UNIVERSAL CHURCH OF CHRIST v. FCC:
PRIVATE ATTORNEYS GENERAL AND THE
RULE OF LAW

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INTRODUCTION

In Office of Communication of the United Church of Christ v. FCC, the D.C. Circuit addressed the failure of the Federal Communications Commission (FCC) to police the racist behavior of a Jackson, Mississippi, television station, WLBT. The court's two opinions in the case were at the forefront of the "reformation" of administrative law that was occurring at the time. They also were important in the civil rights struggle in the

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South. The first impact now is only dimly appreciated, and the second is overlooked almost entirely.

It is unfortunate that United Church of Christ is mostly out of sight and out of mind. This litigation vividly demonstrates the important virtues of “private attorneys general” as a source of the rule of law when agencies fail to meet statutory commitments to protect workers, consumers, or the environment. It is important for regulatory beneficiaries to be able to appeal administrative decisions because if a decision favors a regulated entity, no one else may have an incentive to file a judicial challenge to the agency’s decision. In this context, “private attorneys general” promote the rule of law because when they appeal a decision in favor of a regulated entity, the court has an opportunity to determine the legality of an agency’s actions.


5. A good new book, however, seeks to credit the United Church of Christ cases for their contribution to civil rights. See Mills, supra note 3 (identifying the role that the United Church of Christ cases had in the Civil Rights Movement).

6. See infra notes 109-12 and accompanying text.

7. The concept of “private attorney general” has multiple meanings, only one of which is empowering representatives of regulated beneficiaries to challenge potentially illegal agency decisions that favor regulated entities. For example, Congress has included
This Article argues that we should regard *United Church of Christ* as a significant and still important case in administrative law. The argument has three steps. Section I reviews the history of the case, and demonstrates its significance as a blow for civil rights. The *United Church of Christ* decisions were the beginning of the end for the unfair and biased treatment of racial issues by Southern television stations. The history of the case, therefore, demonstrates the important role that private attorneys general can play in promoting the public interest and the rule of law.

Section II describes the two opinions in the case. The first decision held that television viewers were entitled to intervene in FCC hearings because Congress had authorized them to appeal a decision to award a license if they were "adversely affected" or "aggrieved" by such a decision. The second decision held that the Commission lacked substantial evidence for its decisions to renew WLBT's license in light of the station's record of racist programming and its lack of responsiveness to black viewers in its audience.

Section III explains how the court's analysis in both decisions paved the way for two important doctrinal developments that followed the case and the current significance of these doctrines. First, the case was at the vanguard of the judicial movement in the 1960s and 1970s in that it gave standing to regulatory beneficiaries to sue agencies for illegally failing to protect consumers, workers, and the environment. The Supreme Court, however, has ignored this important value in recent decisions that have restricted standing, despite the fact that agencies are still liable to be unduly influenced by the industry groups that they are supposed to regulate.

Second, the case was foundational for the development of the "hard look" doctrine, which is linked to standing for private attorneys general such as the Office of Communication of the United Church of Christ. Under the hard look doctrine, courts examine the adequacy of an agency's justification for its actions. When the doctrine is used in appeals brought by regulatory beneficiaries, it helps to ensure that agencies are faithfully implementing their statutory mandate. Nevertheless, the "hard look" doctrine has turned out to be a mixed blessing for public interest and

provisions in most of the environmental statutes that authorize non-government attorneys to enforce environmental statutes if the government has not done so. See Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192-93 (indicating that every major environmental law passed since 1970 includes a citizen suit provision). Professor Rubenstein, who has attempted to categorize these different functions, indicates the variety of private attorneys general. William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2142 (2004).
environmental advocates because it is readily subject to misuse. Its importance to private attorneys general litigation, however, counsels against scrapping the concept.

I. THE HISTORY

In 1958, an important meeting took place at the United Church of Christ. Participants included Truman B. Douglas, Martin Luther King, Jr., Andrew Young, and Everett Parker, who would become the director of the Office of Communication. Dr. King and the other civil rights leaders were concerned about the biased coverage of civil rights demonstrations and legal actions by Southern television stations, and they asked the Office of Communication for assistance.

The civil rights leaders sought out the Office of Communication because of its advocacy on behalf of people of color and others historically excluded from the media. The United Church of Christ's commitment to civil rights, a central element in the church's identity, dates back more than 100 years. Members of the Congregational domination, one of the denominations that merged to form the United Church of Christ, were important supporters of the cause of the slaves who revolted on the Schooner Amistad and sought their freedom.

8. See Mills, supra note 3, at 59 (describing the meeting); Letter from Everett C. Parker to Sidney A. Shapiro (Sept. 25, 2006) [hereinafter Parker Letter] (on file with author) (providing the date of the meeting as 1958).
12. The United Church of Christ was formed in 1957 from a merger of the Congregational Christian Churches and the Reformed Church, and the Evangelical Synod of North America. Hood College, Faith Community, http://www.hood.edu/campuslife/faith.cfm?pid=faith_history.html (last visited Oct. 13, 2006). The first Congregationalists were the Pilgrims and the Puritans of the Massachusetts Bay Colony. Parker Letter, supra note 8. The German Reformed Church was made up of German refugees who fled Bismarck's regime and settled along the Gulf Coast and up the Mississippi River to St. Louis, which became the church's headquarters. Id.
After a trip through the South to see first-hand local television programming, Parker met with the president of the National Association of Broadcasters (NAB), the trade association for television owners. He asked the NAB to send a letter to its members suggesting that the stations give blacks equal time to present their views, integrate their programming, and address African-Americans with courtesy titles, such as "mister," which was the standard practice at the time when stations spoke with white persons.\(^{14}\) The Directors of the NAB refused the request.\(^{15}\)

