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MISUNDERSTANDING STANDING

"[A]part from Art. III's minimum requirements," wrote Justice Powell in *Warth v. Seldin* in 1975, the essence of the question of standing to sue "is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."[1] This is the soundest sentence the Supreme Court has uttered on this troublesome subject within human memory. Unfortunately, the Court has generally ignored its own good counsel.

The case-or-controversy requirement of Article III, the Court has made clear, forbids suit only by those who have suffered no "threatened or actual injury resulting from the putatively illegal action. . . ."[2] Yet the Court has often refused to entertain challenges made by persons plainly alleging a constitutionally sufficient injury.

The stated justifications for refusing to hear such claims have varied over the years. The TVA cases in the 1930s denied electric companies standing to attack allegedly unconstitutional competition on the ground that they had no "legal right" to be free from

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[1] 422 U.S. 490, 500.

[2] The quoted language is taken from Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973), a case denying standing. Among decisions upholding standing of parties with nothing more than statutory authorization and actual injury is FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). The recently enunciated "second prong" of the constitutional test, "a 'substantial likelihood' that the relief requested will redress the injury claimed," Duke Power Co. v. Carolina Environmental Study Group, Inc. 438 U.S. 59, 75 n. 20 (1978), is implicit in the simpler formulation quoted in the text.

0-226-46434-2/82/1981-0027$01.00

competition.[3] The *Data Processing* case in 1969, rejecting the "legal right" test, declared in apparently general terms that an injured party had standing only if the interest he sought to protect was "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[4] The dominant theme today, as stated in *Warth v. Seldin*, is that even an injured party generally has no standing to litigate a " 'generalized grievance' shared in substantially equal measure by all or a large class of citizens," or to assert the "rights or interests of third parties."[5] Thus in *Warth* itself, assuming that both residents of the town of Penfield and taxpayers of the city of Rochester had been injured by the town's allegedly unconstitutional refusal to allow the construction of low-cost housing, the Court denied them standing on the ground that they were asserting the rights of others.[6] Conversely, in the *Duke Power* case the Court allowed neighbors subject to everyday power-plant radiation to contest the constitutionality of a limitation on liability for nuclear accident because they were "champion[ing their] own rights" and their injury was "particularized."[7]

No one can sue, I should have thought, unless authorized by law to do so; yet despite Justice Powell's admonition in *Warth* that the issue was whether some law granted the plaintiffs "a right to judicial relief," neither in that case nor in *Duke Power* did the Court indicate what law gave the plaintiffs a right to sue.

Numerous statutes expressly confer the right to sue: The Communications Act, for example, authorizes any "person who is aggrieved or whose interests may be adversely affected" to challenge the grant of a broadcast license,[8] and the 1968 Civil Rights Act permits suit by "any person who claims to have been injured by a discriminatory housing practice."[9] In other cases, the Court has

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[3] Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939).

[4] Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970).

[5] 422 U.S. at 499.

[6] *Id.* at 512–14, 508–10.

[7] 438 U.S. at 80.

[8] 47 U.S.C. § 402(b)(2). See FCC v. Sanders Bros. Radio Station 309 U.S. 470 (1940).

[9] 42 U.S.C. § 3610(a). See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

inferred an implicit right to challenge administrative action from a statute silent on the subject: "[W]hen the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest," wrote Justice Black in 1968, "the injured competitor has standing to require compliance with that provision" even in the absence of an explicit grant of standing.[10] This reasoning is precisely analogous to that by which the Court inferred private rights of action for damages from substantive statutory or constitutional provisions in the familiar *Borak* and *Bivens* cases,[11] and rightly so: Whether the answer is labeled "standing" or "cause of action," the question is whether the statute or Constitution implicitly authorizes the plaintiff to sue. Decisions recognizing implicit standing on the basis that the plaintiff is in the class protected by the substantive provision, therefore, have been placed under a cloud by the Court's recent retrenchment of the *Borak* doctrine.[12] In any event, neither in *Warth* nor in *Duke Power* did the Court make an effort to derive a right to sue from the Equal Protection Clause or from the other substantive provisions the plaintiffs had invoked.[13]

At least three federal statutes arguably confer a right to sue that is broader than that given by the specific provisions already considered. The first is § 10(a) of the Administrative Procedure Act (APA): "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."[14] There is some judicial support for Professor Davis's view, based on a paraphrase in the legislative history, that this provision confers standing on any person "in fact adversely affected" by federal agency action.[15] The contemporaneous *Attorney General's Manual*, however, convincingly explained that the refer-

[10] Hardin v. Kentucky Utilities Co., 390 U.S. 1, 6 (1968).

