative of the public interest, then I think we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate.” *Id.*

*D. Standing and the Administrative Procedure Act*

The Administrative Procedure Act (APA) became law in 1946 and the state of standing law at that time is what this Part has described: a party either had to identify a violation of a “legal right” or point to an act of Congress that allowed those without legal rights to bring challenges to agency action “on behalf of the public.” The APA picked up both approaches. In identifying who could challenge administrative action, the statute specified the following: “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>69</sup> The widely accepted view of the history is that this statement was a declaration of existing law.<sup>70</sup> The “legal wrong” test applied when there was no special statutory review provision; those without legal rights had standing only if Congress adopted a statute that allowed them to bring claims of government illegality before the courts. After the adoption of the APA, the lower courts applied these two tests,<sup>71</sup> and the Supreme Court, as late as 1968, applied the legal wrong test to determine that private competitors to the Tennessee Valley Authority (TVA) had standing—because the statute granted them a legal right—to challenge expansion of TVA’s services.<sup>72</sup>

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<sup>69</sup> 5 U.S.C. § 702 (2006).

<sup>70</sup> See *Duba v. Schuetzle*, 303 F.2d 570, 574 (8th Cir. 1962); *Kansas City Power and Light Co. v. McKay*, 225 F.2d 924, 932 (D.C. Cir. 1955); U.S. Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act 95–96 (1947); see also *Harrison-Halsted Cmty. Group, Inc. v. Hous. & Home Fin. Agency*, 310 F.2d 99, 104 (7th Cir. 1962). Initially, Professor Davis shared the view that the APA codified existing law. Kenneth Culp Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 Colum. L. Rev. 760, 767–68 (1949). He subsequently changed his mind, concluding that the APA extended standing to parties “adversely affected in fact.” Davis, *supra* note 11, at § 22.02; Kenneth Culp Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353, 355 (1955). Professor Jaffe rejected Davis’ position, adopting many of the arguments that Davis had initially supported. Jaffe, *supra* note 11, at 529–30; Louis Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 288 (1961).

<sup>71</sup> *Rural Electrification Admin. v. N. States Power Co.*, 373 F.2d 686, 692 n.9 (8th Cir. 1967); *Cobb v. Murrell*, 386 F.2d 947, 952 (5th Cir. 1967); *Braude v. Wirtz*, 350 F.2d 702, 707 (9th Cir. 1965); *Penn. R.R. Co. v. Dillon*, 335 F.2d 292, 294 (D.C. Cir. 1964); *Harrison-Halsted*, 310 F.2d at 104 (7th Cir. 1962); *Scolnik v. Conn. Tel. & Elec. Corp.*, 265 F.2d 133, 135 (2d Cir. 1959).

<sup>72</sup> See *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 5–7 (1968).

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## II. THE RISE OF LIBERALIZED STANDING AND THE FALL OF STANDING FOR THE PUBLIC

The period of change in the law of standing came in the middle of the 1960s in the lower courts and culminated in the Supreme Court in 1970.<sup>73</sup> Two well-known appellate court decisions—a Second Circuit case known as *Scenic Hudson*,<sup>74</sup> and a D.C. Circuit case known as *United Church of Christ*<sup>75</sup>—are widely regarded as the opening bell in a period of liberalization in the law of standing. Then, in 1970, the Supreme Court boldly rewrote the law of standing. It introduced an entirely new framework and made clear that the new approach was intended to expand the class of persons who were permitted to challenge government action.

Ironically, it is precisely in this period that the courts slowly killed off the standing for the public principle. The first blows actually came in the mid-1960s appellate court cases, but it was the Supreme Court that put the nails in the coffin. That Supreme Court action occurred in the confusing aftermath of the Court's rewriting of standing law in 1970. In a follow-on case in 1972, the Supreme Court tamed the *Sanders Brothers* line of cases and, then, in cases decided in 1975 and 1976, with Justice Powell as the key author, the Supreme Court significantly restricted Congress' ability to authorize parties to stand for the public. The full consequences of the demise of *Sanders Brothers* were not to be fully realized until a 1992 Supreme Court decision, but by then it had become well-settled law, repeated in case after case since the middle of the 1970s, that Article III imposed significant limits on Congress' ability to authorize parties to sue to vindicate the rights of the public.

### *A. Mid-1960s, the Appellate Courts, and Expansion of "Legal Rights"*

Oddly enough, the initial evidence of retreat from the *Sanders Brothers* principle can be seen in the two mid-1960s cases that are

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<sup>73</sup> Thomas W. Merrill, Capture Theory and the Courts: 1967–1983, 72 Chi.-Kent L. Rev. 1039, 1075–78 (1997).

<sup>74</sup> *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608 (2d Cir. 1965).

<sup>75</sup> *Office of Comm'n of the United Church of Christ v. FCC*, 359 F.2d 994, 1002 (D.C. Cir. 1966).

widely hailed as inaugurating the era of expanded standing.<sup>76</sup> Consider, first, the conventional story about each case. The first of the landmark cases, *Scenic Hudson Preservation Conference v. Federal Power Commission*, was decided in 1965 and involved a challenge by environmentalists and others to a power company proposal to build a large hydroelectric facility on the Hudson River.<sup>77</sup> The Federal Power Commission (FPC) had granted a license to the power company under the Federal Power Act. The Scenic Hudson Preservation Conference, a coalition of conservation groups and individuals organized to stop the facility, had challenged the license in the FPC proceeding and, having failed there, challenged the FPC order granting the license in the Second Circuit.

The agency's first line of defense was to keep the Conference out of court, but that effort failed. The statute had a special statutory review provision of the *Sanders Brothers* variety—it permitted any “aggrieved” parties to seek review of the FPC's actions. The agency argued that the Conference lacked standing to sue because it could not point to a personal economic injury resulting from its granting of the license and therefore it was not an “aggrieved” party. One question was whether Congress could, consistent with the constitutional requirement that federal courts hear only cases or controversies, permit a party to obtain judicial review of agency action based on a non-economic grievance about such action. The Second Circuit easily answered that question in the affirmative, observing that “the Constitution does not require that an ‘aggrieved’

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<sup>76</sup> See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1669, 1728 (1975) (describing *Scenic Hudson* and *United Church of Christ* as “landmarks in the current expansion of standing rights”); see also Peter L. Strauss, *Citizens to Preserve Overton Park v. Volpe—Of Politics and Law*, *Young Lawyers and the Highway Goliath* 308 & n.153 in *Administrative Law Stories* (Strauss ed., 2006) (describing *Scenic Hudson's* role in expanding standing doctrine); Tom Turner, *The Legal Eagles in Crossroads: Environmental Priorities for the Future* 52 (Peter Borrelli ed., 1988) (same); Sidney A. Shapiro, *United Church of Christ v. FCC: Private Attorneys General and the Rule of Law*, 58 *Admin. L. Rev.* 939, 955 (2006) (explaining *United Church of Christ's* role in expanding standing doctrine).

<sup>77</sup> 354 F.2d 608 (2d Cir. 1965). Regarding the *Scenic Hudson* litigation generally, see Skip Card, *Scenic Standing: The 40th Anniversary of Scenic Hudson and the Birth of Environmental Litigation*, 77 *N.Y. St. B.J.* 10 (Sept. 2005); David Sive, *The Litigation Process and the Development of Environmental Law*, 13 *Pace Envtl. L. Rev.* 1, 5 (1995).

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or ‘adversely affected’ party have a personal economic interest” in order to have standing.<sup>78</sup>

The remaining question was one of statutory interpretation: Did the Conference count as an “aggrieved” party within the meaning of the Federal Power Act? According to the Second Circuit, the Act required the FPC to consider non-economic factors as it made its licensing decisions, including the public’s interest in the “aesthetic, conservational, and recreational aspects of power development.”<sup>79</sup> The FPC itself, the court pointed out, had recognized this when it considered the company’s license application. The court also pointed to a 1953 Ninth Circuit case where the court had treated a sportsmen group with an interest in fish preservation as “aggrieved” within the meaning of the Act.<sup>80</sup> Because the Conference “by [its] activities and conduct [has] exhibited a special interest in such areas,” it “must be held to be included in the class of ‘aggrieved’ parties under [the Act].”<sup>81</sup>

In the second landmark case, *United Church of Christ v. FCC*, the D.C. Circuit in 1966 set aside an FCC broadcast license renewal because the agency had failed to permit a listener group to intervene in the relicensing proceeding.<sup>82</sup> When WLBT in Jackson, Mississippi, asked the FCC to renew its license to operate a television station, the Office of Communication of the United Church of Christ, along with two black Mississippians, civil rights activist and state NAACP President Aaron Henry and Reverend R.L.T. Smith, sought to intervene in the licensing proceedings to oppose the license renewal. The challenge to WLBT was spearheaded by Rev-

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<sup>78</sup> *Scenic Hudson*, 354 F.2d at 615 (2d Cir. 1965).

<sup>79</sup> *Id.* at 616.

<sup>80</sup> *State of Wash. Dep’t of Game v. Fed. Power Comm’n*, 207 F.2d 391, 395 n.11 (9th Cir. 1953).

<sup>81</sup> *Scenic Hudson*, 354 F.2d at 616. The *Scenic Hudson* court presented each element in its analysis as straightforward. Perhaps worrying that its holding was indeed exceptional, however, the court for good measure added that, in any event, “petitioners have sufficient economic interest to establish their standing” because one of the conservation groups that organized the Conference maintained trails that would be inundated by the reservoir. *Id.*

<sup>82</sup> *Office of Comm’n of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). Two books have been published that focus on the case. See Steven D. Classen, *Watching Jim Crow: The Struggles over Mississippi TV, 1955–1969* (2004); Kay Mills, *Changing Channels: The Civil Rights Case that Transformed Television* (2004).

erend Everett Parker of the Office of Communication of the United Church of Christ, and it was part of a broader effort he undertook to bring attention to and reform racially biased reporting appearing on television stations across the South.<sup>83</sup> The crux of the complaint about the station was that the segregationist views of its owners translated into biased reporting on issues of race and the civil rights movement.<sup>84</sup> In its petition to the FCC opposing the station's license renewal, the Office of Communication argued that the station did not serve the interests of its black audience and did not fairly represent civil rights issues. The FCC refused to allow Parker to intervene in the FCC proceeding and it did not hold an evidentiary hearing to assess Parker's claims.

Parker sought review of the FCC's action and won a stunning victory in the D.C. Circuit. The court first considered what it called the challengers' "standing" to intervene in the FCC's licensing proceeding—which the court treated as coextensive with the parties' standing to challenge the agency's decision in court. Under the Communications Act, "parties in interest" could participate in licensing proceedings. The FCC had denied the challengers the right to participate in the licensing proceedings because they would not, if the license was granted, risk suffering either of the injuries that could, under the traditional approach, make them "parties in interest": economic injury or electrical interference.

The D.C. Circuit held that listener representatives like the challengers had a right to participate in the proceedings and, by extension, standing to challenge the agency's decision in court. The court's elaborate defense of its holding—it offered many rationales, not all of which were consistent—made clear that it was breaking new ground. It first admitted that the courts had, to that

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<sup>83</sup> Parker reported that he was inspired to focus on television after a meeting with Reverend Martin Luther King in which Dr. King talked about the unfair coverage of the civil rights movement among southern broadcast stations and asked Parker, who had a background in broadcasting, to have the church "[p]lease do something about the TV stations." Mills, *supra* note 82, at 60. After a trip across the south where Parker watched television and looked for a good target for his efforts, Parker settled on Jackson because the station had a terrible record and also had the strongest signal in the South. *Id.* at 65.

<sup>84</sup> After hiring all white monitors to watch the station's broadcast, Parker's monitors reported that the station extensively covered efforts to maintain segregation but did not cover challenges to segregation. *Id.* at 69, 72.

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point, only granted standing to intervene in FCC proceedings based on the two grounds the FCC had identified. But, it noted that neither administrative nor judicial concepts of standing were “static,”<sup>85</sup> and that it was up to the courts to interpret the relevant statutory provision. As the court put it, “[s]ince the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience.”<sup>86</sup>

The court claimed that there was “nothing unusual” in granting the consuming public the right to challenge administrative action, pointing to several cases giving consumers (coal consumers, electricity users, transit system riders) the right to challenge rate increases, permitting a passenger to challenge racial segregation in rail dining cars, and allowing consumers of oleomargarine to challenge orders dictating the ingredients of oleomargarine.<sup>87</sup> In a footnote, the court cited the then-recent *Scenic Hudson* decision.<sup>88</sup> Although these cases were not interpretations of the intervention provision of the Communications Act, they were relevant (according to the court) because in each the courts were deciding whether the challengers were affected or aggrieved (a la *Sanders Brothers*) by agency action—a question that the court said could not be distinguished from which parties had standing to oppose FCC license renewals. The court also noted that while the FCC itself was obligated to protect the public interest, that did not preclude members of the listening public from participating in agency proceedings.<sup>89</sup>

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<sup>85</sup> *United Church of Christ*, 359 F.2d at 1000.

<sup>86</sup> *Id.* at 1002.