Parker then decided to seek a license renewal proceeding for two television stations in Jackson, Mississippi, WLBT and WJTV, which were up for renewal in 1964. To obtain a hearing, he presented the FCC with a "bill of particulars" about the failure of the stations to serve the interest of the entire public in their area.\(^{16}\) In adopting this strategy, the Office of Communication had both an advantage and a disadvantage. According to an FCC rule then in effect called the "fairness doctrine," television stations were obligated to present programming that addressed controversial issues and to afford a reasonable opportunity for the presentation of contrasting points of view.\(^{17}\) The FCC, however, did not recognize a right for listeners to intervene in licensing application or renewals, although the Commission did permit rival or potential station owners to intervene in such cases.\(^{18}\)

The immediate problem for Parker was to gather evidence on the content of local television programming. Parker enlisted the assistance of two Jackson residents, Gordon and Mary Ann Henderson, who agreed to help to set up a monitoring operation for the two Jackson stations.\(^{19}\) Gordon

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\(^{14}\) Mills, supra note 3, at 66.

\(^{15}\) Id.

\(^{16}\) Id.

\(^{17}\) See Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 369-70, 400-01 (1969) (rejecting a challenge that the fairness doctrine relating to personal attacks and political editorializing violated the First Amendment). The FCC has since eliminated the doctrine on the ground that the multiplicity of media outlets made it unnecessary. See Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989) (upholding the FCC's decision to eliminate the fairness doctrine).

\(^{18}\) The FCC permitted broadcasters to intervene because they had a right to challenge the Commission's decision to license a competitor. See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476 (1939) (holding that competitors of a station awarded a license were entitled to appeal that decision).

\(^{19}\) Classen, supra note 3, at 61; Mills, supra note 3, at 67. Since there was no technology at the time that allowed Parker to record a TV signal from a TV tube, he used a recording method that he had developed at Yale University with Dallas Smythe, who had been the chief economist at the FCC, and David Barry, a social scientist. The group monitored TV stations from sign-on on a Monday morning to sign-off on Sunday night, recording the sound and having a human monitor describe at length the visual contents. This methodology was used to monitor the educational programming of network affiliates in several major markets, and the results were submitted to the FCC, which was investigating that issue. The FCC accepted this evidence as the equivalent of evidence of their typical programming submitted by stations to the FCC, which was called the "composite week." In light of this precedent, the FCC accepted the monitoring in Mississippi as evidence of the programming record of the WLBT. Parker Letter, supra note 8.
Henderson rented television sets, and a family let the monitors use their home for this effort. Parker trained the monitors, all of whom were adult Jackson residents, mostly women. He decided that none of the monitors would be black to eliminate claims of a conflict-of-interest. They also treated the monitoring operation as a secret, for good reason. Civil rights leaders were routinely intimidated and jailed in Jackson during this period, and Medgar Evers, a Mississippi radio disc jockey who encouraged the African-American community to pay their poll taxes, register, and vote, had been assassinated in Jackson not long before the monitoring effort began. The monitoring was supervised by Mary Ann Henderson, who was formerly employed by Nielsen Media Research, and who therefore was able to testify that the monitoring produced better data about programming than that was gathered by Nielsen.

Parker chose WLBT as a test case. The station had refused to give equal time to black groups to oppose station editorials opposing racial integration. About one-half of WLBT’s audience was African-American, but no blacks had ever appeared on televised church services on Sunday morning or on a weekly teen dance program. There was evidence that the station flashed a “Sorry, Cable Trouble” on screens to block out network coverage of Thurgood Marshall, who, at the time, served as Chief Counsel of the National Association for the Advancement of Colored People (NAACP). Hodding Carter III, who was then a journalist in Mississippi, told the FCC in 1964 that the two Jackson television stations were “geared to a far right-wing, rigid segregationist approach,” and that WLBT’s manager was “little more than . . . an unofficial mouthpiece for the total resistance line of the Citizen’s Council,” a local segregationist group.

After the monitoring was complete, Parker contacted several Washington broadcast attorneys to represent the Office of Communication before the FCC. Everyone turned him down, saying the case was a waste of the

21. MILLS, supra note 3, at 69.
22. CLASSEN, supra note 3, at 41-42; MILLS, supra note 3, at 66.
24. MILLS, supra note 3, at 3.
26. MILLS, supra note 3, at 19-20; see also CLASSEN, supra note 3, at 171 (quoting a former WLBT programming director who states that the manager Fred Beard made the television station “his own personal propaganda machine”).
Church's time and money.\textsuperscript{27} He then turned to Orrin Judd, a partner in a New York law firm, who did not know any broadcasting law, but who had worked with the United Church of Christ on other matters.\textsuperscript{28}

In April 1964, Judd's law firm filed a "Petition to Intervene and to Deny Application for Renewal" in the license renewal proceedings of WLBT. The petition was filed on behalf of the United Church of Christ in Jackson, which claimed an injury because WLBT excluded black churches from religious programming and, on behalf of two individuals, R.L.T. Smith, a local minister, and Aaron Henry, who was the statewide NAACP president.\textsuperscript{29} Both had attempted to buy time on WLBT when they were political candidates and had been turned down. The ten-page petition claimed that the broadcasters had failed to serve the interests of their large black audience and had failed to give a fair presentation of controversial issues, particularly concerning race relations.\textsuperscript{30}

