

April 21 faculty workshop

To: Workshop Participants
Fr: Liz Magill

Enclosed are two documents. Both are pieces of a larger project—that I expect to be a book—that I have started while at Princeton. My goal is to come to terms with the health, safety, environment, and consumers’ rights regulatory “revolution” of the 1966-1976 period and its meaning for the law.

The first short document, titled “Introduction,” is an overview of the whole project. The perspective there is pretty far from the ground and the details are consequently sketchy. I include it because it identifies what I now think of as the crucial moving parts of the period and the basic story about each of them. The Introduction should put into perspective the other document. That second document is only a piece of a larger jigsaw puzzle and I wanted to give readers a sense of the whole scene.

The second document, titled “Understanding the New Administrative Law,” is the start of what I expect to be a section in the book. That section will describe and explain the rather dramatic changes that occurred in legal doctrine in this period. If the Introduction is too far from the ground, this part may be too close to the ground. As you’ll see, the method is to integrate what is happening outside the courts with what is happening inside the courts. This is, in my view, the best way to understand what happened and it is a corrective to a common court-centered story.

HEALTH, SAFETY, CONSUMERS, AND THE ENVIRONMENT:
THE STRUCTURE OF A LEGAL REVOLUTION

INTRODUCTION

By the early 1970s, a lawsuit by an environmental organization challenging an Environmental Protection Agency regulation for failing to adequately protect the public health was familiar, even routine. The challengers filed the action because, given the statutes they relied on and the courts in which they appeared, they had some chance of winning. Today, we think of this kind of suit as a normal part of regulatory policymaking. But in the early 1960s, this legal challenge did not exist nor did any recognizable pre-cursor. In fact, suits of this sort are one of several critical developments—in Congress, in the legal profession, and in the courts—that originated in the 1960s and 1970s and that produced a new regulatory order, the modern one that is still with us today.

The first development came from the halls of Congress. Starting in the middle of the 1960s, Congress embarked on what counts as the third major wave of regulatory innovation in the 20th Century. The first two periods were the Progressive Era and the New Deal and, in both periods, the role of government was re-envisioned. This third period, often called the new social regulation, rivals if not exceeds its predecessors in scope. Social and political movements organized around health, safety, the environment, and consumers' rights demanded action and Congress obliged. The political branches created brand-new regulatory agencies, including the Consumer Product Safety Commission, the Council on Environmental Quality, the Environmental Protection Agency, the National Highway Traffic Safety Administration, and the Occupational Safety and Health Administration. These new agencies were charged with administering more than a hundred statutes designed to promote consumer protection and health and safety; several old agencies were given new assignments intended to promote those objectives as well.

These agencies looked different from their New Deal predecessors. Their substantive missions were distinctive. They were charged with protecting human health

and safety and the environment. To accomplish those tasks, one must be able to identify the risks and have some idea about how to reduce them. Many of the agencies' important initiatives, in other words, would be based on technology or science. NHTSA was to articulate design standards for safer cars. EPA was to protect human health by mandating technologies that would reduce harmful emissions. OSHA was to identify and reduce exposure to workplace risks.

These agencies were also designed differently. When compared to their predecessors, they were weighed down with more procedural obligations; they had more specific statutory mandates; and Congress contemplated that they would be monitored and sued by regulatory watchdogs. The design of these new agencies owed a great deal to the peculiar politics that produced them—a strange brew of cynicism and optimism. A widely held view, endorsed by those on the left and the right, was that the old, especially economic regulatory agencies, were captured by the parties they were supposed to regulate. For the economists, this meant regulation should be abandoned. But for others, this just called for a new design. Agencies *could* serve the public interest if only they were given a progressive agenda and were required to hear the voice of the people often enough as they worked to implement it. If they did not adequately do their jobs, citizens would be ready to sue the agency or enforce the statute itself.

This vision is intriguing in part because it was so historically contingent. New Dealers would have thought that agencies with ambitious substantive mandates and procedural obligations, extensive public participation and close scrutiny by courts would be a recipe for agency failure. Likewise, a generation after the health and safety revolution scholars have increasingly come to question the value of this vision of agency policymaking.

The second development occurred in the legal profession and its details are recounted in some detail in the chapter included here. Regulated parties had long turned to the courts when confronted with regulation. For as long as federal regulatory bodies existed, those they regulated had challenged their actions in court—they had challenged the constitutionality of agencies, their regulation, and their processes; they had challenged the statutory validity of the process or substance of agency decisions. But in the 1960s, a new group of parties began to appear in the case reports. Watchdog

lawyers—who followed, critiqued, and challenged agency activity on behalf of “the public”—appeared and pursued their missions with vigor, both inside and outside the courts. Such public interest lawyers—now on the left and the right, but then mostly on the left—are so much a part of the contemporary fabric of regulatory disputes that it is hard to appreciate how recent they are. Most of the groups that now routinely litigate in the health, safety, environment, and consumers’ rights arena started litigating in this period. Not only was this development relatively recent, it was novel. Once again, the New Deal provides perspective. Advocates of the New Deal would not have placed any confidence in courts as a mechanism to promote sound regulatory policymaking; they viewed the courts as friends of regulated parties. But the new group of lawyers were supporters of aggressive regulation and they had confidence that the courts could be allies.

The confidence of these lawyers was not misplaced. They did find a friendly audience in the courts. Between the middle of the 1960s and the middle of the 1970s, courts transformed their own relationship with agencies. They required agencies (old and new) to be open, participatory, and reasonable. Courts broadened access to judicial review of agency decision making. They did so by expanding standing doctrine, establishing a presumption that agency decisions were subject to review, and permitting pre-enforcement review of agency rules. When they reached the merits, courts of course required agencies to adhere to the statutes that governed them, but they did more than that. They were demanding about both the process and substance of agency decision making. Agencies had to provide extensive notice of their proposed course of action and the basis for it; they had to consider all the major policy issues associated with their proposed action and the major comments made on their proposal; and the record and explanations the agency compiled had to persuade the court that the agency had reasonably resolved the issues associated with its proposed course of conduct.

UNDERSTANDING THE NEW ADMINISTRATIVE LAW

It has been a truism now for some time. . .that a regulatory agency is ‘captured’ by the elements it is supposed to regulate. . . Arguably what is meant is that an agency is more likely to be captured than other organs of government. That no doubt is the contention of the current proponents of the theory who, as is typical of Americans, are completely innocent of history. They look to the courts for salvation. They have either forgotten or have never known that for many years it was gospel truth supported by a massive record that the judiciary is inherently reactionary.

--Louis L. Jaffe, 1970¹

With a longer view of history than most, Harvard Law Professor Louis Jaffe, a towering figure in the field of administrative law, thus raised doubts about the legal revolution that was happening around him. He was commenting on what is a commonplace: Judicial supervision of administrative action changed dramatically starting around 1965. The list of judicial innovations is very long, but, in brief, the new administrative law permitted a broader range of parties to participate in administrative proceedings and obtain judicial review of agency decisions and, once the challengers obtained review, courts took their procedural and substantive objections seriously. In the parlance of administrative law, standing, ripeness, and reviewability less often stood in the way of parties seeking to challenge the substance of or process associated with an agency decision; and, once the courts directed their attention to the merits, the “scope” of their review was more intense.

Professor Richard Stewart, writing in 1975, memorably labeled many of these developments a “reformation” of administrative law.² According to Stewart, it was a reformation inspired by a particular story about what was wrong with regulatory agencies. It was not that agencies were running roughshod over regulated parties. That sort of concern about the fairness of agency treatment of regulated parties had helped motivate the adoption of the Administrative Procedure Act in 1946. But the concern of

¹ The Administrative Agency and Environmental Control, 20 Buff. L. Rev. 232 (1970-71).

² Stewart, Reformation (1975)

the 1960s was different. The reformation was inspired by a critique of government decision making uttered by left wing and right wing critics at once. Agencies paid far too much attention to regulated parties. Indeed, they were captured by them and, as a consequence, their actions did not advance the good of the public. Judges responded by forcing agencies to listen to and consider the views of that public—consumers, citizens, listeners, and environmentalists.

There is much to this story. Stewart wrote as both eyewitness to and astute critic of what was happening around him. But the arc of the story has essentially held as it has been told by others with the distance of time.³ And no wonder. Many of the developments did empower diffuse interests—listeners, consumers—and, in ruling against agencies, the courts occasionally sounded just like the critics. As Professor Jaffe wrote in 1965, “[M]any will have observed that the judges of the District of Columbia Court of Appeals appear recently to have become distinctly distrustful of the agencies, particularly of the FCC and the FPC; they are convinced that these agencies have been failing to represent ‘the public interest.’”⁴ And Jaffe had many examples in mind. Listen to just one (admittedly very colorful) judge, Skelly Wright, writing in 1970: “This appeal presents the recurring question which has plagued public regulation of industry: whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate.”⁵ Government decision makers were too sympathetic to the regulated, courts seem to agree, and they responded by forcing the public through the agency door and arming it with a meaningful right to be heard.

But this story is also wrong. Wrong in part because it emphasizes some developments and not others; wrong in part because regulated parties both facilitated and benefited from the evolving public law; wrong because it overstates the break with the past. Mostly, though, it is wrong because courts are the central players in the drama. It is judges who generate a new regime of judicial controls on administration. In this reformation, judges play Martin Luther.

But the central drama here is outside the courtroom. Courts did then what courts do: they *reacted* to a changing world. That world was changing on many levels.

³ Schiller, Rabin, Merrill

⁴ Louis L. Jaffe, *Judicial Control of Administrative Action* 521 (1965).

⁵ 430 F.2d 891, 893 (D.C. Circ. 1970).

Agencies were behaving differently. The Progressive era and New Deal agencies—the Federal Communications Commission, the Federal Power Commission, the Food and Drug Administration—were increasingly giving meaning to their statutory mandates through rulemaking instead of through case-by-case adjudication and the newly created health and safety agencies—the National Highway Traffic Safety Administration, the Occupational Safety and Health Administration, the Environmental Protection Agency—were all designed to proceed in that way. This was a quite profound shift from a common law model of policymaking to a legislative model and it required courts to adjust a body of law designed around adjudications. Public interest litigators, a familiar figure from the civil rights movement but entirely new in other arenas, appeared and starting pressing their claims before the court. All of the now familiar players in regulatory litigation—for instance, the Environmental Defense Fund, the Natural Resources Defense Council, the entire Nader empire—began litigating in this period. Last, but far from least, Congress enacted what can only be understood to be a new regulatory order that was embodied in over a hundred statutes and a whole new generation of agencies. Another way of putting the point is that courts could hardly reengineer judicial supervision of agencies until someone showed up in court and complained about agency activity in a way that was sensible to judges. If there is an architect of this reformation, he is to be found in the likes of Ralph Nader, not Henry Friendly.

