

THE PUBLIC PLAINTIFF COMES TO NEBRASKA: AN ESSAY ON THE LIMITS OF STATE JUDICIAL POWER

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INTRODUCTION

In *Cunningham v. Exon*¹ a citizen and taxpayer challenged the form in which state officials proposed to promulgate an amendment to the constitution adopted at a general election.² The district court dismissed the suit on the grounds that the plaintiff lacked standing to sue. On appeal, however, the supreme court reversed. While recognizing that Nebraska usually required a personal interest in the outcome of litigation as a precondition for standing, the court held that the status of citizen and taxpayer was sufficient in *Cunningham* although the plaintiff had no peculiar interest in the outcome of the litigation and suffered no pocketbook injury as a taxpayer.³

In deciding *Cunningham*, the court paid little attention to prior Nebraska authority. No effort was made to integrate the decision into prior Nebraska case law. Rather, the court recognized standing in the citizen taxpayer to challenge governmental action where the question was one of great public interest and, if the ordinary rules were applied, no one would be likely to have standing and the action would escape judicial review.⁴

Cunningham, then, recognizes standing in an individual who comes asserting only injury to the public in general: in other words, a public plaintiff. The aim of this essay will be threefold. In the first part, I review the debate about the appropriate role of a law of standing. This debate has ranged from the view that some standing requirement is of the essence of the judicial process, to the view that standing is an unnecessary limitation upon judicial power and that the citizen's interest in the regime of legality deserves a hearing in the judicial forum. In the second part of the essay, I relate this general debate, largely conducted at the level of federal constitutional and administrative law, to the history of the

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1. 202 Neb. 563, 276 N.W.2d 213 (1979).
2. *Id.* at 563-64, 276 N.W.2d at 213-14.
3. *Id.* at 566-68, 276 N.W.2d at 215-16.
4. *Id.* at 568-69, 276 N.W.2d at 216.

law of standing in Nebraska. Finally, I briefly comment on the change worked by *Cunningham* in the Nebraska law of standing and discuss appropriate limitations on the reach of the decision.

STANDING AND THE JUDICIAL PROCESS—COMPETING MODELS OF JUDGING

The decision as to what role a law of standing should play in challenges to the constitutionality or legality of governmental action depends upon what is believed to be the appropriate judicial role in such actions.⁵ Two parables will make this point clear. In our first story George and Mary are married. George commits adultery with Hazel. Fred, the next door neighbor of George and Mary, discovers this and files suit to require the dissolution of their marriage. The divorce is granted. In our second parable John discovers that Joe is being robbed. He calls the police. Since it is not Joe who is being robbed, the police refuse to respond.

In each story there is something wrong. In the first case, we would regard the neighbor as an intermeddler and wonder why a court would listen to him at all. In the second case, the source of the complaint is irrelevant. It is the police officer's job to respond to whoever is complaining. If a reviewing court is like a divorce court, then challenges to the legality of governmental action

5. As Tribe notes with regard to justiciability doctrines in general, these doctrines describe "how the federal courts, or more accurately the Justices of the Supreme Court, view their own role." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-7, at 53 (1978).

While debates about standing in the United States have revolved around the case or controversy language of Article III, "[t]he problem of standing . . . is inherent in all legal systems, and is certainly not a mere by-product of the 'cases and controversies' provision of the American Constitution." B. SCHWARTZ & H. WADE, *Legal Control of Government* 291 (1972). Compare S. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 422-24 (2d ed. 1968). Even Justice Jackson's "painfully logical French," R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 46 (1955), have required some interest in the underlying controversy involved in a challenge to governmental action out of the fear that a public action "would . . . be open to abuse and likely to hamper effective public administration." L. BROWN & J. GARNER, *FRENCH ADMINISTRATIVE LAW* 86 (2d ed. 1973). Even the distinction between the standing of the local taxpayer and the lack of standing of the national taxpayer, so long a feature of federal constitutional standing, is drawn in French administrative law. L. BROWN & J. GARNER, *supra*, at 87. Compare *Everson v. Board of Education*, 330 U.S. 1 (1947) with *Massachusetts v. Mellon*, 262 U.S. 447 (1923). But see *Flast v. Cohen*, 392 U.S. 83 (1968).

Nevertheless, the case and controversy requirement has been the set piece for the debate about standing in the United States. Traditionally, the search has been either for an historically valid model of the judicial role drawn from Anglo-American legal history or for an essential definition of the characteristics of a controversy fit for judicial resolution, to assure that judges will stay within the sphere assigned to them in the federal system of divided powers. See generally C. WRIGHT, *LAW OF FEDERAL COURTS* § 12, at 38-41 (3d ed. 1976).

should only be heard when those having a stake in the underlying controversy are complaining. If a reviewing court is like a police officer, then stake in the controversy is irrelevant and whoever complains should be heard.

The traditional legal interest test of standing views the judge's role in reviewing governmental action as the same role the judge performs when he decides any other lawsuit. Judges decide the rights and wrongs of controversies only when a plaintiff points to a prima facie violation of an interest which the law protects.⁶ If prenatal injury is not actionable, then however badly hurt a fetus may be and even though it be born alive, its complaint that the injury was negligently inflicted will not be heard. In a like manner, unless the injury claimed to have resulted from an improper governmental action is an injury to a legally protected interest, the judge has no role to perform. Had the injury been inflicted by a private party it would not be actionable, and the fact that the actor claimed to be clothed with governmental authority would be irrelevant: even if he had no authority, the complaining party has no claim.⁷

The legal interest test views judicial review as a species of tort suit.⁸ Standing consists in the existence of legal injury.⁹ The

6. See Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 633-65 (1971).

7. See Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 432-34 (1974); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1386-87 (1973).

8. See Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 649-50 (1973).

9. Traditional legal interests are staked out in the totality of potential interests of any individual. An interest under this approach is anything that an individual is capable of desiring or wanting. Any conduct by one person has the potential to thwart the desires or wishes of others. If all conflicting desires and wishes must be taken into account by an actor then it becomes impossible for him to project the potential costs of his action. If an actor cannot project the potential costs of actions, he cannot weigh them against potential benefits. This type of situation would tend toward paralysis. To make room for action it becomes necessary to divide out those interests worthy of protection from all others. In this way a core of interest is created which an actor must take into account before he acts. All other interests may safely be ignored. For example, in the absence of privity of contract, an action is generally free to ignore the economic interest of others, unless he intentionally acts to thwart those interests. *Robins Drydock and Repair Co. v. Flint*, 275 U.S. 303, 307 (1927); *Derry v. Peek*, 14 A.C. 337, 353-54 (H.L. 1889). Under this rule, in determining whether or not a proposed course of conduct would be reasonable, an actor need only evaluate the benefits of the conduct against any threat to the physical interests of others that the conduct presents. Economic interests may safely be ignored.

The same necessity for line drawing is present when the government acts. For example, if the state decides to relocate a highway, it needs to know whether it will have to pay only for the property it takes for the new highway or whether it will have to compensate a filling station operator who will lose customers because his filling station is no longer on a main road. If the government cannot project in advance the cost of a project, then a rational decision as to whether or not to undertake the project becomes impossible.

plaintiff is required to demonstrate the existence of an ordinary claim, the invasion of an interest caused by the defendant's action.¹⁰ Once this claim has been established, the underlying question of legality is resolved. The difference from the ordinary tort suit consists in the existence of the presumption of legality. The plaintiff has the burden of proving that the governmental action is

It might be queried, however, whether this ripple effect problem is as severe when a challenge to governmental action is preventive. Since a party seeking an injunction is not seeking compensation, a recognition of his interests would not present the ripple effect problem. This analysis, however, is too facile. Much of the business of government, be it legislative or administrative, is a process of striking a balance between competing interests. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1735 (1975); see Jaffe, *supra* note 6, at 636-37. A legal interest approach defines those interests which a legislative body or administrative agency is required to take into consideration in arriving at a decision. Stewart, *supra*, at 1735-36. Only those whose interests must be considered may complain of the balance struck. See Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. L. REV. 256, 270-71 (1971). So long as these interests are taken into account, and so long as the interest groups are satisfied with the outcome of a decisional process, the decision maker knows that his decision is immune from judicial attack. On the other hand, if the interests that form the basis of an attack on a decision are broader than the interests that the decision maker has to take into account, then stable decision making becomes more difficult. See Stewart, *supra*, at 1735.

Legal interests serve a "relevance function" in the administrative process. They define those interests which the agency must take into account. The recognition of a new interest on appeal amounts to a redefinition of the agency task. Cases like *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965) did not merely recognize new parties as competent to appeal regulatory decisions, but imposed on the relevant agencies new factors which they had to take into account in making a decision. *E.g., id.* at 612-17. If anyone affected by a decision can appeal without regard to the immediacy of effect, then all interests have to be taken into account.

The courts are fond of stating that an agency must consider "all factors bearing on the public interest" in making a decision. See *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961); *Atlantic Refining Co. v. Public Serv. Comm'n of New York*, 360 U.S. 378, 391 (1960). Professor Stewart has suggested that this broad public interest standard, which requires the consideration of all interests, is the twentieth century replacement for God. Stewart, *supra*; at 1683 n.63. It might be more appropriate, however, to say that the standard makes the administrator who must consider all possible factors the modern equivalent of God. For, as Stigler has noted with regard to a similar formulation of the state's role in economic planning, it might easily be rewritten as, "Almighty Jehovah would be able to put all the alternatives into his economic accounting." G. STIGLER, *THE CITIZEN AND THE STATE* 113 (1975). No one really believes that any decision maker can consider all factors which bear on a decision. Concepts of relevance need to be developed in order to confine decisions within manageable proportions. "Evidence which might even be highly relevant in a protracted academic investigation is treated as too remote from the issues in a forensic inquiry because the body which has to come to the conclusion is controlled by the time factor. . . . R. CROSS, *EVIDENCE* 17 (3d ed. 1967).

If all interests must be balanced, then the regulatory process will have to await the time when the "Almighty Jehovah" becomes one of its participants before it can effectively perform its charge.

10. Albert, *supra* note 7, at 433-34 n.32.

unlawful.¹¹ Hence, those matters which would be the matters of defense in the ordinary tort suit become the merits of the suit for review.

The legal interest approach does not deny that each citizen has an interest in the regularity of the governmental process nor does it deny that the maintenance of such regularity is important to that process.¹² However, the judicial function in the preservation of the regime of legality is limited to the vindication of the citizen's interest to the extent that an invasion causes him judicially cognizable harm.¹³ Where the injury to protected interest is absent, the party desiring to preserve legality is remitted to his remedies within the political process.¹⁴

Standing is a logical outcome of the traditional model of the judicial process. This traditional approach saw litigation as a bipolar conflict between a party claiming to have been injured and the party alleged to have injured him.¹⁵ If the injury had occurred and the interest invaded was a legal interest, the plaintiff prevailed. If there was no injury or the interest was one which the law did not protect, there was no remedy. The model led directly to a legal interest test of standing.¹⁶ A suit challenging the action of the government was like any other lawsuit.¹⁷ A plaintiff could challenge governmental action if he could show that the action of a government official had caused him a harm of the type which the law would remedy.¹⁸

The traditional concept of adjudication fitted into the dominant political tradition in the United States in the late Nineteenth and early Twentieth Century. With the demise of mercantilism, which had been the economic philosophy of the founders of the Constitution, came the rise of laissez-faire, the dominant American economic theory through most of the Nineteenth and the early

11. See *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *Elm Creek State Bank v. Department of Banking*, 191 Neb. 584, 589, 216 N.W.2d 883, 886 (1974).

12. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian of Ideological Plaintiff*, 116 U. PENN. L. REV. 1033, 1034-35 (1968).

13. See Green, *Stone v. Powell: the Hermeneutics of the Burger Court*, 10 CREIGHTON L. REV. 655, 659-60 n.20 (1977).

14. Jaffe, *supra* note 12, at 1036.

15. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976).

