Ashwander v. TVA, 297 U.S. 288, 341-356 (1936) (Brandeis, J., concurring).

***341** Mr. Justice BRANDEIS (concurring).

'Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.' Blair v. United States, 250 U.S. 273, 279, 39 S.Ct. 468, 470, 63 L.Ed. 979.

I do not disagree with the conclusion on the constitutional question announced by the CHIEF JUSTICE; but, in my opinion, the judgment of the Circuit Court of Appeals should be affirmed without passing upon it. The government has insisted throughout the litigation that the plaintiffs have no standing to challenge the validity of the legislation. This objection to the maintenance of the suit is not overcome by presenting the claim in the form of a bill in equity and complying with formal prerequisites required by Equity Rule 27 (28 U.S.C.A. following section 723). The obstacle is not procedural. It inheres in the substantive law, in well-settled rules of equity, and in the practice in cases involving the constitutionality of legislation. Upon the findings made by the District Court, it should have dismissed the bill.

From these it appears: The Alabama Power Company, a corporation of that state with transmission lines located there, has outstanding large issues of bonds, preferred stock, and common stock. Its officers agreed, with the approval of the board of directors, to sell to the Tennessee Valley Authority a part of these lines and incidental property. The management thought that the transaction was in the interest of the company. It acted in the exercise of its business judgment with the utmost good faith.[1] ***342** There was no showing of fraud, oppression, or gross negligence. There was no showing of legal duress. There was no showing that the management believed that to sell to the Tennessee Valley Authority was in excess of the company's corporate powers, or that it was illegal because entered into for a forbidden purpose.

Nor is there any basis in law for the assertion that the contract was ultra vires the company. Under the law of Alabama, a public utility corporation may ordinarily sell a part of its transmission lines and incidental property to another such corporation if the approval of the Public Service Commission is obtained. The contract provided for securing such approval. Moreover, before the motion to dissolve the restraining ****481** order was denied, and before the hearing on the merits was concluded, the Legislature, by Act No. 1, approved January 24, 1935 (Gen.Acts Ala.1935, p. 1) and effective immediately, provided that a utility of the state may sell all or any of its property to the Tennessee Valley Authority without the approval of the Public Service Commission or of any other state agency.

First. The substantive law. The plaintiffs who object own about $^{1}/_{340}$ of the preferred stock. They claimed at the hearing to represent about $^{1}/_{9}$ of the preferred stock; that is, less than $^{1}/_{45}$ in amount of all the securities outstanding. Their rights are not enlarged because the Tennessee Valley Authority entered into the transaction pursuant to ***343** an act of Congress. The fact that the bill calls for an enquiry into the legality of the transaction does not overcome the obstacle that ordinarily stockholders have no standing to interfere with the management. Mere belief that corporate action, taken or contemplated, is illegal gives the stockholder no greater right to interfere than is possessed by any other citizen. Stockholders are not guardians of the public. The function of guarding the public against acts deemed illegal rests with the public officials.

Within recognized limits, stockholders may invoke the judicial remedy to enjoin acts of the management which threaten their property interest. But they cannot secure the aid of a court to correct what appear to them to be mistakes of judgment on the part of the officers. Courts may not interfere with the management of the corporation, unless there is bad faith, disregard of the relative rights of its members, or other action seriously threatening their property rights. This rule applies whether the mistake is due to error of fact or of law, or merely to bad business judgment. It applies, among other things, where the mistake alleged is the refusal to assert a seemingly clear cause of action, or the compromise of it. United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261, 263, 264, 37 S.Ct. 509, 61 L.Ed. 1119. If a stockholder could compel the officers to enforce every legal right, courts, instead of chosen officers, would be the arbiters of the corporation's fate.