The New Administrative Law

Judicial supervision of agency action in this period evolved in a range of areas. More parties had access to court to seek review of a wider range of agency decisions and, once in court, judges were (relatively speaking) skeptical of agency action. They flyspecked the process by which the decision was reached as well as the substance of the decision. A hit parade of the major developments underscores the point. As for the expanded access, courts recognized more parties as having standing to challenge agency action in court; they established a presumption that agency action would be reviewable by courts; they decreed that some challenges to agency action would be ripe at the “pre-enforcement” stage, that is, before the agency had taken an enforcement action. Once

these barriers to review were overcome, courts required agencies to permit more parties to participate in their proceedings; to provide extensive notice of their proposed actions and the basis for them; they demanded that agencies “adequately consider” the views of the participants in their proceedings; and they required that the record demonstrate to the court that the agency engaged in reasoned decision making as it considered plausible alternatives and settled on a course of action. The accepted view is that these changes were transformative in the relationship between courts and agencies.

What was happening in court was in large part shaped by what was happening outside of court. This part will first introduce the two cases that are understood as kicking off this period of change in the law governing administrative action. The cases are themselves important, but they also well introduce the period because they are emblematic of what was to come. One can see traces of the court-centered story in them, but also begin to appreciate the distinctive story put forward here. This part will then systematically discuss the new administrative law, integrating the changes in the doctrine with the outside forces that shaped the courts’ evaluation of claims.

The Start of the Era: *Scenic Hudson* and *United Church of Christ*

Two cases decided in the middle of the 1960s are often thought of as the starting point of this period of innovation in public law. The first, *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.⁶ The Federal Power Commission (FPC) had granted a license to the power company under the Federal Power Act (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 permitted “aggrieved” parties to seek review of the FPC’s actions. The agency argued that the Conference lacked standing to sue because it could

⁶ Regarding the Scenic Hudson litigation generally, see Skip Card, *Scenic Standing: The 40th Anniversary of Scenic Hudson and the Birth of Environmental Litigation*, 77 *Sep. N.Y.St.B.J.* 10 (2005); David Sive, *The Litigation Process and the Development of Environmental Law*, 13 *Pace Env'tl. L.Rev.* 1 (1995).

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’ or ‘adversely affected’ party have a personal economic interest” in order to have standing.⁷ The remaining question was one of statutory interpretation: Did the Conference count as an ‘aggrieved’ party within the meaning of the 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.⁸ 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 sportsmens’ group with an interest in fish preservation as “aggrieved” within the meaning of the Act.⁹ Because the Conference “by [its] activities and conduct have exhibited special interest in such areas,” it “must be held to be included in the class of ‘aggrieved’ parties under” the Act.¹⁰

The *Scenic Hudson* standing analysis has been subsequently hailed as groundbreaking.¹¹ But the *Scenic Hudson* court presented each element as straightforward. The Constitution did not require injury to a personal economic interest in order to establish standing; the Act required the agency to consider non-economic factors as it determined whether to grant the license; and a group that had demonstrated a particular interest in such factors had standing to challenge the FPC’s decision. Perhaps worrying that the holding was indeed exceptional, the court for good measure added that, in any event, “petitioners have established sufficient economic interest to establish their

⁷ 354 F.2d 608, 615 (2d Cir. 1965).

⁸ 354 F.2d at 616.

⁹ *State of Wash. Dept. of Game v. Federal Power Comm.*, 207 F.2d 391, 395 n. 11 (9th Cir. 1953).

¹⁰ 354 F.2d at 616.

¹¹ See Strauss on Overton Park; Tom Turner, *The Legal Eagles* in CROSSROADS: ENVIRONMENTAL PRIORITIES FOR THE FUTURE 52 (Peter Borrelli, ed., 1988)

standing”¹² because one of the conservation groups that organized the Conference maintained trails that would be inundated by the reservoir.

Turning to the merits, the Second Circuit expressed great—actually, extreme—displeasure at the quality of the FPC’s consideration of the environmental effects of the project. The court faulted the FPC for failing to allow the testimony of one expert about an alternative to the proposed project and, more generally, for failing to adequately investigate alternatives, including not building the project at all or putting the power lines underground to minimize scenic damage. It also faulted the Commission for refusing to consider testimony from fishermen’s groups about the threat to fish posed by the project and failing to consider mitigation measures to reduce the impact of the project on fish.

These failings were not just bungling or laziness. The court saw something more sinister. In these errors the court found a Commission that was defaulting on its obligation to act in the interest of the public. As the court put it, acting as a representative of the public interest “does not permit [the FPC] to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.”¹³ Describing the record as “fail[ing] markedly” to consider the relevant factors, the court warned that the proceedings after the court’s remand “must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered.”¹⁴

In the second landmark case, *United Church of Christ v. Federal Communications Commission*, 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 re-licensing proceeding.¹⁵ 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

¹² 354 F.2d at 616.

¹³ 354 F.2d at 620.

¹⁴ 354 F.2d at 624.

¹⁵ *Office of Communication 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 TC, 1955 – 1969* (Duke 2004); Kay Mills, *Changing Channels: The Civil Rights Case that Transformed Television* (Mississippi 2004).

Aaron Henry and Reverend R.L.T. Smith, sought to intervene in the licensing proceedings to oppose the license renewal. The crux of their 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.

The challenge to WLBT was spearheaded by Reverend 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. 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 on broadcasting, to have the church ““Please do something about the TV stations.””¹⁶ 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.¹⁷ Parker and other allies first contacted the National Association of Broadcasters and asked it to reform the practices of southern stations, but this effort went nowhere.¹⁸

Thereafter Parker focused on the FCC license renewal as a way to reform the station. 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. 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 and his allies to intervene in the FCC proceeding and it did not hold an evidentiary hearing to assess Parker’s claims. But instead of granting WLBT the usual 3-year license renewal, it noted that “serious issues” had been raised about whether the license holder had satisfied the public interest standard, and the FCC granted only a one-year renewal of the license, making clear that it was probationary.

Parker then sought review of the FCC’s action and won a stunning victory in the D.C. Circuit. Then-judge (and later Supreme Court Justice) Warren Burger started the

¹⁶ Mills at 60.

¹⁷ Mills at 65.

¹⁸ Mills at 66.

opinion with several paragraphs recounting a series of complaints made against the station at the FCC, including an allegation that the station deliberately cut off network programs about race relations when Thurgood Marshall appeared and had broadcast a program on maintaining segregation and refused requests to present opposing viewpoints.

The D.C. Circuit first considered what it called the challengers' "standing" to participate in the FCC's licensing proceeding. 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. 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 point, only granted standing to intervene in FCC proceedings based on the two grounds the FCC had identified. But, it noted that neither administrative or judicial concepts of standing were "static,"¹⁹ 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 the proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience."²⁰

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 consumers of oleomargarine to challenge orders dictating the ingredients of oleomargarine.²¹ In a footnote, the court cited the then-recent *Scenic Hudson* decision.

¹⁹ 359 F.2d at 1000.

²⁰ 359 F.2d at 1002.

²¹ 359 F.2d at 1002 (citing *Associated Industries of New York State, Inc. v. Ickes*, 134 F.2d 694 (2d Cir. 1943) (coal consumers challenging price order); *United States v. Public Utilities Commission*, 151 F.2d

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 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, especially where the Commission seemed to be abdicating its role as guardian of the public:

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 attorneys 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.²²

Having cast the listeners as necessary watchdogs of an errant agency, the court then asserted that the listeners could be research assistants for the Commission. 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.²³ The mishmash of reasons added up to what the court essentially admitted was an unexpected conclusion: “In order to safeguard the public interest in broadcasting, therefore, we hold that some ‘audience participation’ must be allowed in license renewal proceedings.”²⁴ The Commission was ordered to adopt rules to determine which members of the public would be allowed to participate.

The *United Church of Christ* case is famous for its holding on intervention, but the court also held that the FCC was required, given the claims of the challengers, to hold

609 (D.C. Cir. 1945) (electricity consumers challenging utility rates); *Bebchick v. Public Utilities Commission*, 287 F.2d 337 (D.C. Cir. 1961) (public transit rider challenging rate increase); *Henderson v. United States*, 339 U.S. 816 (1950) (passenger challenging legality of ICC rules on racial segregation in rail cars); *Read v. Ewing*, 205 F.2d 630 (2d Cir. 1953) (consumer of oleomargarine challenging order affecting ingredients).

²² 359 F.2d at 1003-04.

²³ 359 F.2d at 1005.

²⁴ 359 F.2d at 1005.

a full-scale hearing on the license renewal. Such a hearing was required under the act where there was a “substantial question of material fact” presented or the Commission could not make the appropriate finding that, as the statute required, the public interest, convenience, and necessity being served by the license renewal. According to the Commission, a hearing was not necessary because it accepted all the allegations of the challengers and had, as a result, renewed the license for a probationary period of one year and imposed restrictions in hopes that the behavior of the licensee would improve. The D.C. Circuit found this nonsensical, held that the grant of the license was in error, and directed the Commission to hold an evidentiary hearing.

But the battle was not yet over. After remand, the FCC held a hearing and again granted the license. In 1969, the D.C. Circuit reversed the grant of the license and condemned the Commission’s actions in strong terms. “The record before us leaves us with a profound concern,” wrote the court, “over the entire handling of this case following the remand to the Commission.” After observing that the hearing examiner was improperly hostile to the intervenors and listing a series of errors committed in the proceeding, the court said “it will serve no useful purpose to ask the Commission to reconsider the Examiner’s actions and its own Decision and Order under a correct allocation of the burden of proof” because “[t]he administrative conduct reflected in this record is beyond repair.”²⁵ The FCC sought reconsideration of this rather extraordinary condemnation of its proceedings and the court rejected the request.

The Broader Picture: Judicial Controls on Administration, 1965-1975

Scenic Hudson and *Church of Christ* are the place to begin the story of legal change for many reasons. They are the standard markers for the beginning of a period of change in the law governing agency action and they are predictors of what is to come in several ways. They are innovative as a matter of doctrine. Few thought the standing analysis in *Scenic Hudson* or the intervention analysis 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

²⁵ *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 550 (D.C. Cir. 1969).

with courageous leaps over intellectual chasms that might never be bridged.”²⁶ In *Church of Christ*, the court essentially admitted it was innovating.

The two cases are also emblematic of what might be called the “mood” of the era. Both holdings benefited non-regulated parties, or, as the courts put it, “the public” and, in both cases, the courts expressed concern that the agencies were not fulfilling their mission to protect the public interest. These cases thus reflect a familiar story about this period: Courts, suspicious that agency decision making favored regulated parties, forced agencies to listen and give meaningful consideration to the other side of the equation. And one can easily see from these two cases why judges are usually cast as the heroes in this story. They were prone to eye catching statements. But, stepping back and paying attention to context, one sees less innovation than reaction.