<sup>87</sup> *Id.* (citing *Henderson v. United States*, 339 U.S. 816 (1950) (passenger challenging legality of ICC rules on racial segregation in rail cars); *Bebchick v. Pub. Utils. Comm’n*, 287 F.2d 337 (D.C. Cir. 1961) (public transit rider challenging rate increase); *Read v. Ewing*, 205 F.2d 630 (2d Cir. 1953) (consumer of oleomargarine challenging order affecting ingredients); *United States v. Pub. Utils. Comm’n*, 151 F.2d 609 (D.C. Cir. 1945) (electricity consumers challenging utility rates); *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694 (2d Cir. 1943) (coal consumers challenging price order)).

<sup>88</sup> *United Church of Christ*, 359 F.2d at 1002 n.16.

<sup>89</sup> The court explained that listeners could be watchdogs of the agency. See *United Church of Christ*, 359 F.2d at 1003–04 (“The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attor-

This mishmash of reasons added up to what the court confessed was a surprising conclusion: “In order to safeguard the public interest in broadcasting, therefore, we hold that some ‘audience participation’ must be allowed in license renewal proceedings.”<sup>90</sup>

Both these lower court decisions were widely hailed and analyzed at the time they were decided and even more so later. They were viewed as innovative and ushering in a new and more enlightened era of expanded standing.<sup>91</sup> The Supreme Court took notice of the cases as well, citing both approvingly as it rewrote standing law in 1970.<sup>92</sup>

But that is not the whole story. Even as they granted standing, these courts actually shifted *away* from the *Sanders Brothers* conception of standing for the public. In both cases, instead of following the *Sanders Brothers* script and treating the challengers as having no legal rights but still able to challenge the government action, the courts allowed the challengers to move forward because they *had* legal rights. The parties were aggrieved because they alleged that the agency had disregarded their interests, *and* that their interests were made relevant by the governing law.<sup>93</sup> Thus, environmentalists and listeners had standing because the relevant statutes required the agency to consider those interests and the challengers claimed that the agency had failed to do so. The challengers, in the old formulation, were not private attorneys-general who had no rights of their own but stood in court for the public. They had legal rights.

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neys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it.”). The court also asserted that listeners could assist the Commission in doing its job. See *id.* at 1005 (listeners needed to be heard because otherwise deficiencies would not be brought to the attention of the Commission, especially where there were no rivals for the license).

<sup>90</sup> *Id.* at 1005.

<sup>91</sup> Few observers thought the standing analysis in *Scenic Hudson* or in *Church of Christ* were straightforward applications of existing law. Professor Kenneth Culp Davis described the standing reasoning in *Scenic Hudson* this way: “The *Scenic Hudson* opinion is filled with courageous leaps over intellectual chasms that might never be bridged.” Kenneth Culp Davis, *Administrative Law Treatise*, 1970 Supplement, § 22.19 (1971). In *Church of Christ*, the court essentially admitted it was innovating.

<sup>92</sup> *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153–54 (1970).

<sup>93</sup> See Merrill, *supra* note 73, at 1076; Sunstein, *Standing and the Privatization of Public Law*, *supra* note 3, at 1440–42.

*United Church of Christ* is less clear-cut than *Scenic Hudson* in this regard. The court treated the question of intervention in the FCC proceeding and standing to challenge the resulting administrative action as the same question. But the court's general conclusion was that broadcasters were explicitly required by statute to serve the public, and, as a result, "responsible representatives of the listening public" had a right to participate in proceedings and also had standing to challenge the resulting agency action. This ties the listener's standing to their own connection to interests made relevant by the statute.

In 1966's *Scenic Hudson*, the logic of the legal right test straightforwardly seeped into the understanding of which parties were "aggrieved." In *Scenic Hudson* the government argued that the Scenic Hudson Preservation Conference was not aggrieved because it could not point to a personal economic injury resulting from the grant of the license. But, the *Scenic Hudson* court noted, the Supreme Court had never held that an economic injury was *necessary* for a party to be aggrieved.<sup>94</sup> And this was a fair statement of the law. The challenger had to be aggrieved. It was clear that injury to competitive position could count. But the fighting issue in *Sanders Brothers* was not about who counted as aggrieved, but instead whether the admittedly aggrieved but lacking-in-legal-right party could raise the rights of others—in fact, the public's rights—and the Supreme Court's answer to that was, yes, Congress could create such an arrangement. The Supreme Court did not state that the only reason that the aggrieved party could raise the rights of the public was because it suffered economic harm. And that is just what the *Scenic Hudson* court said.<sup>95</sup>

Then, however, the Second Circuit's analysis got strange. After rejecting the government's argument that one had to have a personal economic injury to count as aggrieved, the court then should have asked what else might make a party aggrieved. So, for instance, the question might have been, can a hiking organization devoted to the use of certain Hudson River Valley trails that will now be under water as a result of the Federal Power Commission's action claim to be aggrieved? But that was not what the court did.

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<sup>94</sup> 354 F.2d at 615.

<sup>95</sup> *Id.*

Instead, the court looked to the interests that the Federal Power Act protected. “The Federal Power Act seeks to protect non-economic as well as economic interests,” it wrote, and the Commission had admitted this.<sup>96</sup> It turned out that this fact, along with the challengers’ relationship to those interests, established standing:

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreation aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of “aggrieved” parties under §313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.<sup>97</sup>

Hence, the Scenic Hudson Preservation Conference was “aggrieved” because the statute required the agency to take account of conservation values and the Conference, through its activities, had “exhibited a special interest in such areas.”<sup>98</sup> This was a step away from the *Sanders Brothers* test, which was built out of the situation where the challenger’s interest was *not* recognized in the statute or the common law and, nonetheless, the court granted standing to an aggrieved party and permitted him to vindicate the public’s rights. In *Scenic Hudson*, the court asked the challenger to demonstrate that the statute requires consideration of certain interests and that the challenger had a particular relationship to those interests. This was not only a step away from *Sanders Brothers*. It was a step toward the legal right test because the parties have standing only if they can establish that their interests are recognized by statute—that they have “rights” the statute recognizes that have been ignored by the agency.<sup>99</sup>

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<sup>96</sup> Id. (footnote omitted).

<sup>97</sup> Id. at 616.

<sup>98</sup> Id.

<sup>99</sup> This aspect of these two cases may have influenced the Supreme Court in its 1970 re-writing of standing law. The exact same analytic move is evident in the “zone of interest” test the Court invented in *Data Processing* as it interpreted the “party aggrieved” provision of the APA. See *infra* notes 101–115 and accompanying text. It seems most likely that the Court thought it was applying a kind of *Sanders Brothers* principle to the APA provision itself where the APA gave rise to the cause of action. But its test was not the *Sanders Brothers* principle. The zone of interest test required

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Why the *Scenic Hudson* court proceeded this way is unclear. It could have been nervous about the government's argument that the interest had to be an economic one, and the long list of *Sanders Brothers* cases that involved economic interest. But the court dismissed that fairly easily. It could have been responsive to the way the Conference itself phrased its pitch for standing, that it was concerned about conservation, the statute required consideration of conservation, and the agency had allegedly and unlawfully disregarded this interest. Whatever the explanation, in this move, the *Sanders Brothers* line of cases was sapped of the private attorney general concept, where an aggrieved party was permitted to vindicate the rights of the public.

There is no evidence, it should be said, that these courts intended to narrow standing law—indeed, just the opposite seems true. Particularly in *United Church of Christ*, the court was self-consciously expanding standing by holding that the listening public has a “legal right” that permits it to have standing in court.<sup>100</sup> And yet, at the same time, by shrinking from the standing for the public principle, these courts helped make that principle disappear.

*B. The Death of Standing for the Public in the Supreme Court*

The ever-so-subtle, perhaps-unintentional shift away from the standing for the public principle that occurred in the lower courts became far less subtle when the action shifted to the Supreme Court.

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challengers to show that the statute recognized the interests of concern to the challengers and to allege that those concerns had been disregarded. This should sound familiar because, again, it is a trace of the legal right test. And this is what concerned the two dissenting Justices Brennan and White. They argued that the question of standing rested solely on an inquiry based on Article III. And, in their view, injury in fact was all the Constitution required. *Ass'n of Data Processing Servs. Orgs. v. Camp*, 397 U.S. 159, 167–68 (1970). To the dissenters, the requirement that the challengers demonstrate that their interests were regulated or protected by the statute at issue—even arguably—was the legal wrong test all over again. *Id.* at 168 (“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>100</sup> Sunstein views this as a salutary step, one that could have strongly liberalized standing. See Sunstein, *Standing and the Privatization of Public Law*, *supra* note 3, at 1440–42. Merrill reads the courts to be doing this as well, but he expresses no view on it. Merrill, *supra* note 73, at 1076.

### 1. *The 1970 Revolution*

Understanding what happened to the standing for the public principle in the Supreme Court must start in 1970 with *Data Processing*, for that is when the seismic shift in standing doctrine occurred.<sup>101</sup> *Data Processing* was a classic competitor suit. Those selling data processing services were not pleased when the Comptroller of the Currency announced a new rule permitting banks to enter their market. They challenged the rule, claiming that the interpretation violated the relevant statute because it permitted banks to engage in non-bank activities. The Eighth Circuit, applying then-existing law, held that the data processors did not have standing because they had no legal interest and the statute did not contain a *Sanders Brothers* provision, which would have permitted them “to assert the public’s rights.”<sup>102</sup> As the court put it, “Without a legal interest or the status of a recognized ‘aggrieved’ party, the complaint resolves itself into an attempt merely to show ‘a common concern for obedience to law.’”<sup>103</sup> So much followed the treatises.

*Data Processing* in the Supreme Court did not. Applying the earlier law, the Court should have proceeded much like the Eighth Circuit and asked whether the competitor had alleged injury to a legally protected interest. But the Court did not conduct anything that looked like that inquiry. Justice Douglas first observed that standing was to be considered in light of the Constitutional case or controversy requirement.<sup>104</sup> He then turned to the APA, which was the source of the challenger’s cause of action. Construing the provision that permitted those suffering “legal wrong because of agency action” or “adversely affected or aggrieved by agency action within the meaning of a relevant statute” to challenge agency action in court,<sup>105</sup> Justice Douglas said that this required the chal-

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<sup>101</sup> *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970). The new test adopted in *Data Processing* was applied in *Barlow v. Collins*, 397 U.S. 159, 164 (1970), which was decided on the same day as *Data Processing*.

<sup>102</sup> *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 406 F.2d 837, 843 (8th Cir. 1969).

<sup>103</sup> *Id.* (quoting *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940)).

<sup>104</sup> *Data Processing*, 397 U.S. at 151.

<sup>105</sup> *Id.* at 153–54 (citing Administrative Procedure Act, 5 U.S.C. § 702 (1964 & Supp. IV)).

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lenger to demonstrate two things. Most important, it had to show that the agency's action had caused him "injury in fact, economic or otherwise."<sup>106</sup>

This terminology was startling because the Supreme Court had never before used the term "injury in fact" in connection with standing law.<sup>107</sup> This injury-in-fact test, which Justice Douglas seemed to offer as an interpretation of the APA's statutory provision (though in light of Article III), was to replace the "legal wrong" test.<sup>108</sup> Noting that the lower court had searched for a "legal interest" to establish standing (it could have been excused for doing so), the Court treated that test as improper: "The 'legal interest' test goes to the merits. The question of standing is different."<sup>109</sup> In theory, the injury-in-fact test was to ask whether a party was factually injured by government action, rather than ask whether the

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<sup>106</sup> *Data Processing*, 397 U.S. at 152.

<sup>107</sup> In the period immediately preceding *Data Processing*, the Court had asked whether the challenger had a "personal stake" in the outcome. This phrase came from *Baker v. Carr*, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.").

A search of the Westlaw United States Supreme Court Cases database shows three instances of the phrase "injury in fact" prior to 1970. None of these are in the context of standing. Professor Davis first proposed an "adversely affected in fact" test in 1955. His goal, he wrote, was to 1) broaden the availability of standing, 2) simplify standing doctrine, and 3) implement his interpretation of the Administrative Procedure Act. Davis, *Standing to Challenge Governmental Action*, supra note 70, at 354–55. He continued to support the novel test in subsequent work. Davis, supra note 11, §§ 22.03–22.04 (1958). In 1970, when the Court adopted the "injury in fact" and "zone of interests" tests in *Data Processing*, Professor Davis wrote that the Court was "three-quarters of the distance" toward a coherent standing doctrine. Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 450–51 (1970). Professor Davis would have required only "injury in fact." *Id.*

<sup>108</sup> The majority opinion is ambiguous, though Justice Brennan read the majority as treating "injury-in-fact" as an interpretation of Article III. See *Data Processing*, 397 U.S. at 167 (Brennan, J., concurring in part and dissenting in part). In subsequent cases, injury-in-fact was treated as an interpretation of the APA and in a pair of cases in 1974, injury-in-fact was treated as a gloss on Article III's case or controversy requirement. See cases discussed in note 116, *infra*.

<sup>109</sup> *Data Processing*, 397 U.S. at 153.

challenger could assert injury to a legally recognized right or privilege.<sup>110</sup>

Although the Supreme Court said very little by way of elaborating on the meaning of the injury-in-fact test—except that it could be “economic or otherwise”<sup>111</sup>—the result in *Data Processing* proved that the injury-in-fact test expanded the class of persons who had standing to challenge administrative action. Where before competitive injury could be a “legal wrong” only if the statute made such considerations relevant, the Court stated that competitive injury easily satisfied the injury-in-fact test.<sup>112</sup> In defining what counted as an injury in fact, the Court seemed to be borrowing from the *Sanders Brothers* idea of who counted as “aggrieved” when a statute permitted such parties to challenge agency action. Before 1970, the correct answer on an administrative law exam would have been that *Sanders Brothers* was *not* relevant because there was no special statutory review provision.