In Hawes v. Oakland, 104 U.S. 450, 462, 26 L.Ed. 827, a common stockholder sought to enjoin the Contra Costa Water-Works Company from permitting the city of Oakland to take without compensation water in excess of that to

which it was legally entitled. This Court, in affirming dismissal of the bill, said: 'It may be the exercise of the highest wisdom, to let the City use the water in the manner complained of. The directors are better able to act ***344** understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California, may take this view of it and be content to abide by the action of their directors. If this be so, is a bitter litigation with the City to be conducted by one stockholder for the Corporation and all other stockholders, because the amount of his dividends is diminished?'
In Corbus v. Alaska Treadwell Gold Mining Co., 187 U.S. 455, 463, 23 S.Ct. 157, 160, 47 L.Ed. 256, a suit by the common stockholder to enjoin payment of an Alaska license tax alleged to be illegal, the Court said: 'The directors represent all the stockholders, and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs.'[2]

Second. The equity practice. Even where property rights of stockholders are ****482** alleged to be violated by the management, stockholders seeking an injunction must ***345** bear the burden of showing danger of irreparable injury, as do others who seek that equitable relief. In the case at bar the burden of making such proof was a peculiarly heavy one. The plaintiffs, being preferred stockholders, have but a limited interest in the enterprise, resembling, in this respect, that of a bondholder in contradistinction to that of a common stockholder. Acts may be innocuous to the preferred which conceivably might injure common stockholders. There was no finding that the property interests of the plaintiffs were imperiled by the transaction in question; and the record is barren of evidence on which any such finding could have been made.

Third. The practice in constitutional cases. The fact that it would be convenient for the parties and the public to have promptly decided whether the legislation assailed is valid, cannot justify a departure from these settled rules of corporate law and established principles of equity practice. On the contrary, the fact that such is the nature of the enquiry proposed should deepen the reluctance of courts to entertain the stockholder's suit. 'It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.' 1 Cooley, Constitutional Limitations (8th Ed.), p. 332.

The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress;[3] and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory ***346** opinions.[4] On this ground it has in recent years ordered the dismissal of several suits challenging the constitutionality of important acts of Congress. In Texas v. Interstate Commerce Commission, 258 U.S. 158, 162, 42 S.Ct. 261, 66 L.Ed. 531, the validity of titles 3 and 4 of the Transportation Act of 1920 (41 Stat. 456). In New Jersey v. Sargent, 269 U.S. 328, 46 S.Ct. 122, 70 L.Ed. 289, the validity of parts of the Federal Water Power Act (41 Stat. 1063). In Arizona v. California, 283 U.S. 423, 51 S.Ct. 522, 75 L.Ed. 1154, the validity of the Boulder Canyon Project Act (43 U.S.C.A. s 617 et seq.). Compare United States v. West Virginia, 295 U.S. 463, 55 S.Ct. 789, 79 L.Ed. 1546, involving the Federal Water Power Act and Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 47 S.Ct. 282, 71 L.Ed. 541, where this Court affirmed the dismissal of a suit to test the validity of a Kentucky statute concerning the sale of tobacco; also, Massachusetts State Grange v. Benton, 272 U.S. 525, 47 S.Ct. 189, 71 L.Ed. 387.

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.' Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176. Compare Lord v. Veazie, 8

How. 251, 12 L.Ed. 1067; Atherton Mills v. Johnston, 259 U.S. 13, 15, 42 S.Ct. 422, 66 L.Ed. 814.

****483** 2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' ***347** Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899;[5] Abrams v. Van Schaick, 293 U.S. 188, 55 S.Ct. 135, 79 L.Ed. 278; Wilshire Oil Co. v. United States, 295 U.S. 100, 55 S.Ct. 673, 79 L.Ed. 1329. 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' Burton v. United States, 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L.Ed. 482.

3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners, supra. Compare Hammond v. Schappi Bus Line, Inc., 275 U.S. 164, 169—172, 48 S.Ct. 66, 72 L.Ed. 218.