On May 19, 1965, the FCC voted 4-2 to reject the petition. The majority opinion had a schizophrenic quality. Although the majority did not condone WLBT's programming practices, they nevertheless renewed the station's license for one year.\textsuperscript{31} The FCC explained that it was important to have a broadcaster in Jackson that could contribute to improving race relations, and it believed that WLBT could serve this role despite its past behavior. The Commission believed that WLBT would perform in the public interest, as spelled out in a series of conditions issued by the FCC, because compliance would be necessary for permanent renewal of its license.\textsuperscript{32} The opinion was written by Henry Geller, then General Counsel of the FCC, who became a long-time and well-known communications lawyer in Washington, D.C.\textsuperscript{33} According to Geller, "We tried to make it a purple cow by saying that the situation there was so dicey with integration being so important . . . that if we could get immediate compliance, it was worth it in the public interest."\textsuperscript{34} Nevertheless, said Geller, "It was really totally wrong."\textsuperscript{35}

\begin{thebibliography}{99}
\bibitem{Mills} Mills, \textit{supra} note 3, at 75.
\bibitem{Id} Id.
\bibitem{CLASSEN} CLASSEN, \textit{supra} note 3, at 61-62.
\bibitem{Mills2} Mills, \textit{supra} note 3, at 76, 93.
\bibitem{CLASSEN2} CLASSEN, \textit{supra} note 3, at 125-26.
\bibitem{Office} Office of Commc'n of the United Church of Christ v. FCC (\textit{United Church of Christ I}), 359 F.2d 994, 1008 (D.C. Cir. 1966) ("We are granting a renewal of license, so that the licensee can demonstrate and carry out its stated willingness to serve fully and fairly the needs and interests of its entire area—so that it can, in short, meet and resolve the questions raised.").
\bibitem{Mills3} Mills, \textit{supra} note 3, at 88.
\bibitem{Id2} Id.
\end{thebibliography}
After the FCC decision, Parker created the Office of Communication, Inc. to protect the United Church of Christ from lawsuits. All legal actions were conducted under that title, although the court of appeals designated the case as "United Church of Christ." The Office of Communication remains an independent body with its own directors.

When the Office of Communication appealed the Commission’s decision to the D.C. Circuit, WLBT hired a new lawyer, Paul Porter. Paul Porter was a former FCC chair and founding partner of Arnold, Fortas and Porter, as it was then known. He apparently wasted no time asserting the law firm’s power and the client’s resources. He warned Parker, "Everett, if you file this thing, I’m going to make this run at least ten years, and I will bankrupt the United Church of Christ and I will force you out of the broadcasting field." Parker replied, "Well, Paul, if it runs ten years or fifteen years and if you’re dead and I’m dead, the United Church of Christ will still be in there." Porter was right and wrong. The lawyers for WLBT managed to litigate the issue of WLBT’s license before the Commission and the courts for sixteen years, but at the end of the day, the FCC did not renew the station’s license, making it one of the very few broadcast licensees ever to lose a licensing renewal proceeding.

In March 1966, the D.C. Circuit held that the FCC’s grant of a one-year renewal of WLBT’s license was erroneous, and it directed the Commission to hold hearings on the station’s renewal application and to permit representatives of the listening public in Jackson to intervene. The panel, consisting of Judges Warren Burger, Carl McGowan, and Edward Tamm, was unanimous. The court also found Henry Geller’s post hoc attempt to justify the decision to grant a one-year license, rather than hold a hearing, unconvincing.

The lawyers for both sides immediately began to skirmish over the issues that had to be resolved prior to the hearing. The station, for example, wanted the hearing to be in Washington, D.C., while the intervenors favored Jackson. The most important of these issues was the burden of

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38. MILLS, supra note 3, at 99.
39. Id.
40. Id. at 241.
41. See Anthony E. Varona, Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation, 6 MINN. J. L. SCI. & TECH. 1, 30 (2004) (stating that the FCC has not revoked the license of a television station for failure to satisfy the public interest standards in fifty years).
42. Office of Comm’n of the United Church of Christ v. FCC (United Church of Christ f), 359 F.2d 994, 1009 (D.C. Cir. 1966).
43. Id. at 1007.
44. MILLS, supra note 3, at 113-14.
proof. The FCC had directed its examiner to hear four issues: whether WLBT provided opportunities for the discussion of conflicting views, whether it provided all significant groups in its area the chance to use its facilities, whether it acted in good faith on racial matters or misrepresented such matters to the public or the FCC, and whether granting a new license to the station’s owners would serve the public interest. The Commission ruled that the Office of Communication had the burden of proof on the first two issues, the Commission staff had the burden of proof on the third issue, and the station would have to prove, in light of all the evidence, that a renewal served the public interest. When the intervenors asked the FCC to reconsider its ruling, the Commission refused, saying that a party charging misconduct had the burden to prove the charge.45

The two sides also engaged in settlement negotiations. Henry Geller, FCC General Counsel, urged Paul Porter to settle the case, anticipating correctly that if the FCC decided in favor of his client “we’ll be looking at a howitzer in the court of appeals.”46 Parker told his lawyers that the objective of any settlement was “an airtight procedure that would make WLBT a model for all stations in the South in serving the black community.”47 When Arnold, Fortas, and Porter asked what legal fees the church would demand in a settlement, Earl K. Moore answered that the church may have spent as much as $200,000 on the case, although the actual amount was probably somewhat less.48 The settlement negotiations, however, floundered because of the station’s opposition. According to Paul Porter, “Some of these Mississippians said that they wouldn’t traffic with the devil. They felt this was a bunch of carpetbaggers.”49