ACCESS TO REVIEW – STANDING, RIPENESS AND REVIEWABILITY

A variety of barriers can prevent those who object to an agency’s action from challenging it. A party might lack standing, her timing might be off (the claim may not be “ripe”), and even if the challenger is the right party and is before the court at the right time, the particular agency decision may not be “reviewable” in court. Tripping over any of these doctrines prevents a challenger from getting the court to listen to her claims on the merits, that is, complaints about the deficiencies in the process or the substance of the agency’s decision. All three of these access doctrines changed between the mid-1960s and mid-1970s. In the most complicated of the developments, the lower courts and then the Supreme Court liberalized the law of standing. The Supreme Court also announced a brand-new test for ripeness that permitted many agency decisions to be challenged before they were enforced against a particular party. And, the Supreme Court announced a “presumption” that agency actions were reviewable. Each change was important in its own way.

Standing

By far the most complicated of these three is the change in the law of standing. Since at least the 1920s, the Supreme Court has required a party to have “standing” to

²⁶ Kenneth Culp Davis, *Administrative Law Treatise*, 1970 Supplement, §22.19 p. 775.

challenge administrative action.²⁷ Changes in standing law are at the top of any list of the changes to legal doctrine in this period. And no wonder. In 1970 the Supreme Court announced a brand new doctrine of standing that explicitly shed its past approach and undoubtedly permitted more parties to establish standing. These changes cannot be understood without understanding the world outside the courts. And, in fact, as I demonstrate below, the evolution in the law was more complicated than a straightforward liberalization in the law. But to understand the changes of 1970 and thereafter, one must first appreciate two things: the difficulty at the center of 20th Century standing law and the Supreme Court's doctrine prior to the 1960s.

* * *

The concept of standing is deceptively simple: The challenger has to be the proper party to bring an agency's allegedly illegal action before the court. The right sort of party is one who can claim to be been harmed in some way by the allegedly unlawful conduct. The trouble with standing doctrine is, at its core, rooted in the difficulty of translating what counts as a paradigmatic case fit for judicial resolution to disputes about the activities of the modern regulatory state.²⁸ That model case comes from the private law, that is, a claim resting on the law of property, contract, or tort. For example, A claims that B has wrongfully breached a contract, or, in other words, B breached a duty she owed to A under the law of contract. Focusing on A's injury is another way to put the same point: A suffered a legally cognizable injury because B unlawfully breached a contract.

Translate this model case to situations where the parties are the government and a private party who objects to the legality of governmental action. This increases the complexity on a number of dimensions. There are governmental immunities from suit; there is the power of the legislature to create legal obligations by statute and, subject to constitutional limitations, identify who can bring suit in federal courts to enforce those legal obligations. Put those complications aside for a moment, and focus on the growth

²⁷ This account is based on 20th Century cases about standing to challenge administrative action. There is a lively and interesting debate about whether the courts' concerns are historically grounded or whether their concerns are misplaced. I am not wading in to that debate. See Louis Jaffe's writings in 1960s and then especially Winter, Harnett, Sunstein, Fletcher, Woolhandler & Nelson.

²⁸ Whether the private law case should, or did historically, serve as a model is not something I address here.

of the administrative state and the expansion of constitutional limitations on governmental action. Those developments expanded governmental duties far beyond any common law duties arising out of contract, torts, and property. The question whether a government actor owed a duty that an individual could enforce in court becomes a complicated question rooted in, in addition to the common law, statutory and constitutional law.

Even so, some complaints about an agency's action at least resemble the model case: A statute authorizes an agency to set utility rates and a company subject to the rate alleges that the agency failed to follow the relevant law as it set the rate. The company asserts it has been injured by the allegedly unlawful action of the agency. Or, like the contracting party in the model case, the company claims that the government breached a duty owed to it—a statutory-based duty to follow the law as the agency determined the party's fate.

Now consider the citizen—the consumer, the taxpayer, the environmentalist—who argues that, when the government made a decision of interest to her, it acted illegally. The FCC granted a broadcast license without adequately considering whether it was in the listener's interest. The FPC granted a dam license without adequately considering the effect of the dam on recreation. The government gave money to religious organizations without sufficient attention to the dictates of the religion clauses of the Constitution. These cases are difficult to analogize to the paradigmatic case.

There are two ways to understand the difficulty. One can ask whether the government owes a duty *to* the consumer, the taxpayer, the environmentalist. The statute that the FCC administers does say that it must grant licenses only when they are in the public interest and in that sense the agency has a duty. But, that is a duty the FCC owes to the public at large. It is not a duty that is owed to any particular citizen as distinct from any other. Another way of putting what is really the same point is to focus, as standing law does, on the nature of the injury suffered by the challenger. Any injury flowing from the government's alleged failures to follow that law is an injury to the public at large; it does not individually harm one member of the public more than any other.

In the language often used by courts and commentators of earlier eras when they wrote about standing to sue, this is the difference between “public rights” and “private rights.” One alleging a private injury—paradigmatically an invasion of a common law right—has standing to complain about the legality of governmental action. One alleging a public injury—paradigmatically the interest of the public in the adherence to law—is a much more difficult case. Professor Louis Jaffe, who himself spent years advocating for the judicial recognition of “public actions” based on early English and American practice, put it this way in 1965:

It is accepted . . . that the primary role of judicial review is the protection of interests specially affected by allegedly illegal official action; its articulation for this purpose has been highly developed in the courts. If there is controversy, it is controversy concerning the degree of special interest required. But when the plaintiff is not able to satisfy the requirement of special interest, when he brings his action as a representative of the general public, the propriety of judicial intervention is sharply questioned.²⁹

This is not to say that the Supreme Court has refused to grant standing to those bringing claims “on behalf of the public.” Indeed, as I will argue below, one should understand the evolution in standing law in the second half of the 20th Century as going a long way, though not all the way, toward doing just that. But it is to say that coming to terms with the difference between the party with a private injury (the party “specially” harmed by allegedly unlawful government action) and the party with a public injury (one of a large number of people injured by allegedly unlawful government action) is the location of the trouble in standing law.

The Supreme Court’s signal that significant movement in its own standing law might be on the horizon came in 1968, when the Court decided *Flast v. Cohen*. *Flast* held that a taxpayer had standing to press the claim that some government expenditures violated the Establishment Clause. In so doing, *Flast* carved out an exception to the long-standing precedent of *Frothingham v. Mellon*, decided in 1923, which held that status as a taxpayer did not give a party standing to challenge the constitutionality of government action. *Flast* itself turned out to be a very limited exception to

²⁹ Louis L. Jaffe, “Standing to Secure Review: Public Actions,” in *Judicial Control of Administrative Action* 456 (1965).

Frothingham: the Court distinguished it at every turn in subsequent years. If it had not—that is, if status as a taxpayer gave one the right to challenge the legality or constitutionality of any spending program, or even more broadly to challenge the legality of any governmental action—then a huge class of individuals could establish standing to challenge some, or all, administrative action and the rather subtle evolution in the law described below would not matter. Even though *Flast* did not open up standing to taxpayers generally, it did turn out to be an early warning of a judicial re-writing of the law of standing.

That promise was fulfilled in 1970, when the Supreme Court explicitly adjusted standing law in a case involving a challenge to administrative action. In *Association of Data Processing Service Organizations, Inc. v. Camp*,³⁰ the Supreme Court held that sellers of data processing services had standing to challenge a decision of the Comptroller of the Currency that permitted banks to sell data processing services.³¹ Since the advent of the administrative state, the pattern in *Data Processing* had presented itself many times. Economic actors who were not the subject of regulatory action, but whose market opportunities were affected by an agency’s decision, had sought to challenge the legality of agency decision. Whether this sort of “competitor injury,” as it was known, gave a party standing bedeviled courts in a series of cases in the pre-1970 period. Such cases bedeviled the courts, in large part, because the common law did not protect competitive position. But in *Data Processing*, the Supreme Court cast every bit of that trouble aside and announced a newly minted standing test that, in general, granted standing to those whose competitive position was affected by administrative action. What *Data Processing* did to the law of standing is actually quite complicated and can only be understood by understanding the well-entrenched—and in some ways more liberal—law that it discarded.

³⁰ 397 U.S. 150 (1970).

³¹ The Court applied *Data Processing* in *Barlow v. Collins*, a case decided that same day in March, 1970. There tenant farmers who received federal agriculture benefits challenged a regulation that permitted them to assign their benefits to landowners for rent of the land; under the previous rule, farmers could not so assign their benefits. The Court said they obviously established injury in fact because they had the sort of “personal stake and interest that impart the concrete adverseness” required under the Constitution. And the satisfied the second requirement because the statute evinced an intent to protect the interests of farmers. 397 U.S. 159 (1970).

* * *

Prior to 1970, the Supreme Court's approach to standing in cases challenging agency action proceeded along two tracks.³² One test applied when the source of law giving rise to the challenger's claim did not identify who could challenge administrative action. That is, the statute authorized a court to set agency action aside, but it did not say who was permitted to bring such actions. In such cases, the challenger had to identify a "legal wrong" to establish standing to challenge administrative action. The other test applied when a statute did identify who could challenge administrative action. A common formulation in such statutory review provisions was that those who were "aggrieved" by agency action could challenge it in court. The tests were, arguably, not in conflict because they rested on interpretations of distinct statutory schemes. But, as will be explained below, they were in tension. The legal right test implicitly meant that only private rights, or legally-protected interests, could be adjudicated by courts; the party aggrieved test quite explicitly permitted those parties to bring public rights to courts for their adjudication. Whatever the extent of the conceptual conflict, there is no doubt at all that the bottom-line effects were different: The legal right test operated to deny standing in cases where the party aggrieved test would grant standing.

The first test required a party to identify a "legal wrong" in order to challenge governmental action.³³ 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. But, in the absence of that sort of injury, determination of legal wrong depended on an analysis of the relevant statutory (or constitutional) law that set forth the obligations of the agency. With the common law model in mind, the court would survey the relevant sources of law looking to see whether the challenger to government action had a legally protected interest that had allegedly been disregarded.

The legal wrong test was developed in a series of cases involving challenges to decisions of the Interstate Commerce Commission. In each, the Court confronted challengers to administrative action who were not the objects of the ICC orders (they did

³² See generally Louis L. Jaffe, *Judicial Control of Administrative Action* 505-531 (1965).

³³ *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249 (1930).

not pay the rate; they were not denied ownership) but rather parties whose competitive position 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 lost the advantage they had over those 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.”³⁴ The challenger’s legal right, said the court, was “limited to protection against unjust discrimination.”³⁵

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.³⁶ Before the ICC order, the terminal was not controlled by any carrier and it was used by all railroads entering Chicago. Rivals 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 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.³⁷ That is, the statute required the ICC to consider the interests of all parties

³⁴ Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143 (1923).

³⁵ 263 U.S. at 148.

³⁶ The Chicago Junction Case, 264 U.S. 258 (1924).

³⁷ 264 U.S. at 267.