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 191, 29 S.Ct. 451, 53 L.Ed. 753; Light v. United States, 220 U.S. 523, 538, 31 S.Ct. 485, 55 L.Ed. 570. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. Berea College v. Kentucky, 211 U.S. 45, 53, 29 S.Ct. 33, 53 L.Ed. 81.

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.[6] ***348** Tyler v. Judges, etc., 179 U.S. 405, 21 S.Ct. 206, 45 L.Ed. 252; Hendrick v. Maryland, 235 U.S. 610, 621, 35 S.Ct. 140, 59 L.Ed. 385. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. Columbus & Greenville Ry. Co. v. Miller, 283 U.S. 96, 99, 100, 51 S.Ct. 392, 75 L.Ed. 861. In Fairchild v. Hughes, 258 U.S. 126, 42 S.Ct. 274, 66 L.Ed. 499, the Court affirmed the dismissal of a suit brought by a citizen who sought to have the Nineteenth Amendment declared unconstitutional. In Massachusetts v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078, the challenge of the federal Maternity Act was not entertained although made by the commonwealth on behalf of all its citizens.

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.[7] Great Falls Mfg. Co. v. Attorney General, 124 U.S. 581, 8 S.Ct. 631, 31 L.Ed. 527; Wall v. Parrot Silver & Copper Co., 244 U.S. 407, 411, 412, 37 S.Ct. 609, 61 L.Ed. 1229; St. Louis Malleable Casting Co. v. Prendergast Construction Co., 260 U.S. 469, 43 S.Ct. 178, 67 L.Ed. 351.

7. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' ****484** Crowell v. Benson, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598.[8] ***349** Fourth. I am aware that, on several occasions, this Court passed upon important constitutional questions which were presented in stockholders' suits bearing a superficial resemblance to that now before us. But in none of those cases was the question presented under circumstances similar to those at bar. In none, were the plaintiffs preferred stockholders. In some, the Court dealt largely with questions of federal jurisdiction and collusion. In most, the propriety of considering the constitutional question was not challenged by any party. In most, the statute challenged imposed a burden upon the corporation and penalties for failure to discharge it; whereas the Tennessee Valley Authority Act (16 U.S.C.A. s 831 et seq.) imposed no obligation upon the Alabama Power Company, and under the contract it received a valuable consideration. Among other things, the Authority agreed not to sell outside the area covered by the contract, and thus preserved the corporation against possible serious competition. The effect of this agreement was equivalent to a compromise of a doubtful cause of action. Certainly, the alleged invalidity of the Tennessee Valley Authority Act was not a matter so clear as to make compromise illegitimate. These circumstances present features differentiating the case at bar from all the cases in which stockholders have been held entitled to have this Court pass upon the constitutionality of a statute which the directors had refused to challenge. The cases commonly cited are these:[9]

Dodge v. Woolsey, 18 How. 331, 341—346, 15 L.Ed. 401, was a suit brought by a common stockholder to enjoin a breach of trust by the directors which, if submitted to, would seriously injure the plaintiff. The Court crew clearly the distinction between 'an error of judgment' and a breach ***350** of duty; declared that it could not interfere if there was only an error of judgment; held that on the facts the threatened action of the directors would be a breach of trust; and

pointed to the serious injury necessarily resulting therefrom to the plaintiff.[10]

Greenwood v. Union Freight R. Co., 105 U.S. 13, 15, 16, 26 L.Ed. 961, was ****485** a suit brought by a common stockholder to enjoin the enforcement of a statute alleged to be unconstitutional as repealing the corporation's charter. The Court said: 'It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence * * * that we think the complainant as a stockholder comes within the rule * * * which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter.'

Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 553, 554, 15 S.Ct. 673, 679, 39 L.Ed. 759, was a suit brought by a common stockholder to enjoin a breach of trust by paying voluntarily a tax which was said to be illegal. The stockholder's substantive right to object was not challenged. The question raised was that of equity jurisdiction. The allegation of threatened irreparable damage to the corporation and ***351** to the plaintiff was admitted. The Court said: 'The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. * * * Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits.' The jurisdictional issued discussed in the dissent (157 U.S. at pages 608—612, 15 S.Ct. 673, 39 L.Ed. 759) was the effect of Rev.St. s 3224 (26 U.S.C.A. s 1543).

Cotting v. Kansas City Stock Yards Co., 183 U.S. 79, 113, 22 S.Ct. 30, 44, 46 L.Ed. 92, was a suit brought by a common stockholder to enjoin enforcement of a rate statute alleged to be unconstitutional against which the directors refused to protect the corporation. It was alleged and found that its enforcement would subject the company to great and irreparable loss. The serious contention concerning jurisdiction was, as stated by Mr. Justice Brewer, whether a suit lay against the Attorney General of the State. Of the jurisdiction of the suit 'as one involving a controversy between the stockholders and the corporation and its officers, no serious question is made.'

Chicago v. Mills, 204 U.S. 321, 27 S.Ct. 286, 51 L.Ed. 504, was a suit brought by a common stockholder of the People's Gas, Light & Coke Company to enjoin enforcement of an ordinance alleged to be illegal. The sole question before this Court was whether the federal court had jurisdiction. That question raised an issue of fact. This Court in affirming the judgment below said (204 U.S. 321, at page 331, 27 S.Ct. 286, 289, 51 L.Ed. 504): 'Upon the whole record we agree with the circuit court that the testimony does not disclose that the jurisdiction of the Federal court was collusively and fraudulently invoked.'

Brushaber v. Union Pacific R. Co., 240 U.S. 1, 9, 10, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann.Cas.1917B, 713, was a suit brought by a common stockholder to restrain the corporation from voluntarily paying a tax alleged to ***352** be invalid. As stated by plaintiff's counsel: 'The contention is—and this is the only objection that is made to the suit—that it seeks to do indirectly what the Revised Statutes (section 3224) have said shall not be done; namely, enjoin the collection of a tax.' The Court, assuming that the averments were identical with those in the Pollock Case, declared that the right of the stockholder to sue was clear.

Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199—202, 41 S.Ct. 243, 65 L.Ed. 577, was a suit brought by a common stockholder to enjoin investment by the company in bonds issued under the Federal Farm Loan Act. Neither the parties, nor the government which filed briefs as amicus, made any objection to the jurisdiction. But as both parties were citizens of Missouri, the Court raised, and considered fully, the question whether there was federal jurisdiction under section 24 of the Judicial Code (28 U.S.C.A. s 41). It was on this question that Mr. Justice Holmes and Mr. Justice McReynolds dissented. The Court held that there was federal jurisdiction; and upon averments of the bill, assumed to be adequate, sustained the right of the stockholder to invoke the equitable remedy on the authority of the Brushaber and Pollock Cases.

Hill v. Wallace, 259 U.S. 44, 60—63, 42 S.Ct. 453, 455, 66 L.Ed. 822, was a ****486** suit by members of the Board of Trade of Chicago to restrain enforcement of the Future Trading Act (42 Stat. 187), alleged to be unconstitutional. The Court held that the averments of the bill, which included allegations of irreparable injury, stated 'sufficient equitable grounds to justify granting the relief' on the cases above cited.

If, or in so far as, any of the cases discussed may be deemed authority for sustaining this bill, they should now be disapproved. This Court, while recognizing the soundness of the rule of stare decisis where appropriate, has not

hesitated to overrule earlier decisions shown, upon fuller ***353** consideration, to be erroneous.[11] Our present keener appreciation of the wisdom of limiting our decisions rigidly to questions essential to the disposition of the case before the court is evidenced by United States v. Hastings, 296 U.S. 188, 56 S.Ct. 218, 80 L.Ed. 148, decided at this term. There, we overruled United States v. Stevenson, 215 U.S. 190, 195, 30 L.Ed. 35, 54 L.Ed. 153, long a controlling authority on the Criminal Appeals Act (18 U.S.C.A. s 682).