Forty-seven witnesses testified at the hearing, which lasted twelve days and produced a trial record of 1,500 pages with 200 exhibits.50 The parties then proposed findings and conclusions to the trial examiner. The FCC staff attorneys, who recommended granting the station a new license, excused or minimized the bad behavior alleged by the Office of Communication. For example, there was evidence that a station announcer had referred to members of the black community as “niggers” or “negras.” The FCC lawyers asked the hearing officer to ignore this episode. They noted that the announcer had explained “he had difficulty pronouncing the word ‘Negro’ and meant no harm.”51 The trial examiner ruled in favor of the station, finding that the monitoring study undertaken by the Office of

45. Id. at 109-10.
46. Id. at 111.
47. Id. at 112.
48. Id. at 113.
49. Id.
50. Id. at 152.
51. Id. at 145.
Communication had little probative value. More generally, he concluded that the hearing gave the intervenors ample opportunity to prove their allegations, and that "[t]hey have woefully failed to do so."

Less than four weeks after oral arguments, the Commission announced its 5-2 decision to renew WLBT's license for three years. The majority agreed with the trial examiner that the church's monitoring study had "little probative value," and, even though the station's performance had been far from perfect, the station's improvements justified the full renewal of the license. Commissioners Kenneth Cox and Nicholas Johnson dissented, concluding:

[It] would appear that the only way in which members of the public can prevent renewal of an unworthy station's license is to steal the document from the wall of the station's studio in the dead of night, or hope that the courts will do more than merely review and remand cases to the FCC with instructions that may be ignored.

When the Office of Communication appealed the Commission's decision, the D.C. Circuit provided the relief to the intervenors that Cox and Johnson had worried might not be forthcoming. In September 1969, the court reversed the Commission's decision to renew WLBT's license for three years on the ground the decision lacked substantial evidence. It also ordered the FCC to hold a comparative hearing to determine who should be the new station owner, although it did not disqualify WLBT from seeking a new license from the FCC as one of the applicants. They took this step because the failure of the FCC to create a competent record was not the station's fault. Nevertheless, the decision disadvantaged WLBT because it required the station to compete with other applicants for the license on an equal basis.

The same three judges heard the case on the second appeal, and Warren Burger again was the author of the unanimous opinion. It was the last opinion Burger authored as a D.C. Circuit judge before ascending to the Supreme Court. The irony of the FCC's action did not go unnoticed. Judge Burger wrote: "The Commission itself, with more specific

52. Id. at 146.
53. Id. at 147.
54. Id. at 157.
55. Id. at 157-58.
56. Id. at 162.
58. Id.
59. Id.
60. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945) (ruling that the FCC must hold a comparative hearing involving all mutually exclusive applications for a broadcast license, which puts all applicants on an equal basis).
61. MILLS, supra note 3, at 165.
documentation of the licensee's shortcomings than it had in 1965 has now found virtues in the licensee which it was unable to perceive in 1965 and now finds the grant of a full three-year license to be in the public interest." 62

The comparative hearing and related litigation continued for years after the D.C. Circuit opinion. The FCC selected an interim manager for the station, and WLBT competed for the license against four other applicants.63 Those four applicants finally reached an agreement to own the station jointly. The new board chair for the station was Aaron Henry, who was one of the intervenors in the original licensing proceeding after WLBT refused to air his political ad because he was black.64

An excellent history of the WLBT case ends with this epitaph:

Some may remember the WLBT case for the courage and doggedness of the challengers and for the impact that they had on both the industry and the community around Jackson, Mississippi. Others will doubtless damn the challengers for singling out one broadcaster for the practices of many at the time and for pushing the FCC to examine programming content. But the case was indeed historic. It changed lives and perceptions, and it remains an example of what can happen when the public not only cares but also acts.65

The lesson of this story, however, is not just that courageous and committed individuals can right a social wrong. The story also highlights the importance of administrative law's role in empowering members of the public to hold agencies like the FCC accountable for illegally failing to protect the public interest. This important function, which is sometimes overlooked today, is the subject of the remainder of this Article.

II. THE DECISIONS

The United Church of Christ opinions indicated to the FCC and to television station owners in the South that it would no longer be permissible to show biased coverage of civil rights issues and to have no local programming for black audiences. This Section indicates how the D.C. Circuit held the Commission accountable for its unprincipled refusal to conduct a serious investigation of WLBT or to credit the serious allegations made against the station by the intervenors.

63. Mills, supra note 3, at 208-09.
64. Id. at 240.
65. Id. at 268.
A. United Church of Christ I

*United Church of Christ I* answered two key questions. First, did television viewers have a statutory right to intervene in FCC licensing hearings? Second, had the FCC violated its statutory mandate when it renewed WLBT’s license for one year?

1. Intervention

The court characterized the intervention issue as “standing” because all of the parties involved in the appeal had assumed the same legal standards applied to both intervention and who had a cause of action to appeal a Commission order. The FCC statute gave a right to appeal to persons “aggrieved or whose interests are adversely affected by any order of the Commission.” While the opinion clearly stated the court was only addressing the intervention issue, the court primarily looked to standing law to resolve whether viewers had a right to intervene.