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.³⁸

The trilogy of cases was completed in the 1930 case of *Alexander Sprunt & Son, Inc. v. United States*.³⁹ The pattern was familiar. The ICC had eliminated a two tiered rate structure for the shipment of cotton because it found the rate structure was prejudicial. Although the railroads subject to the rate structure as well as 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.” As shippers, they were entitled “only to reasonable service at reasonable rates and without unjust discrimination.”⁴⁰ 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 applying the “legal wrong” test were sometimes difficult to reconcile. But the inquiry was straightforward: Has the challenger asserted that the law requires the agency to take account of its interest and the agency has failed to do so?⁴¹ And the inquiry was built on a private law model: Did the challenger allege an injury flowing from agency disregard of his legally protected interest?

In 1940, the second approach was born and, with it, the Supreme Court quite fundamentally moved away from the private law model. The case, *FCC v. Sanders Brothers Radio Station*,⁴² involved a familiar pattern. The present holder of a broadcast

³⁸ 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 proceeding had no standing, “there would in some cases be no redress for the injury inflicted by an illegal order.” _____

³⁹ 281 U.S. 249 (1930).

⁴⁰ 281 U.S. at 255.

⁴¹ See Jaffe, *supra* note ____, at 507.

⁴² 309 U.S. 470 (1940).

license near Dubuque, Iowa challenged an FCC order permitting a newspaper company to construct a broadcast station in Dubuque.

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 obligated 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. 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. As the Court saw it, applying the legal right test would deprive that statutory provision of any effect. The Court speculated that, although competitors did not have legal rights 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"⁴³ in the action of the Commission, and the Court held that Congress had the power to confer standing to prosecute such an appeal.

It might be said that *Sanders Brothers* is not in tension with the legal right test because it turned on an interpretation of a provision of the Communications Act while the legal right test turned on an interpretation of the statutes relevant to challenging ICC orders. But the two are in tension. Deeply so. The legal right test was built out of a common law model. It asked whether the plaintiff had a legally protected interest that the agency had allegedly disregarded. If the challenger could allege this sort of injury (disregard of her legally protected interest), the court would then proceed to determine whether the agency had indeed unlawfully disregarded the challenger's interest. Another way to put the point is that the challenger's was pressing his own legal rights before the court. In *Sanders Brothers*, that connection between the challenger's interest and the alleged illegality of the agency's action was broken. The challenger has no legally protected interest in its competitive position and, yet, the injury to its competitive

⁴³ 309 U.S. at ____.

position gives it standing to challenge agency action as unlawful, not on behalf of its own legal interest (it has none) but on behalf of the legal interests of others.

This is the place where the important gap between the legal right test and the *Sanders Brothers* test opens up. The actual claims that the *Sanders Brothers*' challengers were permitted to raise makes the significance of that gap clear. The aggrieved challengers were permitted to assert a classic public right, the public's interest in adherence to the law. As the Court approvingly put it, Congress "may 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 in granting the license."⁴⁴ Congress authorized a private party—albeit only one who is "aggrieved"—to assert the public's right to adherence to the law. Did this present any Constitutional difficulty? The *Sanders Brothers* Court did not seem to think so as it concluded, without any reference to the Constitution, that Congress could create such standing.

This holding was not some slip of a 1940 typewriter. That this is what *Sanders Brothers* meant, and that some found it constitutionally troublesome for just this reason, is confirmed by the contemporaneous understanding of it. The first bit of evidence comes two years later, when 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 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.⁴⁵ 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 courts had to issue stays pending appeals. But to Justice Douglas, writing in dissent, this history was irrelevant

⁴⁴ 309 U.S. at 696.

⁴⁵ *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11-13 (1942).

given the nature of the legal rights that aggrieved parties were presenting. As he put it, “All constitutional questions aside, we should require explicit, unequivocal authorization before we permitted an appellant who has no individual substantive right at stake in the litigation to obtain a stay to protect the public interest.”⁴⁶ 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 had 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.⁴⁷

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

In 1943, in *FCC v. NBC (KOA)*, the Supreme Court again opined on the meaning of *Sanders Brothers*. 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

⁴⁶ *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 20 (1942) (Justice, J., dissenting).

⁴⁷ *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14-15 (1942) (citations omitted).

the FCC’s action on other grounds, namely, “to vindicate the public interest.”⁴⁸ He then observed that the constitutionality of 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...”⁴⁹ 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.⁵⁰

Although a bit 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, 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. “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.”⁵¹ Why was this necessary? Otherwise, he wrote, “[w]e will most assuredly run afoul of the constitutional requirement of case or controversy.”⁵² When Douglas applied his own test of who counted as aggrieved, the challenger flunked.

A well-known decision written in 1943 by Judge Jerome Frank of the Second Circuit illustrates the same understanding of *Sanders Brothers*. In *Associated Industries v. Ickes*,⁵³ coal consumers sued the Secretary of the Interior, challenging a 20 cent per ton price increase on bituminous coal sold in New York state.⁵⁴ 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 as a party

⁴⁸ *FCC v. National Broadcasting Co., Inc.*, (KOA), 319 U.S. 239, 259 (1943).

⁴⁹ 319 U.S. at 259-60.

⁵⁰ 319 U.S. at 260-61 (challenger must show that “its interests were substantially impaired” and this the challenger failed to do).

⁵¹ 319 U.S. at 265 (Douglas, J., dissenting).

⁵² 319 U.S. at 265 (Douglas, J., dissenting).

⁵³ 134 F.2d 692 (2d Cir. 1943).

⁵⁴ 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. 134 F.2d at 697.

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 and the Counsel 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, which he defined either as one of “‘recognized’ character, at ‘common law’ or a substantive private legally protected interest created by statute.”⁵⁵ 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 respondents, even if he can show no past or threatened invasion of any private legally protected substantive interest of his own.⁵⁶

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.’”⁵⁷

⁵⁵ 134 F.2d at 700-702.

⁵⁶ 134 F.2d at 705.

⁵⁷ 134 F.2d at 705.

It is in *Ickes* itself that Judge Frank coined the term that, for many, evokes this arrangement: the private attorney general.⁵⁸ 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.”⁵⁹ Frank may have coined this evocative term, but he did not answer the question he set out to answer, which was why permitting aggrieved parties to raise the rights of the public was consistent with the Constitutional requirement that courts only hear cases or controversies. Perhaps he is not to be blamed. The Supreme Court opinions on the subject didn’t cast much more light. What is most revealing about those decisions, however, is that the Supreme Court did not appear to be bothered by the question.

When the Administrative Procedure Act was approved in 1946, these two tests were the state of the law. There were two possible situations. If the statute that gave rise to the cause of action did not specify who was authorized to challenge agency action, then, to establish standing the challenger had to identify a legally protected interest that the agency had disregarded. That legally protected interest could be found in the common law, or in a privilege conferred on the party by a statute. But if the statute identified the class of parties—commonly, permitting challenges by those who were “aggrieved” by agency action⁶⁰—the Court applied the *Sanders Brothers* principle. And that principle should be considered striking. It is true, the parties had to be “aggrieved,” but the court’s cases did not put much pressure on defining who was aggrieved. The courts were explicit about the fact that aggrieved parties were authorized to raise the rights of the public. Their injury gave them an entrée into court, but it did not dictate the claims they were permitted to bring before the courts.

⁵⁸ See generally William B. Rubenstein, *On What A ‘Private Attorney General’ Is—And Why it Matters*, 57 Vand. L.Rev. 2129 (2004).

⁵⁹ 134 F.2d at 704.

⁶⁰ See Kenneth Culp Davis, *Administrative Law Treatise* §22.03, p. 215-16 (reviewing statutory review provisions in Federal Power Act, National Labor Relations Act, Securities Act, Public Utility Holding Company Act, and Communications Act) (1958).

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.” The widely accepted view of the history is that this statement was a declaration of existing law.⁶¹ The former “legal wrong” test applied when there was no statutory review provision in the statute that gave rise to the plaintiff’s complaint. The *Sanders Brothers* principle applied if the statute identified certain parties, most commonly those “aggrieved” by agency action, as able to challenge administrative action. The lower courts applied these two tests in many cases, and the Supreme Court, as late as 1968, applied the legal wrong test to determine that private competitors to the Tennessee Valley Administration had standing to challenge expansion of TVA’s services.⁶²

* * *

With this understanding of the state of the law in mind, we are ready to turn to the evolution in standing law in the more recent period. As I will argue below, those changes liberalized the law of standing, but, even as they did this, they retreated from the *Sanders Brothers*’ principle. But the changes in the legal doctrine should not be understood in a vacuum. One must take account of what was happening outside the courts and appreciate how those developments manifested themselves inside the courtroom. The most pivotal development was the appearance, almost overnight, of a new generation of lawyers who set their sights on challenging agency action in court. From today’s vantage point, the groups that challenged the Federal Power Commission in 1965 and 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 1971, lawyers devoted to (especially) the environment, but also auto safety, consumer’s health and safety and rights were fixtures on the scene.

⁶¹ See, e.g., Jaffe, *supra* note ____, at 529-30.

⁶² See *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 5-7 (1968).

These litigators were one piece of broader social and political movements organized around these quality of life issues. A quick (though necessarily superficial) chronological summary of the relevant highlights of the period can capture only some of its flavor, but it does provide some context. In 1962 Rachel Carson published *Silent Spring*, a book that exposed the hazards of the pesticide chemicals, in particular DDT and, more broadly, questioned technological advance as an unalloyed good. *Silent Spring* had a remarkable public following and Carson's book is often credited with awakening a broad-scale public consciousness about environmental concerns. In the same year, President Kennedy sent a special message on protecting consumer interests to Congress, which was the first of its kind. Congress also approved legislation that year that created the modern regime of drug regulation. Under the 1962 Amendments to the Food Drug and Cosmetic Act, drugs could not be shipped in interstate commerce unless the manufacturer persuaded FDA that they were both safe and effective for their intended use.

In 1964, Congress adopted the Wilderness Preservation Act and amended the basic federal pesticide law, which dated to 1947, in order to create a mechanism to cancel pesticide licenses. In 1964, Ralph Nader arrived in Washington, and by 1965 he had published *Unsafe at Any Speed* which, unlike Rachel Carson's lyrically written book, contained a sober and scholarly account of the role that the design of cars played in producing highway fatalities. It might never have become famous had General Motors not decided to have Nader investigated—GM's Corvair figured prominently in the book—and thereafter Nader achieved enormous public recognition as the gnat that Detroit tried to swat.⁶³ That episode and Nader himself figured prominently in the hearings leading up to Congress's decision, in 1966, to establish the first of the new generation of health and safety agencies, eventually called the National Highway Traffic Safety Administration (NHTSA) and charge it with the task of developing motor vehicle safety standards.

1970 was a crucial year, particularly for the environment. On January 1, President Nixon signed the National Environmental Policy Act (NEPA), a statute that reads like an environmental bill of rights. Among other innovations, it created the

⁶³ Justin Martin, NADER: CRUSADER, SPOILER, ICON 54-63 (2002).