[11] J. L. Case Co. v. Borak, 377 U.S. 426 (1964); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[12] *E.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979).

[13] Application of the precedents on implied rights might well have led to the conclusion that these provisions gave the plaintiffs no right to sue, either because they were silent on the subject, or because the plaintiffs were not their intended beneficiaries.

[14] 5 U.S.C. § 702.

[15] Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 466–67 (1970); S. Doc. No. 248, 79th Cong. 2d Sess. 212, 276 (1946) ("This section confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute"); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

ence to persons affected or aggrieved "within the meaning of a relevant statute" was meant only to incorporate provisions of particular statutes, such as the Communications Act, that gave standing to persons "adversely affected or aggrieved," not to create new rights of its own;[16] and early decisions tended to support this interpretation.[17] The *Data Processing* case,[18] as later summarized by the Court, held "that persons had standing . . . under § 10 of the APA where they had alleged that the challenged action had caused them 'injury in fact,' and where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated."[19] In reaching this conclusion the Court relied on decisions inferring standing from particular substantive provisions for the benefit of the protected class.[20] *Data Processing* can thus be read consistently with the original view of the APA: A person is "adversely affected or aggrieved . . . within the meaning of a relevant statute" only when that statute provides an express or implicit remedy. A more recent decision, however, seems to reject the Attorney General's interpretation without discussing either it or *Data Processing:* Despite finding "no intent to create a private right or action" in a criminal statute protecting confidential information, Justice Rehnquist without explanation held the complaining party " 'adversely affected or aggrieved' within the meaning of § 10(a)."[21] Thus the Court may have backed into the position that the APA is a broad grant of standing indeed; but it did not suggest that the APA authorized suit by any of the plaintiffs in *Warth* or in *Duke Power*.[22]

[16] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 95–6 (1947).

[17] *E.g.*, Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 931–32 (D.C. Cir. 1955). This reading is consonant with numerous other provisions of the APA. *E.g.*, "Agency subpenas *authorized by law* shall be issued to a party on request . . ."; "Agency action *made reviewable by statute* . . . [is] subject to judicial review." 5 U.S.C. § 555(d), 704 (emphasis added).

[18] See Association of Data Processing Service Organizations v. Camp, note 4 *supra*.

[19] Sierra Club v. Morton, 405 U.S. 727, 733 (1972).

[20] 397 U.S. at 153–56, citing, *inter alia*, Hardin v. Kentucky Utilities Co., note 10 *supra*.

[21] Chrysler Corp. v. Brown, 441 U.S. 281, 317–18 (1979). Apparently it had not been argued that Chrysler was not "adversely affected or aggrieved . . . within the meaning of a relevant statute"; the Court discussed only whether the challenged action was committed to agency discretion.

[22] It could hardly have done so in *Warth*, which was a challenge to state rather than federal action; and while *Duke Power* questionably entertained a claim against the Nuclear Regulatory Commission as well as against a private utility, there was no challenge to any "action" of the federal agency.

Two other general statutes arguably conferring a right to sue, however, were relevant to *Warth v. Seldin*. The first, which the plaintiffs specifically relied on, was the familiar § 1983:[23]

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This statute plainly authorizes suit by anyone alleging that he has been deprived of rights under the Constitution or federal law, and by no one else. It thus incorporates, but without exceptions, the Court's "prudential" principle that the plaintiff may not assert the rights of third parties; on the Court's view that the provisions in question gave no substantive rights to Penfield residents or to Rochester taxpayers, therefore, § 1983 did not give them a right to sue. Yet the Court did not seem to think it relevant to consider the statute under which the suit had been brought.

The final general provision arguably conferring standing is the Declaratory Judgment Act, which was relevant to both *Warth* and *Duke Power*:[24]

> In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration. . . .[25]

The implications of this provision for the standing question are obscure. On the one hand, the reference to "a case of actual controversy" might be taken to suggest that the Act confers a right to sue on anyone satisfying the constitutional injury requirement derived from the "controversy" language of Article III. On the other hand, the court is empowered to declare only the "rights" of the "party seeking such declaration," and he must be "interested"; these terms seem both to forbid litigation of third-party rights absolutely and to impose an additional and unfamiliar "interest" requirement

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[23] 42 U.S.C. § 1983.

[24] 28 U.S.C. § 2201.

