Judicial Review of Agency Action: The Unsettled Law of Standing

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Traditionally, the doctrine of standing has existed as the major obstacle frustrating the attempts of numerous plaintiffs to obtain relief for the injuries they have suffered as a result of allegedly illegal action by federal administrative agencies. Frequently, the rigid standards effectively have prevented any feasible plaintiff from challenging the actions of an administrative agency. The ultimate consequence of this problem has been practically to insulate a wide range of administrative activity from judicial review.

In recent years the courts have been under increasing pressure to liberalize the law of standing and to provide a judicial forum where administrative agencies would be required to justify their conduct. In response to this pressure, the Supreme Court, in a series of cases over the past few years, has undertaken a major overhaul of all aspects of the law of standing. In light of this judicial activity, a re-examination of the current law of standing appears to be in order.

I. THE LAW OF STANDING PRIOR TO 1970

The test for standing is focused on the constitutional requirement that the judicial power of the United States be limited to "cases" and "controversies." In a few situations the Supreme Court

1. The scope of this Comment will be limited to judicial review of federal agencies. Moreover, it will not discuss, except peripherally, the right of parties to intervene in federal agency hearings. For a treatment of the right to intervene in agency hearings, see 3 K. DAVIS, ADMINISTRATIVE LAW § 22.08 (1958).

2. One area in which judicial review has been restricted on standing grounds involves actions to challenge the Comptroller of the Currency's rulings allowing national banks to expand their activities into nonbanking operations. See note 16 infra. Also subjected to the same obstacle have been actions by residents of urban-renewal areas to require federal administrators to comply with statutory standards for federal housing programs. See Comment, Judicial Review in Urban Renewal Cases: Concepts and Consequences, 57 GEO. L.J. 615 (1969); Note, Protecting the Standing of Renewal Site Families To Seek Review of Community Relocation Planning, 73 YALE L.J. 1080 (1964). Other areas in which standing has inhibited judicial review include conservation of historic landmarks (e.g., South Hill Neighborhood Assn. v. Romney, 421 F.2d 454 (6th Cir. 1969), cert. denied, 397 U.S. 1025 (1970); Kent County Council for Historic Preservation v. Romney, 304 F. Supp. 885 (W.D. Mich. 1969)) and the allocation of electrical-power and utilities markets (Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1939); Rural Elec. Admin. v. Northern States Power Co., 373 F.2d 696 (6th Cir.), cert. denied, 387 U.S. 948 (1967); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), cert. denied, 350 U.S. 894 (1956).

3. U.S. CONST. art. III, § 2. One of the justifications for the existence of standing is that it prevents suits that are collusive or friendly or that seek advisory opinions and that it therefore avoids the resolution of issues that are not fully and openly argued.
has stated that this constitutional minimum represents all that is
required to determine standing—that is, when a party shows such a
personal stake in the controversy to assure a "concrete adverseness"
in which issues will be litigated, then standing will attach. This
minimum approach, however, generally has not been adopted by the
courts for purposes of review of agency action. Rather the courts
have usually required the plaintiff to show something more before
he is granted standing to challenge agency action. The nature of this
additional requirement varies with the situation; generally, however,
the plaintiff has been required to demonstrate the applicability to
his claim of one of four means of attaining standing: (1) a legal
right created by common law; or (2) an express provision within a
statute for judicial review; or (3) section 10(a) of the Administrative
Procedure Act (APA), commonly referred to as the "standing"
provision; or (4) in the absence of a statutory provision for express
review, proof of an implied congressional grant of review based on
a legislative purpose to protect the plaintiff's interest.