Council on Environmental Quality and required the preparation of an environmental impact statement for all major federal actions. In April, 1970, twenty million people gathered to demonstrate on the first Earth Day. By December, 1970, Congress had approved the far-reaching Clean Air Act Amendments of 1970 and created a statutory home for the Environmental Protection Agency, which President Nixon had created in the summer of 1970 through a reorganization plan. 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. 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, EPA banned the use of Rachel Carson's target—DDT—and Congress passed more landmark legislation, including the Clean Water Act, important amendments to the federal pesticide law, and the Toxic Substances Control Act. Congress also approved the Consumer Product Safety Act, which created the Consumer Product Safety Commission. In 1973, Congress passed the Endangered Species Act and created yet another new agency, the Mine Safety and Health Administration (MSHA). 1974 saw the passage of the Safe Drinking Water Act and 1976 the Resource Conservation and Recovery Act.

This whirlwind tour ignores connections, causes, and consequences. But it is not intended to delve into them at the moment. It is only intended to create the context for understanding the role of the new breed of lawyer who began to litigate, particularly against agencies, in this period. One part of the legislative developments is, however, worthy of our intensive focus at this point because of its relevance to the question of access to judicial review of agency action. In creating each new agency and charging it with a mission, Congress contemplated the possibility of judicial challenges to the agencies' actions and provided for it explicitly. More than that, starting in 1970, Congress broadened availability of review even more, including citizen suit provisions that cast any private parties as supplements to agency enforcement—the citizens were permitted to sue those who violated regulatory mandates. In discussing who might challenge agencies or bring suits to supplement their enforcement, it is clear that Congress considered those dissatisfied with the vigor with which agencies pursued their

missions to improve auto, worker, consumer safety or environmental protection as likely litigants. Congress, in other words, had Ralph Nader and his ilk in mind as a set of possible litigators.

This was true as early as 1966. The National Highway Traffic Safety Act required the new auto safety agency to adopt motor vehicle safety standards that would be “practicable, meet the need for motor vehicle safety, and shall be stated in objective terms.”⁶⁴ The statute provided that “any person who will be adversely affected by such order” could file a petition in a federal appellate court.⁶⁵ 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 action.”⁶⁶ On the House floor, Congressman Smith of Iowa asked the floor manager whether an 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 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 could challenge the agency’s action were not “confined to the industry or to people who manufacture cars” and the floor manager again agreed.⁶⁷

The year 1970 brought something old and something remarkably new. The Occupational Safety and Health Act of 1970 followed auto safety act model. The Act created OSHA and, under Section 6, commanded it to promulgate occupational safety and health standards. The provision permitted “[a]ny person who may be adversely

⁶⁴ National Traffic and Motor Vehicle Safety Act of 1966 §103(a), 80 Stat. 719.

⁶⁵ NTMVSA §105(a)(1), 80 Stat. 720.

⁶⁶ House Report 1776 pp. 20-21, reprinted in NHTSA, National Traffic and Motor Vehicle Safety Act of 1966, Legislative History, v. II, 1985, pp. 126-27.

⁶⁷ House Debate of August 17, 1966, reprinted in Legislative History, v. II, pp. 124-25.

affected” by such a standard to challenge it in federal appellate court.⁶⁸ The 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.⁶⁹ As explained in the House-Senate Conference Committee report, the House bill had permitted only the Secretary of Labor and employers to challenge enforcement judgments⁷⁰ but the House had receded to the broader Senate version. Far more innovative than the OSH Act, however, were the Clean Air Act Amendments of 1970. 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. The provision permitted “any person” to initiate a civil action against “any person” alleged to be in violation of an existing EPA emission standard or limitation; “any 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.”⁷¹ The Clean Air Act provision permitted courts to award injunctive relief—declarations that the behavior was in violation of the law and a requirement to cease the behavior. 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.”⁷²

Citizens wanting to file suit were required to provide notice and wait before filing. If the person intended to file suit against a party allegedly in violation of an existing

⁶⁸ Pub. L. 91-596, §6(f), 84 Stat. 1597.

⁶⁹ Pub. L. 91-596, §11(a), 84 Stat. 1602.

⁷⁰ Conference Report to accompany S. 2193, H. Rep. 91-1765, p. 39, reprinted in Legislative History of the Occupational Safety and Health Act of 1970, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Committee Print, 92nd Congress, 1st Session, 1971, p. 1192.

⁷¹ Pub. L. 91-604, §304(a), 84 Stat. 1706.

⁷² Pub. L. 91-604, §304(d), 84 Stat. 1706.

dictate of the EPA, he had to first give notice to the EPA, the state in which the alleged violation occurred, and the alleged violator. Sixty days after the notice was given, the party could sue under the citizen suit provision unless EPA was already “diligently prosecuting” an action to enforce compliance. If so, the party could not file his own suit but was permitted to intervene in that action as a matter of right.⁷³ In most circumstances, the citizen suit provision also required 60 day notice to EPA before the citizen suit could be filed against the agency. It was modeled on a Michigan statute drafted by Michigan Professor Joseph Sax and approved in the summer of 1970.⁷⁴ In Congress, an even more muscular citizen suit provision was originally proposed by Senator Muskie, a version of which was included in the Senate-passed bill. The House bill had no citizen suit provision, but the House-Senate Conference committee accepted the Senate provision with some modifications—suits against the Administrator were limited to the performance of mandatory (not discretionary) duties and the notice required was extended from 30 to 60 days.⁷⁵

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 memo that outlined a series of objections. The memo described the provision as “unprecedented in American history,” noting 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.”⁷⁶ 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. Senator Muskie, in defending the provision, first cast the citizen lawyers as mere supplements to agency enforcement, extra investigators out there detecting violations so

⁷³ Pub. L. 91-604 §304(b)(1), 84 Stat. 1706.

⁷⁴ Joseph L. Sax, *Defending the Environment* 247-252 (1970).

⁷⁵ Conference Report to Accompany H.R. 17255, reprinted in *Legislative History of the Clean Air Amendments of 1970*, v. 1, p. 206.

⁷⁶ Senate Debate, in *Legislative History*, v. 1, p. 277.

that an agency could proceed against violators.⁷⁷ 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. No stranger to overstatement himself, the 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.”⁷⁸ The citizen suit provision became a model for similar provisions in environmental statutes enacted in subsequent years—including the Clean Water Act (1972),⁷⁹ the Marine Protection, Research, and Sanctuaries Act (1972),⁸⁰ the Noise Control Act (1972),⁸¹ the Endangered Species Act (1973),⁸² the Toxic Substances Control Act (1976),⁸³ and the Surface Mining Control and Reclamation Act (1977).⁸⁴

It takes very little detective work to comprehend what sorts of citizens Congress thought might be challenging agency action or bringing enforcement actions against violators. While one could imagine competitors suing to enforce compliance on their rivals (*Sanders Brothers’* style), there is no evidence that Congress had such litigants in mind. State officials were one group they had in mind; some Governors and Attorney Generals testified in support of the citizen suit provision in a Senate hearing. And, clearly, Congress had in mind environmental groups like the Scenic Hudson Preservation Conference. Those who would be suing, in short, were those who wanted to realize the promise of cleaner air; they would file suit to prod the EPA or, in the absence of EPA enforcement, enforce existing standards themselves.

The Consumer Product Safety Act, 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

⁷⁷ Senate Debate on S. 4358, Sept. 21, 1970, reprinted in *Legislative History*, v. 1, pp. 273-281 (Hruska-Muskie exchange).

⁷⁸ 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.”)

⁷⁹ Federal Water Pollution Control Act Amendments of 1972, §2(505), 33 U.S.C. §1365.

⁸⁰ MPRSA of 1972, §105(g), 33 U.S.C. §1415(g).

⁸¹ Noise Control Act of 1972, §12, 43 U.S.C. §4911.

⁸² ESA of 1973, §11(g), 16 U.S.C. §1540(g).

⁸³ TSCA of 1976, §20, 15 U.S.C. §2619.

⁸⁴ SMCRA of 1977, ____, 30 U.S.C. §1270(a)(1).

new Food, Drug, and Consumer Product Agency. The Senate bill transferred a wide variety of consumer product safety activities from other agencies, especially 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 HEW. The statute authorized the CPSC to promulgate consumer product safety standards.⁸⁵ 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.⁸⁶ 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.

But the CPSA moved closer to the Clean Air Act model, and indeed beyond it, considering two other provisions that contemplated extensive private involvement in the agency’s activities. First, it permitted private parties—“[a]ny interested person, including a consumer or consumer organization”—to petition the Commission to promulgate a standard or amend or revoke an existing standard and required the Commission to respond to the petitions.⁸⁷ If the Commission denied the petition, it authorized the petitioner to file suit to “compel the Commission to initiate a proceeding to take the action requested.”⁸⁸ The statutory standards that the petitioner had to satisfy to compel CPSC action were onerous. The petitioner had to demonstrate that the product presented an unreasonable risk of injury, and that the Commission’s failure to act had unreasonably exposed consumers to a risk of injury. Even so, the provision reveals a Congressional expectation that private entities would act as watchdogs of the agency, able to force it to act in certain circumstances. Finally, the Act contained a citizen suit provision for the purpose of enforcing CPSC standards and orders against violators. It permitted “any interested person” to bring an action (after providing the CPSC, the state Attorney General, and the violator with 30 days of notice) to enforce a consumer product safety

⁸⁵ Consumer Product Safety Act, Pub. L. 92-573, §7, 86 Stat. 1212.

⁸⁶ CPSA, Pub. L. 92-573, §11(a), 86 Stat. 1218.

⁸⁷ CPSA, Pub. L. 92-573, §10, 86 Stat. 1217-1218.

⁸⁸ CPSA, Pub. L. 92-573, §10(e), 86 Stat. 1217.

rule or a CPSC order that a defective product be recalled. If the U.S. took action, the private action was displaced.⁸⁹

* * *

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. And it is quite clear that, while Congress surely expected regulated parties to challenge agency action, it also had in mind litigants who would prod the agency to go further in implementing its statutory mandate. From today's vantage point, this is unremarkable. But, as an historical matter, the statutory provisions are a marker of what was really remarkable transformation in the types of parties who were interested in challenging regulatory agencies in court. In 1962, when Congress adopted the modern system of drug regulation, it did not include any special statutory review provision; nor did it do so when it adopted the Wilderness Act in 1964. Yet by 1966, members of Congress want to assure themselves that "not only industry" will be able to challenge agency action in court. The difference between the early 1960s and the late 1960s is that a new group of regulatory watchdogs appeared on the scene and they saw judicial challenges as a key mechanism for forcing bureaucracy to serve what they saw as the public interest.