[25] The plaintiffs asked the Court in *Warth* to "declare" the ordinance invalid and in *Duke Power* for a "declaration" that the Price-Anderson Act was unconstitutional. 422 U.S. at 496; 438 U.S. at 67.

that goes beyond the constitutional minimum. Finally, in accord with the phrase "within its jurisdiction," the Supreme Court has held that the Act "enlarged the range of remedies available in the federal courts but did not extend their jurisdiction";[26] while standing in the nonconstitutional sense is not strictly speaking a jurisdictional matter,[27] a brief glance at the legislative history suggests the Act was designed merely to affect the timing and party alignment of controversies otherwise litigable,[28] not to confer standing on anyone who otherwise would be without it. In neither *Warth* nor *Duke Power* did the Court address the question whether the Declaratory Judgment Act, under which both suits were evidently brought, gave the plaintiffs a right to sue.

If no statute or constitutional provision authorized the plaintiffs in *Warth* or *Duke Power* to sue, the sole remaining possibility is the common law. In the States the doctrine that the injured beneficiary of a legislative enactment may sue without statutory authorization has an impressive pedigree.[29] Since the *Erie* decision interpreted the reference to state "laws" in the Rules of Decision Act[30] to encompass judge-made rules,[31] the lawmaking powers of the federal courts have been severely limited; the extension of this Act to equity cases and the repeal of the provision that "the forms and modes of proceedings in suits of equity . . . shall be according to the principles, rules, and usages which belong to courts of equity"[32]

[26] Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950), suggesting that realignment of the parties did not allow evasion of the principle that a case arises under federal law only if that law is the basis of the plaintiff's own claim.

[27] Bell v. Hood, 327 U.S. 678 (1946) (question whether victim of unlawful search may sue for damages goes to merits); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109, n. 21 (1979) (because not properly raised, "the question whether Bellwood is a 'private person' entitled to sue under § 812 is not properly before us . . .").

[28] "The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages." S. Rep. No. 1005, 73d Cong., 2d Sess. 2 (1934).

[29] See Restatement, Torts § 286 (1934): "The violation of a legislative enactment . . . makes the actor liable for the invasion of an interest of another if: (*a*) the intent of the enactment is . . . to protect the interest of the other as an individual, and (*b*) the interest invaded is one which the enactment is intended to protect. . . ."

[30] 28 U.S.C. § 1652: "The laws of the several States, except where the Constitution or treaties of the United States otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." Contrary to popular rumor, nothing in this section limits its applicability to diversity cases.

[31] Erie R. R. v. Tompkins, 304 U.S. 64 (1938).

[32] 28 U.S.C. § 723 (1934). See Guffey v. Smith, 237 U.S. 101 114 (1915), holding a

seem to remove the basis of the former practice of developing judge-made federal equitable remedies independent of the implications of particular statutes. In any case, neither in *Warth* nor in *Duke Power* did the Court suggest that federal common law gave the plaintiffs a right to sue; nor did it investigate, as the Rules of Decision Act seems to require in the absence of contrary federal legislation, whether the law of any appropriate State did so.[33]

In summary, it is by no means clear that any law gave the plaintiffs in our two cases the right to sue, yet the Court in *Duke Power* upheld a statute on its merits, and in *Warth* ordered a dismissal partly on "prudential" grounds, without ever addressing the threshold question. These are by no means isolated instances; they represent typical Supreme Court practice. Yet if no law gave the plaintiffs the right to sue in *Duke Power*, the Court had no business entertaining the case; and if some statute or constitutional provision did authorize the plaintiffs to sue in *Warth*, one must echo Justice Brennan's doubts as to the right of the Court to invoke its own "prudential" notions to refuse to hear them.[34]

In short, Justice Powell was right that the proper inquiry in nonconstitutional standing cases is whether the law grants the plaintiffs "a right to judicial relief"; but unfortunately the Court failed to pursue this inquiry even in the case in which it was announced.[35]

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federal injunction available in a diversity case despite state law limiting relief to damages, on the basis of an earlier version of this provision.

[33] A right to sue under state law for violation of a federal right would not, under some persuasive decisions, arise under federal law. See Moore v. Chesapeake & Ohio Ry., 291 U.S. 205 (1934).

[34] "[C]ourts cannot refuse to hear a case on the merits merely because they would prefer not to. . . ." 422 U.S. at 520 (dissenting opinion). See also Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976). It is true that the word "may" in the Declaratory Judgment Act has been taken to make the declaratory remedy to some degree "discretionary," A. L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 331 (1961), and that statutes authorizing injunctive relief can be construed to incorporate traditional equitable limitations such as the need to show irreparable harm. Neither *Warth* nor *Duke Power*, however, attempted to relate the "prudential" standing limitations to traditional equitable principles or to limit them to declaratory actions.

[35] Views similar in some respects to those here expressed can be found in Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L. J. 425 (1974).