16. See Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 938, 948 (1975).

17. Chayes, *supra* note 15, at 1285; Monaghan, *supra* note 7, at 1366-68.

18. Albert, *supra* note 7, at 432-34.

Twentieth Century.¹⁹ This theory saw the free decisions of atomized individuals as the central dynamic of progress. The state was assigned only a limited role.²⁰ The laissez faire model directly supported the traditional theory of litigation. Litigation was undertaken by an individual in pursuit of his personal interest. He had total control of the process. The governmental function was essentially the passive function of a referee.²¹ When the laissez faire model of politics is combined with the traditional model of adjudication, the combination inevitably leads to a legal interest approach to standing of active government.²²

The traditional model is consistent with a laissez faire philosophy. However, it is not consistent with a system in which the government has become an active participant in economic affairs and an affirmative creator of valuable new interests.²³ Nevertheless, at least at the federal level, the legal interest theory survived well into the age of active government and was endorsed by many enthusiastic supporters.²⁴

A large part of the responsibility for the continuity of the legal interest test can probably be laid at the door of a formalistic conception of the judicial process: the view that the business of courts is the protection of legally protected private interest.²⁵ The coming of the activist government had been delayed by judicial activity. The supporters of the activist government came to view that judicial interference as inappropriate. The courts were not popularly elected. Their thwarting of the will of the political process was essentially undemocratic. Such an undemocratic action may have been a necessity of constitutionalism, but its incidents had to be limited. The judiciary was best limited by confining judges to a very narrowly defined judicial function in public litigation. Standing and its allied doctrines of justiciability performed this function.²⁶ This approach limited the occasions on which judges acted

19. R. GABRIEL, *THE COURSE OF AMERICAN DEMOCRATIC THOUGHT* 154-55, 163, 167-69 (2d ed. 1956).

20. S. FINE, *LAISSEZ FAIRE AND THE GENERAL WELFARE* 3-4 (1964).

21. Chayes, *supra* note 15, at 1288; Verkuil, *The Emerging Concept of Administrative Due Process*, 78 COLUM. L. REV. 258, 264-65 (1978); *see*, Verkuil, *The Ombudsmen and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 851 (1976). Compare Rosenberg, *Contemporary Litigation in the United States*, in *LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED*, 180-81 (H. Jones ed. 1977).

22. Stewart, *supra* note 9, at 1724.

23. *See* Verkuil, *The Ombudsmen and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 853-55 (1978).

24. *See, e.g.*, *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 20-21 (1942) (Douglas, J., dissenting).

25. Stewart, *supra* note 9, at 1724.

26. *See, e.g.*, *Dennis v. United States*, 341 U.S. 949, 525 (1951) (Frankfurter, J.,

to appropriate cases and simultaneously minimized the possibility of interference by limiting the number of occasions on which judges could intervene.²⁷

The undemocratic character of judicial review served as a justification for a legal interest test in connection with constitutional litigation. It does not explain the continuity of the legal interest test in the administrative law area. That continuity revolves around the notion of expertise. The formulators of modern administrative law placed great reliance upon the development of a cadre of specialists who would manage the administrative process.²⁸ The principal control on the performance of these experts was to be a combination of that professionalism which flows from the possession of expert knowledge, together with informed public scrutiny and the formulation of large scale policy issues through the political process.²⁹ This twin process of broad scale political decision making and technical problem solving was likely to be thwarted by excessive judicial interference.³⁰ Only when the legislative branch had expressed the judgment that judicial review was to be regarded as an ordinary part of the total administrative process was it permissible to depart from the narrow legal interest test of standing and take a broader approach.³¹

As already noted, a legal interest test of standing becomes increasingly difficult to maintain as the government becomes a creator of values, a creator of the new property. The initial breach in the legal interest wall occurs with the recognition of the ability of legislative bodies to create new legal rights. The common law recognized no interest of third parties in the life of another. This was changed by the Fatal Accident's Act, commonly known as Lord Campbell's Act, which created an action for wrongful death in England in 1846. Now those within the statutory protection have a legal right in the life of a decedent which they may vindicate in a lawsuit. Similarly, regulatory legislation can create such legal in-

concurring). Compare A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 175-76 (1970).

27. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 115-17 (1976); Scott, *supra* note 8, at 684-85.

28. J. FREEDMAN, *CRISES AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 44-45 (1979).

29. *Id.* at 46.

30. Stewart, *supra* note 9, at 1725-26 nn.281 & 284. The classic example of this attitude is *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), where the Supreme Court was "[h]aunted by a past of judicial arrogance, beguiled by the promise of administrative action. . . ." L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 344 (1965). Compare S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 28 (1979).

31. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940).

terests. Where it does so standing to sue is compatible with the legal interest test.³²

The growth of governmental activity has made the yardstick of common law liberty and property rights an inadequate measure of the private interests entitled to seek judicial intervention against asserted administrative illegality. The perceived need to protect new classes of private interest—particularly those in advantageous relationships with the government—has produced a responsive expansion of standing rights.³³

As it is proved difficult in connection with due process cases to maintain any distinction between rights and privileges, so also in the standing area it is difficult to maintain any distinction between a requirement that an agency taken an interest into consideration, which amounts to the creation of a right, and a requirement that an agency consider an interest, which does not raise that interest to the dignity of a right.³⁴ Hence, the statutorially protected interest rationale has expanded to include all interests which an administrator is required to take into account in making a decision.³⁵ As the function of administrative agencies, and particularly planning agencies, comes increasingly to be viewed as the function of balancing "all factors bearing on the public interest,"³⁶ then the distinction between intended beneficiaries and unintended beneficiaries of regulatory legislation begins to collapse.³⁷

Once the distinction between intended and incidental beneficiaries of legislative protection dissolves, injury in fact becomes the test of standing.³⁸ The arguments for an injury approach have been twofold. On the one hand the defenders of the injury approach have seen it as an accurate application of the traditional legal model. When a party is injured by another he has a right to

32. The Chicago Junction Case, 264 U.S. 258, 267-68 (1924); L. JAFFE, *supra* note 30, at 507-10; Albert, *supra* note 7, at 429-32; Scott, *supra* note 8, at 651-52.

33. Stewart, *supra* note 9, at 1725.

34. S. BREYERS & R. STEWART, *supra* note 29, at 922; Stewart, *supra* note 9, at 1717 n.235, 1735; see Albert, *supra* note 7, at 463-64; Monaghan, *supra* note 7, at 1380-81. On the right to hearing developments see L. TRIBE, *supra* note 5, § 10-8 at 506-14. Compare Van Alstyne, *The Demise of the Rights-Privileges Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1451-54 (1968).

35. See Hadin v. Kentucky Util. Co., 390 U.S. 1, 5-7 (1968); Stewart, *supra* note 9, at 1726-28.

36. Atlantic Refining Co. v. Pub. Serv. Comm'n of N.Y., 360 U.S. 378, 391 (1959).

37. Dugan, *supra* note 9, at 273-74.

38. Presumably this is what has happened to the zone element of the two-tiered test of Association of Data Processing Organizations, Inc. v. Camp, 397 U.S. 150, 153-54 (1970) given the Court's unwillingness to engage in close analysis of legislative purpose. Scott, *supra* note 8, at 665-66. Cf. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72-74 (1977) (demise of the nexus test).

come to court and ask the court to decide whether or not the injury was lawfully inflicted.³⁹ The existence of injury determines the existence of a case the courts should decide. To inject into the injury element the question of whether or not the interest was protected is to conflate the question of whether or not the court should decide the case with the question of how the case should be decided. Such circularity is unwarranted.⁴⁰

The second thread of the defense of an injury approach has been the belief that government has been inadequately attentive to the impact of its action and the corresponding belief that those affected should be heard in court before the impact becomes final.⁴¹ The judiciary increasingly views its function as requiring justification of the impact made by those with the power to affect others, rather than trusting them to use their power reasonably.⁴²

The notion that an interested plaintiff is essential to a true lawsuit has not gone unchallenged. An alternative model of the judicial process has been developed by a judicious combination of historical arguments, analogies to state practice, and reference to changes in the character of litigation generally. An action by a public plaintiff is a fully justified example of the kind of cases judges are supposed to handle within this alternative process.

The first prong of the attack on the traditional interest model of litigation is a historic one. If the test of the appropriateness of a judicial function is that it be a function traditionally performed by judges, then there is a considerable amount of English legal history which suggests that judges have traditionally entertained public interest litigation. At the time when the Constitution was formulated, the English courts were willing to entertain both certiorari and prohibition actions though they were brought by a party without any stake in the underlying controversy.⁴³ The English practice did not require an interest as a precondition to actions recognized as public.⁴⁴ Similarly, suits brought by strangers to the underlying controversy were entertained in mandamus.⁴⁵ While

39. L. TRIBE, *supra* note 5, § 3-27 at 111. See also K. DAVIS, ADMINISTRATIVE LAW TEXT § 22.07, at 432-34 (3d ed. 1972).

40. Ass'n of Data Processing Serv. Organization, Inc. v. Camp, 397 U.S. 150, 153 (1970).

41. Stewart, *supra* note 9, at 1728.

42. J. FREEDMAN, *supra* note 28, at 54-55.

43. Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 819-20 (1969). This continues to be the English practice. B. SCHWARTZ & H. WADE, *supra* note 5, at 293.

44. Berger, *supra* note 43, at 829.

45. Berger, *supra* note 42, at 824-26. The subsequent development of mandamus in England has been more restrictive. In these actions a special interest in the controversy is now required, B. SCHWARTZ & H. WADE, *supra* note 5, at 294.

mandamus actions were subsequently narrowed, injunction and declaratory judgment actions in England were held to require some interest. The writ of certiorari has remained a "public interest remedy" which a stranger to the underlying controversy may seek.⁴⁶ Thus both the historic and the current English practice demonstrate that judges operating within the common-law tradition have entertained and continue to entertain what are essentially public interest actions. These actions then cannot be regarded as outside a common-law model of the judicial role.

Although the federal courts lost contact with the public action,⁴⁷ many of the state courts never did so. Beginning with *People v. Collins*,⁴⁸ many state courts began to entertain mandamus actions brought by strangers to the underlying controversy where the duty was regarded as a duty owed to the public generally.⁴⁹ Similarly, the taxpayer's action to enjoin unlawful expenditures of public funds has been a regular feature of state constitutional and administrative law.⁵⁰ While the taxpayer's personal interest in the pocketbook effects of taxation and spending might analogize the taxpayer's action to an ordinary interest action, it is arguable that given the infinitesimal interest which the taxpayer may have, the taxpayer's action has been essentially a public interest lawsuit designed to keep governmental officials within the ambit of their granted authority.⁵¹

The citizen's action in the state, be it the taxpayer's action or the mandamus action, again illustrate judges working within the

46. B. SCHWARTZ & H. WADE, *supra* note 5, at 293-96.

47. In discussing the law of standing, the federal courts have largely hidden this history from themselves. In *Degge v. Hitchcock*, 299 U.S. 162, 165-69 (1913), "the Supreme Court tore up certiorari by its historical roots and tossed it out of the system." L. JAFFE, *supra* note 30, at 328. In so doing, the Supreme Court lost contact with what has been the central public interest remedy in the common law system. *Id.*; B. SCHWARTZ & H. WADE, *supra* note 5, at 296. With the rejection of certiorari came a "consequent shift from public law to private law concepts," which brought about the emphasis on interest as an element of standing in what were essentially public law cases. *Id. Compare id.* at 220. Similar comments might be made with regard to mandamus. Mandamus, as we shall see, has remained a public action in many American states, despite contrary developments in England. However, the federal courts largely lost contact with the mandamus action because of the decisions in *McInire v. Wood*, 11 U.S. (3 Cranch) 503, 504 (1813) and *Kendall v United States ex rel. Stokes*, 37 U.S. (12 Pet.) 522, 541 (1838), which limited the mandamus jurisdiction of the federal courts to those of District of Columbia. *Compare L. JAFFE, supra* note 30, at 328. *But see* 28 U.S.C. 1361 (1976), which now provides all district courts with mandamus jurisdiction.

48. 19 Wend. 56 (N.Y. 1837).

49. L. JAFFE, *supra* note 30, at 456-69.

50. Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 898-904 (1960).

51. *Id.* at 902-05.

common-law tradition and yet comfortably entertaining what are essentially citizens' suits to vindicate the public interest. Again, as with the English history, it is hard to argue that judges do not entertain public interest suits by noninterested plaintiffs when in fact the state courts have regularly done so over a long period of time.

If history points toward an acceptable role for the public plaintiff, recent developments in the ordinary process of litigation lend additional support to such a development. The traditional model of the judicial process begins to break down as new developments such as the broad class action or the suit for a structural injunction are recognized as appropriate to the judicial process.⁵² In this new model of the civil process, "the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy."⁵³ The interest of the plaintiff ceases to be an important factor in the determination of whether or not to entertain a case, since the monitoring function of the courts makes it more important that the cases come to court than that they be brought by someone who has an interest.⁵⁴ Within this new model of the public action, the citizen's suit over political questions would be totally appropriate.⁵⁵

The second model of the judicial role, the public plaintiff model, sees the judge as a monitor charged with the task of assuring the legality of governmental action. The government has no special powers that the private citizen does not have, unless those powers have been granted either by the Constitution or by statute. Whenever the government acts, the question arises as to its warrant for action.⁵⁶ Unless there is an authority which may demand to see the warrant, the government becomes a law unto itself.⁵⁷ Limitations on power are reduced from mandates of law to hortatory subjunctives. The place where government must display its warrant for action is in the courtroom.⁵⁸ If limitations on power are not to be transgressed, then they must be enforceable. The en-

52. Scott, *supra* note 16, at 938-40; see Chayes, *supra* note 15, at 1304; Monaghan, *supra* note 7, at 1382-83. The traditional litigant control of the trial process, which was the hallmark of the adversary system, is also in decline. Rosenberg, *supra* note 21, at 181-83.