The Supreme Court’s invention of the injury-in-fact test was enough for a headline, but the *Data Processing* Court was not finished with its re-invention of standing law. The Court then announced an entirely separate test—subsequently known as the zone of interest test—that the challenger had to satisfy in addition to injury in fact, which was “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>113</sup> The Court presented this test as an interpretation of the APA’s permission to those “aggrieved by agency action within the meaning of a relevant statute” to challenge agency action in court. Again, the Court treated this test as liberalization in

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<sup>110</sup> As many pointed out, the court did not really ask about “injury” without reference to unstated ideas about what sorts of injuries gave rise to standing—and hence this was not a “factual” inquiry at all. See Fletcher, *supra* note 3, at 231–33.

<sup>111</sup> The internal correspondence in *Data Processing* and the related case of *Barlow v. Collins* demonstrates that at least some Justices were anticipating future cases involving non-economic injuries. See Letter from Justice Douglas to Justice Brennan (Jan. 9, 1970) (William O. Douglas Papers, Files on Association of Data Processing Servs. v. Camp, No. 69-85, Box 212, Library of Congress, Manuscript Division, Washington, D.C.); Letter from Justice Brennan to Justice Douglas (January 8, 1970) (William O. Douglas Papers, Files on Barlow v. Collins, No. 69-249, Box 215, Library of Congress, Manuscript Division, Washington, D.C.).

<sup>112</sup> *Data Processing*, 397 U.S. at 152.

<sup>113</sup> *Id.* at 153.

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the law of standing. As the Court put it approvingly, those interests might represent “aesthetic, conservational, and recreational, as well as economic values,”<sup>114</sup> and it cited the two landmark lower court cases just discussed, *Scenic Hudson* and *United Church of Christ*. As for the competitor’s injury at issue in *Data Processing* itself, the Court said that a provision of the statute that prohibited banks from engaging in non-banking activities brought the competitors within the zone of interest.<sup>115</sup>

The Supreme Court thus completely butchered the prior law. It ignored the decades of precedent that treated the APA terms “adversely affected or aggrieved within the meaning of a relevant statute” as a reference to “party aggrieved” provisions of the *Sanders Brothers* variety. It is true that, if one were starting with nothing but the text of the APA, the Supreme Court’s interpretation might be one reasonable construction of the bare words of the APA—a party aggrieved within the meaning of a relevant statute. But that is not what those words meant when Congress chose them, or, for that matter, for many years thereafter in the courts. Nonetheless, as *Data Processing* made quite clear, its approach liberalized standing. The Court permitted an economic competitor to challenge agency action where, under the prior tests, it would not have been permitted to do so.

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It was in the aftermath of *Data Processing* that the standing for the public principle died in the Supreme Court. Chaotic is the only way to describe that aftermath. For several years, majorities of the Supreme Court were unclear whether the newly minted injury-in-fact test was an interpretation of the judicial review provisions of the APA or an interpretation of Article III’s case or controversy requirement.<sup>116</sup> The Supreme Court also started to re-explain its

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<sup>114</sup> *Id.* at 154 (quotations omitted).

<sup>115</sup> *Id.* at 155–56.

<sup>116</sup> In *Data Processing*, the majority identified the injury-in-fact requirement and the “zone of interest” test after it observed that while “[g]eneralizations about standing to sue are largely worthless,” one generalization was acceptable—namely, that standing needed to be considered “in the framework of Article III.” 397 U.S. at 151. In his partial concurrence and dissent in the companion case of *Barlow v. Collins*, Justice Bren-

prior law on standing. *Sanders Brothers*, for instance, became a case that turned solely on the competitor's *economic injury*.<sup>117</sup> More

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nan read the injury-in-fact test to be the constitutional minimum required by the case or controversy requirement of Article III. 397 U.S. at 167–68.

Whether the injury-in-fact test was an interpretation of Article III took a couple of years to settle, however. In 1972, in *Sierra Club v. Morton*, the majority treated the injury-in-fact test as an interpretation of the APA. See 405 U.S. 727, 733 (“[I]n *Data Processing Service v. Camp* . . . we held more broadly that persons had standing to obtain judicial review of federal agency action under §10 of the APA where they had alleged that the challenged action had caused them ‘injury in fact’”). In dissent in 1972, Justice Douglas said that injury in fact was the test for whether there was an Article III case or controversy. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 184 n.4 (1972) (Douglas, J., dissenting). In 1973, a Court majority again treated injury in fact as an interpretation of the APA. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973) (reiterating that in *Data Processing* and *Barlow v. Collins*, “we held that §10 of the APA conferred standing to obtain judicial review of agency action only upon those who could show ‘that the challenged action had caused them injury in fact’”); *id.* at 689 n.14 (“‘Injury in fact’ reflects the statutory requirement that a person be ‘adversely affected’ or ‘aggrieved’ and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem.”).

In 1974, however, a majority of the Supreme Court made clear that the injury-in-fact test was an interpretation of the case or controversy requirement of Article III and, more than that, it (re-)read *Data Processing* to have established this point. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218 (1974) (“[T]he Court . . . held that whatever else the ‘case or controversy’ requirement embodied, its essence is a requirement of ‘injury in fact.’”) (citing *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970)). And the point has been well-established law ever since. See, e.g., *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2535 (2008); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 225 (2003); *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000), *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>117</sup>The most significant place this occurred was in 1972’s *Sierra Club v. Morton*. See 405 U.S. 727, 736–38 (1972). See discussion, *infra* notes 119–130 and accompanying text.

Explanations of the *Sanders Brothers* line of cases have suggested that it stood for the proposition that only those economically injured by administrative action were permitted to sue. For instance, this is how Richard Stewart explained these cases in 1979. See Richard Stewart, *Standing for Solidarity*, 88 *Yale L.J.* 1559, 1569 (1979). As the text states, this is the way the Supreme Court eventually started to explain *Sanders Brothers*, most notably in 1972 in *Sierra Club v. Morton*. See 405 U.S. 727, 734 n.6, 736–38. But, as Part I explains, in the 1940s, the Supreme Court did not emphasize the economic nature of the injury as the central fact permitting the challenger to bring the rights of the public before the courts. Instead, the key point that the Court considered, and answered in the affirmative, was whether Congress could authorize an aggrieved party without any cognizable legal rights to challenge administrative action. The court put very little emphasis on what counted as aggrievement—the key point was that the aggrievement had nothing to do with any recognized legal rights of the challenger.

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surprisingly, the Court opined several times that the Court's earlier "legal right" test was an interpretation of Article III of the Constitution,<sup>118</sup> which made the *Sanders Brothers* line of cases inconsistent with Article III, as they were cases where the parties did not have any legal rights. These developments were part of the revision of standing law that occurred in the aftermath of *Data Processing*. During that revision, as the next two parts reveal, the standing for the public principle was erased.

Even before the clear-cut doctrinal shift can be detected in the mid-1970s, the Supreme Court's discomfort with the standing for the public principle became evident in 1972's *Sierra Club v. Morton*. The Sierra Club had challenged the U.S. Forest Service's decision to permit the construction of a ski resort and recreation area in the Mineral King Valley in the Sierra Nevada Mountains.<sup>119</sup> *Morton* is one of those (many) Supreme Court cases where the important work is done in the Court's framing of the question. And in this case, that framing was aided by a revisionist version of the history of standing doctrine.

The Court began by explaining that, in the Court's recent *Data Processing* case, the injuries had been to competitive position. Such "palpable" economic injuries, the Court stated, "have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review."<sup>120</sup> Actually, no. Prior to 1970, whether such competitive injuries were sufficient to confer standing depended on the existence of a legal right or a *Sanders Brothers*' provision that permitted aggrieved parties to challenge administrative action. But equipped with this version of the history, the Court began to frame its question. Those with eco-

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<sup>118</sup> See *Sierra Club v. Morton*, 405 U.S. at 733 ("Early decisions under [the APA judicial review provision] interpreted the language as adopting the various formulations of 'legal interest' and 'legal wrong' then prevailing as constitutional requirements of standing."); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976) ("Reduction of the threshold requirement [in *Data Processing*] to actual injury redressable by the court represented a substantial broadening of access to the federal courts over that previously thought to be the constitutional minimum under [the APA].").

<sup>119</sup> The statutes governing the Forest Service did not contain a statutory review provision permitting "aggrieved parties" to sue, and *Sierra Club* relied on the judicial review provisions of the Administrative Procedure Act. 405 U.S. at 734. *Data Processing*, in reading the APA the way it did, had elided the distinction so important in prior law between APA actions and special statutory review actions.

<sup>120</sup> *Sierra Club*, 405 U.S. at 733-34.

conomic injuries could (always) establish injury in fact, but what about parties with non-economic injuries?

The stage-setting was not over. It was not simply that the Sierra Club's injuries were non-economic, but also that they were widely shared. Concern about widely shared injuries is a recurrent theme in justiciability doctrines, and is prominent in several standing cases in this period.<sup>121</sup> As the Supreme Court saw it, the relevant precedents did not speak to the question "which has arisen with increasing frequency in federal courts in recent years," namely, "what must be alleged by persons who claim injury of a non-economic nature to interests that are widely shared?"<sup>122</sup> This statement of concern excised the *Sanders Brothers* line of cases. The standing for the public principle permitted parties to raise widely shared injuries. Indeed, in retrospect, that is what makes them remarkable.

After creating these questions, the Court decisively answered them. First, non-economic injuries were sufficient. The Court approvingly noted that the trend in the cases had been toward recognizing non-economic injuries as a basis for standing, citing *United Church of Christ* and *Scenic Hudson*, among other cases. "We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing under . . . the APA," the Court wrote.<sup>123</sup> "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."<sup>124</sup> Count this in the "expanded standing" column on the standing scorecard.

Although non-economic injuries were fine, widely shared injuries were not. And here is where the Court explicitly addressed *Sanders Brothers*, (re)explaining it in the process. Sierra Club, the Court explained, tried to rely on the standing for the public principle, but the Club failed to understand what that principle permitted. According to the Court, the Club argued that, given that this

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<sup>121</sup> See, e.g., *United States v. Richardson*, 418 U.S. 166, 175–76 (1974); *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

<sup>122</sup> *Sierra Club*, 405 U.S. at 734.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

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was a “public” action related to the use of natural resources, the Club’s special interest in and expertise in these matters were sufficient to give it standing as a representative of the public.<sup>125</sup> Indeed, the Sierra Club was the ideal party to represent the public’s interest because it was organized around protecting those interests.

The Court soundly rejected this argument because, the Court said, it misunderstood the *Sanders Brothers* line of cases, which the Court explained this way:

[T]he fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate. It was in the latter sense that the ‘standing’ of the appellant in *Scripps-Howard* existed only as a ‘representative of the public interest.’ It is in a similar sense that we have used the phrase ‘private attorney general’ to describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action.<sup>126</sup>

With this (new) take on the workings of *Sanders Brothers* at hand, the Court held that Sierra Club failed to establish standing. The crux of the problem was that Sierra Club had not established any individual injury. “[B]roadening the categories of injury that may be alleged in support of standing,” the Court warned, “is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.”<sup>127</sup> And Sierra Club had failed to show it was individually harmed: “Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.”<sup>128</sup> Without such individual injury, there could be no

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<sup>125</sup> *Sierra Club*, 405 U.S. at 736 (“The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a ‘public’ action involving questions as to the use of natural resources, and that the Club’s longstanding concern with and expertise in such matters were sufficient to give it standing as a ‘representative of the public.’”) (footnote omitted).

<sup>126</sup> *Id.* at 737–38.

<sup>127</sup> *Id.* at 738.

<sup>128</sup> *Id.* at 735. According to the Sierra Club, it was forced to argue this way at this stage of the litigation. In its view, it could not seek a preliminary injunction while as-

standing. This holding, the Court made clear, was intended to cut off lower courts that had found various public interest groups to have standing because they had demonstrated an organizational interest in issues like environmental or consumer protection.<sup>129</sup> Such an approach, the Court warned, would authorize “judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences” in the courts.<sup>130</sup> The individual injury requirement, the *Morton* Court seemed to say, would put an end to that.

## 2. *The End of Standing for the Public*

Despite the Court’s obvious discomfort with the standing for the public principle in *Morton*, that principle did not actually meet its (unacknowledged) death until 1976. In 1976, Justice Powell wrote a majority opinion making clear that all plaintiffs—regardless of whether they could point to a statutory authorization of their suit—had to demonstrate that they had suffered an injury in fact and, given how the Court was by then defining injury in fact, that meant the end of standing for the public.

### a. *Statutory Authorization of “Public Actions”*

The death of the standing for the public principle is now so settled that it is easy to forget that it retained vitality well into the middle of the 1970s. Until the Court’s decisions to which this Article will turn shortly, judges and government litigants acknowledged that Congress could authorize “public actions”—and by using those terms, they meant that Congress could authorize suits (con-

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serting a “private injury,” because such an injury could never outweigh the government’s interest in going forward with the project. As the Club put it in its reply brief:

The Government seeks to create a ‘heads I win, tails you lose’ situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Reply Brief for Petitioner at 6, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (No. 70-34).