A. *Tennessee Power: The Legal-Wrong Test*

For thirty years the leading case in the law of standing was
*Tennessee Electric Power Company v. TVA.* In that case, the
Supreme Court gave the "legal wrong test"—which became the
central standard for determining questions of standing—its most
prominent and influential application. In *Tennessee Power,* nineteen
power companies sought to challenge the constitutional validity of
the Tennessee Valley Authority (TVA). Despite the uncontroverted
fact of financial damage to the plaintiffs, the court found that they
had no right derived from common law, statute, or franchise to be
free from competition:

The appellants invoke the doctrine that one threatened with di-

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a federal program that financially aided parochial schools. In addition to requiring
the plaintiff to prove injury in fact, the Court in Flast required the plaintiff to prove
that a "logical nexus" existed between his status as a taxpayer and a specific con-
stitutional limitation on the congressional taxing and spending power in the Con-
stitution. 392 U.S. at 102-03. Thus it is not clear whether injury in fact is the "consti-
tutional" minimum or whether a nexus appropriate to the particular type of action is
required. For analyses of Flast, see Davis, *Standing: Taxpayers and Others,* 35 U. CHI.


6. 306 U.S. 118 (1939). See also Perkins v. Lukens Steel, 310 U.S. 113 (1940), and
Alabama Power Co. v. Ickes, 302 U.S. 454 (1938) for applications of the legal-wrong
test.

7. The legal-wrong test was most prominently expounded in *Tennessee Power,*
in which the Court stated that to challenge a statute, a plaintiff must show that there
has been a "violation of his legal rights" and that the "right invaded is a legal
right." 306 U.S. at 157. Thus the plaintiff must establish that a "legal wrong" was
inflicted upon him.
rect and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege. 8

The plaintiffs in *Tennessee Power* argued that when Congress established a federally financed hydroelectric system it had violated their rights to engage in and carry on the business of supplying electrical power free of governmentally sponsored competition. The plaintiffs contended that they must be granted standing to bring their suit in order to protect this legal right. 9 The Supreme Court rejected the power companies' position and held that they failed to meet the legal-wrong test, and that such a test must be met in order to be allowed standing to contest governmental action. 10 The Court held that the plaintiffs did not possess any substantive right to be free of governmentally sponsored competition. 11 Failure to enjoy such a legal right meant, conversely, that when the Government established the TVA these companies had suffered no legally cognizable "wrong." Rather, as noted above, 12 the Supreme Court required an immediate inquiry into the nature of the claim asserted by the plaintiff. In large measure, this inquiry was one conducted on the merits, for the Court only looked to see whether some common-law property right had been violated. 13 If such a right had not in fact been violated, then the Court was not willing to say that a legally recognized wrong had occurred for purposes of standing. The Supreme Court decided *Tennessee Power* at a time when the federal bureaucracy was on the threshold of an enormous expansion. Unfortunately, in formulating the rigid legal-wrong test in that case, the Court did not recognize the necessity of providing significant judicial checks on the conduct of the mushrooming bureaucracy. 14

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8. 306 U.S. at 137-38.
10. 306 U.S. at 137-38.
11. 306 U.S. at 139.
12. See text accompanying note 8 supra.
Over the years, the defects of the *Tennessee Power* doctrine have become evident. The plight of the plaintiff who desires to challenge allegedly illegal agency action has been perceptively described by Professor Davis:

A plaintiff who seeks to challenge governmental action always has standing if a legal right of the plaintiff is at stake. When a legal right of the plaintiff is not at stake, a plaintiff sometimes has standing and sometimes lacks standing. Circular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether the plaintiff has a legal right, but the question whether the plaintiff has a legal right is the final conclusion, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right.\(^{15}\)

In other words, the legal-wrong test has required that the determination whether standing exists be based not on the personal stake of the party, but on a circular, conclusory process by which the merits are resolved in order to justify a decision of standing. Very simply, the fundamental objection to the test is that it goes to the merits. Again, Professor Davis has summarized this objection to the legal-wrong test: “What happens repeatedly is, in effect, that injury to the plaintiff plus illegality of the governmental action equals standing; the essence of many opinions is that injury plus illegality equals a legal right.”\(^{16}\) Certainly if a plaintiff fails to establish the violation

\(^{15}\) 3 K. DAVIS, *supra* note 1, § 22.04, at 217.