The sheer number of interest groups attempting to influence policymaking grew exponentially starting in the late 1960s. By one estimate, the number of such groups in Washington tripled between the early 1970s and the early 1990s.⁹⁰ Whatever the scope of general interest group growth, though, there is no doubt that the number of groups attempting to influence regulatory policy through litigation exploded in this period. There were important antecedents to 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

⁸⁹ CPSA, Pub. L. 92-573, §24, 86 Stat. 1226. The statute also permitted those who sustained injury as a result of a knowing violation of a Commission rule or order to recover damages and costs of the suit. These remedies were in addition to and not lieu of other remedies provided by law. Section 23, Pub. L. 92-573, 86 Stat. 1226.

⁹⁰ Jack L. Walker, Jr., *Mobilizing Interest Groups in America: Patrons, Professions, and Social Movements* 1, 35-36(1991).

founded in 1949, and the Committee on Law and Social Action formed by the American Jewish Congress in 1945.⁹¹

But in the mid-1960's a new, much larger, generation of lawyer-policymakers emerged and they set their sites on regulatory policymaking. Consumer advocate and "one-man army"⁹² Ralph Nader was an early signal of this set 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 wide 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: his exhaustively documented investigations exposed 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. His profile that year put him on the cover of Newsweek in early 1968.

Nader's work started to go beyond his single-man show in 1968. That summer, he formed the Center for 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 Harvard graduate students who must endure endless years of drivel in order to mechanically defend the guilty and profitably screw the consumer."⁹³ This group of students spent the summer investigating the Federal Trade Commission 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

⁹¹ See Karen O'Connor and Lee Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 Harv. J. L. & Pub. Pol'y 483, 484-485 (1984).

⁹² Martin, *supra* ____, at 64.

⁹³ Martin, *supra* note ____, at 75 (quoting from letter to Nader from Harvard Law students Robert Fellmeth and Andrew Egendorf). The Summer of 1968 group included Fellmeth, Egendorf, 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 USC Law School.

groups of raiders each summer and hired a permanent staff for the Center in 1969 so that it could investigate and expose full-time.

By 1970, there were other 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." But no one quite competed with Nader. His empire was expanding and, increasingly, Nader or his spin-offs were turning to the litigation process as a way to advance his causes. With proceeds from a settlement of his suit against General Motors, 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.⁹⁴ In 1971, Nader founded Public Citizen and under that umbrella he created a series of groups—the Health Research Group, which focused its attention on the Food and Drug Administration's work in particular, 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 impoundment and the legislative veto.⁹⁵ By 1974, Nader or Nader-like groups existing in the areas of auto safety, aviation, health research, corporate responsibility, land use, water quality, food safety, women's issues, and science and technology.⁹⁶

In the same period, much of the growing environmental movement turned to the litigation process to promote their agenda. Long-standing conservation and wildlife groups turned increasingly to litigation. Sierra Club and Izaak Walton League are telling. Both groups had existed for a long time and had serviced their outdoorsmen members, but both had done more than that. They, especially Sierra Club, had engaged in extensive legislative and administrative lobbying. But it was not until late 1960s that they turned to litigation to promote their agenda. In 1969 Sierra Club formed the Sierra Club Legal Defense Fund; the LDF acted as the Club's lawyer. Izaak Walton League

⁹⁴ Martin, *supra* note ____, at 123.

⁹⁵ Barbara Hinkson Craig, *COURTING CHANGE: THE STORY OF THE PUBLIC CITIZEN LITIGATION Group* Chpts. 5 and 6 (2004).

⁹⁶ Joel Handler, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 74 (1978).

started to join litigation in the late 1960s and thereafter made appearances in many lawsuits, sometimes along with other organizations, sometimes by itself.

Not only were longstanding organizations increasingly looking to the litigation process as an avenue 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.⁹⁷ EDF never limited its efforts to lawyers and litigation—it lobbied in Congress, in agencies, and published scientific reports. Although only one part of its portfolio, EDF litigation was important immediately. 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.⁹⁸

The Natural Resources Defense Council (NRDC) was also founded in this period, in 1970. NRDC was formed out of two groups. One group were third year Yale Law graduates who wanted to start an environmental law firm upon graduation. The other were 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. Between 1972 and 1975, Circuit Courts of Appeals resolved nearly 20 cases brought by NRDC.

These (and many more) groups emerged in this period that put some or all of their faith in lawsuits as a mechanism for advancing the causes of interest to them.⁹⁹ 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

⁹⁷ Karen O'Connor and Lee Epstein, *PUBLIC INTEREST LAW GROUPS: INSTITUTIONAL PROFILES* 68-69 (1989).

⁹⁸ Westlaw search.

⁹⁹ Burton A. Weisbrod, et. al. *Public Interest Law: An Economic and Institutional Analysis*, Chpt. 4 (1978).

for over a decade and involved millions of dollars of support.¹⁰⁰ Ford provided critical start-up and ongoing funding for EDF, NRDC, and Sierra Club's Legal Defense Fund. Other foundations provided support as well and the award of attorney's fees, provided for by statutes, also funded the activities of these organizations.

A very large literature catalogues, analyzes, and attempts to explain the cause and consequences of this explosion in public interest law activities. But those hard questions are not important to understanding the changes in the law this chapter is exploring. What is important to understanding that change is the very existence of groups representing those who were supposed to benefit from the regulatory programs (drivers, consumers, the environment, listeners) who were riding herd on the agency and, when dissatisfied, ready and able to bring court action. In the early 1960s, groups like this simply did not exist in these arenas. Then, they appeared and started to file suit after suit against agencies, both old and new, for failing to live up to their obligation to serve the public.

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 challenge administrative action. Sometimes they granted standing, sometimes they did not. But *all* of those cases involve 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 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.

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¹⁰⁰ See, e.g., O'Connor and Epstein, *supra* note ____, at 486-87.

It is (finally) time to return to standing doctrine made by the courts in this period. There are two notable developments in the cases. The first is that courts straightforwardly expanded standing doctrine. The other development, however, cuts in the other direction. Even as they expanded standing doctrine, the courts started to retreat from the *Sanders Brothers* conception of the private attorney general permitted to raise the rights of the public. This part will first consider the liberalization in standing doctrine.

The standard story is that the courts liberalized standing law so that parties who previously would not have had standing did have standing under the new rules. In one sense, that is true. It is an accurate statement about *Data Processing*, which lifted pre-existing limitations on suits by competitors. But, as applied to the new public interest litigators, that story is not right because it suggests that the courts had previously denied standing to this set of parties. But this is not true. Such parties did not present themselves to the courts until the middle of the 1960s. The more accurate way to put the point is that, once these new parties showed up in court, the courts found a way to grant them standing.

Scenic Hudson and *United Church of Christ* represented the new more liberal approach to standing. In both cases, the statutes permitted parties who were “aggrieved” to challenge the agency’s action. When confronted with challengers who were not economic competitors but claiming to be aggrieved, the courts permitted listeners and those representing the environment to qualify as “aggrieved” by agency action and therefore establish standing. The Supreme Court cited both cases in 1970’s *Data Processing* as it threw out the old tests for standing and announced its brand-new liberalized law of standing.

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 8th 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.”¹⁰¹ 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.’”¹⁰² 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 8th Circuit and ask 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. 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, Justice Douglas said that this required the challenger to demonstrate two things. First, it had to show that the agency’s action had caused him “injury in fact, economic or otherwise.”¹⁰³ This test, which Justice Douglas put forward as an interpretation of the APA’s statutory provision, clearly replaced the legal wrong test. 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.” And there is little doubt where this “injury in fact” test came from. Administrative law scholar Kenneth Culp Davis had long campaigned for exactly that test as a substitute for the “legal wrong” test and the Court had finally become receptive. According to Davis—but few others—this new test just asked about the ‘fact’ of injury and thus separated the question of standing from the question of the merits of the legal challenge one wanted to raise.

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—the result in *Data Processing* proved that it 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

¹⁰¹ Association of Data Processing Service Organizations, Inc. v. Camp, 406 F.2d 837, 843 (8th Cir. 1969).

¹⁰² 406 F.2d 837.

¹⁰³ 397 U.S. at 151.

competitive injury easily satisfied the injury in fact test. In defining what counted as an “injury in fact,” the Court seemed to be borrowing from the *Sanders Brothers* conception of who counted as “aggrieved” when a statute permitted such parties to challenge agency action. (Of course, before 1970, the correct answer on an administrative law exam would be that *Sanders Brothers* was not relevant because there was no statutory review provision.) This was dramatic enough, but the Supreme Court was not finished with its reconstruction 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.”¹⁰⁴ This, like the injury in fact test, the Court presented 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. Again, the Court treated this test as a liberalization in the law of standing. As the Court put it approvingly, those interests might represent “aesthetic, conservational, and recreational, as well as economic values”¹⁰⁵ and it cited *Scenic Hudson* and *United Church of Christ*. The fact that the zone of interest might include these values should have been obvious from the Court’s formulation of the test—whether the parties’ interests were “regulated or protected” by the statute depended on the interests that various statutes made relevant. 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.

The Court completely butchered the prior law. It ignored the decades of precedent that treated the APA terms 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

¹⁰⁴ 397 U.S. at 153-54.

¹⁰⁵ 397 U.S. at 154.

many years thereafter in the courts. Nonetheless, at least as applied in *Data Processing*, the test counted as a liberalization in the law of standing in that it permitted a competitor to challenge agency action where, under the prior tests, it would not have been permitted to do so.

Two years later, in *Sierra Club v. Morton*, the Supreme Court had the opportunity to make good on its *Data Processing* aside that an “injury in fact” could be economic or *otherwise*. The Sierra Club had challenged the U.S. Forest Service’s decision to permit the construction of a ski resort and summer recreation area in the Mineral King Valley in the Sierra Nevada Mountains. 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. Much like *Data Processing*, the Supreme Court’s re-statement of the existing doctrine would come as a surprise to those schooled in it. But also like *Data Processing*, it expanded standing doctrine.

As the Court framed it, the key question in the cases revolved around whether a non-economic injury could count as an injury in fact and, if so, what it took to establish that injury. The Court began by explaining that, in *Data Processing*, the injuries had been to competitive position. Such “palpable” economic injuries, the Court claimed, “have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review.”¹⁰⁶ This was not true. 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, with this sleight of hand, the Court painted a particular version of history. Those with economic injuries could establish injury in fact, but could parties with non-economic injuries establish standing and, if so, how?

On the first part of the question, the Court answered yes. It 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

¹⁰⁶ 405 U.S. at 733-34.

the basis for standing under . . . the APA,” the Court wrote. “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.”¹⁰⁷ *Morton* thus vindicated the promise of expanded standing outlined in *Data Processing* in a case involving the new generation of public interest challengers to agency action.