See also Robert H. Freilich, Editor’s Comments, *Sierra Club v. Morton*, No Standing in Our National Parks—Move Over for the Special Interests, 4 Urb. Law. vii, ix (1972).

<sup>129</sup> *Sierra Club*, 405 U.S. at 739.

<sup>130</sup> *Id.* at 740.

sistent with the standing for the public principle) by those who suffered no personal or proprietary injury that could be distinguished from the rest of the population, but who were nonetheless authorized to bring suit to “vindicate public rights.”<sup>131</sup> Evidence of this comes, first, from 1968’s controversial case of *Flast v. Cohen*.<sup>132</sup> *Flast* granted standing to taxpayers who sought to enjoin the use of federal funds to buy textbooks for use in parochial schools, thus carving out an important exception to the prohibition on taxpayer standing established in 1923 in *Frothingham v. Mellon*. (The majority’s holding in *Flast*, of course, indicates that Article III does not prohibit taxpayer suits, but *Flast* was fairly quickly limited to its facts, a pattern that continues to this day.<sup>133</sup>)

It was Justice Harlan’s much noted dissent in *Flast* that featured the *Sanders Brothers* principle. He argued that the Court should not—as a matter of judicial self-restraint—recognize taxpayer standing in *Flast*. Borrowing from well-known academic phrasing used by Louis Jaffe in his articles at the time (which themselves borrowed from the ideas developed by Wesley Newcomb Hohfeld),<sup>134</sup> Justice Harlan argued that the taxpayer-plaintiffs in the case were non-Hohfeldian—that is, they could claim no injury to a recognized legal right or privilege. Instead, he noted, they

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<sup>131</sup> *Flast v. Cohen*, 392 U.S. 83, 120 (Harlan, J., dissenting). Here is how Harlan defined public actions:

We must recognize that these non-Hohfeldian plaintiffs complain, just as the petitioner in *Frothingham* sought to complain, not as taxpayers, but as ‘private attorneys-general.’ The interests they represent, and the rights they espouse, are bereft of any personal or proprietary coloration. They are, as litigants, indistinguishable from any group selected at random from among the general population, taxpayers and non taxpayers alike. These are and must be, to adopt Professor Jaffe’s useful phrase, ‘public actions’ brought to vindicate public rights.

*Id.* at 119–120. Louis Jaffe defined public actions as situations where the plaintiff “is not able to satisfy the requirement of special interest, when he brings his action as a representative of the general public.” Louis L. Jaffe, *Judicial Control of Administrative Action* 459 (1965).

<sup>132</sup> 392 U.S. 83 (1968).

<sup>133</sup> *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 596–97 (2007); *Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 333 (2006), *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988), *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 479 (1982); *United States v. Richardson*, 418 U.S. 166, 173 (1974).

<sup>134</sup> *Flast*, 392 U.S. at 119 n.5 (Harlan, J., dissenting); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968).

complained as private attorneys-general. They had the same interests that everyone else had; indeed, they were “indistinguishable from any group selected at random from among the general population.”<sup>135</sup> To Justice Harlan, the challengers were bringing (again borrowing from Louis Jaffe and others) a “public action[]” in order to “vindicate public rights.”<sup>136</sup>

Despite his opposition to granting the taxpayers standing in *Flast*, Harlan acknowledged that public actions of this sort *could* be heard in the federal courts. In fact, he had no doubt that permitting such suits would be constitutional. The federal courts, Harlan observed, “have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as ‘representatives of the public interest.’”<sup>137</sup> And what was his primary proof for this point? The *Sanders Brothers* line of cases, as well as a series of lower court cases.<sup>138</sup> While the cases were “by no means free of difficulty,” Harlan thought it “clear that non-Hohfeldian plaintiffs as such are not constitutionally excluded from the federal courts.”<sup>139</sup> The question, for Harlan, was under what circumstances the courts should permit such actions. Because he saw many risks to the judiciary from federal courts recognizing public actions, he argued that the courts should entertain them only when Congress so authorized them. As he put it:

This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits . . . . I would adhere to that principle. Any hazards to the proper allocation of authority among the three branches of the Government would be substantially dimin-

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<sup>135</sup> *Flast*, 392 U.S. at 119–20 (Harlan, J., dissenting).

<sup>136</sup> *Id.* at 120.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (citing *FCC v. Sanders Bros.*, 309 U.S. 470 (1970); *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942); *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965); *Reade v. Ewing*, 205 F.2d 630 (2d Cir. 1953); *Associated Indus. of N.Y. State v. Ickes*, 134 F.2d 694 (2d Cir. 1943)).

<sup>139</sup> *Flast*, 392 U.S. at 120 (emphasis omitted).

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ished if public actions had been pertinently authorized by Congress and the President.<sup>140</sup>

Justice Douglas, who concurred in the majority in *Flast*, disagreed with what he seemed to think were Justice Harlan's quaint notions about Congressional authorization of such suits. In his view, the Court should not "wait for Congress to give its blessing to our deciding cases clearly within [the Court's] jurisdiction," for that would "allow important constitutional questions to go undecided and personal liberty unprotected."<sup>141</sup> Despite that disagreement between the Justices, there seemed to be no disagreement about the fundamental point of interest here: Congress had the power to authorize public actions, and the *Sanders Brothers* line of cases stood for the principle.

The same understanding is evident—tellingly—in the government's briefs in *Morton*,<sup>142</sup> just discussed. There, the government's brief on the merits explained that Sierra Club could not establish standing without a special statutory review provision of the *Sanders Brothers* variety. According to the government, Sierra Club, "although it apparently might have claimed a more traditional basis for standing," attempted to establish standing based "only on a statute declaring an undifferentiated 'public' interest, in this case an interest in the preservation of certain types of values in designated public lands."<sup>143</sup> The Supreme Court, the government claimed, had not yet reached the question whether a party had standing in such a circumstance. The government's brief then acknowledged that "Congress has undoubted power to authorize such litigation," citing Judge Frank's decision in *Ickes* that coined the term "private attorney general" and quoting at length from the

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<sup>140</sup> *Id.* at 131–32 (footnote omitted). In the footnote, Harlan then attempted to reconcile the *Sanders Brothers*' principle with Article III of the Constitution. He explained that he would not abrogate Article III restrictions upon actions that could be properly brought in federal court when "Congress has authorized a suit." He explained, however, the primary problematic case, *Muskrat v. United States*, could be distinguished because in that case, the United States "evidently had 'no interest adverse to the claimants.'" *Id.* at 132 n.21.

<sup>141</sup> *Id.* at 112.

<sup>142</sup> 405 U.S. 727 (1972).

<sup>143</sup> Brief for the Respondent at 17, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (No. 70-34).

case.<sup>144</sup> But it had not done so in this case; there was no special statutory review provision on which the Sierra Club could rely. After citing lower court cases in which standing was granted where there was a special statutory review provision, the brief concluded that “*in the absence of such a legislative judgment*, a citizen asserting an interest essentially limited to having the law obeyed should have no standing to sue.”<sup>145</sup>

The *Morton* Court itself, writing in 1972, appeared to agree with the government’s view about the scope of the Congressional power to authorize public actions. In restating the law of standing with respect to Congress’ ability to authorize suits, the Court observed that where Congress had authorized a suit, the “inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.”<sup>146</sup> In a footnote, the Court recognized there were some limits on this power: Congress could not authorize the Court to issue advisory opinions (citing *Muskraat v. United States*) or entertain friendly suits.<sup>147</sup> That this did not intend to limit Congress’ ability to authorize public actions is made clear by the remainder of the footnote. The Court went on to say that Congress could, other than those limits, determine who the proper parties were to bring suit. The Court then cited *Sanders Brothers*, Justice Harlan’s dissent in *Flast* (where he discussed *Sanders Brothers*), Judge Frank’s opinion in *Ickes* (where he discussed *Sanders Brothers* and the concept of private attorneys-general), and two academic articles (one by Raoul Berger and one by Louis Jaffe) that argued that the requirement of individual injury was not an Article III requirement.<sup>148</sup>

As a final bit of evidence of the robustness of this standing for the public principle well into the 1970s, consider Justice Powell’s concurrence in 1974’s *United States v. Richardson*.<sup>149</sup> There, the Court held that taxpayers did not have standing to challenge the constitutionality of parts of the laws governing the CIA. In Pow-

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<sup>144</sup> *Id.* at 17, 20–21.

<sup>145</sup> *Id.* at 21–22 (emphasis added); see also *Sierra Club v. Morton*, 405 U.S. 727, 732 & n.3 (1972).

<sup>146</sup> *Sierra Club*, 405 U.S. at 732.

<sup>147</sup> *Id.* at 732 n.3.

<sup>148</sup> *Id.*

<sup>149</sup> 418 U.S. 166 (1974).

ell's concurrence, which set the stage for the key cases Powell would write in the coming years, he acknowledged that Congress had the authority to authorize public actions. His acceptance of the standing for the public principle came at the end of an opinion that was mostly devoted to taking up and expanding upon the set of arguments Justice Harlan made in dissent in *Flast v. Cohen*. Taxpayer standing presented great risks to the judiciary, warned Powell, and he urged the Court to limit *Flast v. Cohen* to its facts. Powell did agree, however, that the Supreme Court had "confirmed the power of Congress to open the federal courts to representatives of the public interest through specific statutory grants of standing,"<sup>150</sup> citing the *Sanders Brothers* line of cases.

Thus, as late as 1974, what this Article calls the standing for the public idea was alive and well in the cases.<sup>151</sup> Congress could authorize "public actions"—that is, it could authorize those without an otherwise cognizable injury to bring challenges to governmental action. Such a statute could permit parties to bring public rights to the courts to, for instance, assert the general public interest in the government abiding by the law. To be sure, as Justice Harlan's dissent acknowledged in a footnote,<sup>152</sup> there were some constitutional limitations on Congress' ability to authorize public actions, but, as was true in the 1940s, the Justices and litigants did not linger over precisely what those limits were, apparently because, whatever those limits were, they were not pertinent to the points they were making. For Justice Harlan, in other words, if there were a statute granting taxpayer standing, those limits would not have been a barrier to taxpayer standing in *Flast*, and if there were a statute granting Sierra Club standing, the government itself admitted that those limits would not have been a barrier to Sierra Club's argument for standing in the *Morton* case. The same is true of Justice Powell in

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<sup>150</sup> *Id.* at 193 (Powell, J., concurring).

<sup>151</sup> There are several other examples that reinforce the point. Justice Douglas, writing in *Data Processing*, explained the *Sanders Brothers* case in the following way: "The third test mentioned by the Court of Appeals, which rests on an explicit provision in a regulatory statute conferring standing and is commonly referred to in terms of allowing suits by 'private attorneys general' is inapplicable in the present case." *Ass'n. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 n.1 (1970).

<sup>152</sup> *Flast*, 392 U.S. at 132 n.21.

*Richardson*.<sup>153</sup> The problem in all these cases was that there was no such statute. As the Supreme Court put it several times in this period (before 1976), a party had to establish an injury in fact “*in the absence of a statute granting standing*.”<sup>154</sup>

*b. The Death of Standing for the Public*

This was not long to be. By 1976, every challenger—relying on a statutory review provision or not—had to establish an injury in fact and its rapidly growing sub-elements because, as it had by then become clear, the injury in fact requirement was the bare minimum requirement of Article III. This shift meant that, after 1976, parties stood, if at all, only to ask the courts to redress their own, individual injuries. Congress could no longer authorize them to stand for the public.

Justice Powell was the key architect of the shift and he made his concerns about the liberalization of standing law known almost as soon as he was appointed to the Court. In 1974, he wrote a lengthy concurrence in *United States v. Richardson*, the taxpayer standing case just discussed. There, he catalogued many reasons why the federal courts should not entertain such suits.<sup>155</sup> When Powell went

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<sup>153</sup> See 418 U.S. at 196 n.18 (Powell, J., concurring) (“[M]y objections to public actions are ameliorated by the congressional mandate. Specific statutory grants of standing in such cases alleviate the conditions that make ‘judicial forbearance the part of wisdom.’” (citing Justice Harlan’s dissent in *Flast v. Cohen*)).

<sup>154</sup> See *United States v. Richardson*, 418 U.S. 166, 194 (1974) (Powell, J., concurring) (“[D]espite the diminution of standing requirements in the last decade, the Court has not broken with the traditional requirement that, *in the absence of a specific statutory grant of the right of review*, a plaintiff must allege some particularized injury that sets him apart from the man on the street.”) (emphasis added); *id.* (“The Court has confirmed the power of Congress to open the federal courts to representatives of the public interest through specific statutory grants of standing.” (citing *Sanders Brothers*)); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973) (“Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, *at least in the absence of a statute expressly conferring standing*, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.”) (emphasis added) (footnotes omitted).

<sup>155</sup> *United States v. Richardson*, 418 U.S. 166, 188–93 (1974) (Powell, J., concurring); *id.* at 192 (“[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens.”).

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from writing a separate opinion to writing two majority opinions, one in 1975 and one in 1976, he shifted the doctrine in a decisive way and established the now boiler-plate language on both the meaning and source of the injury-in-fact requirement.