\(^{16}\) Davis, *supra* note 4, at 621. Professor Davis’ analysis is demonstrated in cases in which competitors of banks that had been authorized by the Comptroller of the Currency to engage in nonbank activities challenged the Comptroller’s rulings. In Baker, Watts & Co. v. Saxon, 261 F. Supp. 247 (D.D.C. 1966), aff’d sub nom. Port of N.Y. Authority v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968), an investment-banking firm challenged a Comptroller’s ruling that allowed banks to underwrite and deal in general obligations of states and their political subdivisions that were not supported by the taxing power. The district court attempted to distinguish the case from the line of cases following *Tennessee Power*. But in the process it still focused on the merits in deciding the standing issue:

While no one may maintain a suit to restrain lawful competition merely because he is suffering an economic detriment, nevertheless, a person has a standing to complain against illegal competition, or specifically, against competition on the part of a person who lacks the legal right or power to pursue the competitive activities. 261 F. Supp. at 248. Significantly, the court later decided that the Comptroller had no authority under applicable federal statutes to allow banks to engage in such activities. But only after this determination was the standing issue resolved. Instead of analyzing the personal stake of the plaintiff or any congressional intent to provide reviewability by him, the court relied on the substantive outcome to determine the preliminary issue of standing.

This analytical fallacy was also displayed in Saxon v. Georgia Assn. of Independent Ins. Agents, 399 F.2d 1010 (5th Cir. 1968), in which the court held that the plaintiff insurance agents had standing to contest a Comptroller’s ruling that banks could act as
of a legal right, a dismissal for failure to state a claim or cause of action, rather than a dismissal for want of standing, would be the appropriate judicial response.

B. Sanders: Provision for Express Review

The Court soon recognized the rigidity of the legal-wrong test, and within two years after Tennessee Power it moved to establish the first exception—albeit a very limited one—to that test. In FCC v. Sanders Brothers Radio Station, the plaintiff, an owner of a radio station, sought judicial review of the grant of an operating license to an applicant. The plaintiff claimed only that it had suffered economic harm from the competition. The Federal Communications Act allowed an appeal by any "person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application." On the basis of this provision, the Court held that the plaintiff had standing to challenge the grant of the license to its competitor.

Rather than applying the rigid test of Tennessee Power in this statutory context, the Court looked to the congressional purposes in passing the Federal Communications Act and to the policies evident in that Act. Although the competitor could not demonstrate that it had been subjected to a legal wrong, the Court found that the plaintiff did have sufficient interest as a competitor to justify conferring standing in the proceedings. The Court construed the review provision of the Federal Communications Act broadly as an express grant of standing to the plaintiff-competitor. The Court

insurance agencies incident to banking transactions. Such activities were statutorily limited to places that had populations that did not exceed 5000 people. Nevertheless, the Comptroller attempted to justify his ruling on his general rule-making authority. Although presented with a rather straightforward case on the merits, the Court of Appeals for the Fifth Circuit devoted most of its opinion to justifying its holding that the plaintiff had standing. The court distinguished the case before it from Tennessee Power because in the instant case, the government-sponsored competition was "unlawful," whereas in Tennessee Power, it was "lawful." 999 F.2d at 1016. The result in Saxon was doubtless an appropriate one from a policy viewpoint. Nevertheless, it was unfortunate that the court was driven to such a strained analysis in order to reach its desired result. This type of analysis employed by the court has been criticized by Judge Burger, in his concurring opinion in National Assn. of Sec. Dealers v. SEC, 420 F.2d 83, 107 (D.C. Cir. 1969) (per curiam), cert. granted, 597 U.S. 986 (1979) (No. 855, 1969 Term; renumbered No. 59, 1970 Term):

Quite often courts pursued a "bootstrap" or circular logic by initially analyzing the merits, in order that a finding of standing to challenge actions seems more palatable because the court has already found a possible encroachment of "rights" which it desires to review. To evaluate standing solely or even primarily on such visceral reactions does violence to the judicially created concepts of standing . . . . See pt. V infra for a discussion of the case.