53. Chayes, *supra* note 15, at 1302.

54. Scott, *supra* note 16, at 948-49.

55. Monaghan, *supra* note 7, at 1368-71.

56. J. LUCAS, *THE PRINCIPLES OF POLITICS* 118-21 (1966).

57. See J. LUCAS, *supra* note 56, at 208-09; B. SCHWARTZ & H. WADE, *supra* note 5, at 291.

58. See also Berger, *supra* note 43, at 828-29.

forcement of these limitations is the judicial function.⁵⁹

The second approach needs no law of standing. Since the courts are not self-starting, they need informers to call their attentions to apparent governmental excesses. However, the only requirement for a good informer is that he be reliable.

If we compare the two polar models, the legal interest model and the citizen plaintiff model of the litigation process, it can be seen that each is a response to a different fear of excess and that each formulates its limitations on the judicial process in terms of that fear. The great fear which underlay the legal interest approach was the fear of excessive judicial involvement in political decision making. The answer to that fear was to impose limitation on judicial action. The standing rule served as an appropriate limitation both because it limited the types of cases that the courts could reach and the number of cases, therefore, both restricting courts to appropriate cases and limiting the opportunities for inappropriate interference. The great fear of the citizen plaintiff model is the fear of excess by government, namely abuse of authority. Its response is to remove as many limitations as possible on the judicial power to the end that all of those abuses capable of being uprooted by judges will be uprooted. In other words, in the legal interest view we begin with a Pelagianism of the political process and an Augustinianism toward the judiciary.⁶⁰ With the citizen plaintiff approach we come to expect much from judges and see our political processes as flawed.⁶¹

STANDING IN NEBRASKA

THE TAXPAYER

Two alternative theories have underpinned the allowance of taxpayers' actions. On the one hand, the taxpayers' action may be regarded as a public action brought without regard to any personal interest which the plaintiff has in the litigation. The taxpayer status confers a capacity to sue analogous to that of a private attorney general, and injury is not essential for the action.⁶² The alternative approach seeks to preserve injury as the essential element of justiciability. The taxpayer's action is justified as a pocketbook ac-

59. Monaghan, *supra* note 7, at 1370-71; B. SCHWARTZ & H. WADE, *supra* note 5, at 291.

60. L. TRIBE, *supra* note 5, § 3-6 at 49-51.

61. As Scott remarks with regard to Justice Douglas's description of the judicial role in *Flast v. Cohen*, 392 U.S. 83, 111 (1968), "[so] generous an appreciation of the judicial role is not universally shared . . ." Scott, *supra* note 16, at 689.

62. Jaffe, *supra* note 12, at 1033-36; Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 903-05 (1960).

tion.⁶³ The taxpayer is injured by the threatened burden of future taxation. The burden, of course, may be small to the point of being infinitesimal, but small damages do not bar the justification of a legal right, so long as the right has been invaded.⁶⁴ Under the injury approach the taxpayer's action would be limited to those instances in which pocketbook injury can be found.⁶⁵

In *Woodruff v. Welton*,⁶⁶ the supreme court adopted a public plaintiff approach to the taxpayer's action.⁶⁷ Lancaster County had failed to comply with a public bid statute. The taxpayer sought an injunction against performance of the contract entered into without competitive bidding. The plaintiff's standing as a taxpayer was challenged. The court, however, rejected that challenge, noting that "in this jurisdiction the law has long been settled beyond debate that a resident taxpayer, as such, and without proof of peculiar interest or injury to himself, may enjoin the illegal expen-

63. Stewart, *supra* note 9, at 1739-40 n.342.

64. K. DAVIS, *supra* note 39, § 22.07 at 429-30.

65. Nebraska has recognized an action by a state taxpayer. *Haynes v. Anderson*, 163 Neb. 50, 54, 77 N.W.2d 674, 677-78 (1956); *Rein v. Johnson*, 149 Neb. 67, 70, 30 N.W.2d 548, 552 (1947); *Fisher v. Marsh*, 113 Neb. 153, 159, 202 N.W. 422, 424 (1925). The local taxpayer's action has also been recognized against counties, cities, and school districts. *Interstate Power Co. v. City of Ainsworth*, 125 Neb. 419, 420, 250 N.W. 649, 649 (1933) (cities); *Ruwe v. School Dist. No. 85*, 120 Neb. 668, 671, 234 N.W. 789, 790 (1931) (school districts); *Follmer v. Nuckolls County*, 6 Neb. 204, 213 (1877) (counties).

In *Cosentino v. Carver-Greenfield Corp.*, 433 F.2d 1274 (8th Cir. 1970), the court summarized the situations in which Nebraska allows a taxpayer suit:

The Nebraska cases allow a taxpayer to sue on behalf of his municipality to recover those funds expended by it in violation of municipal ordinances or state statutes which prohibit a city official from having a personal financial interest in contracts with the city . . . or where the particular contractual obligation was outside the city's power. . . .

Id. at 1276.

The conflict of interest cases are exemplified by *Heese v. Wenke*, 161 Neb. 311, 73 N.W.2d 223 (1955). The illegal expenditure cases include cases where statutory formalities such as competitive bidding, *Follmer v. Nuckolls County*, 6 Neb. at 204-05, and vote of the people, *Tukey v. City of Omaha*, 54 Neb. 370, 373, 74 N.W. 613, 614 (1898) have not been complied with, or in which an expenditure is for an unauthorized purpose, *Darnell v. City of Broken Bow*, 139 Neb. 844, 846-47, 299 N.W. 274, 278 (1941), or the statute authorizing the expenditure is alleged to be unconstitutional, *Rein v. Johnson*, 149 Neb. 67, 81-82, 30 N.W.2d 548, 557-58 (1947). With regard to both illegal and unconstitutional expenditures, the question arises whether the illegality must be a transgression of a limitation on spending power or whether a collateral illegality may be attacked. In *Midwest Employers Council, Inc. v. City of Omaha*, 177 Neb. 877, 131 N.W.2d 609 (1964), the court allowed a taxpayer's challenge to a fair employment practices ordinance as beyond the authority of a city on the grounds that funds were being spent in the enforcement program. *Id.* at 882, 131 N.W.2d at 613. On the other hand, the nexus test announced in *Ritums v. Howell*, 190 Neb. 503, 507, 209 N.W.2d 160, 163-64 (1973) could be read as requiring that the limitation transgressed be a direct limitation on the power to spend.

66. 70 Neb. 665, 97 N.W. 1037 (1904).

67. *Id.* at 668, 97 N.W. at 1038.

diture of money by a public board or officer."⁶⁸ In explaining the basis for the decisions which had recognized the taxpayer's suit, the court held that the taxpayer's action is "in the nature of a public proceeding to test the validity of the corporate acts sought to be impeached, and deal with and control it accordingly."⁶⁹ It went on to add "it is evident that if, in such cases as the present, a taxpayer cannot intervene, no one else can except one who is a participant in the illegal proceedings, and who, according to the defendant's first contention, will be estopped from so doing."⁷⁰

The defendant also argued that there was no evidence that there would have been a lower bid. In rejecting this argument the court stated that, "[s]o to hold would be practically to repeal the statute. No one can say what would have happened if something which did not occur had taken place."⁷¹ On ordinary causation principles, the defendant's contention was unsound. Since the statute proceeds on the assumption that competitive bidding is more likely to draw forth a lower price than direct contracting, to deprive the community of the benefit of competitive bidding increases the likelihood that a price higher than necessary will be paid. This increase in likelihood of harm is an adequate demonstration of causation, unless it is shown that no lower bid was possible.⁷² However, rather than handling the question solely as a causation question, the court emphasized the necessity for a mechanism to enforce the public bidding requirement and rejected the causation argument on that basis.

The theory of *Woodruff v. Welton* that a public action by a public plaintiff to confine government within constitutional or statutory limits is permissible without regard to injury finds additional support in the case of *State v. City of Kearney*.⁷³ In that case, the supreme court recognized the existence of a public mandamus action in which it would not be necessary for the relator to show that he had any legal or special interest in the outcome, "it being sufficient to show that he is a citizen, and as such interested in the execution of the laws [of the state]."⁷⁴ In recognizing the existence of such a public or citizen's mandamus action, the court cited and adopted language from a leading American case recognizing

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. See generally Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 681-84 (1977).

73. 25 Neb. 262, 41 N.W. 175 (1888).

74. *Id.* at 266, 41 N.W. at 176.

such an action.⁷⁵ It distinguished the citizen's mandamus cases from cases in which interest had to be shown on the basis that:

The distinction between the cases where a private person may act as relator to enforce a public duty, and where to maintain the action he must show an interest, is not very clearly drawn in the cases. The dividing line, however, appears to be, that where private or corporate rights are affected, then the relator must show an interest, while if the state is the real party and the relator the mere informer, to procure the enforcement of a mere public duty, then a private individual may become the relator.⁷⁶

While *Woodruff v. Welton* viewed the taxpayer's action as an action by a public plaintiff to vindicate a public right, that approach was inconsistent with the line that the Nebraska Supreme Court had already begun to draw between taxpayer's actions and other actions. As early as *Kittle v. Fremont*,⁷⁷ the court had rejected a suit by a resident freeholder of the City of Fremont seeking to enjoin a claimed unlawful abandonment of park land.⁷⁸ The plaintiffs in that case had presented "themselves before the court in the character of volunteer champions of the public interest, . . ."⁷⁹ However, the supreme court held that there was no place for such a defender of the public interest. In the absence of a showing of special injury to himself, the plaintiff was unable to "maintain his standing in court . . ."⁸⁰

The rejection of a general public action to test the legality of official action, enunciated in *Kittle v. Fremont*, continued in later cases. For example, *Clark v. Interstate Independent Telephone Co.*,⁸¹ involved a challenge to the legality of a grant of a franchise to operate the telephone company in the City of South Omaha.⁸² The grant of the franchise involved no expenditure of public funds and threatened no adverse impact on tax rates. In those circumstances, the court held that the taxpayer had no standing to sue. Where an unlawful increase in the burden of taxation or an unauthorized and unlawful expenditure are challenged, the taxpayer has standing. Where these elements are not present, his status as taxpayer confers no standing and he must show special injury.⁸³

75. *Id.* at 266, 41 N.W. at 177.

76. *Id.* at 266-67, 41 N.W. at 177.

77. 1 Neb. 329 (1871).

78. *Id.* at 337.

79. *Id.*

80. *Id.*

81. 72 Neb. 883, 101 N.W. 977 (1904).

82. *Id.*

83. *Id.* at 885-86, 101 N.W. at 978.

This approach to standing was reiterated by the court in *Chizek v. City of Omaha*.⁸⁴ In *Chizek*, the decision in *Tukey v. City of Omaha*⁸⁵ was pressed on the court as authority for the recognition of a taxpayer's right to challenge unlawful governmental action. However, the court noted that: "[in *Tukey*] 'an illegal disposition of the public money, or the illegal creation of a debt which must be paid by taxation,' was threatened and would occur if not enjoined. The evidence in the instant case affirmatively negatives both of the conditions quoted."⁸⁶

Tukey had articulated an alternative theory to the public action theory of taxpayer standing.⁸⁷ The *Tukey* court undertook to explain its prior recognition of the taxpayer's action: It adopted the theory that the taxpayer was analogous to a stockholder in a private corporation, and like the stockholder had the right to seek the aid of a court of equity where the governing body threatened to make an illegal expenditure of funds or to create an unlawful debt.⁸⁸ Under this approach, the taxpayer was seen as having

84. 126 Neb. 333, 338-39, 253 N.W. 441, 443-44 (1934).

85. 54 Neb. 370, 74 N.W. 613 (1898).

86. 126 Neb. at 339, 253 N.W. at 444.

87. 54 Neb. at 378, 74 N.W. at 615.