Justice Powell did two important things in these cases. He was explicit that the requirement of injury as the Court was developing it was a bare minimum Article III requirement and had to be demonstrated even where parties could point to explicit authorization of suit. Beyond that, these cases also expanded what it meant to establish that Article III injury. The injury had to be individual, “distinct and palpable” as the Court had previously said in cases like *Sierra Club v. Morton*, but it also had to be caused by the defendant’s actions and redressable by the court. No statute could change these requirements. And with this, *Sanders Brothers* was dead.

The first of the pair of cases is *Warth v. Seldin*,<sup>156</sup> where the Court held that several organizations and individuals did not have standing to challenge the zoning ordinance of Penfield, New York. The substantive claim was that the zoning ordinance effectively prevented the building of low and moderate income housing, thus excluding poorer people from residing in Penfield.

As Justice Powell explained the relationship between statutory authorization of suit and standing law, he turned what had seemed to be a statutory holding in *Morton* into a clear-cut constitutional requirement. He took a circuitous route, though. First, he emphasized that Article III judicial power existed *only* to “redress or otherwise to protect against injury to the complaining party, even though the court’s judgment may benefit others collaterally.” The plaintiff, he continued, generally “must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”<sup>157</sup> This, of course, is the opposite of what the Supreme Court of the 1940s seemed fairly comfortable with, as evidenced by the *Sanders Brothers* line of cases. As the Court put it, in 1975, without such requirements—which Powell described as “closely related to Article III concerns but essentially

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<sup>156</sup> 422 U.S. 490 (1975).

<sup>157</sup> *Id.* at 499.

matters of judicial self-governance”<sup>158</sup>—the federal courts would be in the business of deciding questions that should be decided by other institutional actors.<sup>159</sup>

Those prudential limitations on raising the rights of others could be changed by a statute that authorized parties to bring suit, Powell acknowledged, but *only if* the challenger could show the kind of injury (and here was the key first move) required by Article III. Thus, the Court accepted that it was permissible for “Congress [to] grant an express right of action to persons who would otherwise be barred by prudential standing rules”<sup>160</sup> (and here he was referring to what he had just emphasized, which was what he called the usual rule that one cannot raise the rights of others). But, the Court immediately added, “[o]f course, Article III’s requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.”<sup>161</sup> As long as this individual injury could be shown, Congress could grant individuals “standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.”<sup>162</sup> The majority then cited the *Morton* Court’s re-explanation of *Sanders Brothers*, as well as *Sanders Brothers* itself.

That these words were carefully considered is clear from the Justices’ internal papers on the case. In the original draft opinion, Justice Powell’s words were slightly different. He originally wrote that Congress could grant individuals standing “to seek relief on the basis of the legal rights and interests of others, and indeed *of the public generally*.”<sup>163</sup> Chief Justice Burger objected in writing to the reference to Congress’ ability to authorize parties to seek relief on behalf of the “public generally.” He wrote, “I question whether we should or need say one can ‘seek relief on the basis of the legal rights . . . of the public generally.’ Even though that generalization has many exceptions it may be read as a holding.” He concluded

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<sup>158</sup> *Id.* at 500.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 501.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Warth v. Seldin, No. 73-2024, Opinion, First Draft, p. 9. Lewis F. Powell, Jr. Papers, 1921–1998, Ms 001, Lewis F. Powell, Jr. Archives, Washington and Lee University, Lexington, VA (emphasis added).

that, “It seems to me that a person who has been granted statutory standing by Congress *must* seek relief solely for the ‘distinct and palpable injury to himself.’”<sup>164</sup> Justice Powell, in a subsequent draft, noted instead that they could “invoke the general public interest” in support of their claim.<sup>165</sup>

This carefully considered phrasing in the opinion aside, *Warth* decisively shifted standing law in the direction that is now familiar. As noted above, on the *Warth* Court’s reading, the individual injury the Court demanded in *Morton* was not an interpretation of the APA, but rather was a bare minimum requirement of Article III. Thus, to take a salient example from the period, an “organizational interest” in an issue of concern could not—constitutionally—make out an injury sufficient for Article III purposes. The challengers had to identify an individual, concrete injury to the organization, or individuals within it.

But *Warth* did more than that. It also articulated additional injury requirements that sprung from Article III. Among other failings, the low-income plaintiffs in *Warth* did not properly allege facts that would have allowed the Court to conclude that the restrictive zoning scheme was the cause of their failure to find housing in Penfield or that, if the Court granted relief, they would be able to find housing in Penfield. The challengers’ housing problems could stem from their poverty, not the allegedly illegal acts of the city, and, as a result, they could not show that the defendant’s actions caused their injury, nor could they show that a judgment from the court would redress it.<sup>166</sup> After *Warth* was handed down, then,

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<sup>164</sup> *Warth v. Seldin*, No. 73-2024, Correspondence from Chief Justice Burger to Justice Lewis Powell, June 5, 1975, Lewis F. Powell, Jr. Papers, 1921–1998, Ms 001, Lewis F. Powell, Jr. Archives, Washington and Lee University, Lexington, VA.

<sup>165</sup> *Warth v. Seldin*, No. 73-2024, Opinion, Fourth Draft, p. 9. Lewis F. Powell Jr. Papers, 1921–1998, Ms 001, Lewis F. Powell, Jr. Archives, Washington and Lee University, Lexington, VA.

<sup>166</sup> *Warth*, 422 U.S. at 507. The Court relied heavily on *Linda R.S. v. Richard D.*, 410 U.S. 614 (1972), where the Court held that the mother of an illegitimate child did not have standing to bring a class action designed to force enforcement of the child support laws in Texas. In the 1972 case, however, the Court made clear that cases where a statute explicitly authorized suit would be different. See *id.* at 617 (“[W]e have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.”).

Article III requires every plaintiff to show an individual injury that is caused by the defendant and can be redressed by the Court. Previously the Court had identified injury requirements that challengers had to show “in the absence of a statute explicitly authorizing suit.”<sup>167</sup> The *Warth* Court stated that these requirements applied even where a statute authorized suit.

But there was no discussion of an explicit statutory authorization of suit in *Warth*. It is in *Simon v. Eastern Kentucky*,<sup>168</sup> decided the next year and also written by Justice Powell, that the Court brought its (rapidly growing) injury requirements to bear in a case where the parties were statutorily authorized to sue. In *Simon*, low-income individuals and organizations representing them sought to challenge an IRS decision that gave favorable tax treatment to hospitals as “charitable” institutions even where the hospitals did not provide services to the poor to the extent of their financial ability.<sup>169</sup> The cause of action was based on the APA provision allowing those who suffered legal wrong or were aggrieved by agency action to challenge that action in court.<sup>170</sup> Recall that the Court had, in a 1970s watershed case, (re)read that APA provision to permit challenges by any party who could establish an injury in fact.<sup>171</sup> *Simon* turned on whether the parties had established such an injury.<sup>172</sup>

Much of what is in *Simon* was not new after *Warth*. The Court said very clearly that the *Data Processing* “injury in fact” requirement was required by the Constitution and not simply a matter of interpreting the APA.<sup>173</sup> It also made clear, in its holding, that the

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<sup>167</sup> See supra note 154 and accompanying text.

<sup>168</sup> 426 U.S. 26 (1976).

<sup>169</sup> Id. at 29–32.

<sup>170</sup> Id. at 58 (Brennan, J., dissenting) (regarding challengers who bring action under the Administrative Procedure Act).

<sup>171</sup> *Data Processing Serv. Org. v. Camp*, 397 U.S. 150 (1970).

<sup>172</sup> The Court made clear in a footnote that its decision did not rest on the “zone of interest” test also established in *Data Processing*. *Simon*, 426 U.S. at 39 n.19. Justice Powell was not a fan of the zone of interest test. See *Warth v. Seldin*, No. 73-2024, Correspondence from Justice Lewis Powell to Chief Justice Burger, June 6, 1975, Lewis F. Powell, Jr. Papers, 1921–1998, Ms 001, Lewis F. Powell, Jr. Archives, Washington and Lee University, Lexington, VA.

<sup>173</sup> *Simon*, 426 U.S. at 38–39 (“In *Data Processing* . . . this Court held the constitutional standing requirement under this [APA] section to be allegations which, if true, would establish that the plaintiff had been injured in fact by the action he sought to have reviewed.”) (citation omitted); id. at 39 (“The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an

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elements of that Article III injury included not only a concrete, individual injury,<sup>174</sup> but one that was caused by the defendant's allegedly unlawful action and could be remedied by a judicial judgment.<sup>175</sup> It is apparent from Justice Powell's correspondence with his clerk on this point that he was determined to make clear that (as we would say today) injury, causation, and redressability were all requirements of making out an injury in fact.<sup>176</sup>

What *is* important about *Simon* is that the challengers could point to an explicit authorization of their suit (albeit one that existed in part because of the fancy footwork of the Court in its 1970 decision in *Data Processing*). It was one thing for the Court to state in 1975 that the injury requirements applied even where Congress had explicitly authorized suit and it was another to actually apply those injury requirements in a case where such an authorization existed. And that is just what the Court did in *Simon*.

The Court did not sweep away the history that this Article has explicated without any recognition. It acknowledged that it had previously stated that challengers had to establish an injury in fact "at least in the absence of a statute expressly conferring standing."<sup>177</sup> But this was merely a reference, the Court now explained, to cases that permitted Congress to recognize new legal rights.<sup>178</sup> (This did not, however, capture the Court's previous use of this ca-

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Art[icle] III requirement. A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies.").

<sup>174</sup> *Id.* at 40 (holding that organizations devoted to advocating for indigents cannot have standing based on their "abstract concern with a subject that could be affected by an adjudication" (citing *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972))).

<sup>175</sup> *Simon*, 426 U.S. at 38 (explaining an injury required by Article III is injury to challenger that can be redressed by a court); *id.* at 41–46 (stating challengers cannot show that injury of denial of hospital care is caused by defendant IRS, as opposed to hospitals who are not before the court, and thus cannot show that action by court would redress injury).

<sup>176</sup> *Simon v. E. Ky. Welfare Rights Org.*, No. 74-1123, Memo from Lewis F. Powell, Jr. to Phil Jordan, Feb. 16, 1976, Lewis F. Powell, Jr. Papers, 1921–1998, Ms 001, Lewis F. Powell, Jr. Archives, Washington and Lee University, Lexington, VA.

<sup>177</sup> *Simon*, 426 U.S. at 41.

<sup>178</sup> *Id.* at 41 n.22 (referencing that a statute expressly conferring standing "was in recognition of Congress' power to create new interests the invasion of which will confer standing . . . . When Congress has so acted, the requirements of Art[icle] III remain: '[T]he plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants'" (citation omitted)).

veat. In one case, the caveat did appear to refer to Congressional creation of additional legal rights.<sup>179</sup> But in *Richardson*, Justice Powell's reference to "specific statutory grant[s] of the right of review" was clearly a reference to the *Sanders Brothers* line of cases.<sup>180</sup> Even where Congress had done so, the Court continued, "the requirements of Article III remain"<sup>181</sup> and, as *Simon* made clear, those requirements included an individual injury caused by the defendant and redressable by a Court.

Justice Brennan's angry concurrence in *Simon* came back again and again to the fact that Congress had authorized the suit. "Any prudential, nonconstitutional considerations that underlay the Court's disposition of the injury-in-fact standing requirement in [*Linda R.S. v. Richard D.* and *Warth v. Seldin*] are simply inapposite when review is sought under a congressionally enacted statute conferring standing and providing for judicial review."<sup>182</sup> All that is required under the Constitution, Brennan argued, is a personal stake in the outcome and the challengers had clearly established that.<sup>183</sup> Justice Brennan concluded by identifying the "most disturbing aspect of today's opinion," which he identified as the Court's insistence on resting its holding squarely on Article III, and "effectively placing its holding beyond congressional power to rectify."<sup>184</sup>

When it handed down *Simon* on June 1, 1976, the Supreme Court erased the standing for the public principle. Oddly enough, as recently as two years before, Justice Powell himself, writing in concurrence, acknowledged Congress' ability to statutorily authorize "public actions," but by 1976, that was no longer true. Injury in fact (as the Court was by then defining it) is a bare minimum requirement of Article III that every plaintiff, even those with statutory authorization to sue, must demonstrate. Theoretically, chal-

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<sup>179</sup> See *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

<sup>180</sup> *United States v. Richardson*, 418 U.S. 166, 194-95 (1974) (Powell, J., concurring).

<sup>181</sup> *Simon*, 426 U.S. at 41 n.22.

<sup>182</sup> 426 U.S. at 58-59 (Brennan, J., concurring); see also *id.* at 59 n.7 ("[I]t is distressing that the Court should mechanically apply the approach developed [in *Linda R.S.* and *Warth v. Seldin*] to a case brought under the Administrative Procedure Act without any analysis . . . of the only constitutional dimension of standing—the requirement of concrete adverseness flowing from a personal stake in the outcome.") (citation omitted).

<sup>183</sup> *Id.* at 60.