17. 309 U.S. 470 (1940).
19. 309 U.S. at 476-77.
20. 309 U.S. at 476-77.
justified this broad interpretation of the provision on the policy ground that competitors were "the only person having a sufficient interest to bring to the attention of the appellate court errors of law." Thus, instead of applying a formal legal-wrong test, the Court looked to the relevant legislative history and formulated a new test that required a plaintiff to demonstrate only an actual private injury in order to assert the public interest in the limited situations—such as was presented in *Sanders*—in which an express statutory provision for review existed. To this extent, *Sanders*, and the test formulated in that case, has been applied to a separate segment of the law of standing and has coexisted with *Tennessee Power* and the test of that case over the years.

C. The Administrative Procedure Act

In 1946 Congress enacted the Administrative Procedure Act, which provided that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved within the meaning of a relevant statute, is entitled to judicial review thereof." The APA was designed to limit the unchecked power of federal administrative agencies by providing a minimum standard of review in the absence of an express review provision in the relevant statute. Thus, if a regulatory statute did contain an express review provision, that provision would be applied by a court, as was done by the Court in *Sanders*. In the absence of such a provision, the APA would apply. The lower courts have consistently held that the APA merely codified existing law—the *Tennessee Power* legal-wrong theory.

21. 609 U.S. at 477. Professor Jaffe has argued that Congress was not interested or concerned about encouraging private individuals to protect the public interest, and he found no basis in the legislative history for the Court's discovery of such an intent. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 522 (1965).


26. 309 U.S. at 477.

27. The leading case is Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir. 1955), cert. denied, 350 U.S. 884 (1955). However, the same court has recognized that the weight of McKay "has been greatly reduced" and has therefore adopted the position of Professor Davis (see note 28 infra and accompanying text) that the APA greatly expanded standing. Scanwell Labs. v. Shaffer, 424 F.2d 859, 865 (D.C. Cir. 1970).
Professor Davis, on the other hand, has argued that the APA significantly expanded the availability of standing in that it requires only that a party prove that he was adversely affected in fact;\(^28\) but his view has not received much support in the courts.\(^29\)

D. **Hardin: Implied Review**

The law of standing to challenge agency action remained fairly static until 1968, when the Supreme Court decided *Hardin v. Kentucky Utilities Company.*\(^{30}\) In *Hardin,* a private power company sought review of the expansion of TVA services into its market area by alleging the violation of a statute that prohibited TVA expansion after a stated date.\(^{31}\) It has long been settled that possession of an express government-granted franchise or license entitles the bearer to standing to challenge the granting of any additional government-issued franchises.\(^{32}\) In *Hardin,* however, the power company could not claim that an express government franchise furnished it protection from competition; instead it had to rely on only the implication of such protection from a regulatory statute. In the absence of an express provision for judicial review in the Tennessee Valley Authority Act, the Supreme Court undertook an examination of the pertinent legislative history. From this inquiry it drew the inference

A number of cases in other jurisdictions have followed *McKey:* *Braude v. Wirtz,* 350 F.2d 702 (9th Cir. 1965); *Duba v. Schuetze,* 303 F.2d 570 (8th Cir. 1962); *Harrison-Halsted Community Group v. Housing & Home Fin. Agency,* 310 F.2d 99 (7th Cir. 1962).