The FCC argued that listeners were not among those authorized by Congress to sue because they did “not suffer any injury peculiar to them and that allowing them standing would pose great administrative burdens.” The court responded by citing *FCC v. Sanders Bros. Radio Station*, a 1940 Supreme Court case that had interpreted the FCC judicial review provision to include companies with an economic interest in a licensing decision. In *Sanders Bros.*, the Court determined that Congress had meant to include competitors as persons “aggrieved” by an FCC licensing decision “on the theory that such persons might well be the only ones sufficiently interested to contest a Commission action.” The purpose of such private attorneys’ general was to “vindicate the public interest,” which was the same role that United Church of Christ was seeking to play. Moreover, the court found that the legislative history did not defeat this interpretation. Members of Congress had discussed the standing issue, but the discussion focused only on potential abuses of

68. *United Church of Christ I*, 359 F.2d at 1006 (“In line with this analysis, we do not now hold that all of the Appellants have standing to challenge WLBT’s renewal.”).
69. Id. at 1000.
70. 309 U.S. 470 (1940).
72. Id.
Standing. The court interpreted this history as indicating that Congress expected that members of the public would have standing, but was concerned about how appeals by the public could be managed.\footnote{See \textit{id.} (discussing congressional reports that expressed fears that broad standing may be used "by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made").}

The court rejected the notion that the "fact that the Commission itself is directed by Congress to protect the public interest" was an "adequate reason to preclude the listening public from assisting in that task."\footnote{\textit{Id.} at 1003.} The facts on the ground were sufficient to convince the court of the futility of this assumption:

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it.\footnote{\textit{Id.} at 1003-04.}

The court supported its decision that local viewers had a right to intervene in a licensing hearing by citing to five earlier cases that held the economic interests of consumers were sufficient to give them "standing" to appeal agency decisions under statutes granting a cause of action to persons "aggrieved" or "affected" by agency action.\footnote{\textit{Id.} at 1002 (citing Henderson v. United States, 339 U.S. 816, 818 (1950) (holding that a passenger could appeal Interstate Commerce Commission rules permitting racial segregation in railroad dining cars based on economic interest); Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 710 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943) (announcing that coal consumers have standing to appeal minimum price orders); Bebchick v. Pub. Utilities Comm'n, 287 F.2d 337, 338 (D.C. Cir. 1961) (stating that public transit riders had standing to appeal a rate increase); Reade v. Ewing, 205 F.2d 630, 631-32 (2d Cir. 1953) (holding that an oleomargarine consumer could challenge orders affecting the ingredients of the product based on economic interest); United States v. Pub. Utils. Comm'n, 151 F.2d 609, 613 (1945) (saying that an electricity consumer had standing to appeal a rate order).}

Another of these cases, \textit{Scenic Hudson Preservation Conference v. FPC},\footnote{\textit{354 F.2d 608} (2d Cir. 1965).} determined that individuals had standing to appeal a decision by the Federal Power Commission because of both economic and non-economic injuries.\footnote{\textit{Id.} at 616-17 (holding that non-profit conservation associations have standing to protect the aesthetic, conservational, and recreational aspects of power development).} However, the D.C. Circuit decided it did not have to reach the issue of non-economic injuries in \textit{United Church of Christ I}. Television viewers, the court noted, "have a huge aggregate investment in receiving equipment."\footnote{\textit{United Church of Christ I}, 359 F.2d at 1002.}
2. Licensing Hearing

Having decided that the FCC had to admit local viewers as intervenors in a licensing hearing, the Court then decided that the FCC had to hold such a hearing. Congress had required the Commission to hold a hearing concerning a renewal application where "a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified" that "the public interest, convenience, and necessity will be served by the granting of such application." The Commission had recognized that WLBT’s past behavior made it an undesirable licensee. Nevertheless, as related earlier, the FCC had granted the station a one-year renewal of its license because there was an urgent need for a properly run station in Jackson.

The court, which characterized this justification as a "policy" decision, refused to defer to it because it was ad hoc rather than a "reflection of some long standing or accepted proposition." In addition, it found that the Commission’s prediction that the station would comply with the conditions was a "pious hope" because there was no evidence to support the prediction. This was not a case, the court observed, where the station had promised to change or demonstrated any willingness or capacity to change. There was also no evidence in the record that the need for a properly run station was so pressing that the FCC had to issue a one-year license to WLBT. This is not surprising. As noted earlier, the FCC’s justification was an afterthought made up by the FCC General Counsel who said he lacked any other basis to justify the decision.

B. United Church of Christ II

United Church of Christ I ordered the FCC to hold a hearing on WLBT’s request to renew its license and to permit representatives of the public to intervene. After completion of the hearing, the Commission voted to renew

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81. id. § 309(a) (listing the current version of the hearing provision).
82. See United Church of Christ I, 359 F.2d at 1007 ("When past performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest.").
83. See supra notes 31-35 and accompanying text (relating the circumstances surrounding the FCC’s renewal decision).
84. United Church of Christ I, 359 F.2d at 1008.
85. See id. at 1007 (explaining that past performance is the best criterion of a licensee's ability to serve the public interest).
86. See id. ([The] grant of the one-year license on the policy ground that there was an urgent need at the time for a properly run station in Jackson must have been predicated on a belief that the need was so great as to warrant the risk that WLBT might continue its improper conduct.").
87. See supra notes 34-35 and accompanying text.
the station’s license for the full three-year period.\textsuperscript{88} It held that the intervenors had failed to prove the station was ineligible to have its license renewed.\textsuperscript{89}

In \textit{United Church of Christ II}, the court focused on the FCC’s decision to assign the burden of proof to the intervenors concerning two critical issues. The court found that this decision effectively placed the “entire burden” on the intervenors to show the licensee was not qualified.\textsuperscript{90} The proper role of the Commission, however, was to “assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee’s performance of his duty to serve the public interest.”\textsuperscript{91} The Commission not only failed to perform this role, the hearing examiner had “impede[d] the exploration of the very issues which [one] would reasonably expect the Commission itself would have initiated.”\textsuperscript{92} An “ally,” the court noted, “was regarded as an opponent.”\textsuperscript{93} The majority of the Commissioners were similarly misguided because they were “in agreement with the examiner’s conclusions that the intervenors failed to corroborate or substantiate virtually all of their allegations upon which the hearing was predicated.”\textsuperscript{94}