<sup>184</sup> *Id.* at 64.

lengers who satisfy these injury requirements might be able to (like the *Sanders Brothers* challengers) advance the rights of the public in court, but only, as Justice Powell put it in *Warth*, “collaterally.”<sup>185</sup> (And it is worth noting that even this sort of language about advancing the “public interest” disappears in *Simon*.) But given that the point of each element of the injury in fact requirement is to test the challenger’s personal connection to the injury caused by the (allegedly) unlawful actions of the defendant, a court collaterally reaching the public’s interest, for instance, in the correction of legal errors by the government, seems remote indeed.

Technically, one could argue that the standing for the public principle does not really die until 1992, when the Supreme Court decided the well-known *Lujan v. Defenders of Wildlife*.<sup>186</sup> This is so—in a technical sense—because 1976’s *Simon* was a case where the challenger’s cause of action was the APA, and was not based on a special statutory review provision of the *Sanders Brothers* variety. Before 1970’s *Data Processing*, the difference between an APA action and a special statutory review action was critical.<sup>187</sup> *Data Processing* diminished that distinction in important ways, but, even so, one might say that *Sanders Brothers* could not officially die until the Supreme Court applied its Article III injury-in-fact requirements in a case where the challenger relied on a special statutory review provision like that at issue in the *Sanders Brothers* line of cases. And that is precisely what occurred in 1992’s *Lujan* case. There, the Supreme Court applied what it had established over fifteen years earlier in *Warth* and *Simon* to a case where the cause of action was an old-fashioned special statutory review provision—specifically, the citizen suit provision of the Endangered Species Act.<sup>188</sup> But by then, *Sanders Brothers* might as well have never existed. It had been excised from the narratives of standing law.<sup>189</sup> Instead, it had become mantra, repeated in the cases and the

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<sup>185</sup> 422 U.S. at 499.

<sup>186</sup> 504 U.S. 555 (1992).

<sup>187</sup> *Data Processing*, with its creative reading of the APA provision, blurred the line between APA cases and special statutory review cases. See *supra* text accompanying notes 99–113.

<sup>188</sup> *Lujan*, 504 U.S. 555.

<sup>189</sup> A Westlaw search reveals that *Sanders Brothers* was cited in four cases between *Warth* in 1975 and the 1992 decision in *Lujan v. Defenders* and never for the “standing for the public” principle in this Article. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547,

treatises, that Article III requires individual injury, causation, and redressability—even where Congress has explicitly authorized suit.

### III. UNDERSTANDING THE FALL: CONTEXT AND EXPLANATION

The most obvious question is why. Why, in the very period where courts expanded access to the courts, did the Supreme Court read Article III in such a way as to prevent Congress from authorizing parties to stand for the public and, in so doing, bury a long-standing doctrine? Legal change is a complex phenomenon and providing a persuasive explanation of the change identified here is especially challenging because of the conflicting currents in the law—the courts both expand and retract standing. Given that complexity, this Part does not aspire to fully explain the change in the law chronicled here. Instead, it starts by looking to developments outside the Court in order to place the Court's decision in context. The most important development is the emergence of a large public interest bar and Congress' embrace of their tactics as a key means to improve government decisionmaking. Those developments outside the Court, it turns out, do suggest an explanation for the Court's actions because the Court was clearly uncomfortable with the manifestation of those developments inside the court—the proliferation of “public interest” suits. This Part concludes by suggesting one explanation for the fall of the standing for the public

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584–85 n.36 (1990) (citing *Sanders Brothers* for the principle that direct federal control over discrete programming decisions is unwise); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 394 n.8 (1987) (citing *Sanders Brothers* as an example of a case that involved a statute that gives review to all persons adversely affected or aggrieved by agency action); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 588–89, 589 n.14 (1981) (repeating FCC's citation of *Sanders Brothers* and citing *Sanders Brothers*' statement that broadcasters are not common carriers); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 803–04 (1978) (citing *Sanders Brothers* for skepticism about the utility of widespread divestiture of ownership of newspaper-broadcast combinations); *id.* at 805–06 n.24 (citing *Sanders Brothers* for the irrelevance of private losses under the Communications Act when there is no adverse effect on broadcasting service to the public).

After 1990, *Sanders Brothers* was not cited again in a Supreme Court opinion until eighteen years later, when the majority opinion in *Federal Election Comm'n v. Akins* relied on *Sanders Brothers* and its progeny to read the special statutory review provision at issue as one that, because it used the “party aggrieved” language, “cast[s] the standing net broadly—beyond the common-law interests and substantive statutory rights upon which ‘prudential’ standing traditionally rested.” 524 U.S. 11, 19 (1998).

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principle: it was a victim of the Court's discomfort with the ascendant litigation-oriented model of reformist politics.

*A. The World Outside the Supreme Court: The "Public Interest" Era*

Consider first what was happening outside the courts. The most pivotal development was the explosion in the number of public interest lawyers who set their sights on challenging governmental action in court. From today's vantage point, the groups that challenged the federal agencies in the middle of the 1960s—the Federal Power Commission in 1965, the Federal Communications Commission in 1966—seem unremarkable, but they were pioneers in these arenas. In 1965, not even a handful of groups devoted to litigating on behalf of the “public”—listeners, consumers, drivers, the environment—existed. By 1970, just five years later, that had changed.

These lawyers were one part of much broader social and political movements organized around various quality of life issues.<sup>190</sup> A quick summary of the relevant highlights of the period can capture only some of its flavor, but it does provide important context. In 1962 Rachel Carson published *Silent Spring*,<sup>191</sup> which had a remarkable public following and is often credited with awakening a broad-scale public consciousness about environmental concerns.<sup>192</sup> In 1964, Congress adopted the Wilderness Act<sup>193</sup> and amended the basic federal pesticide law, which dated to 1947, in order to create a mechanism to cancel pesticide licenses.<sup>194</sup> In 1964, Ralph Nader arrived in Washington, and he figured prominently in the hearings leading up to Congress' decision, in 1966, to establish the first of the new generation of health and safety agencies, eventually called

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<sup>190</sup> For a general description and critique of the work of many of these groups, see Michael W. McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* (1986). With respect to the environmental movement and its successes in this period, see Richard N. L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy* (1999); Robert Gottlieb, *Forcing the Spring: The Transformation of the American Environmental Movement* pt. II (1993); Richard J. Lazarus, *The Making of Environmental Law* ch. 4 (2004).

<sup>191</sup> Rachel Carson, *Silent Spring* (Houghton Mifflin 1962).

<sup>192</sup> Lazarus, *supra* note 190, at 43.

<sup>193</sup> Pub. L. No. 88-577, 78 Stat. 890 (1964).

<sup>194</sup> Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 88-305, 78 Stat. 190 (1964).

the National Highway Traffic Safety Administration (NHTSA) and charge it with the task of developing motor vehicle safety standards.<sup>195</sup>

1970 was a crucial year, particularly for the environment. On January 1, President Nixon signed the National Environmental Policy Act (NEPA),<sup>196</sup> and in April, 1970, twenty million people gathered to demonstrate on the first Earth Day.<sup>197</sup> By December 1970, Congress had approved the far-reaching Clean Air Act of 1970<sup>198</sup> and President Nixon had created the Environmental Protection Agency (EPA) through a reorganization plan.<sup>199</sup> This was the year of the environment, but it was not only that. It was also the year that Congress approved the Occupational Safety and Health Act and created the Occupational Safety and Health Administration (OSHA) to administer the Act.<sup>200</sup> For those tempted to count, by the end of 1970 Congress had created *three* major new regulatory agencies in less than five years.

In 1972, the EPA banned the use of Rachel Carson's target—DDT<sup>201</sup>—and Congress passed more landmark legislation, including the Clean Water Act,<sup>202</sup> important amendments to the federal pesticide law,<sup>203</sup> and the Consumer Product Safety Act,<sup>204</sup> which created the Consumer Product Safety Commission. In 1973, Congress passed the Endangered Species Act<sup>205</sup> and the Department of Interior created yet another new agency, the Mining Enforcement and Safety Administration, which was to enforce mine safety laws in-

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<sup>195</sup> National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966); Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety* ch. 3 (1990).

<sup>196</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (to be codified at 42 U.S.C. 4321-4347).

<sup>197</sup> Lazarus, *supra* note 190, at 44.

<sup>198</sup> Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

<sup>199</sup> Reorganization Plan No. 3 of 1970, available at <http://www.epa.gov/history/org/origins/reorg.htm>; Alfred A. Marcus, *EPA's Organizational Structure*, 54 *Law & Contemp. Probs.* 5, 9-21 (1991).

<sup>200</sup> Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1590 (1970).

<sup>201</sup> Press Release, EPA, DDT Ban Takes Effect (Dec. 31, 1972), available at <http://www.epa.gov/history/topics/ddt/01.htm>.

<sup>202</sup> Pub. L. No. 92-500, 86 Stat. 816 (1972).

<sup>203</sup> Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (1972).

<sup>204</sup> Consumer Product Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207 (1972).

<sup>205</sup> Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973).

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dependently of the Bureau of Mines.<sup>206</sup> The year 1974 saw the passage of the Safe Drinking Water Act<sup>207</sup> and 1976 the Resource Conservation and Recovery Act.<sup>208</sup>

*1. Congress, the New Agencies, and Public Interest Litigation*

That whirlwind tour of political developments ignores causes and consequences. But it is only intended to create context for understanding the model of reformist politics that emerged in this period. That model took litigation by public interest lawyers to be essential to advancing reform in these areas. Congress, as it created a new generation of agencies, both acknowledged and embraced public interest litigation as essential to ensuring the success of the regulatory regimes.

Starting in 1966, when Congress created each new agency and charged it with a mission, it contemplated the possibility of judicial challenges to the agencies' actions and, more than that, it contemplated that those legal actions would be brought by lawyers representing the "public interest." This is familiar to us now, but it was a new development as of the middle of the 1960s. When Congress adopted the modern system of drug regulation in 1962, it did not include any special statutory review provision that would allow public interest lawyers to sue the government or private parties.<sup>209</sup> Nor did Congress do so when it adopted the Wilderness Act in 1964.<sup>210</sup>

But by 1966, public-interest lawyers and the lawsuits they were to bring were an acknowledged—and celebrated—part of the new regulatory regimes that Congress created. The National Highway Traffic Safety Act, approved in 1966, required the new auto safety agency to adopt motor vehicle safety standards that would be "practicable, shall meet the need for motor vehicle safety, and shall

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<sup>206</sup> In 1977, Congress passed the Mine Act, which created and now governs the successor agency, the Mine Safety and Health Administration (MSHA). Federal Mine Safety and Health Admendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (1977).

<sup>207</sup> Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974).

<sup>208</sup> Resource Conservation and Recovery Act, Pub. L. No. 94-580 (1976).

<sup>209</sup> Kefauver-Harris Amendments, Pub. L. No. 87-781, 76 Stat. 780 (1962).

<sup>210</sup> Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964).

be stated in objective terms.”<sup>211</sup> The statute provided that “any person who will be adversely affected by such order” could file a petition in a federal appellate court.<sup>212</sup> The House report explained that the term “adversely affected” had been construed by the courts to “permit many diverse individuals and groups and associations of individuals to have judicial review of administrative actions.”<sup>213</sup> On the House floor, Congressman Smith of Iowa asked the floor manager whether a state attorney general could be considered a party aggrieved—because, for instance, the price of state-purchased automobiles was increased without a commensurate increase in safety. The floor manager responded that, yes, in his opinion the attorney general would count as aggrieved and thus would be able to challenge the agency’s actions. Congressman MacDonald asked whether “adversely affected” would include “anybody who drives a car, or a defective car and has an accident, or has reason to suppose he will have an accident by virtue of the fact that the car was not properly turned out” and the floor manager of the bill responded that, in his view, such a person would be aggrieved within the meaning of the act. Just to make clear his concern, Congressman MacDonald ended by clarifying that those who could challenge the agency’s action were not “confined to the industry or to people who manufacture cars,” and the floor manager again agreed.<sup>214</sup>

The year 1970 brought something old and something *very* new. The “old” could be found in the Occupational Safety and Health Act (OSH Act) of 1970, which followed the Auto Safety Act model. The Act created the Occupational Safety and Health Administration (OSHA) and, under Section 6, commanded it to promulgate occupational safety and health standards. The provision permitted “[a]ny person who may be adversely affected” by such a standard to challenge it in federal appellate court.<sup>215</sup> The

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<sup>211</sup> National Traffic and Motor Vehicle Safety Act of 1966 § 103(a), Pub. L. No. 89-563, 80 Stat. 718, 719.

<sup>212</sup> *Id.* § 105(a)(1).

<sup>213</sup> H.R. Rep. No. 1776, at 20–21, reprinted in 2 NHTSA, National Traffic and Motor Vehicle Safety Act of 1966: Legislative History 126–27 (1985).

<sup>214</sup> Cong. Rec. 19650-19651 (1966) (statement of Rep. MacDonald), reprinted in 2 NHTSA, National Traffic and Motor Vehicle Safety Act of 1966: Legislative History 125 (1985).

<sup>215</sup> Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 6(f), 84 Stat. 1590, 1597 (1970).