88. *Id.* The Nebraska Supreme Court has said that the taxpayer may sue to prevent illegal expenditures. Two separate situations could be encompassed by the phrase "illegal." In the first situation, the action is either beyond the power of the official acting or statutory formalities are not complied with; thus the action is void and subject to collateral attack. In the second situation, the action is within his power but the official abuses his discretion in the exercise of his power; thus the official's action is not void, but only voidable. It is, therefore, not subject to collateral attack. *See, e.g., Lindgren v. School District of Bridgeport*, 170 Neb. 279, 286-87, 102 N.W.2d 599, 606 (1960). It is only when the first type of illegality (void action subject to collateral attack) is involved that the taxpayer's suit is allowed. *Follmer v. Board of County Comm'rs*, 6 Neb. 204, 213 (1877).

There are some cases that arguably review an exercise of spending discretion on the grounds that equity may act to prevent a waste of public funds. In *Philson v. City of Omaha*, 167 Neb. 360, 93 N.W.2d 13 (1958), a decision by the supreme court under the public bid provision of the Omaha City Charter, the court held that a city ordinance setting a minimum wage to be paid by all public contractors was inconsistent with the Charter provision that public contracts go to the lowest responsible bidder. *Id.* at 364-65, 93 N.W.2d at 16. The case enunciates no broad policy not found in the Charter of the City of Omaha, and it asserts no judicial power beyond that to determine whether or not ordinances are consistent with provisions of a charter granting legislative power to a city council. *Id.* at 362-63, 93 N.W.2d at 15.

Wright v. Huctor, 95 Neb. 342, 145 N.W. 704, (1914), involved a constitutional challenge to an ordinance of the City of South Omaha requiring union labor on certain public construction contracts. *Id.* at 344, 145 N.W. at 705. The ordinance was declared unconstitutional primarily because it unreasonably discriminated against nonunion labor. *Id.* at 349, 145 N.W. at 707. The court noted that the ordinance required the city to pay more than the going rate for labor, and, therefore, made public works projects more costly. *Id.* The vice of the greater expense was held to be a taking of the taxpayer's property without due process, since the taxpayer would "be compelled to pay a higher rate because only union labor can be employed by the

“such an individual and common interest in public funds as to entitle him to maintain an action to prevent their unauthorized appropriation.”⁸⁹

In Nebraska the taxpayer's action is a “pocketbook action.”⁹⁰ Pecuniary injury in the status of taxpayer is a prerequisite of such a suit.⁹¹ A taxpayer is injured when he has to pay a tax. He is out of pocket the tax dollars. When he challenges a spending program supported by his taxes there is a chance, although the chance might be slight, that “a successful suit against such a program can result in some decrease in the litigant's taxes.”⁹² However, when the taxpayer cannot demonstrate a pocketbook impact, his status as a taxpayer involves nothing more than his “generalized ideological interest,” which is insufficient to confer standing.⁹³

The rejection of a taxpayer's action where pocketbook injury is not involved demonstrates that in Nebraska injury has been regarded as an essential ingredient of standing to sue. Additional support for a requirement of injury can be found in the court's treatment of ripeness issues in connection with challenges to constitutionality. Since equity can act before injury has occurred, if injury is a prerequisite to suit a test for the nearness of injury as a justification for equitable action is required. In cases dealing with ripeness issues, the Nebraska court has first emphasized that only one injured by an unconstitutional statute may complain of the unconstitutionality.⁹⁴ It has then gone on to dismiss cases where the immediacy of injury was not apparent.⁹⁵

The requisite of injury is also demonstrated by the supreme court's recent decision in *Stahmer v. Marsh*.⁹⁶ That case dealt with a challenge to the constitutionality of the statutes governing class I

contractor.” *Id.* at 354-55, 93 N.W.2d at 709. The constitutional argument is apparently part of a broader holding that such a statute violates the public bidding statute. *Id.* It is for this latter proposition that *Wright v. Hoctor* is cited in *Philson v. City of Omaha*, 167 Neb. 360, 364, 93 N.W.2d 13, 16 (1958).

89. *Clark v. Interstate Independent Tel. Co.*, 72 Neb. 883, 885-86, 101 N.W. 977, 978 (1904).

90. *See Doremus v. Board of Education*, 342 U.S. 429, 434 (1952), where the Supreme Court analyzed a New Jersey statute and disallowed a taxpayer action due to want of a pecuniary injury.

91. *See generally* *Holland v. Brownsville Grain Co.*, 174 Neb. 742, 746-47, 119 N.W.2d 304, 307 (1963); *see also* *Clark v. Interstate Independent Tel. Co.*, 72 Neb. 883, 886, 101 N.W. 977, 978 (1904).

92. L. TRIBE, *supra* note 5, § 3-19 at 84.

93. *Id.*

94. *Metropolitan Util. Dist. v. Merritt Beach Co.*, 179 Neb. 783, 793, 140 N.W.2d 626, 633 (1966); *State v. Butler*, 145 Neb. 638, 651, 17 N.W.2d 683, 691-92 (1945).

95. *Evans v. Metropolitan Util. Dist.*, 184 Neb. 172, 174-75, 166 N.W.2d 411, 413-14 (1969); *State v. Butler*, 145 Neb. 638, 651-52, 17 N.W.2d 683, 691-92 (1945).

96. 202 Neb. 281, 284-85, 275 N.W.2d 64, 66-67 (1979).

school districts.⁹⁷ These districts are districts which do not maintain a high school.⁹⁸ The other Nebraska school district classes are defined in terms of population, they run from the class II districts with a population of 1,000 or less, to the class V district having a population of more than 200,000.⁹⁹ All school districts other than class I districts maintain a high school. The *Stahmer* suit was brought by certain residents within the School District of Omaha, the only class V district in the state. They brought the suit as residents and taxpayers of the School District of Omaha on behalf of all similarly situated persons. Their claim was that residents and taxpayers of class V districts were victims of discrimination in that the statutes governing the class V districts were less favorable to such residents and taxpayers than were the statutes governing class I districts. However, the plaintiffs did not seek a declaration of the unconstitutionality of the statutes governing the class V districts. Rather, they sought a declaration that the statutes governing the class I districts were unconstitutional.

An injury test of standing is rendered vacuous unless the additional requirement is imposed that the injury be caused by the governmental action which is the subject of the complaint.¹⁰⁰ If the governmental action caused the injury, then a remedy aimed at the government should redress the injury. Therefore, implicit in the causation requirement is a requirement that the injury complained of be "likely to be redressed by a favorable decision."¹⁰¹

In the *Stahmer* case, the supreme court adopted this analysis.¹⁰² The district court had sustained a demurrer aimed at the plaintiffs' standing. On appeal, the supreme court affirmed. It held that:

The plaintiffs here have alleged that the taxpayers and residents in Class I districts are treated differently than the taxpayers and residents in other districts, including Class V districts. . . . But . . . the plaintiffs have not demonstrated how they would benefit from a declaration that one or more of the laws applicable to Class I districts is invalid. In short, the pleadings show that they have no standing to bring the suit.¹⁰³ We conclude the demurrers

97. *Id.* at 282, 275 N.W.2d at 65.

98. NEB. REV. STAT. § 79-102(1) (Reissue 1976).

99. NEB. REV. STAT. § 79-102(2)-(5) (Reissue 1976). There are also Class VI districts which maintain only a high school. *Id.* at § (6).

100. *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973); *see, e.g., Ritums v. Howell*, 190 Neb. 503, 506-07, 209 N.W.2d 160, 163-64 (1973). *See generally* *Warth v. Seldin*, 422 U.S. 490, 505-06 (1975).

101. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

102. 202 Neb. at 284, 275 N.W.2d at 66.

103. *Id.* at 285, 275 N.W.2d at 67.

were properly sustained.

THE PRIVATE PLAINTIFF

The first Nebraska case which recognizably deals with problems of standing to sue is *Kittle v. Fremont*.¹⁰⁴ In *Kittle* the plat of a subdivision of the City of Fremont had included certain streets and a park. When the area began to develop, the City of Fremont decided to abandon a portion of the park land and relocate that portion upon other property. In addition, it decided to extend certain of the streets into the former park land and to convey the abandoned park land to other users. The plaintiffs sought an injunction which would have required the city to reestablish the original park boundaries and streets and which would have barred the city from further encumbering the original park grounds.¹⁰⁵ The injunction would have also barred those to whom park lands had already been conveyed from building upon it.¹⁰⁶ The district court dismissed the petition.¹⁰⁷

On appeal, the supreme court determined the case solely on the issue of standing. It noted, "the pretended grievance is one of general interest, and the question we meet at the threshold, to be first determined, is, have they shown such an interest as will enable them to maintain this suit?"¹⁰⁸ The court analogized the closing of streets and the vacation of public parks to a common or public nuisance and then proceeded to apply the ordinary rules of nuisance law to the case.¹⁰⁹ Ordinarily a suit for a public nuisance must be brought by a proper public official on behalf of the people.¹¹⁰ However, where a private plaintiff alleges and proves special injury to himself, he may sue to challenge the public nuisance.¹¹¹ Since the abandonment of the streets or park lands, if illegal, would constitute a public nuisance, the same rules apply. Hence, the private plaintiff had to show special injury before he had standing to sue.¹¹² The court explained its holding as follows:

The plaintiffs are simply resident freeholders of the town of Fremont. They have no real estate bordering upon the park, or upon either of the streets affected by this change. They have sustained no special damage by reason

104. 1 Neb. 329 (1871).

105. *Id.* at 336.

106. *Id.*

107. *Id.* at 329, 337-38.

108. *Id.* at 336.

109. *Id.* at 337.

110. *Id.* at 336-37.

111. *Id.* at 337.

112. *Id.*

thereof, and a very large majority of the inhabitants are benefitted thereby. They present themselves before the court in the character of volunteer champions of the public interests, and in its behalf challenge the officers of the town to meet them in the courts of justice to defend their official acts, which appear not only to have been in harmony with the expressed wishes of a large majority of the people, but acquiesced in by all the inhabitants for several years without objection. Under these circumstances we are most clearly of the opinion that the plaintiffs show no interest in the subject of this suit, nor are they in such position as to enable them to maintain this action.¹¹³

The decision in *Kittle* can be read as consistent with the traditional legal interest test of standing. Under this reading a legal interest is required in a suit challenging the legality of governmental action. Since a legal interest is the type of interest that would be recognized in an ordinary tort suit, where the governmental action may be analogized to a public nuisance, the right adequate to such a suit—special injury—is sufficient. However, where the action is not analogous to a public nuisance, then special injury, if it does not amount to an invasion of a legal right, would not be adequate.

Such a reading of *Kittle* finds support in *Clark v. Interstate Independent Telephone Co.*¹¹⁴ *Clark* was a taxpayer's action against the City of South Omaha to enjoin it from granting a franchise to a telephone company.¹¹⁵ The court held that a taxpayers' action is not an appropriate action to challenge the grant of a franchise, since the grant of the franchise neither increases the burden of taxation nor involves an unauthorized appropriation.¹¹⁶ At the conclusion of its discussion of taxpayer's standing, the court added language that looked toward a legal interest test of standing:

[a] private individual suing simply as a taxpayer must show something more than a mere speculative or theoretical wrong, which has resulted or will result from a mere illegal act of a city council, to entitle him to equitable relief. It is not enough that the act alleged against is simply illegal, but it must also appear that the illegal act will result in the invasion or destruction of a distinctive right belonging to the party maintaining the action, or to the body of citizens for whom he sues.¹¹⁷

Another case which might be read as supporting a legal inter-

113. *Id.*

114. 72 Neb. 883, 101 N.W. 977 (1904).

115. *Id.*

116. *Id.* at 885-86, 101 N.W. at 978.

117. *Id.* at 886, 101 N.W. at 978.

est approach is *Day v. City of Beatrice*.¹¹⁸ In *Day* the apparent low bidder on a contract for collection and disposal of garbage in the City of Beatrice challenged the legality of the grant of the contract to one who had made a higher bid.¹¹⁹ The supreme court discussed the issue of standing in two contexts. First, the plaintiff contended that there had been an insufficient appropriation to cover the obligation of the contract as required by statute. The court held that the unsuccessful bidder had no standing to raise this issue. It could only be raised by the successful bidder or a taxpayer.¹²⁰ The apparent basis for the finding of no standing in this context was that there was no nexus between the bidder's status as an unsuccessful bidder and the claimed illegality.