Considering the record as a whole, the court concluded the evidence did not justify a three-year renewal of WLBT’s license.\textsuperscript{95} The court’s distrust of the Commission, however, stopped it from remanding the case for a new decision. A remand would serve no useful purpose, the court decided, in light of the “impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, [and] plain errors in rulings and findings . . . .”\textsuperscript{96} In short, the court concluded, the “administrative conduct reflected in this record is beyond repair.”\textsuperscript{97} As discussed earlier,\textsuperscript{98} the court therefore ordered the Commission to start a comparative licensing proceeding.\textsuperscript{99}

The court also permitted WLBT to participate in the proceeding for two reasons. First, it was not the station’s fault that the Commission had misallocated the burden of proof which, in turn, caused the Commission to

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\bibitem{88} Mills, \textit{supra} note 3, at 157.
\bibitem{89} \textit{See supra} note 55 and accompanying text (relating the FCC’s conclusion that the monitoring study was insufficient for the intervenors to establish their claims).
\bibitem{90} Office of Commc’n of the United Church of Christ v. FCC (\textit{United Church of Christ II}), 425 F.2d 543, 549 (D.C. Cir. 1969).
\bibitem{91} \textit{Id.} at 548.
\bibitem{92} \textit{Id.} at 549.
\bibitem{93} \textit{Id.}
\bibitem{94} \textit{Id.}
\bibitem{95} \textit{Id.} at 550.
\bibitem{96} \textit{Id.}
\bibitem{97} \textit{Id.}
\bibitem{98} \textit{See supra} note 58-59 and accompanying text.
\bibitem{99} \textit{United Church of Christ II}, 425 F.2d at 550.
\end{thebibliography}
compile a record that could not be repaired.100 Second, the FCC had failed affirmatively to find that WLBT was not qualified to have a license.101 Nevertheless, this decision disadvantaged the then owners of WLBT because they had to compete on an equal basis with the other applicants to persuade the Commission that they would be the best people to operate the station in the public interest.102

III. THEN AND NOW

In the 1960s and 1970s, the courts fashioned several administrative law doctrines that empowered regulatory beneficiaries to participate in administrative proceedings, required agencies to take account of their evidence and arguments, and authorized the beneficiaries to seek judicial review of agency policy choices that they opposed. Professor Richard Stewart famously described these changes as the “reformation” of American administrative law.103 Stewart explained that these innovations were a “reaction” to the critique that “agencies are biased in favor of regulated and client groups, and are generally unresponsive to unorganized interests.”104 Professor Stewart understood the “reformation” as promoting a more representative and balanced interest group process in agency government. He envisioned “the agency as a mini-legislature—a place where all voices have an opportunity to be heard.”105 I have proposed a different, but related, interpretation of the reformation as promoting the rule of law.106 Every year there are dozens of examples of environmental and other interest groups who successfully challenge agency decisions for failing to protect the public and the environment as required by their statutory mission.107

100. Id.
101. See id. (declaring that the D.C. Circuit was refraining from finding that WLBT was disqualified from filing a new application).
102. See supra note 60 and accompanying text (discussing the Ashbaker Radio Co. decision, which held that comparative licensing hearings put all applicants on an equal basis).
103. Stewart, supra note 2 (entitling his work The Reformation of American Administrative Law).
104. Id. at 1712 (internal footnotes omitted).
107. See id. at 6 (providing examples such as Riverkeeper, Inc. v. EPA, 358 F.3d 174 (2d Cir. 2004), where the Second Circuit found that the Environmental Protection Agency exceeded its authority by failing to require industrial facilities to use technologies that would reduce fish kills).
United Church of Christ was at the vanguard of the reformation of administrative law. This Section focuses on expanded standing, the hard look doctrine, and the role of private attorneys in challenging potentially illegal agency decisions in favor of regulated entities. It concludes that, despite recent disaffection with these aspects of the reformation, they remain important elements in the effort to promote the rule of law.

A. Standing

The first United Church of Christ opinion held that television viewers were entitled to intervene in FCC licensing proceedings. As noted earlier, the decision was based on language that indicated who could appeal a FCC decision. The focus of the opinion was therefore on standing to appeal, although the holding addressed only the right to intervene in a licensing hearing.

The court held that the economic injuries of listeners qualified them as persons “aggrieved” or “affected” by agency action. The opinion recognized that listeners also might have non-economic claims, but concluded that it was unnecessary to decide if such injuries also qualified listeners to appeal an FCC decision. Nevertheless, United Church of Christ I was crucial to the expansion of standing to include persons with aesthetic and recreational injuries, which was an important step in the reformation of administrative law. United Church of Christ I was crucial to this development because it associated consumer standing with the private attorney general theory of agency accountability that the Supreme Court had originated in Sanders Bros. and Sierra Club v. Morton and Ass’n of Data Processing Service Organizations v. Camp, for example, cited this linkage (and United Church of Christ I) as a justification for expanding standing to include non-economic injuries.