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statute also authorized the Secretary of Labor to seek penalties against employers who violated safety and health standards or failed to satisfy a series of general duties imposed on employers. Such citations could be contested and, if they were, they were adjudicated in front of an independent adjudicatory body called the Occupational Safety and Health Review Commission (also established in the OSH Act). Section 11 of the Act permitted “[a]ny person adversely affected or aggrieved” by an enforcement order to seek judicial review of it.<sup>216</sup> As explained in the House-Senate Conference Committee report, the House bill had permitted only the Secretary of Labor and employers to challenge enforcement judgments but the House had receded to the broader Senate version.<sup>217</sup>

Far more innovative than the OSH Act, however, was the Clean Air Act of 1970.<sup>218</sup> The Act included the first “citizen suit” provision and, since that moment, such provisions have been included in nearly every piece of federal environmental legislation. The Clean Air Act provision imagined citizens as both private enforcers of existing EPA dictates as well as direct watchdogs on EPA activities. “[A]ny person” could initiate a civil action against “any person” alleged to be in violation of an existing EPA emission standard or limitation. “[A]ny person” could also commence a civil action against the Administrator of the EPA “where there is alleged a failure of the Administrator to perform any act or duty . . . which is not discretionary.”<sup>219</sup>

The most extensive debate on the provision took place in the Senate. Senator Hruska objected that the provision would flood the courts, and he inserted into the Congressional record a lengthy memorandum that outlined a series of objections. The memo described the provision as “unprecedented in American history,” not-

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<sup>216</sup> OSHA § 11(a), 84 Stat. at 1602 (1970).

<sup>217</sup> Conf. Rep. to accompany S. 2193, H. Rep. 91-1765, at 39, reprinted in *Legislative History of the Occupational Safety and Health Act of 1970*, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Committee Print, at 1192 (1971).

<sup>218</sup> Pub. L. No. 91-604, 84 Stat. 1676 (1970).

<sup>219</sup> Pub. L. No. 91-604, § 304(a), 84 Stat. at 1706. The provision authorized courts to award injunctive relief. Unlike the later-enacted Clean Water Act, the provision did not authorize civil penalties, which would have permitted citizens to seek relief for past violations. Courts were, however, permitted to award litigations costs, including attorneys’ fees and expert witness fees, “whenever the court determines such award is appropriate.” See Pub. L. No. 91-604, § 304(d), 84 Stat. at 1706.

ing that it rested on the “erroneous” assumption that Executive Branch officials would not do their jobs. “Never before in the history of the United States,” the memo opined, “has the Congress proceeded on the assumption that the Executive Branch will not carry out the Congressional mandate, hence, private citizens shall be given specific statutory authority to compel such officials to do so.”<sup>220</sup> With this bit of overstatement, the memo went on to argue that the provision would subject every administrative action, or inaction, to challenge in the courts, flood the courts, and lead to inconsistent application of the laws.

In defending the provision, Senator Muskie first cast the citizen lawyers as mere supplements to agency enforcement—extra investigators detecting violations so that an agency could proceed against violators.<sup>221</sup> The next day, in the face of similar objections, Muskie inserted a staff memo that defended the provision according to this optimistic story, but also according to a less optimistic one. Not devoid of overstatement itself, the Muskie memo noted that the cost of more lawsuits was a trifle because, in a “government of the people,” citizens must be permitted to sue to remedy administrative failure: “The provision is directed at providing citizen enforcement when administrative bureaucracies fail to act.”<sup>222</sup> The citizen suit provision became a model for similar provisions in environmental statutes enacted in subsequent years—including the Clean Water Act (1972),<sup>223</sup> the Marine Protection, Research, and Sanctuaries Act (1972),<sup>224</sup> the Noise Control Act (1972),<sup>225</sup> the Endangered Species Act (1973),<sup>226</sup> the Toxic Substances Control Act

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<sup>220</sup> Senate Debate, *in* Legislative History, v. 1, p. 277.

<sup>221</sup> Senate Debate on S. 4358, Sept. 21, 1970, *reprinted in* Legislative History, v. 1, pp. 273–81 (Hruska-Muskie exchange).

<sup>222</sup> Senate Debate, *in* Legislative History, v. 1, p. 352; see also *id.* (“Citizen enforcement may add to the burden of the courts—but in a democracy, the answer cannot lie in the denial of citizen access to the courts—in a society of Government of and by the people we foreclose participation by citizens at our peril.”).

<sup>223</sup> Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 505, 86 Stat. 816, 888 (1972).

<sup>224</sup> MPRSA of 1972, Pub. L. No. 92-532, § 105(g)(1), 86 Stat. 1052, 1057 (1972).

<sup>225</sup> Noise Control Act of 1972, Pub. L. No. 92-574, § 12, 86 Stat. 1234, 1243 (1972).

<sup>226</sup> ESA of 1973, Pub. L. No. 93-205, § 11(g), 87 Stat. 884, 900 (1973).

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(1976),<sup>227</sup> and the Surface Mining Control and Reclamation Act (1977).<sup>228</sup>

The Consumer Product Safety Act (CPSA), approved in 1972, was closer to the Clean Air Act model than the 1966 model of the highway traffic safety agency. The Act itself was a much scaled-back version of the Senate-passed bill, which called for the creation of a new Food, Drug, and Consumer Product Agency. The Senate bill transferred a wide variety of consumer product safety activities from other agencies, especially the FDA, and added new responsibilities as well. The final statute followed the House version, which left most FDA activities where they were, in an agency within the Department of Health Education and Welfare. The statute authorized the CPSA to promulgate consumer product safety standards.<sup>229</sup> In authorizing judicial review of such standards, the statute went one big step beyond the *Sanders Brothers* formulation picked up in the auto safety act, but not quite as far as the citizen suit provision of 1970. The statute permitted “any person adversely affected by such a rule, or any consumer or consumer organization” to challenge the rule in federal appellate court.<sup>230</sup> To the extent that “any consumer” is a slightly narrower category than “any person,” the CPSA did not go quite so far as the 1970 statute.

## 2. *Public Interest Lawyers*

As it created a new generation of agencies, Congress was thus careful to adopt provisions permitting judicial challenges to agency action or even, in the case of citizen suits, to permit private parties to stand in for the agency itself and enforce the law against violators. It is quite clear that, while Congress surely expected regulated parties to challenge agency action, it had in mind “public interest” litigants who would prod the agency to go further in implementing its statutory mandate.

These statutory provisions are both a marker of and an embrace of the model of reformist politics that emerged with full force in this era. That model took litigation to be a key mechanism of social

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<sup>227</sup> TSCA of 1976, Pub. L. No. 94-469, § 20, 90 Stat. 2003, 2041 (1976).

<sup>228</sup> SMCRA of 1977, Pub. L. No. 95-87, § 520, 91 Stat. 400, 503–504 (1977).

<sup>229</sup> Consumer Product Safety Act, Pub. L. No. 92-573, § 7, 86 Stat. 1207, 1212–15 (1972).

<sup>230</sup> CPSA § 11(a), 86 Stat. at 1218.

change. Reformist groups devoted to environmental protection, consumers' rights, the eradication of poverty, and many other goals sprung up in this period. Some of these groups used well-worn tactics such as lobbying or direct action intended to persuade policymakers in Congress and the executive branch to consider their interests. But many of these groups believed that bringing lawsuits was a key tool to advance their groups' interest. And this turn toward litigation influenced long-standing groups as well.

Litigations as a key tool for pursuing social change was, of course, not genuinely *new*. There were important antecedents to the rapid growth of public interest lawyers in the 1960s. They included the National Consumers' League litigation starting in the early 1900s, the ACLU litigation starting in the 1920s, the NAACP and later the Legal Defense Fund founded in 1949, and the Committee on Law and Social Action formed by the American Jewish Congress in 1945.<sup>231</sup>

But in the mid-1960s a new, much larger, generation of lawyer-policymakers emerged and they relied on litigation to advance goals that had not previously been advanced through litigation.<sup>232</sup> Study after study bears out the enormous growth in public interest lawyers in this period. Seminal work by Professor Joel Handler finds that, of the seventy-two public interest law firms<sup>233</sup> that existed in 1976, only four of them existed prior to 1965—meaning that sixty-eight came to life in the decade between the middle of the 1960s and the middle of the 1970s.<sup>234</sup> The Council for Public Interest Law identified ninety-two public interest firms in 1976,

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<sup>231</sup> See Karen O'Connor & Lee Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 *Harv. J.L. & Pub. Pol'y* 483, 484–85 (1984).

<sup>232</sup> Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 *Stan. L. Rev.* 207, 224–31 (1976).

<sup>233</sup> Handler defines a public interest law firm as one that is 1) part of the voluntary sector; 2) uses primarily legal tools such as litigation; 3) involved primarily in actions that, if successful, have a substantial external benefits component or a high public interest ratio. Handler, *infra* note 234, at 49. Handler's definition would include lawyers working in the legal aid area as well as lawyers working on issues such as consumer or environmental protection or occupational and auto safety.

<sup>234</sup> Joel F. Handler, Betsy Ginsberg, & Arthur Snow, *The Public Interest Law Industry*, in *Public Interest Law: An Economic and Institutional Analysis* 42, 50 (Burton A. Weisbrod ed., 1978).

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which was up from fifteen in 1969.<sup>235</sup> Professor Kornhauser and Dean Revesz observe that, between 1960 and 1970, the percentage of total lawyers in the U.S. working in public interest positions nearly doubled from 1.1% to 2.1% of all lawyers. In this period, the total number of lawyers grew at the rate of 24%, and the number of lawyers in the public interest field grew at a rate of almost 240%.<sup>236</sup>

For those public-interest lawyers who targeted regulatory policymaking, consumer advocate and “one-man army”<sup>237</sup> Ralph Nader was an early embodiment of this group and also its most recognized participant in the early years. Nader’s earliest efforts focused more on the Congress and agencies than on the courts. He made his mark pressing for new legislation, first for auto safety, then for a variety of consumer protection statutes. Nader developed a signature style: a combination egghead, muckraker, and legal reformer. He had a genius for generating publicity. His message was almost always the same: exhaustively documented investigations exposing the dangers ordinary citizens faced due to the incompetence or malice of large corporations and their many friends in the bureaucracy. He appeared in any and all venues, writing articles, giving speeches, testifying before Congress. And, even when he was essentially acting alone in his early years, he generated enormous publicity for his concerns. In 1967 alone, he played a role in the passage of four laws.<sup>238</sup> His profile that year put him on the cover of *Newsweek* in early 1968.<sup>239</sup>

Nader’s work started to go beyond his single-man show in 1968. That summer, he formed the Center for Study of Responsive Law and hired his first batch of “Nader’s Raiders.” Two of them, Harvard Law students, had written him asking where they could sign up for Nader’s “judicious jihad” because they were “disgusted

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<sup>235</sup> Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America* 79 (1976). This figure excludes legal aid and legal services lawyers and includes only “policy-oriented” groups.

<sup>236</sup> Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 *N.Y.U. L. Rev.* 829, 839 (1995). Kornhauser and Revesz count legal aid oriented firms as well as lawyers working on issues like environmental or consumer protection.

<sup>237</sup> Justin Martin, *Nader: Crusader, Spoiler, Icon* 64 (2002).

<sup>238</sup> *Id.* at 70–73.

<sup>239</sup> *Id.* at 73.

Harvard graduate students who must endure endless years of drivel in order to mechanically defend the guilty and profitably screw the consumer.”<sup>240</sup> This group of students spent the summer investigating the Federal Trade Commission (FTC) and they produced a 185-page report condemning the FTC (“a self-parody of bureaucracy, fat with cronyism, torpid through inbreeding”). The report made a splash. The students testified before Congress and in early 1969, newly elected President Nixon asked for an ABA report of the FTC. Nader continued to hire groups of raiders each summer and hired a permanent staff for the Center in 1969 so that it could investigate and expose full-time.<sup>241</sup>

By 1970, there were rivals for the title of people’s representative. John Gardner formed Common Cause in that year to “ensure government and political process serve the general interest rather than special interest.”<sup>242</sup> But no one quite competed with Nader. His empire was expanding and, increasingly, Nader and his spin-offs were turning to the litigation process as a way to advance his causes. Nader formed Public Interest Research Group in 1970, and its lawyers set about searching for cases to advance “consumer’s interests” in health care, pensions, tax policy, and the environment.<sup>243</sup> In 1971, Nader founded Public Citizen and under that umbrella he created a series of groups, including the Health Research Group, which focused its attention on the Food and Drug Administration’s work, and the Public Citizen Litigation group, which focused on litigation on behalf of “the public.” With Alan Morrison at the helm, the Litigation Group focused on appellate litigation and, especially in the early years, involved itself in Freedom of Information Act (passed in 1966) litigation and in controversies over im-

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<sup>240</sup> Id. at 75 (quoting from letter to Nader from Harvard Law students Robert Fellmeth and Andrew Egenderf). The Summer of 1968 group included Fellmeth and Egenderf, as well as William Howard Taft IV, Edward Finch Cox (a Princeton senior), Peter Bradford, Judy Areen, and, the oldest of the bunch, John Schultz, a 29-year-old assistant professor of law at University of Southern California Gould School of Law. Id. at 76.

<sup>241</sup> Craig, *Courting Change*, *infra* note 244, at 12–22; Martin, *supra* note 237, at 80–85.

<sup>242</sup> Letter from John Gardner Announcing the Formation of Common Cause (Aug. 18, 2007) available at <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=189955>; see also John W. Gardner, *In Common Cause* 15 (1973).

<sup>243</sup> Martin, *supra* note 237, at 123.