The court also dealt with the issue of standing in connection with the plaintiff's challenge to the city's decision to reject his bid and accept the next bid. The bases for the rejection were that, while the plaintiff was low on some items, the accepted bidder was low on others and that the city had experienced difficulties with the plaintiff's performance of a prior contract.¹²¹

The court first addressed the merits of the plaintiff's complaint, and found that there had been no abuse of discretion by the city in rejecting the bid.¹²² Only after so holding did the court discuss the issue of standing. It then held that the plaintiff lacked standing to sue. Plaintiff was found to have no standing because:

An unsuccessful bidder has no contractual right to enforce. The plaintiff by his bid proposed to contract for certain work, but his bid was not accepted. It was a proposal only that bound neither party, as it was never consummated by a contract. The city acquired no rights against the plaintiff nor he against the city. The injury, if any, resulting from the rejection of his bid fell upon the public and not upon him personally.¹²³

Since the injury fell upon the public, and since it involved a claimed unlawful expenditure of public funds, the appropriate plaintiff would have been a taxpayer of the City of Beatrice.¹²⁴

The language of the *Day* decision strongly suggests a legal interest test. However, other portions of the opinion are inconsistent with that approach. Thus the court concedes that an unsuccessful bidder might be able to challenge the rejection of his bid "where

118. 169 Neb. 858, 101 N.W.2d 481 (1960).

119. *Id.* at 859-60, 101 N.W.2d at 484.

120. *Id.* at 863, 101 N.W.2d at 486.

121. *Id.* at 864-65, 101 N.W.2d at 486-87.

122. *Id.* at 865-66, 101 N.W.2d at 487.

123. *Id.* at 866, 101 N.W.2d at 488.

124. *Id.*

the rejection of it appears to be wholly arbitrary or fraudulent, and against the interests of the public."¹²⁵ The area of challenge left open to the unsuccessful bidder appears to be at least as large as that available to the taxpayer, should he sue to challenge the grant of a contract to a party not the lowest bidder.¹²⁶ If a legal interest is required to challenge the legality of the grant of a contract, it is difficult to see how the unsuccessful bidder acquires a legal interest merely because the action of the city in granting the contract to another is illegal. Even though the acceptance of the other bid may be illegal, it remains the case that the rejected bid was just a proposal that bound neither party. Since "it was never consummated by a contract the city acquired no rights against the plaintiff nor he against the city."¹²⁷ The theory might be that where the rejection was unlawful, and the plaintiff was in fact the low bidder, then the council had no discretion to reject the bid.¹²⁸ Since the council had no discretion, the low bidder had legal power to compel acceptance and hence had a contract. However, this approach seems forced.

A simpler approach to the ambiguity of the *Day* opinion would be to read it as holding that a legal interest is not required. Since the bidder may sue on all of the open issues, it must be the injury resulting from the rejection of the bid which confers the standing.

If *Day* when analyzed appears to support an injury in fact approach to standing, that approach is even more clearly supported by the language of the opinion in *Sullivan v. City of Omaha*.¹²⁹ *Sullivan* was an action to challenge the legality of the annexation of certain land by the City of Omaha. The complaining plaintiff did not live in the area annexed. However, as a result of the fact that the City of Omaha has zoning authority three miles beyond its corporate limits, his land would become subject to the zoning authority of the city, if the annexation was lawful, since it was brought within three miles of the city's border. The city argued that only those within the area annexed had standing to sue.¹³⁰ The supreme court, however, held that the fact that the plaintiff would now be subject to the regulatory powers of the city gave him standing.¹³¹ In so holding the court formulated as its test of standing

125. *Id.*

126. *See* *Best v. City of Omaha*, 138 Neb. 325, 329-33, 293 N.W. 116, 119-20 (1940); *State v. Board of Comm'rs*, 105 Neb. 570, 573-75, 181 N.W. 530, 532-33 (1921).

127. 169 Neb. at 866, 101 N.W.2d at 488.

128. *See* *Marsh v. State*, 2 Neb. (Unof.) 372, —, 96 N.W. 520, 521-22 (1902); *State v. Cornell*, 52 Neb. 25, 36-40, 71 N.W. 961, 964-66 (1897).

129. 183 Neb. 511, 162 N.W.2d 227 (1968).

130. *Id.* at 513, 162 N.W.2d at 229.

131. *Id.* at 513, 162 N.W.2d at 229.

that "where a person has a personal, pecuniary, and legal interest which is adversely affected by an annexation ordinance, he has standing to contest the validity of the ordinance."¹³² While the use of "and" and the phrase "legal interest" would suggest the continuity of a legal interest test, the phrases "personal" and "pecuniary" suggest that the test should be that where a person has a personal, pecuniary, or legal interest, he has standing to contest the validity of action. Under this approach, *Sullivan* would support an injury in fact reading of the Nebraska law of standing.

Reading *Sullivan* as adopting an injury in fact approach, however, is thwarted by the decision in *Feldman v. City of Omaha*¹³³ which was decided less than a year after *Sullivan*. In *Feldman* the City of Omaha abandoned a portion of Capitol Avenue. The plaintiff contested the legality of the abandonment.¹³⁴ His property did not lie along the portion of the street abandoned, but faced Capitol Avenue in the next block. The supreme court, returning to *Kittle v. Fremont* and its progeny, held that a vacation could only be attacked by a property owner who owned land which abutted on the vacated street or one who suffered a special or peculiar damage differing in kind from the general public.¹³⁵ Since *Feldman* still had access to his property, the mere inconvenience of losing the access to the east along Capitol Avenue did not constitute injury different from that being suffered by the public generally. Hence, *Feldman* lacked standing. The loss of access from the east, which at least arguably was injury and would have brought the case within *Sullivan*, was not deemed sufficient.

Feldman returns us to our starting place, *Kittle v. Fremont*.¹³⁶ While *Kittle* can be read consistently with a legal interest approach, there is an alternative reading. Under such an alternative reading, a legal interest is not required for standing, but injury alone is insufficient. Rather, the injury must be shown to be special or peculiar. In other words, this approach would turn the rule governing suit by a private plaintiff for a public nuisance into a generalized standing approach.

Support for such an approach to standing can be found in *In re Nebraska Power Co.*¹³⁷ In that case, the supreme court had to construe the language in the statutes which then applied to the State Railway Commission, which granted standing to appeal to the

132. *Id.*

133. 184 Neb. 226, 166 N.W.2d 421 (1969).

134. *Id.* at 227, 166 N.W.2d at 422.

135. *Id.* at 228, 166 N.W.2d at 423.

136. See notes 104-114 and accompanying text *supra*.

137. 147 Neb. 324, 23 N.W.2d 312 (1946).

supreme court.¹³⁸ An appeal was granted to "persons affected" by the decision.¹³⁹ The court read the phrase "affected" to mean "any person or persons who either have a substantial right, a property right, or a pecuniary right that would be adversely or injuriously affected or some right other than merely a general interest common to all members of the public that would be adversely or injuriously affected, as a result of the order of the commission."¹⁴⁰

While the *Nebraska Power Co.* case involves a statute, the definition it gives of person affected in terms of being "adversely or injuriously affected" engages a phrase which the court has often used to define standing in connection with challenges to the constitutionality of litigation.¹⁴¹ Reading the phrase "adversely affected" as it was defined in the *Nebraska Power Co.* case, would produce a standing test that basically required an injury different from that suffered by the public generally.

The view that the *Nebraska Power Co.* cases states the general Nebraska test of standing finds support in the case dealing with the taxpayer's action. In the second syllabus to *Woodruff v. Welton*,¹⁴² the supreme court had stated that, "[a] resident taxpayer, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer."¹⁴³ This became the regular formulation of the rule governing the standing of a taxpayer.¹⁴⁴ This formulation treats the taxpayer's action as an exception to the otherwise applicable standing requirement of special injury.

The implication that the taxpayer's action, where properly brought, was an exception to a special injury requirement was first drawn in *Kirby v. Omaha Bridge*.¹⁴⁵ That suit was brought by a taxpayer of the City of Omaha seeking to enjoin the issuance of revenue bonds, to be paid out of tolls, for the construction of a bridge across the Missouri River. The plaintiff claimed that such revenue bonds would become a general obligation of the City of Omaha.¹⁴⁶ The district court had dismissed on the merits.¹⁴⁷

138. *Id.* at 326-28, 23 N.W.2d at 314-15.

139. *Id.* at 329, 23 N.W.2d at 315.

140. *Id.*

141. *See, e.g.,* *Stanton v. Mattson*, 175 Neb. 767, 774, 123 N.W.2d 844, 849 (1963).

142. 70 Neb. 665, 97 N.W. 1037 (1904).

143. *Id.*

144. *Martin v. City of Lincoln*, 155 Neb. 845, 850, 53 N.W.2d 923, 926 (1952); *Fisher v. Marsh*, 113 Neb. 153, 159, 202 N.W. 422 (1925); *Wright v. Hochter*, 95 Neb. 342, 352, 145 N.W. 704, 708 (1914).

145. 127 Neb. 382, 255 N.W. 776 (1934).

146. *Id.* at 383, 255 N.W. at 777.

147. *Id.* at 383-84, 255 N.W. at 777.

On appeal, the supreme court held that the only issue that it could address was the issue of whether or not the bonds would constitute a general obligation of the City of Omaha.¹⁴⁸ If they constituted such a general obligation, then the rules applicable to taxpayer's action, whereby a taxpayer could attack an action that would involve an illegal expenditure of public funds or involve an illegal increase in taxation, would have been applicable. However, if such elements were not present, the plaintiff would only have standing if he could "show some special injury peculiar to himself aside from and independent of the general injury to the public" ¹⁴⁹

In formulating the applicable standards for standing in the *Kirby* case, the supreme court cited cases such as *Kittle v. Fremont* and *Clark v. Interstate Independent Telephone Co.*¹⁵⁰ as if they stated a general standing rule, rather than treating them as applications of a special rule applicable where the governmental action complained of could be analogized to a public nuisance. In other words, *Kirby* reads the *Kittle* case as stating the general Nebraska rule on standing, subject to an exception where the requisites of a taxpayer's action are present.

The *Kirby* formulation is reiterated in *Martin v. City of Lincoln*¹⁵¹ in which the supreme court states:

It is an established principle in this jurisdiction that a person seeking equity to restrain an act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation.¹⁵²

In *Martin*, which involved an attack on a municipal contract, the supreme court found that the contract would be a charge against public funds, and, therefore, held that a taxpayer without showing special injury could attack the legality of the contract. However, the *Martin* formulation was repeated in *Holland v. Brownsville Grain Co.*¹⁵³ In that case, the contract being attacked by the taxpayer was a lease of municipal property. Finding that neither unlawful taxation nor expenditure was involved, the court found that the case was not an appropriate one for a taxpayer's

148. *Id.* at 383, 255 N.W. at 777.

149. *Id.*

150. See notes 114-117 and accompanying text *supra*.

151. 155 Neb. 845, 53 N.W.2d 923 (1952).

152. *Id.* at 850, 53 N.W.2d at 926.

153. 174 Neb. 742, 119 N.W.2d 304 (1963).

action. Since the plaintiff had failed to plead "a special injury peculiar to himself," he did not satisfy the requisites for a nontaxpayer's action.¹⁵⁴ Therefore, the case was dismissed.

The special injury requisite for standing is reiterated and applied in the context of a challenge to constitutionality in *Ritums v. Howell*.¹⁵⁵ In that case the supreme court phrased the standing requisite to a challenge to the constitutionality of the statute: "[t]he nexus which a suitor must demonstrate between the operation of a statute and his interest must be direct; that is, he must show an interest in the statute greater than that accruing to every other taxpayer with a desire for good government, however commendable that desire may be."¹⁵⁶

SUMMARY

On the basis of our survey then we may attempt a restatement of the standing rules in Nebraska. In Nebraska, one seeking judicial review of governmental action must allege and prove either that the action invades his legal rights or that the action will inflict upon him an injury different in kind than that suffered by the public generally.¹⁵⁷ A plaintiff does not have standing merely because he asserts "a general interest common to all members of the public that would be adversely or injuriously affected" as a result of governmental action.¹⁵⁸

Taxpayers' suits, where properly brought, are an exception to the requirement of special injury as a prerequisite to standing to sue.¹⁵⁹ Where a taxpayer's suit is properly brought, taxpayers may

154. *Id.* at 747, 119 N.W.2d at 307.

155. 190 Neb. 503, 209 N.W.2d 160 (1973).