The concept of consumers and environmentalists as private attorneys general was a decisive break with the previous paradigm of administrative law. Up to this time, the progressive conception of agency government continued to be influential. According to this vision, an agency would

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108. See supra notes 66-68 and accompanying text.
109. See supra note 76 and accompanying text.
110. See supra notes 77-78 and accompanying text.
111. Stewart, supra note 2, at 1728.
112. 309 U.S. 470, 477 (1939) (finding standing for those aggrieved by a licensing decision because such persons may be the only ones sufficiently interested in a licensing decision).
113. 405 U.S. 727, 737-38 (1972) (explaining that economic injury gives private attorneys general a right to make public interest arguments in support of their position).
114. 397 U.S. 150, 154 (1970) (“Certainly he who is ‘likely to be financially’ injured... may be a reliable private attorney general to litigate the issues of the public interest.”) (internal citations omitted).
impartially seek the optimal solution to regulatory problems applying its expertise and experience. The lack of citizen participation was not problematic because the agency would be seeking the correct regulatory outcome and would thereby protect the public. Nevertheless, the due process clause required that regulated entities be given the opportunity to appear before an agency and to appeal adverse decisions. However, since regulatory decisions did not ordinarily deprive members of the public of property or liberty, as those terms were understood at the time, the public could not claim similar protections.

This vision of the administrative system had come under attack starting in the middle 1960s as producing regulatory policies favoring industry and disfavoring the public. Ralph Nader formed his first group of investigative “SWAT teams,” nicknamed Nader’s Raiders by the Washington Post, in 1968 to investigate the then-moribund Federal Trade Commission (FTC). In 1969, Nader founded the first of the several institutions that eventually became Public Citizen, the Center for the Study of Responsible Law. The United Church of Christ decisions in 1966 and 1969 were at the vanguard of this movement. The decisions not only recognized the capture phenomenon—when regulated industries have disproportionate influence at regulatory agencies—but they also understood the participation of regulatory beneficiaries as a solution.

In recent years, the Supreme Court has found the “private attorneys general” theory to be less compelling as a protection against potentially illegal agency decisions that benefit regulated entities. The Court has sought to limit who can sue under a cause of action for persons “aggrieved” or “affected” by agency actions with elaborate standing requirements.

115. See William Funk, When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA’s Woodstove Standards, 18 ENVTL. L. 55, 89-90 (1987) (contending that, implicit in the Progressive’s faith in administrative agency expertise, was a belief that federal agencies “faced problems capable of objective solution”).


117. See Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 HARV. L. REV. 1193, 1202-04 (1982) (noting that the traditional differentiation between public and private law left no basis on which regulatory beneficiaries could file suit to enforce regulations against third parties and that, traditionally, courts refused to endow many governmental benefits with protections of due process).


119. Id.

120. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (describing the requirements for standing: (1) the plaintiff must have suffered an “injury in fact,” which is an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision).
The Court’s lack of interest in this type of private attorney general accountability theory is also evident in statutory interpretation.\[^{121}\]

In its standing decisions, the Court has given great weight to enforcing the “case and controversy requirement” of Article III and paid almost no attention to the value of private attorneys general in promoting statutory compliance and the rule of law.\[^{122}\] As substantial literature indicates, this choice is hardly compelled by constitutional language, history, or doctrine.\[^{123}\] The Court apparently finds it sufficient that consumers, environmentalists, and others are relegated to the political system to press their grievances that agencies are acting illegally.

It is, however, fanciful to think that the political system will necessarily guarantee compliance with statutory mandates. Public interest and environmental advocates, let alone civil rights advocates, are often opposed by corporate and other interests with vastly superior funding and organization. In addition, when both houses of Congress are controlled by the president’s political party, which was the situation at the time of writing, it is unusual for legislators to engage in a robust effort to hold agencies accountable for ignoring their statutory mandates.

In other recent articles, I have argued for the fundamental importance of the concept of rule of law in administrative law, and contended that important developments in administrative law, such as “entitlement” theory in due process\[^{124}\] and legislative preclusion of judicial review of administrative actions,\[^{125}\] are in conflict with preserving the rule of law. Likewise, the Court’s interpretation of standing law is problematic when it is considered in this context. The rule of law depends on holding agencies accountable for violations of statutory mandates. The liberalization of standing doctrine serves this important purpose.

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\[^{121}\] See, e.g., Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 882 (1990) (holding that judicial review of the land withdrawal program of the Bureau of Land Management (BLM) was precluded by the requirement in the Administrative Procedure Act (APA) that only “final agency action” can be appealed).


\[^{123}\] See, e.g., Cass R. Sunstein, What’s Standing After Lujan?—Of Citizen Suits, “Injuries” & Article III, 91 Mich. L. Rev. 163, 166 (1992) (arguing that judicial restraints on legislative grants of standing are not supported by Article III of the Constitution).


B. Hard Look Doctrine

The "hard look" doctrine is another pillar of the reformation of administrative law. Courts employing the hard look doctrine seek to ensure that an agency has taken a "hard look" at the salient problems before it and has genuinely engaged in reasoned decisionmaking. The "hard look" doctrine is linked to expanded standing and the concept of private attorneys general. The expansion of standing would have had little impact on the rule of law if courts had credulously reviewed agency records and applied a highly deferential scope of review. By requiring agencies to have an adequate explanation for their actions, the "hard look" doctrine seeks to be both skeptical and respectful of agency authority. Agencies are required to grapple with the issues in front of them, including evidence filed by public interest groups. If they fail to do so, a court will remand the case and allow the agency to determine how to proceed. If they did do so, the court should affirm the agency's decision even if the judges would have adopted a different policy. At the same time, the fact that regulatory beneficiaries can sue an agency for the failure to implement its statutory mandate gives those beneficiaries the opportunity to influence an administrative decision during the time the agency is making it. Regulatory beneficiaries have this influence because the agency risks a remand if it fails to pay attention to the arguments and evidence submitted by the beneficiaries.