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poundment and the legislative veto.<sup>244</sup> By 1974, Nader or Nader-like groups existed “in the areas of auto safety, aviation, health research, corporate responsibility, land use, water quality, food safety, women’s issues, and science and technology.”<sup>245</sup>

In the same period, much of the growing environmental movement turned to the litigation process to promote their agenda.<sup>246</sup> Long-standing conservation and wildlife groups turned increasingly to litigation. The Sierra Club and the Izaak Walton League are telling examples. The Sierra Club was founded in 1892 and the Izaak Walton League in 1922. Both had services for their outdoorsmen members and engaged in extensive legislative and administrative lobbying, especially the Sierra Club. But it was not until the 1960s that they began to rely seriously on litigation to promote their agenda.<sup>247</sup> Sierra Club formed the Sierra Club Legal Defense Fund to take over the litigation over Disney’s proposed development in Mineral King.<sup>248</sup> Izaak Walton League started to join litigation in the late 1960s and thereafter made appearances in many lawsuits, sometimes along with other organizations, sometimes by itself.<sup>249</sup>

Not only were longstanding organizations increasingly looking to the litigation process to advance their agenda, but several wholly new organizations were formed and immediately began to bring precedent-setting litigation. In 1967, a group of activists on Long Island who wanted to combine scientific expertise and law to protect the environment founded Environmental Defense Fund (EDF). Inspired in part by Rachel Carson’s *Silent Spring*, its early efforts were focused on eliminating the pesticide DDT.<sup>250</sup> EDF did not limit its efforts to lawyers and litigation, but its litigation was

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<sup>244</sup> Barbara Hinkson Craig, *Courting Change: The Story of the Public Citizen Litigation Group*, chs. 5 and 6 (2004).

<sup>245</sup> Joel Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* 74 (1978).

<sup>246</sup> Robert Cameron Mitchell, Angela G. Mertig, & Riley E. Dunlap, *Twenty Years of Environmental Mobilization: Trends Among Environmental Organizations*, in *American Environmentalism: The U.S. Environmental Movement, 1970–1990*, at 11–14 (Riley E. Dunlap & Angela G. Mertig eds., 1992).

<sup>247</sup> Tom Turner, *Sierra Club: 100 Years of Protecting Nature 190–91* (1991).

<sup>248</sup> Michael P. Cohen, *The History of Sierra Club: 1892–1970*, at 452 (1988); Oliver Houck, *Unfinished Stories*, 73 U. Colo. L. Rev. 867, 920 (2002).

<sup>249</sup> Westlaw search (on file with author).

<sup>250</sup> Karen O’Connor & Lee Epstein, *Public Interest Law Groups: Institutional Profiles* 68–70 (1989).

important immediately.<sup>251</sup> Early on, EDF brought several high profile cases that helped spell the end of DDT. Between 1970 and 1973, circuit courts of appeals resolved a dozen cases originally brought by EDF.<sup>252</sup>

The Natural Resources Defense Council (NRDC) was also founded in this period, in 1970. NRDC was formed out of two groups. The first group was Yale Law graduates who wanted to start an environmental law firm upon graduation. The second was New York law firm lawyers who had worked on the *Scenic Hudson* litigation and were, as a result, interested in starting a law firm devoted to litigating over resources issues. They formed themselves as the Natural Resources Defense Council, hired John Adams as their first director, and approached the Ford Foundation about start-up funding. Ford by then had been talking to the Yale Law group and suggested the two connect up. Once formed, NRDC quickly involved itself in litigation.<sup>253</sup> Between 1972 and 1975, circuit courts of appeals resolved nearly twenty cases brought by NRDC.<sup>254</sup>

These (and many more) groups that emerged in this period put some or all of their faith in lawsuits as a mechanism for advancing the causes of interest to them.<sup>255</sup> The growth in these groups would not have happened without the Ford Foundation, which decided in 1967 to channel funds to public interest law groups, a practice that continued for over a decade and involved millions of dollars of support.<sup>256</sup> Ford provided critical start-up and ongoing funding for EDF, NRDC, and Sierra Club's Legal Defense Fund.<sup>257</sup>

One concrete example of the effect of this phenomenon can be seen by looking at standing cases prior to 1965. Between 1940 and 1965, courts of appeals resolved over eighty cases in which they relied on *Sanders Brothers* to decide whether a party had standing to

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<sup>251</sup> Thomas R. Dunlap, DDT: Scientists, Citizens, and Public Policy 143–54 (1981).

<sup>252</sup> Westlaw search (on file with author).

<sup>253</sup> Gottlieb, *supra* note 190, at 193–96; Philip Shabecoff, A Fierce Green Fire: The American Environmental Movement 116 (1993).

<sup>254</sup> Westlaw search (on file with author).

<sup>255</sup> Handler, Ginsberg & Snow, *supra* note 234, ch. 4.

<sup>256</sup> Epstein, *supra* note 231, at 486–87.

<sup>257</sup> Gottlieb, *supra* note 190, at 138–39 (EDF); *id.* at 140–42 (NRDC); Cohen, *supra* note 248, at 452 (Sierra Club LDF).

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challenge administrative action.<sup>258</sup> Sometimes they granted standing, sometimes they did not. But nearly *all* of those cases involved parties with an economic or material interest in the consequences that would flow from an agency decision. The vast majority of cases were brought by competitors—existing license holders under the Communications Act or the Federal Power Act or economic actors in competing markets (for instance, newspapers in the same market as a new broadcast licensee). A couple were brought by employees whose fate would be altered by an administrative decision. And a couple, like *Ickes* discussed above, were brought on behalf of consumers who would pay higher prices as a result of administrative action. Those are the cases that most closely resemble what was to come. But it is not until *Scenic Hudson* (1965) and *United Church of Christ* (1966) that a reader of the legal reports starts to see legal challenges that look like the routine litigation of the early 1970s. The trickle becomes a flood very quickly.

*B. The New Public Interest Litigators Meet the Supreme Court*

While the model of reformist politics that relied on litigation as a key mechanism for reform was embraced by Congress, the same cannot be said of the Supreme Court. In the standing cases this Section seeks to understand, the Supreme Court expressed consternation over these “public interest” suits. The concern runs deep enough that it provides a plausible—if admittedly somewhat speculative—explanation for the elimination of the standing for the public principle.

Consider first the cases between 1970 and 1976 in which the Supreme Court reconstructed standing doctrine in the aftermath of its 1970 decision in *Data Processing*. Nearly all of the key cases have public interest litigators on one side of the case or another. This is true in *Sierra Club v. Morton* (environmental group challenging Interior Department), *United States v. SCRAP* (environmental groups challenging Interstate Commerce Commission), *Schlesinger v. Reservist Committee to Stop the War* (anti-war group challenging reserve status of members of Congress), *Warth v. Seldin* (poor people and advocates for low-income housing challenge local zoning ordinance), and *Simon v. Eastern Kentucky* (poor people and

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<sup>258</sup> Westlaw search (on file with author).

organizations representing poor people challenge IRS ruling). Each of these cases was actually brought by lawyers drawn from the new cohort of public interest litigators. In another key case in the period, *United States v. Richardson*, the taxpayer challenger—seeking disclosure of the CIA budget—was represented by the American Civil Liberties Union, an organization that had long turned to the courts to advance its mission.<sup>259</sup>

These cases unquestionably created consternation among at least some of the Justices. Several distinct concerns emerge. One common theme is the fear that lawsuits (the metaphor of choice always seems to be a “flood” of such suits) could stop the government in its tracks. Justice Powell’s internal papers in *Richardson* (where he ended up writing a lengthy concurrence) reveal outrage that a single taxpayer might be able to force the disclosure of the CIA’s budget.<sup>260</sup> Likewise, in 1972’s *Morton*, the Supreme Court rejected out of hand Sierra Club’s argument that its long-standing interest in environmental matters made it the ideal party to challenge the government’s action. “[I]f any group with a bona fide ‘special interest’ could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.”<sup>261</sup>

But the concern went much deeper than a worry over numbers. Lots of lawsuits is one thing. Lots of lawsuits *of this sort* is another. Although it is no simple task to articulate the precise concern, some of the Justices thought that entertaining these cases raised some sort of flag representing illegitimate judicial action. Justice Powell staked out his position on this matter early, writing a seventeen-page concurrence in *Richardson* in 1974 (Chief Justice Burger’s majority opinion ran only thirteen pages). Almost ten pages

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<sup>259</sup> See Brief for Respondent, *United States v. Richardson*, No. 72-885 (1973).

<sup>260</sup> Justice Powell, “Summer Memorandum,” at 7, *United States v. Richardson*, No. 72-885 (August 15, 1973) (Powell is confident that country would be handicapped in “its foreign policy and national defense posture if the plaintiff prevails in this case,” but Powell is not “equally clear at the moment as to the principles that control or how these principles may be applied soundly to this particular case”) (on file with author); see also Justice Powell’s handwritten notes on Diamond’s “Preliminary Memo,” at 9, *in United States v. Richardson*, No. 72-885 (“Our country could not function in international affairs if every citizen could bring an idiot suit like this!”) (on file with author).

<sup>261</sup> *Sierra Club v. Morton*, 405 U.S. 727, 739–40 (1971); see also *United States v. Richardson*, 418 U.S. 166, 194 n.16 (1973) (Powell, J., concurring) (same).

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of that concurrence warn about the dangers of recognizing taxpayer standing. Taxpayer standing would expand judicial power and shift governance away from democratic decisionmaking, lead to the inappropriate judicial supervision of the executive and legislative branches, and, in the end, ultimately injure the Article III judiciary by diverting its attention away from its traditional role.<sup>262</sup> The Court should not, Justice Powell warned, abandon its historic role of protecting rights and liberties of individual citizens and minority groups in favor of “public-interest suits” that involve “amorphous general supervision of the operations of government.”<sup>263</sup> Powell’s opinions in *Warth* and *Simon* are similarly filled with references to the “properly limited” role of courts in a democratic society.<sup>264</sup>

This legitimacy concern was framed in a more direct way in 1972’s *Morton* decision. There, the Court explained that its requirement of individual injury would put the decision as to whether review of government action should be sought in hands of those who “have a direct stake in the outcome,” as opposed to permitting (apparently what that plaintiffs sought) “judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.”<sup>265</sup> The concern here is not simply “supervision” of the executive branch by the courts, but supervision at the behest of ideological advocates who are attempting to enlist the courts in their

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<sup>262</sup> *Richardson*, 418 U.S. at 188–97.

<sup>263</sup> *Id.* at 192.

<sup>264</sup> *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (standing “is founded in concern about the proper—and properly limited—role of the courts in a democratic society”); *id.* at 500 (without prudential limitations on standing, courts would be “called upon to decide abstract questions of wide public significance even though over governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights”); see also *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37–38 (1976) (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. The concept of standing is part of this limitation. . . . Absent such a showing [of standing], exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.”) (citations omitted); *id.* at 39 (“A federal court cannot ignore [the requirement that the plaintiff have some personal interest] without overstepping its assigned role in our system of adjudicating only actual cases and controversies.”) (citation omitted).

<sup>265</sup> *Sierra Club*, 405 U.S. at 740.

policy-reform campaign. This, the *Morton* Court seemed to be saying, is not what courts (should) do.

There is no direct link in the documentary materials between these concerns about “public-interest” suits that were clearly on the mind of the Justices and a self-conscious decision to excise the standing for the public principle from the law. And perhaps that was an accident, an oversight produced by the mess that was *Data Processing*’s revision in standing law combined with a failure of advocacy. Reading the opinions, and what private documents are available, one detects that at least some Justices felt that the new public interest litigators were asking the courts to decide cases that were not appropriate for adjudication in an Article III Court. *Morton* is the case that makes this most clear—this is not a Court about to embrace (even if it is continuing a line of pre-existing cases) “standing for the public.” In response, the Court expanded what a party had to show to demonstrate an injury in fact and at the same time constitutionalized those requirements. Together, those doctrinal moves stamped out the standing for the public principle.

#### CONCLUSION

The primary agenda of this Article has been to recover a history of standing law that is now lost to us and to explain—in what turns out to be a complicated tale—exactly how and when we lost it. The lesson of that analysis is that the history of standing law is more complicated than our present version of that history would suggest. There was a time when the courts were not reluctant to entertain suits that, as the courts themselves said, adjudicated, not private rights, but the “rights of the public” in court, as long as Congress had authorized the suit. At one time, the Supreme Court gave Congress more leeway than it does now to structure the judicial enforcement of legal obligations.

The secondary agenda of the Article is to speculate about why the standing for the public principle died when it did. Given the complexity of explaining legal change and the lack of clear-cut evidence of motivation, the last part of this Article can do no more than suggest that the standing for the public principle was a victim of the Supreme Court’s discomfort with the public interest lawyers and their efforts at reform when they showed up in the courtroom. Even if the causal speculation is not persuasive, however, looking

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to the developments outside the courts does remind us that the Supreme Court was, in this case, an outlier. The political branches—through citizen suit provisions most prominently—embraced the new model of reformist politics that saw litigation as a key tool to advance social welfare. Whether the Court’s erasure of the standing for the public principle was a reaction or not, the Supreme Court refused to accept a congressional design that enlisted “any person” or “any citizen” to enforce legal obligations by litigating in the federal courts.