156. *Id.* at 506, 209 N.W.2d at 163. Except in situations where the analogy to nuisance was transparent, *see, e.g.*, *Feldman v. City of Omaha*, 184 Neb. 226, 228, 166 N.W.2d 421, 423, (1969), the court has never explained what characteristics make an injury special. However, the thrust of the cases has at least involved an effort to bar the assertion of the mere interest in legality. Whether the requirement that the injury be special means more than this is not clear from the cases. If it does not, then the distinction between a special injury test and a mere injury-in-fact test collapses. That would put the Nebraska cases in line with cases such as *United States v. Richardson*, 418 U.S. 166 (1974) and *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). If the notion of special injury does add anything, it probably is designed to reject the subjective character of an injury test, *see Dugan, supra* note 9, at 261-62, and impose some requirement of separate ability to enjoy the interest the plaintiff claims is being invaded. To that extent the added element would bear an analogy to *Sierra Club v. Morton*, 405 U.S. 727 (1972), with its theory that destruction not viewed is not felt. *See id.* at 740-41.

157. *Holland v. Brownsville Grain Co.*, 174 Neb. 742, 746-47, 119 N.W.2d 304, 307 (1963).

158. *In re Neb. Power Co.*, 147 Neb. 324, 328, 23 N.W.2d 312, 315 (1946).

159. *Rein v. Johnson*, 149 Neb. 67, 70-71, 30 N.W.2d 548, 552 (1947).

sue "without showing any interest or injury peculiar to themselves."¹⁶⁰ However, if a particular case does not come within the ambit of a permissible taxpayer's action, the sole fact that one is a taxpayer confers no standing, and the plaintiff "must show some special injury peculiar to himself aside from and independent of injury to the public"¹⁶¹

A taxpayer's action is properly brought whenever the acts or failures to act complained of would impose pocketbook injury on the taxpayer, that is "an additional financial burden, however slight."¹⁶² That is, a taxpayer may sue to enjoin taxes which he pays and which are unlawful or he may sue to enjoin an unlawful expenditure of funds supported by his tax dollars.¹⁶³

While the cases have treated the taxpayer's action as if it was an exception to the requirement of special injury, it may be questioned whether these cases are in fact that. The special injury requirement is designed to separate plaintiffs who have an interest of their own from plaintiffs whose interests are essentially ideological. The ideological plaintiff asserts only the community interest in a government confined within the lawful limits of its powers. If he prevails, he receives only the benefits that flow from governmental obedience to law, benefits which he shares with the entire community. On the other hand, the nonideological plaintiff benefits in some personal way. While others may share in the benefit, he can separately enjoy his share. When the taxpayer sues because of pocketbook injury, if he prevails, he leaves the litigation with a stable or lower tax bill. While that benefit may be small, it is a benefit different from the benefit received by one who sues only to vindicate the public interest. Hence, if the special injury requirement is designed to bar the citizen's suit, the pocketbook taxpayer's action satisfies the requirement.¹⁶⁴

CAVEATS

There are a number of limitations or caveats which should be made to the summary of Nebraska standing law so far offered. The cases which we have been discussing are the main injunction cases. The scope of injunction has been severely limited where questions of the legality of governmental action is involved. Other remedies have not been integrated into the injunction test of

160. *Id.*

161. *Holland v. Brownsville Grain Co.*, 149 Neb. 742, 746-47, 119 N.W.2d 304, 307 (1963).

162. *Ruwe v. School Dist. No. 85*, 120 Neb. 668, 671, 234 N.W. 789, 790 (1931).

163. *Rein v. Johnson*, 149 Neb. 67, 70, 30 N.W.2d 548, 552 (1947).

164. *Stewart*, *supra* note 9, at 1739-40 n.342.

standing, but rather have developed their own standing tests. It is necessary to discuss both the limitations on the remedy on injunction and the alternative standing tests under other remedies.

Where the decision of a public body to enter into a contract has been challenged either by a taxpayer or a specially interested plaintiff, the supreme court has held that the scope of judicial review is limited to the questions of whether the contract is within the authority of the public body, and whether the public body has complied with statutory preconditions to the exercise of the power.¹⁶⁵ Similarly in cases where the public bid statute has been complied with, but the award to a particular bidder is challenged, the supreme court has indicated that the decision to award the contract to a particular individual, or other discretionary decisions involved in the bid process, are not subject to judicial review.¹⁶⁶ The court has left open the possibility of review where the action was taken for totally improper motives.¹⁶⁷ Review for abuse of discretion, however, has been held to be beyond the judicial competence. As the court noted in *Jones v. Village of Farnam*,¹⁶⁸ "the concern of the court is as to the limits of power, and not the manner or method by which the power is sought to be exercised, if kept within the prescribed limits. Therefore, judicial inquiry is strictly one of power, and not of expediency."¹⁶⁹

Where managerial decisions of governmental bodies are involved, there is a long tradition of withholding judicial review upon claims of abuse of discretion.¹⁷⁰ Despite the current presumption of judicial review at the federal level, there remains a tendency to withhold review for abuse of discretion where complex managerial or business decisions are involved.¹⁷¹ The Nebraska cases such as

165. *Jones v. Village of Farnam*, 174 Neb. 704, 711-13, 119 N.W.2d 157, 162 (1963); *Slepicka v. City of Wilber*, 150 Neb. 376, 381-82, 34 N.W.2d 646, 649 (1948); *Southern Neb. Power Co. v. Village of Deshler*, 130 Neb. 598, 602, 265 N.W. 880, 882 (1936).

166. *Day v. City of Beatrice*, 169 Neb. 858, 864-66, 101 N.W.2d 481, 487 (1960); *Nicklaus v. Miller*, 159 Neb. 301, 306, 66 N.W.2d 824, 827-28 (1954); *Best v. City of Omaha*, 138 Neb. 325, 328, 293 N.W. 116, 118 (1940); *State v. Board of Comm'rs*, 105 Neb. 570, 573-74, 181 N.W. 530, 532 (1921).

167. *Wheelerlaborator Corp. v. Chafee*, 455 F.2d 1306, 1312 (D.C. Cir. 1971); *Nicklaus v. Miller*, 159 Neb. 301, 306, 66 N.W.2d 824, 827-28 (1954).

168. 174 Neb. 704, 119 N.W.2d 162 (1963).

169. *Id.* at 704, 119 N.W.2d at 162.

170. *Panama Canal Co. v. Grace Lines, Inc.*, 356 U.S. 309, 317-19 (1958); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127-29 (1940); *Decatur v. Paulding*, 39 U.S. 496, 501-02 (1840); F. COOPER, 2 STATE ADMINISTRATIVE LAW 667-68 (1965).

171. *Han v. Gotlieb*, 430 F.2d 1243, 1249-50 (1st Cir. 1970); *Kletschka v. Driver*, 411 F.2d 436, 443 (2d Cir. 1969); *REA v. Northern States Power Co.*, 373 F.2d 686, 699-700 (8th Cir. 1967); *Saferstein, Nonreviewability: A Functional Analysis of "Committed Agency Discretion"*, 82 HARV. L. REV. 367, 382-84 (1968).

*Southern Nebraska Power Co. v. Village of Deshlar*¹⁷² could be read, and their language suggests that they should be read, as cases dealing with limitations on judicial power where business decisions are involved.

While the business decision limitation on reviewability provides an adequate gloss on cases such as *Southern Nebraska Power Co.*, those cases are exemplary of a broader tendency in Nebraska cases dealing with challenges to the exercise of governmental power. Where judicial review has been directly authorized or when the agency action comes within a general statute, such as that providing for the writ of error which authorizes review, the Nebraska courts engage in review for abuse of discretion.¹⁷³ How-

172. 130 Neb. 598, 265 N.W. 880 (1936).

173. Full scale judicial review of administrative action may be viewed as being two-tiered. In the first tier, the court reviews the action to determine whether or not the action taken came within the authority or jurisdiction of the governmental official who acted. This is the usual area of judicial review: "The concern of the courts is as to the limits of the power, and not the manner or method by which the power is sought to be exercised, if kept within the prescribed limits. Therefore, judicial inquiry is strictly one of power, and not one of expediency." *Jones v. Village of Farnam*, 174 Neb. 704, 712, 119 N.W.2d 157, 162 (1963).

Where officials exercise judicial power or decide contested cases, direct judicial review is available either under NEB. REV. STAT. § 25-1901 (Reissue 1975) or NEB. REV. STAT. § 84-917 (Reissue 1976). These statutes reach cases in which an administrative official is required to decide like a judge upon the kind of facts typical in a judicial proceedings. See *School Dist. No. 23 v. School Dist. No. 11*, 181 Neb. 305, 307-08, 148 N.W.2d 301, 303-04 (1967). Where quasi-judicial powers are exercised and direct review is provided, the courts may review administrative decisions for abuse of discretion. See *Nash Finch Co. v. County Bd. of Equalization*, 191 Neb. 645, 646-47, 217 N.W.2d 170, 172 (1974); *Lewis v. City of Omaha*, 153 Neb. 11, 14, 43 N.W.2d 419, 421-22 (1950); *Effenberger v. Omaha & C.B. St. Ry. Co.*, 150 Neb. 13, 19, 33 N.W.2d 296, 300 (1948).

Discretion is the power to make a choice among alternatives. L. JAFFE, *supra* note 30, at 181. "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction." K. DAVIS, *supra* note 37, § 4.02 at 91. If a statute leaves an officer with no discretion, his duties are purely ministerial. *State v. Nebraska Liquor Control Comm'n*, 152 Neb. 676, 679-80, 42 N.W.2d 297, 299 (1950); *State v. City of Grand Island*, 145 Neb. 150, 151-58, 15 N.W.2d 341, 346 (1944). Where the officer is left with a choice, the statute creating his or her authority limits the choices which may be made. However, the official is generally free to select any member from among that limited set of alternatives. Where review for abuse of discretion is allowed, the court not only determines the jurisdictional boundaries upon choice, but also reviews the particular choice made to assure that it falls within the "zone of reasonableness." *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 306-08 (1974); L. JAFFE, *supra* note 30, at 586-87.

Where review for abuse of discretion is permissible, the judicial function is to review the decision which the administrator made. The power to decide is vested in the administrator. When the court reviews his or her action, it is not empowered to substitute its own judgment of what is or what is not proper for the judgment of the administrator. Rather, the court may only intervene where there is no reasonable basis for the action taken by the administrator.

In *Effenberger v. Omaha & C.B. St. Ry. Co.*, 150 Neb. 13, 33 N.W.2d 296 (1948), the supreme court noted that it had the authority to review orders of the Railway Com-

ever, where direct review has not been authorized, the available remedy is injunction. Injunction is treated as a collateral attack on the administrative order, and therefore can only succeed where "the order was wholly void and not merely erroneous."¹⁷⁴

In the usual case in which the Nebraska court has held that full review for abuse of discretion is permissible, the administrative action will have been upon a record. Thus, the line which the Nebraska cases draw between full review for abuse of discretion and limited review could be rationalized as being based upon the informality of the administrative action held not subject to full review.¹⁷⁵ There was a tendency in the federal cases to deny full judicial review where informal decision making was the mode. This limitation on review avoids a trial de novo which "often is no more than a game of blind man's bluff, is also expensive and time consuming, and might lead a court to substitute its judgment for that of the agency."¹⁷⁶ One of the tendencies of the federal cases which now hold informal administrative action reviewable is the tendency to impose certain minima of formality in order to insure that the decision under review is reviewed upon the basis on which it was made.¹⁷⁷

While an explanation in terms of the difficulties of review of informal action provides an elegant justification for the line which the Nebraska court has drawn, simple formalism is probably a more coherent and accurate description of the basis of these deci-

mission and to set them aside where the Commission acted arbitrarily. *Id.* at 19, 33 N.W.2d at 300. It then went on to state that "the determination of these questions rests with the Railway Commission, and their findings and orders will not be interfered with on appeal *if any reasonable basis exists upon which they can be supported.*" *Id.* at 18, 33 N.W.2d at 299 (emphasis added). In other words, administrative action is only arbitrary and capricious where no reasonable basis exists upon which it can be supported. *See Board of Regents v. County of Lancaster*, 154 Neb. 398, 403, 48 N.W.2d 221, 224 (1951); *Lewis v. City of Omaha*, 153 Neb. 11, 14, 43 N.W.2d 419, 421-22 (1950). "[D]iscretion is abused only where no reasonable man would take the view" which the administrative official has taken. *Wong Wing Hand v. Immigration & Naturalization Serv.*, 360 F.2d 715, 718 (2d Cir. 1966).

174. *Lindgren v. School Dist.*, 170 Neb. 279, 287, 102 N.W.2d 599, 606 (1960); *Boettcher v. County of Holt*, 163 Neb. 231, 235-36, 79 N.W.2d 183, 186 (1956); *South Platte Land Co. v. City of Crete*, 11 Neb. 344, 347, 7 N.W. 859, 860 (1881).