* * *

But in the end, Sierra Club did not establish standing in *Morton*. While the Court accepted non-economic injuries as a basis for standing, those injuries could not be public injuries. Sierra Club had failed to show that it or its members were *individually* injured by the agency’s action and thus it had not (yet) established standing. As I’ll explain below, this part of *Morton* reveals one of the odd ways in which standing law in this period moved away from the *Sanders’ Brothers* model even as the courts expanded standing. In *Morton*, the Supreme Court’s discomfort with the new era of public interest litigation became obvious, but, even before that, the courts had retreated from parts of the earlier approach to standing.

The pull of some version of a legal rights, or private law, model of standing in these cases is evident even in the two cases that are the poster children of the new era, *United Church of Christ* and *Scenic Hudson*. In both cases, the statutes had *Sanders Brothers* provisions that permitted aggrieved parties to challenge agency action. But in neither case did the court’s analysis track the *Sanders Brothers* test. In fact, in both cases, the *Sanders Brothers* principle collapsed into a version of the legal right test.

United Church of Christ is not as clear-cut as *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 are required by statute to serve the public and, as a result, “responsible representatives of the listening public” have a right to participate

¹⁰⁷ 405 U.S. at 734.

in proceedings and also have 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 even more 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 not held that an economic injury was *necessary* for a party to be aggrieved.¹⁰⁸ And this was a fair statement of the law. The challenger had to be aggrieved, but what counted as being aggrieved was undefined. It was clear that injury to competitive position could count. But there was not much doctrine on this for the obvious reason that 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 had never said that the only reason the party could raise the rights of the public was because it suffered economic harm. And that is just what the *Scenic Hudson* court said.

Then, however, the court'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. 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,"¹⁰⁹ it wrote, and the Commission had admitted this. 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

¹⁰⁸ 354 F.2d at 615.

¹⁰⁹ 354 F.2d at 615 (footnote omitted).

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.¹¹⁰

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 special interest in such areas.”¹¹¹ This is 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 and, nonetheless, the court granted standing to an aggrieved party and permitted him to vindicate the public’s rights. In *Scenic Hudson*, the court asks the challenger to demonstrate that the statute commands consideration of certain interests and that it has a particular relationship to those interests. But it is not enough to say that this is a step away from the *Sanders Brothers* test. It is more than that; it is a step in the direction of the legal right test because it requires parties to establish that their interests are identified in the statute.

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 analytic move, the *Sanders Brothers* line of cases was sapped of the private attorney general concept, where an injured private party is permitted to vindicate the rights of others, including the rights of the public. The *Scenic Hudson* litigants had standing because they were statutory rights-holders who alleged that their rights had been violated by agency action.

A similar analytic move is evident in the “zone of interest” test invented by the *Data Processing* Court as it interpreted the “party aggrieved” provision of the APA. It seems most likely that the Court thought it was applying a kind of *Sanders Brothers*

¹¹⁰ 354 F.2d at 616.

¹¹¹ 354 F.2d at 616.

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 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, the “injury in fact” test was all the Constitution required.¹¹² 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.¹¹³ Like *Scenic Hudson*, this was a retreat from the *Sanders Brothers*’ model. *Data Processing* either ignored or tamed that model into a weaker form of a legal right test.

By 1972, then, this weaker legal right test hovered in the background even as courts expanded standing. Whatever explains what occurred in the courts before 1972, *Morton* made clear that the Supreme Court was concerned about this set of cases. Remember that in *Morton* the Supreme Court distinguished all earlier cases on standing by noting that they all involved economic injuries, which, the Court claimed, had always been enough to establish standing with or without a statutory review provision. This was faulty history, but it framed the Court’s new question, which it said had arisen with increasing frequency in recent years: “What must be alleged by persons who claim injury of a non-economic nature to interests that are widely shared?”¹¹⁴

Posing the question this way was telling. Its two components suggest two concerns: the injury was of the non-economic variety *and* it was widely shared. What is striking about *Sanders Brothers*, in retrospect, is that the latter concern was not at all problematic. That is, being an “aggrieved” party—which Supreme Court now treated as limited to economic injuries—permitted parties to seek a remedy for widely shared injuries, or, as the courts put it in the 1940s, the rights of the public. But as now framed

¹¹² ADAPSO v. Camp, 397 U.S. 166 (1970) (Article III restricts judicial power to cases and controversies and, thus, the “first step is to determine whether the plaintiff alleges that the challenged action has caused him injury in fact”).

¹¹³ ADAPSO v. Camp, 397 U.S. 166 (1970) (“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.”)

¹¹⁴ 405 U.S. at 734.

(one might say tamed) by the Supreme Court, the only reason this arrangement was acceptable was because the competitor's injury was economic.

The Sierra Club organization had relied on *Sanders Brothers*. According to the Supreme Court, the Club argued that, given that this was a "public" action related to the use of natural resources, the Club's special interest in and expertise in these matters was sufficient to give it standing as a representative of the public.¹¹⁵ The aggrieved competitor had only an opportunistic interest in the rights of the public; Sierra Club, on the other hand, was the ideal party to represent the public's interest because it was organized around protecting those interests. Untainted by private interest, Sierra Club presented itself as a non-governmental public attorney general.

This, the Court claimed, misunderstood the *Sanders Brothers* line of cases. The Court explained *Sanders Brothers* 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 had conferred the right to seek judicial review of agency action.¹¹⁶

The problem with Sierra Club's position was that it had not identified a *private* injury flowing from the proposed development. As the Court wrote, "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."¹¹⁷ And Sierra Club had failed to show it was individually harmed. It had relied on harm to the public to raise the rights of the public. As the Court put it, "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."¹¹⁸

¹¹⁵ 405 U.S. at 736.

¹¹⁶ 405 U.S. at 737-738.

¹¹⁷ 405 U.S. at 738.

¹¹⁸ 405 U.S. at 735.

The Court saw something deeply threatening in Sierra Club’s position and hence something grave at stake in its requirement of individual injury. Sierra Club’s position threatened to make the courts into something they were not (supposed) to be. As the Court put it, its requirement of individual injury would prevent those “who seek to do no more than vindicate their own value preferences through the judicial process”¹¹⁹ from establishing standing. Confronting this set of litigators with this set of claims seems to have raised doubts about the whole enterprise of public rights in the courts. Preventing those who want to vindicate their “value preferences” from getting into court sounds quite different from a 1940s Court unperturbed about private parties bringing the rights of the public before the court.

These speculations aside, the *Morton* Court’s requirement of individual injury, while imposed with drama, followed from earlier cases, including *Sanders Brothers*. A competitive injury, after all, is an individual one. *Morton* is telling for the discomfort it revealed about the new breed of public interest lawyer trying to shape regulatory policy on behalf of the public. More than the uneasiness, though, the legal doctrine at this point was retreating from *Sanders Brothers*. Had the Court had reached the zone of interest test, Sierra Club would have had to draw a connection between its concerns and matters made relevant by the statute.

In the end, *Morton*, by holding that non-economic injuries could constitute injuries in fact, must be counted in the “broadening standing” column. So too with *Scenic Hudson* and *United Church of Christ*. When confronted with a new class of public interest litigators, the Supreme Court, following the lead of the lower courts, devised a standing doctrine that permitted them to challenge administrative action. The irony is that the seeds of a more restricted standing doctrine can be found in these very cases. In later years, *Data Processing’s* zone of interest test would be employed—legal right style—to deny standing. And, more significantly, the injury in fact requirement would go beyond *Morton’s* requirement of individual injury to include all of the elements of a private cause of action. Challengers would eventually have to show that their individual injury was caused by the allegedly illegal conduct of the government and that the harm could be redressed by a favorable ruling on the merits of the challengers’

¹¹⁹ 405 U.S. at 740.

claims. By the early 1990s, these requirements were applied even where Congress had authorized “any citizen” to sue. And with this, the *Sanders Brothers* model of standing was dead and buried.

* * *

Ripeness

A party with standing to challenge administrative action has not necessarily reached the point where the court will hear her real complaints about the agency’s action—that the agency’s notice was defective, its statutory interpretation wrong, its factual premises not supported by the record. Challengers also may have to show that it is the right time—the challenge is “ripe.”

Ripeness itself is not a self-evident concept. The general notion is that, sometimes, a court should refrain from considering the validity of an agency policy choice because it is not yet ready for consideration. It has a variety of justifications: preventing courts from becoming involved in abstract disagreements; protecting agencies from judicial interference until their policies are fully vetted and settled. Common situations where ripeness might bar judicial consideration of an agency’s decision are where the agency has threatened some action against a party or has announced its policy but has yet to rely on that policy in the course of making a decision about a particular party, say an enforcement action or a license application. In such circumstances, the court might say that a challenge to the agency is not “ripe.”

The state of the law of ripeness prior to 1967 had not been clear in a variety of respects.¹²⁰ Among other things, the legal source of the doctrine was not clear.¹²¹ Nor were its results. Sometimes, courts refrained from considering the merits of an agency’s policy choice until the policy was actually applied to a party—say in an enforcement action or a license application proceeding. Sometimes, however, courts permitted challengers to attack the validity of an agency policy once it was announced but before it

¹²⁰ Jaffe, *supra* note ___, at 395-417.

¹²¹ See treatise writing of Louis Jaffe & Kenneth Davis and critique of these treatise writers by Professor John Duffy. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 *Tex. L.Rev.* 113, 162-181 (1998).

was applied in an individual proceeding. Such review was called “pre-enforcement” or “direct” review of agency policy.¹²²

Whatever the ambiguity in prior law, in 1967 in three cases—often called the *Abbott Labs* trilogy—involving the Food and Drug Administration, the Supreme Court announced and applied a brand-new test for determining when an agency’s action was ripe for review.¹²³ All three cases involved final rules promulgated by the FDA. One case involved the FDA’s new rule requiring that drug labels bear the established name of the drug (ibuprofen) wherever the label mentioned the commercial name (Advil). The two other cases involved the FDA’s interpretation of a 1960 color additives statute that required manufacturers to obtain FDA approval of dyes before they could be added to cosmetics. Two issues were in dispute about that rule. Industry representatives objected to the breadth of the agency’s definition of color additive and the agency’s assertion of the authority to inspect the plants of color additive license holders. The key question in all three cases, however, was about the timing of the review. Industry challengers sought pre-enforcement review; the agency resisted it. The Court said the drug labeling and color additive definition could be evaluated before enforcement, but the industry’s challenge to FDA’s assertion of inspection authority would have to await enforcement.

Courts can produce a particular kind of answer based on the way they frame the question before them. And the Court’s framing of the question in these cases demonstrated its receptiveness to pre-enforcement review. It started with the presumption that judicial review of final agency decisions was normally available; according to the Court, the question was whether some statute suggested that this presumption did not apply. The Court then analyzed previous decisions where the Court had failed to permit direct review, concluding that there was nothing in the relevant statutes to preclude such review in the case at hand. This brush-clearing complete, the Court identified the two (new) factors that would, in the absence of statutory dictates to the contrary, generally guide judicial determinations about whether pre-enforcement review would be available. According to the Court, the availability of pre-enforcement

¹²² See Ronald Levin, *The Story of the Abbott Labs Trilogy: The Seeds of the Ripeness Doctrine in Administrative Law Stories* 442-45 (2006).