United Church of Christ was foundational for the "hard look doctrine." The first explicit elaboration of this doctrine occurred one year after United Church of Christ II. In Greater Boston Television Corp. v. FCC, the D.C. Circuit noted an agency's obligation to give "reasoned consideration to all the material facts and issues," and it established an obligation to refuse to approve a decision "if the court becomes aware... that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." Although United Church of Christ did not use this language, the opinions essentially adopt

126. See William F. Funk, Sidney A. Shapiro, & Russell L. Weaver, Administrative Procedure & Practice: Problems and Cases 165 (3d ed. 2006) (citing Harold Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509, 511 (1974) (asserting that a court must exercise its power of review over agency discretion "with particular vigilance if it becomes aware... that the agency has not really taken a hard look at the salient problems, and has not genuinely engaged in reasoned decisionmaking").
127. See id. (explaining that the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made) (internal citations omitted).
128. Id.
129. 444 F.2d 841 (D.C. Cir. 1970).
130. Id. at 851.
131. Id. (internal footnotes omitted).
this form of review.\textsuperscript{132} More broadly, \textit{United Church of Christ}
demonstrated the crucial role that hard look review could play in holding
an agency accountable for its failure to protect the public interest. The fact
that the Commission’s failure to do so involved a preeminent issue of the
day—civil rights—made this lesson even more vivid.

Today many scholars and public interest advocates regard the hard look
doctrine as an impediment to their efforts. In the hands of a conservative
judiciary, the doctrine has been turned against stringent regulation instead
of being used as a way to ensure that agencies have regulated
sufficiently.\textsuperscript{133} It is also seen as a culprit in rulemaking ossification, as
agencies labor to come up with elaborate bulletproof explanations for their
rules just in case a court seeks to find flaws in their reasoning process.\textsuperscript{134}

Although overly aggressive judicial review is a significant problem, the
answer cannot be the elimination of the hard look doctrine. The doctrine
remains an important weapon in the arsenal of public interest advocates.\textsuperscript{135}
The difficulty, of course, is how to limit the doctrine to policing agency
capture and how to prevent it from being used to implement the ideological
predilections of a judge.\textsuperscript{136}

This Article is not the place to elaborate on how to reform the “hard
look” doctrine, and I have proposed elsewhere how to keep the doctrine
and make it more difficult for judges to nitpick agency justifications for
their decisions.\textsuperscript{137} The judges in \textit{United Church of Christ} focused on the
makeweight character of the FCC’s justification for renewing the license of
WLBT. Properly implemented, the hard look doctrine asks judges to
perform the same function. The rule of law does not require that agencies
give perfect justifications for their decisions. It does require that they can
articulate some rational basis for how the decision is consistent with the
agency’s statutory mandate, a task that the FCC was unable to meet.

\textsuperscript{132} See supra notes 84-85, 94, 97 and accompanying text.
\textsuperscript{133} Sidney A. Shapiro, \textit{Administrative Law After the Counter-Reformation: Restoring
look” review as meaning the relatively rigorous review that courts apply to agency decisions
to ensure that these decisions are not arbitrary and capricious).
\textsuperscript{134} See, e.g., Thomas O. McGarity, \textit{Some Thoughts on “Deossifying” The Rulemaking
Process}, 41 DUKE L.J. 1385, 1385 (1992) (“An assortment of analytical requirements have
been imposed on the simple rulemaking model, and evolving judicial doctrines have obliged
agencies to take greater pains to ensure that the technical bases for rules are capable of
withstanding judicial scrutiny.”).
\textsuperscript{135} Shapiro, supra note 104, at 10.
\textsuperscript{136} See Sidney A. Shapiro & Richard E. Levy, \textit{Judicial Incentives and Indeterminacy in
(criticizing the Supreme Court for failing to give the “substantial evidence” and “arbitrary and
capricious” standard precise content).
\textsuperscript{137} \textit{Id. at} 1074-76 (proposing amendment of the APA for this purpose).
CONCLUSIONS

The United Church of Christ cases are exemplars of how private attorneys general litigation can promote the rule of law and serve the public interest. The litigation not only exposed the FCC’s failure to meet its statutory responsibilities, the D.C. Circuit, by holding the FCC accountable, struck an important blow for civil rights when the outcome of that struggle was by no means apparent. Moreover, the United Church of Christ story is an inspirational one. Against all odds and at considerable expense, the United Church of Christ steadfastly pursued its goal of changing the behavior of southern television stations.

The case is important in the evolution of administrative law because it was at the forefront of two important developments. By linking private attorneys general theory and standing, the D.C. Circuit established the underpinnings of the expansion of standing that followed, which permitted consumers and environmentalists to challenge agency decisions favoring regulated entities. The Supreme Court’s recent retrenchment of standing doctrine, which threatens the ability of the public to hold agencies accountable, ignores the value of private attorneys general in promoting the rule of law.

In addition, by skeptically and closely reviewing the FCC’s evidence and finding no acceptable reason for the Commission’s actions, the D.C. Circuit paved the way for the hard look doctrine that it adopted the year after, in United Church of Christ II. The intention behind hard look review is to ensure that review at the behest of private attorneys general is not so deferential that agencies effectively can ignore the rule of law. More recently, courts and scholars have been skeptical of the value of private attorneys general litigation. This is unfortunate. As long as the potential for agency capture remains, private attorneys general have an important role to play in ensuring the rule of law.