Fifth. If the Company ever had a right to challenge the transaction with the Tennessee Valley Authority, its right had been lost by estoppel before this suit was begun; and as it is the company's right which plaintiffs seek to enforce, they also are necessarily estopped. The Tennessee Valley Authority Act became a law on May 18, 1933. Between that date and January, 1934, the company and its associates purchased approximately 230,000,000 kwh electric energy at Wilson Dam. Under the contract of January 4, 1934, which is here assailed, continued purchase of Wilson Dam power was provided for and made; and the Authority has acted in other matters in reliance on the contract. In May, 1934, the Company applied to the Alabama Public Service Commission for approval of the transfers provided for in the contract; and on June 1, 1934, the commission made in general terms its finding that the proposed sale of the properties was consistent with the public interest. Moreover, the plaintiffs in their own right are estopped by their long inaction. Although widespread publicity was given to the negotiations for the contract and to these later proceedings, ***354** the plaintiffs made no protect until August 7, 1934; and did not begin this suit until more than eight months after the execution of the contract. Others—certain ice and coal companies who thought they would suffer as competitors—appeared before the commission in opposition to the action of the Authority; and apparently they are now contributing to the expenses of this litigation.

Sixth. Even where by the substantive law stockholders have a standing to challenge the validity of legislation under which the management of a corporation is acting, courts should, in the exercise of their discretion, refuse an injunction unless the alleged invalidity is clear. This would seem to follow as a corollary of the long established presumption in favor of the constitutionality of a statute.

Mr. Justice Iredell said, as early as 1798, in Calder v. Bull, 3 Dall. 386, 399, 1 L.Ed. 648: 'If any act of congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case.'
Mr. Chief Justice Marshall said, in Dartmouth College v. Woodward, 4 Wheat. 518, 625, 4 L.Ed. 629: 'On more than one occasion, this court has expressed the cautions circumspection with which it approaches the consideration of such questions; and has declared, that in no doubtful case, would it pronounce a legislative act to be contrary to the constitution.'[12]

****487 *355** Mr. Justice Washington said, in Ogden v. Saunders, 12 Wheat. 213, 270, 6 L.Ed. 606: 'But if I could rest my opinion in favour of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone, would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench.'

Mr. Chief Justice Waite said in the Sinking-Fund Cases, 99 U.S. 700, 718, 25 L.Ed. 496: 'This declaration (that an act of Congress is unconstitutional) should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.'

The challenge of the power of the Tennessee Valley Authority rests wholly upon the claim that the act of ***356** Congress which authorized the contract is unconstitutional. As the opinions of this Court and of the Circuit Court of Appeals show, that claim was not a matter 'beyond peradventure clear.' The challenge of the validity of the act is made on an application for an injunction—a proceeding in which the court is required to exercise its judicial discretion. In proceedings for a mandamus, where, also, the remedy is granted not as a matter of right but in the exercise of a sound judicial discretion, Duncan Townsite Co. v. Lane, 245 U.S. 308, 311, 312, 38 S.Ct. 99, 62 L.Ed. 309, courts decline to enter upon the enquiry when there is a serious doubt as to the existence of the right or duty sought to be enforced. As was said in United States v. Interstate Commerce Commission, 294 U.S. 50, 63, 55 S.Ct. 326, 331, 79

L.Ed. 752: ‘Where the matter is not beyond peradventure clear, we have invariably refused the writ (of mandamus), even though the question were one of law as to the extent of the statutory power of an administrative officer or body.’ A fortiori this rule should have been applied here where the power challenged is that of Congress under the Constitution.

Mr. Justice STONE, Mr. Justice ROBERTS, and Mr. Justice CARDOZO join in this opinion.