¹²³ *Abbott Labs v. Gardner*, 387 U.S. 136 (1967); *Gardner v. Toilet Goods Assn.*, 387 U.S. 167 (1967); *Toilet Goods Assn. v. Gardner*, 387 U.S. 158 (1967).

review turned on whether the issues were “fit” for judicial consideration and the hardship to the parties of withholding court consideration. Applying this new test, the Court determined that the agency rules on drug labeling and the definition of color additives were ripe, while FDA’s rule asserting authority to inspect cosmetic manufacturing facilities was not ripe for review. The difference was that the lawfulness of the agency’s assertion of authority to inspect would turn on factual details about inspections that would only be developed in the course of actual inspections and that there was little hardship imposed on the manufacturers by delaying review.¹²⁴

The *Abbott Labs* trilogy is widely regarded as expanding pre-enforcement review where it might not have been available in the past, though there are dissenters from that view who argue that pre-enforcement review of rules had been regularly available before *Abbott Labs*.¹²⁵ Whatever that history, the *Abbott Labs* Court was favorably inclined toward pre-enforcement review. And, after *Abbott Labs*, pre-enforcement review of agency rules became the norm. That owes as much to the statutes Congress adopted in this period as it does to the effect of *Abbott Labs*. In those statutes, Congress often dictated that agencies proceed by rule and also made judicial review available after the agency promulgated the rules—that is, at the pre-enforcement stage.

Whether judicial examination of agency rules is available now or later may seem like a trivial question. But the effect of routinely available pre-enforcement review is quite consequential, though in different ways for different actors. As the positions of the contending parties in 1967 indicates, regulated parties favored pre-enforcement review and agencies did not. Regulated parties wanted to know as soon as possible, before money was spent to comply, whether an agency rule was lawful. Agencies, on the other hand, preferred to have their rules tested in the context of an individual proceeding. The delay of review may mean no judicial review at all because all parties may simply comply with the agency command; or, the party against whom the agency chooses to apply the rule may not challenge it. But even if a challenge materializes, agencies may be able—if the rule is applied in an enforcement proceeding—to exercise their

¹²⁴ *Toilet Goods v. Gardner*, 387 U.S. at 163-65.

¹²⁵ *Duffy*, supra note ____, at 173-74.

prosecutorial discretion to pick a favorable set of facts against which the lawfulness of the agency's policy will be judged.

Access to review at the pre-enforcement stage is critical to the non-regulated parties—competitors or regulatory watchdogs—who follow agency policy making. If an agency's rule can only be challenged when the agency applies it in a particular context, then competitors or agency watchdogs can challenge the agency rules only if they are equipped to monitor the agency's (possibly numerous) individual actions and also have an absolute right to intervene in those actions. And, if a situation that would delight the agency occurs—all regulated parties simply comply with the agency rule—the ability to challenge the policy evaporates along with that compliance. Review at the pre-enforcement stage, on the other hand, gives non-regulated parties a shot at challenging agency policies.

Judicial examination of agency policies in the abstract, rather than through the lens of particular cases, also affects the character of judges' evaluation. Imagine two cases. In one, a drug safety agency with the authority to remove unsafe products from the market decides that a particular product is unreasonably unsafe and brings an action seeking to remove the product from the market. Defending against the enforcement action, the company challenges the basis for the agency's claim that its product is unsafe. In the second, the same agency has issued a general rule identifying a class of products that are unreasonably unsafe. A company, or group of companies, that produce such products bring a pre-enforcement challenge to the agency's rule. It is likely that the two judicial evaluations will look different. In the former, the evaluation will turn more on the particular product; in the latter, the court will focus on the rulemaking, the basis for the agency's conclusions about the class of products and the industry's challenges to those conclusions.¹²⁶

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No matter how large or small the stakes of the routine availability of pre-enforcement review, though, its rise to prominence cannot be understood without

¹²⁶ Mashaw; Schiller, *supra* note ____, at 1153.

noticing what was happening in the agencies. The most important fact was that the standard model of agency decision making was transformed in the period between the 1950s and 1960s. In conceptual terms, agencies shifted from a common law model of agency decision making to a legislative model; in administrative process terms, they shifted from adjudication to rulemaking.

In the 1950s, most agencies implemented their statutory mandates primarily by adjudicating individual cases. They granted or denied license applications; they set rates; they brought or entertained enforcement actions. This was true of the National Labor Relations Board, the Federal Power Commission, the Federal Trade Commission, and the Food and Drug Administration. The Federal Communications Commission, the Securities and Exchange Commission, and the Interstate Commerce Commission engaged in some rulemaking, but it did not constitute the lion's share of their activity. These Progressive Era and New Deal agencies mostly developed policies in the way the courts give meaning to a law that they interpret over time. They defined unfair trade and labor practices, reasonable rates, licensing in the public interest in the course of deciding the fate of individuals. And the agency process borrowed from a judicial model. Parties presented evidence and witnesses and impartial adjudicators rendered their decisions based on the record presented at a hearing.¹²⁷

By 1967, things looked quite different. By then, many of the older agencies had started to rely on rulemaking. The Federal Communications Commission was an early adopter. In the late 1940s, in an effort to avoid concentrated ownership in broadcast outlets, it developed a rule limiting multiple ownership of radio and television licenses. License applicants who were over the identified limit would be denied new licenses.¹²⁸ But it was not until the 1960s that other agencies followed suit. The Federal Trade Commission, the Federal Power Commission, and the Food and Drug Administration each launched its first major rulemaking in the 1960s. Not only were the older agencies starting to rely on rulemaking. The new agencies that had been created or were about to be created—the National Highway Traffic Safety Administration, Environmental

¹²⁷ This account relies heavily on Professor Schiller's excellent account of this shift and its meaning. See Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 *Admin. L.Rev.* 1139, 1145-1146 (2001).

¹²⁸ See *United States v. Storer Broadcasting Co.*, 351 U.S. 194 (1956).

Protection Agency, Occupational Safety and Health Administration—were expected to use rulemaking to give meaning to their statutory mandates.¹²⁹ Rulemaking, as an instrument of making policy, looks different from adjudication. The model is not a court; it is a legislature. The rule is like a statute; it applies to all parties who come within its reach (all drug companies, for instance) and it is prospective. The agency process followed is an idealized version of the legislative model. Rulemaking was not unknown in the middle of the 1940s and thus the APA set forth a skeletal set of requirements for rulemaking. Agencies issued a public notice of their intended course of action, they invited comment on their proposal from all interested parties, and then, after considering those comments, the agency reached a conclusion about what they should do and published a final rule that set forth their policy.

There were a number of reasons for this rise of rulemaking as a preferred policymaking tool.¹³⁰ For agencies, old and new, facing large numbers of parties to regulate, rulemaking was a way to regulate a large class of individuals in one fell swoop. As Professor Reuel Schiller recounts, when the Federal Power Commission and the Food and Drug Administration were given a large number of parties to regulate, each agency turned to rulemaking. But the turn was not simply rooted in the perceived superior efficiency of rulemaking. Complaints about administrative process in the 1960s also focused on the unfairness of developing policy through case-by-case proceedings. In 1962, Judge Henry Friendly delivered the Oliver Wendell Holmes Lectures at Harvard Law School and his lecture revolved around the evils that flowed from agencies' failure to develop general rules to guide their exercise of discretion. He ended his lecture with the admonition that agencies should rely on rulemaking more often.

The shift from adjudication to rulemaking was profoundly transformative. Obviously, it changed what agencies did and how they did it and, as a consequence, it changed how interested parties, regulated and non-regulated, interacted with and attempted to influence what agencies did. It also altered the ways that agency overseers like the legislature, the President, and, of particular interest here, the courts interacted with and supervised agencies. Prior to the 1960s, judicial examination of agency action

¹²⁹ Schiller, *supra* note ____, at 1147-48.

¹³⁰ Schiller

was built around agency adjudications. Most of the 1946 APA was devoted to specifying the appropriate procedures for adjudication and courts interpreted that statute. Administrative law cases of the 1950s mostly involved adjudications. In Kenneth Culp Davis' 1958 treatise on administrative law, for instance, two chapters were devoted to rulemaking, while thirteen chapters were devoted to matters related to adjudication.

When rulemaking became the primary way that agencies made policy, the law that courts applied when they reviewed agency action had to be revised. Courts, it should be said, all in favor of a shift to rulemaking. They actually called for it, like Henry Friendly in the Holmes lectures, but also in their judicial opinions. And when agencies like the FDA and the FTC asserted the authority to engage in rulemaking even though the underlying statutes did not seem to convey that authority, the courts endorsed the agency position, singing the praises of rulemaking as they did so. Enthusiastic or not, in the era of rulemaking, judges had to confront old questions in a new light and new questions altogether and the APA, passed when agencies primarily adjudicated, provided relatively few instructions about rulemaking, to either agencies and to courts. This transformation from adjudication to rulemaking helps explain much of what occurred in administrative law in this period.

* * *

Thinking specifically about the timing of judicial review of administrative action, this agency migration toward rulemaking was critical in a straightforward way. Pre-enforcement review does not even arise as an issue until agencies are in the habit of announcing the meaning of a statutory mandate—rates for a particular region, unfair trade practices—before applying those understandings in the course of individual proceedings.

And once agencies, old and new, shift to rulemaking as a primary policymaking tool, waiting to judicially assess the validity of the agency policy until enforcement seems anachronistic. With respect to the new agencies, Congress generally provided that they would proceed by rule and that pre-enforcement review would be available. But consider the old agencies. Think about the FDA rules at issue in *Abbott Labs*. The FDA rule

required drug companies to re-label their pharmaceutical products so that their commercial name was always paired with the established name of the drug. Compliance with this rule would require a substantial sum of resources. If the agency had relied on adjudication, which in the FDA's case might mean imposing the requirement in the course of considering the approval of a single drug and its label, the company subject to the requirement would have the opportunity to challenge that decision after FDA imposed it, but before complying with the requirement. If FDA brought an enforcement action, seizing the drug on the basis that its label made it misbranded, the company would similarly be able to challenge the validity of the policy as it defended itself against the agency's action. Perhaps more importantly, the whole industry could await the outcome of these judicial challenges before deciding whether to comply with the requirement in the future. With this comparison, consider the FDA's position on the drug labeling rule. Under its approach, the rule would apply to the whole industry from the date it was effective and before enforcement. FDA would treat all who did not adhere to the rule as violators. This would occur well before any court had a chance to rule on the validity of the rule. That would occur only when FDA chose its target and enforced the rule, asserting as it did so the right to collect penalties for failure to comply with the rule earlier. In this context, it seemed sensible to resolve up front whether the agency's rule was valid. If the rule applies to all in the industry from its effective date, then determining its validity before that point seems eminently reasonable.

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