There are indicia that this limitation is of constitutional dimension where the administrative action is classed as judicial. *See, e.g., Williams v. County of Buffalo*, 181 Neb. 233, 241-42, 147 N.W.2d 776, 782-83 (1967). Where, however, the administrative authority has to act against an ascertainable standard, it is difficult to see how traditional rationality review could run afoul of a rule against the delegation of legislative authority to the courts. *See K. DAVIS, supra* note 39, § 29.09 at 542-43; L. JAFFE, *supra* note 30, at 102-110.

175. *Saferstein, supra* note 171, at 387-89.

176. *Id.* at 388.

177. *See Dunlop v. Bachowski*, 421 U.S. 560, 575-76 (1975); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

sions. In large measure, the cases simply carry over to other governmental action the line drawn where judicial decisions are involved. In Nebraska, appeal is the remedy for error. Collateral attack may not substitute for appeal. A collateral attack is only available where a judicial decision is totally void.¹⁷⁸

Prior to the supreme court's decision in *American School of Magnetic Healing v. McAnnulty*,¹⁷⁹ the federal cases generally regarded judicial review of administrative action as extraordinary. Hence, full-scale review for abuse of discretion was only engaged in when it had been authorized by statute.¹⁸⁰ *McAnnulty* marks the beginning of the modern tendency to regard full-scale review as the norm.¹⁸¹ With the development of a broad presumption of review, at the federal level, injunction became the "catch all" remedy.¹⁸² However, many state courts have not allowed injunction a comparable growth.¹⁸³ The Nebraska court appears to be an example of a state court unwilling or unable to use injunction as a general remedy for nonstatutory review of governmental action.

In cases in which governmental action is challenged on grounds other than unconstitutionality or lack of substantive or procedural vires, the availability of review will depend upon statutory authorization. Standing in turn will depend upon the statutory formula. The two most common forms of review would be review either under the Administrative Procedures Act or through the writ of error.¹⁸⁴ The Administrative Procedure Act contains two review provisions. One provision deals with review of decisions in contested cases.¹⁸⁵ A contested case as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."¹⁸⁶ Agency means an agency of the state.¹⁸⁷ In the absence of a statutory requirement of a hearing, the Nebraska court would find a right to hearing where adjudicative facts are involved.¹⁸⁸ Where a contested case is involved,

178. See generally *Ballantyne v. Hansen*, 177 Neb. 551, 555-56, 221 N.W. 694, 696 (1928).

179. 187 U.S. 94 (1902).

180. K. DAVIS, *supra* note 39, § 28.02 at 509-10; L. JAFFE, *supra* note 30, at 337-38.

181. K. DAVIS, *supra* note 39, § 28.02 at 510; L. JAFFE, *supra* note 30, at 339-53.

182. L. JAFFE, *supra* note 30, at 193.

183. K. DAVIS, *supra* note 39, § 24.05 at 460-61; F. COOPER, *supra* note 168, at 633-34.

184. NEB. REV. STAT. §§ 25-1901 to 1908, 84-901, -917 (Reissue 1976).

185. *Id.* § 84-917(1) (Reissue 1976).

186. *Id.* § 84-901(3) (Reissue 1976).

187. *Id.* 84-901(1) (Reissue 1976).

188. *School Dist. No. 23 v. School Dist. No. 11*, 181 Neb. 305, 307, 148 N.W.2d 301, 303 (1967).

standing to seek review is granted to "any party aggrieved by a final decision."¹⁸⁹ The person aggrieved language appears to be drawn directly from statutes of the type construed in *FCC v. Sanders Bros. Radio Station*.¹⁹⁰ Therefore, it would presumably be given the same broad reading as *Sanders* gave to that language and would, therefore, embody an injury in fact test of standing.¹⁹¹ The other provision of the APA, provides for judicial review of decisions involving the promulgation of regulations.¹⁹² It grants standing to one threatened with impairment of his "legal rights or privileges . . ." ¹⁹³ This language appears to be somewhat narrower than the language involved in the provision dealing with contested cases. The review provision appears to embody a broadened legal rights test, which would allow review either by one who in fact had a legal right or whose privilege was an intended one under the statute.¹⁹⁴

The other general remedy available for full-scale review is the writ of error.¹⁹⁵ This remedy reaches any final order of a body "exercising judicial functions . . ." ¹⁹⁶ Under the Nebraska cases a tribunal acts judicially when it has to decide adjudicative facts upon a record made at a hearing.¹⁹⁷

The common-law tradition has regarded certiorari as a "public interest remedy."¹⁹⁸ Therefore, no personal interest in the outcome of a case has been required of a plaintiff in a certiorari case.¹⁹⁹ There is little evidence, however, that this broad common-law tradition has influenced the treatment of the writ of error in Nebraska. Given the merger of the right to seek review of the administrative action with the right to seek review of the action of the lower courts, one would expect to find the writ of error limited to

189. NEB. REV. STAT. § 84-917(1) (Reissue 1976).

190. 309 U.S. 470, 472-73 (1940).

191. F. COOPER, *supra* note 168, at 536.

192. NEB. REV. STAT. § 84-911 (Reissue 1976).

193. *Id.*

194. *See* F. COOPER, 1 STATE ADMINISTRATIVE LAW 246-50 (1965). Given the provision of NEB. REV. STAT. § 84-919 (Reissue 1976), a party suffering special injury as a result of a rule might be able to seek injunctive relief. In addition, since section 84-911(2) reaches only facial validity, to the extent that a court is willing to engage in rationality review of a rule injunction would presumably be the remedy. *See* Board of Regents v. County of Lancaster, 154 Neb. 398, 403, 48 N.W.2d 221, 224 (1951). *Compare* Thorpe v. Housing Auth., 393 U.S. 268, 280-81 (1969).

195. *See* NEB. REV. STAT. § 25-1901 (Reissue 1975).

196. *Id.* On the reach of the writ of error see *Jungman v. Collidge*, 157 Neb. 122, 123-24, 58 N.W.2d 828, 829 (1953); *Engles v. Morgenstern*, 85 Neb. 51, 52-53, 122 N.W. 688, 690 (1909); *Mathews v. Hedlund*, 82 Neb. 825, 827-28, 119 N.W. 17, 18-19 (1908).

197. *See, e.g., Mathews v. Hedlund*, 82 Neb. 825, 827-28, 119 N.W. 17, 18 (1908); *Pollock v. School Dist. No. 42*, 54 Neb. 171, 172, 74 N.W. 293, 393 (1898).

198. B. SCHWARTZ & H. WADE, *supra* note 5, at 295-96.

199. *Id.*

legally interested parties who had participated in the proceedings below. However, the Nebraska cases have never extensively discussed the standing requirements for the writ of error.

While discussing standing outside the injunction area, a brief return to mandamus is appropriate. We have already noted that the supreme court indicated that it would recognize a citizen's mandamus action in its early decision in *State v. City of Kearney*.²⁰⁰ However, this recognition of the citizen's mandamus action has not proved fruitful. The remedy has atrophied. The Nebraska cases now typically limit standing in mandamus to an intended special beneficiary of the statutory obligation.²⁰¹

While the citizen's mandamus action has disappeared, it had a brief resurrection in a case which involved a combination of a declaratory judgment action and a suit for mandatory injunction, *Noble v. City of Lincoln*.²⁰² *Noble* involved a suit to compel the City of Lincoln to proceed with the construction of an auditorium, pursuant to amendments to the City Charter, on the site which had been procured for that purpose.²⁰³ In *Noble* the character of the suit was obscured by the fact that the supreme court treated a suit to compel an expenditure as if it were a suit to prevent that expenditure.²⁰⁴

Most of the generalizations about the law of standing in Nebraska pertain to injunction suits. Such generalizations may not be valid where other remedies are sought. While standing at the federal level has been debated in the context of the Article III case or controversy requirement, and in the more general context of the doctrine of separation of powers, such a debate has played little part in the Nebraska law of standing. While several recent cases have explained standing in terms of justiciability,²⁰⁵ these cases are a relatively recent intrusion into the body of Nebraska standing law.

In some ways it is surprising that the connection between justiciability or the judicial function and standing was articulated so late in the Nebraska cases. The Nebraska Constitution contains

200. 25 Neb. 262, 266, 41 N.W. 175, 176 (1888).

201. See, e.g., *State v. Nebraska Liquor Control Comm'n*, 152 Neb. 676, 680, 42 N.W.2d 297, 299 (1950); *State v. City of Grand Island*, 145 Neb. 150, 157-60, 15 N.W.2d 341, 346-47 (1944).

202. 153 Neb. 79, 43 N.W.2d 578 (1950).

203. *Id.* at 81-82, 43 N.W.2d at 581.

204. *Id.* at 97, 43 N.W.2d at 588-89.

205. *Ritums v. Howell*, 190 Neb. 503, 505-07, 209 N.W.2d 160, 163-64 (1973); *Prennergast v. Nelson*, 199 Neb. 97, 122-26, 256 N.W.2d 657, 672-74 (1977) (Clinton, J., concurring in part and dissenting in part); *State v. Gradwohl*, 194 Neb. 745, 758-59, 235 N.W.2d 854, 862-63 (1975) (Clinton, J., responding).

the doctrine of separation of powers and limits the judiciary to the performance of judicial tasks.²⁰⁶ The necessity of defining what are and are not appropriate judicial tasks has been important in Nebraska constitutional law.²⁰⁷

While the Nebraska cases have not explicitly connected standing with justiciability until recently, that does not mean that the element of justiciability has not been a factor in the formulation of the law of standing. As already indicated, most of the standing cases are injunction cases. Injunction is a remedy available for the prevention of irreparable injury.²⁰⁸ Hence, injury is a prerequisite to the granting of an injunction.²⁰⁹ Given this role of injury in the injunction suit, an injury in fact test of standing in this context can be viewed as a logical outcome of the choice of remedy by the plaintiff.²¹⁰ More generally, a law of standing embedded in the law of remedies leads to an injury test. Since injury is the essential justification of judicial action, its absence negates any requirement of judicial action.²¹¹ In such a context, the fact that an injury is shared by all virtually assures that it will be regarded as an injury to none.²¹² Therefore, the ideological plaintiff seeking to vindicate the public interest is barred precisely for that reason.

One consequence of the focus on the law of remedies, and particularly on the analogy to the suit to enjoin a private nuisance, has been the broad standing granted to the attorney general. The Nebraska cases have not regarded injury to the public interest as an inappropriate basis for judicial action. Rather they have followed through on the analogy to the public nuisance, and have generally recognized a broad standing in the attorney general to act to vindicate that interest without requiring a legislative grant of the power to sue.²¹³

206. NEB. CONST. art. 2, § 1; NEB. CONST. art. 5, § 1.

207. See *Williams v. Buffalo County*, 181 Neb. 233, 237-38, 147 N.W.2d 776, 780-82 (1967); *Searle v. Yensen*, 118 Neb. 835, 842-43, 226 N.W. 464, 466-70 (1929); *Winkler v. City of Hastings*, 85 Neb. 212, 215-16, 122 N.W. 858, 859-60 (1909).

208. See S. DESMITH, *supra* note 5, at 466-67 (English rules on standing to obtain an injunction, which closely parallel the Nebraska position).

209. "No one can obtain a quia timet order by merely saying 'Timeo.'" *Attorney Gen. of Can. v. Ritchie Contracting & Supply Ltd.* [1919] A.C. 999, 1005 (P.C. Can.).

210. Similarly, as mandamus has come to be viewed as a remedy available to a party to whom a legal duty was intended to run, the strangers lack of standing is an inherent element of the remedy. See F. COOPER, *supra* note 168, at 655; E. MCQUILLIN, 17 THE LAW OF MUNICIPAL CORPORATIONS § 51.13, at 485-88 (3d ed. 1957).

211. See generally Gelfe and Tarlock, *The Use of Scientific Information in Environmental Decision Making*, 48 S. CAL. L. REV. 371, 382-85 (1974).

212. See *id.*

213. See *State v. Peters*, 188 Neb. 817, 819-21, 199 N.W.2d 738, 739-40 (1972); *State v. State Bd. of Equalization*, 123 Neb. 259, 261-62, 242 N.W. 609, 610 (1932). Compare *State v. Hall*, 99 Neb. 89, 92-94, 155 N.W. 228, 228-29 (1915), *aff'd on rehearing*, 99 Neb.

We can conclude then that in Nebraska, interest has been an essential element of standing. However, it has been an essential element less because the plaintiff's interest is necessary for a justiciable controversy than because such an interest is an essential element of being a plaintiff. When there is pervasive public injury, and the plaintiff's injury is not special, the suit is not entertained because the appropriate plaintiff is not there, not because there is no controversy of which the courts could take hold. The public interest lawsuit has been entertained, but the appropriate plaintiff in such a lawsuit has generally been a public official.

CONCLUSION

In form, *Cunningham v. Exon*²¹⁴ clearly appears to move Nebraska law from a traditional interest-based model, though probably the injury-in-fact model, to a public interest litigation model. However, the degree of change should not be overemphasized. Both the justification of the taxpayer's suit in terms of its public character, which the court offered in *Woodruff v. Welton*²¹⁵ and its recognition of the citizen mandamus action in *State v. City of Kearney*,²¹⁶ would support the citizen plaintiff model. The *Woodruff* theory has not been the dominant theory of the taxpayer's action, and the citizen mandamus action has atrophied. Nevertheless, other authority supports the theory which underpins those cases, namely that there is a role for a citizen action to support the realm the order of legality.²¹⁷ The Nebraska standing cases have not been phrased in terms of injury in fact as an essential element of

95, 96, 156 N.W. 16, 17 (1916) with *Van Horn v. State*, 46 Neb. 62, 82-84, 64 N.W.2d 365, 371-72 (1895). But see *State v. Gradwohl*, 194 Neb. 745, 758-59, 235 N.W.2d 854, 863 (1975).

214. *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979).

215. 70 Neb. 665, 97 N.W. 1037 (1904).

216. 25 Neb. 262, 41 N.W. 175 (1888).

217. See, e.g., *Noble v. City of Lincoln*, 153 Neb. 79, 43 N.W. 2d 578 (1950). Nebraska has applied the usual rule against the assertion of third-party rights. *Blackledge v. Richards*, 194 Neb. 188, 191-92, 231 N.W.2d 319, 322-23 (1975); *State v. Brown*, 191 Neb. 61, 62, 213 N.W.2d 712, 713 (1974); *Griffin v. Gass*, 133 Neb. 56, 63, 274 N.W. 193, 196 (1937). However, in *Greene v. State*, 83 Neb. 84, 119 N.W. 6 (1908), the court allowed a third party to litigate the right of others who would probably be unable to defend their own rights. *Id.* at 85-87, 119 N.W. at 6-7. While surrogate standing is not a public action, it bears certain analogies to a public action (and particularly to the premise for such an action in *Cunningham*) since injury is essential. See L. TRIBE, *supra* note 5, § 3.26 at 103-09 (surrogate standing); Albert, *supra* note 7, at 468-73; Stewart, *supra* note 9, at 1730-34, 1742-47. In addition, the theory upon which public officers have been allowed to resist mandamus actions upon the grounds of unconstitutionality bear a resemblance to the public action. Compare *Van Horn v. State*, 46 Neb. 62, 84-85, 64 N.W. 365, 371-72 (1895) with *State v. Hall*, 99 Neb. 89, 92-94, 155 N.W. 228, 229-30 (1915), *rehearing denied*, 99 Neb. 95, 96, 156 N.W. 16, 17 (1916).

justiciability. Rather, the injury element has been utilized to determine whether the individual plaintiff could sue or whether the suit had to be brought by a public official. In essence then, the Nebraska cases have always recognized a public action. The limitation on the public action has been that it must be brought by a public official. Therefore, *Cunningham v. Exon* does not change the reach of the judicial authority but instead adds private individuals to the class of plaintiffs who may sue to vindicate the public interest.

While this formal justification of *Cunningham v. Exon* fits it within the Nebraska tradition, it leaves open the broader question of the legitimacy of the public action. With regard to this question, I do not intend a final solution. However, a few comments are in order. First, the legal interest model of standing presupposed that the judicial process could be given a final definition which would settle once and for all the question of what the appropriate function of a judge was. Clearly such an essential definition is not possible.²¹⁸ The judicial process is embedded in, and evolves with, the total political tradition of which it is a part. It is not required to remain frozen at some particular point in the history of that tradition, but only to remain in continuity with the tradition.²¹⁹ Moreover, concerns appropriate at the federal level may not be as important at the state level.²²⁰ For example, a large part of the argument for an interest model of standing has arisen from concerns about the undemocratic character of judicial review at the constitutional level. This problem arises because of the relative immutability of the Federal Constitution. State constitutions are notoriously mutable. Hence, these federal concerns may not be of central relevance at the state level.²²¹ Since almost all decisions are easily correctable either by constitutional amendment or enabling legislation, the judicial role, even in constitutional litigation, is more similar to that played in administrative law litigation. The final answer is always given by the political process and the judge's decision is only provisional.²²²

The greater role that judges play in the state political process vis-a-vis the federal reflects fundamental differences in the two levels of government. The Nebraska Legislature is a part-time

218. L. JAFFE, *supra* note 30, at 30-33.

219. Green, *supra* note 13, at 672-73.

220. L. TRIBE, *supra* note 5, § 3.18 at 81.

221. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 68-69 (1969).

222. See Jaffe, *supra* note 12, at 1044; Stewart, *supra* note 9, at 1742. Compare Albert, *supra* note 7, at 456.

body, as are city councils, county boards, and school boards. The ability of these bodies to gather information is limited. Most of them have limited staff assistance. All these bodies are more dependent than the Congress on interest groups for their information. Like federal regulatory agencies, they are prone to captivity by interest groups.²²³ In addition, local bodies in particular are subject to direct pressures of a kind that Congressmen and Senators rarely experience. Anyone who has seen a city council deliberate about a zoning decision, with a hundred angry neighbors shouting, is familiar with the different kinds of pressures that exist in local politics. This dissimilarity between state and the federal politics weakens further the efficacy of arguments drawn from the federal system for a limited judicial role.

Nevertheless, it remains the case that any increase in judicial involvement in political decisions is purchased at a cost. If the question is whether the role of the courts in a state should be modeled on the role of the federal courts, differences in the two systems may be decisive. However, if the question is whether the role of the state courts should be expanded, the arguments against judicial activism, though drawn from the federal system, become more potent.

The arguments for standing as a limitation on judicial review have reflected a concern about the impact of an expanded judicial function on the political process. These concerns are embodied in a tutorial vision of the judge's role. Error is an inevitable part of any human activity. Error has a pedagogical function. A political system learns from its mistakes and more maturely addresses future problems. Just as a wise teacher allows a pupil freedom, with the knowledge that the pupil can in that way learn to choose, so the courts should refrain from constitutional adjudication to the end that the political process may mature and grow.²²⁴

While the pedagogical model, particularly as I have formulated it, overstates the impact of judicial review, it points out an important cluster of risks that judicial review imposes on the political system.

The first risk is the risk of buck passing.²²⁵ An active court is a

223. Professor Stewart's article contains a good outline of the agency captivity thesis. Stewart, *supra* note 9, at 1684-87. The dependence on regulated parties for information and cooperation is at least as great as the level of state and local legislation.

224. A. BICKEL, *supra* note 26, at 175.

225. See Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thought on Section 1983, Comity, and the Federal Case-load*, ARIZ. ST. L.J. 557, 561-63 (1973). Cf. Freedman, *supra* note 27, at 34-35 (the comparable situation

handy scapegoat for politicians. Where vociferous or influential interests press for improper action, the politician interested in the preservation of his position is tempted to respond. This temptation is more easily responded to if the politician knows that any improper decision will be corrected elsewhere. Hence the willingness of the courts to correct error becomes an invitation to error.

Even where review does not produce the scapegoat effect, it shapes the decisions politicians make. Review adds an additional factor to the politicians decisional equation. Where court review is likely, any decision has to be shaped to the reviewing process. How the courts will respond to it becomes an important factor in determining whether or not a decision should be made. This decision making over-the-shoulder assures that values judges regard as important will be given great weight in political decisions, since, if the judges' values are ignored, a decision will not stand. Where the values important to the judges are constitutional values, tilting of the political process in their favor may not be a cause for concern. Where the values, considered by the political process are the personal values of the judges, judicial office has assured to a judge's personal values a disproportionate weight in political decision making. A judge's psychological reaction to a case is always important to a lawyer. In advising on the outcome of a challenge to legislation, a lawyer tries to gauge the judge's attitude toward the legislation on the assumption that if a judge does not like a law, he will be predisposed to find it unconstitutional. If politicians predict judicial decisions the way lawyers do, then any distinction between the constitutional values judges protect and their personal values tends to collapse.

A final impact of judicial review is its dignitary impact. I suspect that when a lawyer is approached by a client about the impact of a federal statute, his first response is to advise the client as to how to comply. When he is approached about a state statute or a city ordinance, his first response is a search for a way to challenge its validity.²²⁶ This difference in approach by lawyers is symptomatic of a difference in public attitudes toward the different decision makers. The Congress commands a respect that a state legislature or a city council does not. While this difference in atti-

between Congress and the administrative agencies as a product of the demise of the delegation doctrine).

226. In part, of course, this difference in response arises out of the greater likelihood that a statute or ordinance will be invalidated. Compare *Olsen v. Nebraska*, 313 U.S. 236 (1941) with *Boomer v. Olsen*, 143 Neb. 579, 10 N.W.2d 507 (1943) and *Nebbia v. New York*, 291 U.S. 502 (1934) with *Gillette Dairy, Inc. v. Nebraska Dairy Prods. Bd.*, 192 Neb. 89, 219 N.W.2d 214 (1974). Compare Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 91 (1950).

tude cannot be attributed only to the different role played by the courts in the federal vis-a-vis the state system of government, the provisional character of state and local political decisions, as against the relative finality of the decisions of the Congress, must have played a part in shaping the relative status of the different bodies. An increase in the judicial involvement in decision making at the state or local level inevitably heightens the provisionality of political decisions. As decisions become more provisional, the dignity of the decision maker inevitably declines.

Moreover, the requirement that the plaintiff at least be injured before a court will upset the solution the political process has reached, serves a number of purposes. First, by keeping judges in contact with the ordinary task of judging when they deal with policy questions, it probably serves as a reminder of the limits of the judicial office.²²⁷ In addition to the requirement of an injury is a symbolic reassertion of these limitations.²²⁸ Public willingness to comply with controversial judicial decisions probably arises at least in part out of the sense that the courts speak for the law and not for themselves. This perception could be tarnished if no connection can be observed between the action taken and the interests of the person for whom it was taken.²²⁹

There is no necessity, however, for an ultimate decision as between an interest model and a public action model.²³⁰ A public action in a state may have a legitimate function, if it is appropriately limited. In a state, like Nebraska, where the usual public action would be an action for injunction and where the injunction is limited to questions of facial legality of the limits of power, the argument for the public interest litigant is at its strongest. These are the types of questions which most strongly call forth the argument from legality, since the debate is or at least appears to be the least political. Where the reasonableness of underlying judgments is the central issue, the argument for leaving the question to the political process becomes much stronger.²³¹ Many provisions of the state constitution, while in form matters of limitation, are in substance largely judgmental.²³² An expansion of the public plaintiff's

227. Albert, *supra* note 7, at 448.

228. *Id.*

229. The critics of busing provide the best evidence for this point. By focusing on the argument that busing does not improve the education of Black children, they demonstrate their awareness of the moral force commanded by a decision to aid an injured party, and how such a decision begins to lose that force where tangible benefit to the complaining party is absent.

230. See also Scott, *supra* note 15, at 949-50.

231. See note 9 *supra*.

232. See, e.g., NEB. CONST. art. 1, § 25; NEB. CONST. art. 8, § 1.

role which would allow him to litigate without regard to interest on questions of due process or equal protection would substantially expand the judicial competence. Such an expansion would be unwarranted.

Whatever the merits of the limitation of injunction of facial legality where a private plaintiff sues, it ought to be preserved in the public action. The public action is about power and not about judgment. The public plaintiff should be limited, as the attorney general has been, to questions that trench only upon public right.²³³ Where there are interested parties, it should be for them to assert the question.²³⁴ This limitation would remove cases involving, for example, equal protection type claims from the reach of the public action. In other words, the twin requirements suggested by the court in *Cunningham*, that the issue be a public one and that there be no likely private plaintiff, should be rigorously observed.²³⁵ If they are, then *Cunningham* may be welcomed, but a broader public action would not be proper.

233. See *State v. Gradwohl*, 194 Neb. 745, 758-59, 235 N.W.2d 854, 862-63 (1975).

234. See *State v. Gradwohl*, 194 Neb. 745, 759, 235 N.W.2d 854, 863 (1975); *State v. Hall*, 99 Neb. 95, 96, 156 N.W. 16, 17 (1916); *Greene v. State*, 83 Neb. 84, 86-87, 119 N.W. 6, 7 (1908).

235. *Cunningham v. Exon*, 202 Neb. 563, 568-69, 276 N.W.2d 213, 216 (1979).