28. 3 K. DAVIS, *supra* note 1, § 22.02, at 211-13. Professor Davis’ argument, however, turns on limited support in the legislative history of the APA and on the interpretation that the phrase “within the meaning of a relevant statute” modifies only “aggrieved” and not “affected” (see text accompanying note 24 *supra*). However, other commentators have disagreed. *See,* e.g., Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 HARV. L. REV. 255, 287-88 (1961), and Note, *Competitors’ Standing To Challenge Administrative Action Under the APA,* 104 U. PA. L. REV. 843 (1956) (both asserting that the APA only codified the existing law of standing). Professor Davis has also argued that the phrasing of the APA is so similar to numerous regulatory statutes—for example, the statute at issue in *Sanders* (see text accompanying note 18 *supra*)—as to indicate that Congress intended to incorporate the approach of *Sanders* into the APA. Thus, a plaintiff could obtain standing merely by establishing injury in fact. Davis, *supra* note 4, at 618-19.

29. The position of Professor Davis was expressly rejected in *Arnold Tours, Inc. v. Camp,* 408 F.2d 1147, 1151 (1st Cir. 1969), vacated and remanded, 397 U.S. 315, affd. on remand, 428 F.2d 359 (1st Cir.), revd. and remanded, 39 U.S.L.W. 5235 (U.S. Nov. 24, 1970) (per curiam) (see notes 84 & 92 infra). Other courts have implicitly rejected the position of Professor Davis in holding that the APA only codified existing law. *See note 27 supra.*


that the "primary purpose" of the statute was to benefit the plaintiff's interests. The Court held that a finding of an implicit congressional intent to benefit the plaintiff was a sufficient justification to grant him standing.

The Hardin test represented a major breakthrough in the law of standing. For the first time in over thirty years, the Supreme Court held that a plaintiff could seek review absent either a legal injury or express congressional permission. The usefulness of the Hardin test has been limited, however, by the difficulty inherent in conducting the required probe into legislative history in order to ascertain what the congressional intent was in enacting a particular statute.

II. THE FUNCTION OF STANDING: LIBERALIZED OR LIMITED JUDICIAL REVIEW

A strict reading of Tennessee Power and the cases that followed it would limit greatly the opportunities for plaintiffs to challenge decisions of federal administrative agencies. Yet public policy clearly requires that these agencies be subject to some sort of effective judicial review. Without such review the exercise of the vast power vested by Congress in these agencies would be subject to no effective check at all. It is clear that in order to facilitate effective, independent review of administrative decision-making, the test of standing must not obstruct the goal of providing a forum in which the legal issues concerning the public interest may be litigated most appropriately. However, courts frequently express doubt about their competency to deal with the detailed and complex issues that arise when questions concerning the administration of government programs are presented. Critics of expanded judicial review might fear that such review, rather than furthering public goals, would actually serve to impede the administrative efficiency of these programs. The critics might also express concern that the enhanced prominence of the judiciary in administrative decision-making would be contrary to the principle of separation of powers in the national government. Moreover, they might argue that increased judicial involvement

33. 390 U.S. at 6-7.
34. 390 U.S. at 7.
36. The critics of expanded review might contend that administrators would be inhibited from firm decision-making by a desire to avoid review and remand of a controversy, by the delays caused by trials and appeals, and by the conflicting decisions of courts of various jurisdictions.
could create an image of a judiciary that is attempting to usurp the role of an elected executive branch in making public-policy decisions or interpreting congressionally dictated policies. In the most extreme circumstances, particularly unpopular judicial decisions might precipitate judicial confrontations with the executive branch in enforcing decisions against recalcitrant agencies or their administrators. Finally, the critics might argue that an already oppressive federal-court caseload would be substantially aggravated by liberalized judicial review.

However valid these objections to liberalized judicial review may be, it is submitted that the doctrine of standing is an inappropriate doctrine to implement a policy of more limited judicial review. Concededly, certain issues may be, by their nature, outside the limits of judicial power or not readily susceptible to judicial review. However, a number of doctrines other than standing are available to courts that desire not to decide such issues. Included among these doctrines are ripeness, exhaustion of remedies, deference to agency discretion, and the political question. Nevertheless, it would appear that courts have used the standing doctrine to restrict judicial review of agency action, and that as a result, the doctrine has served a number of unexpressed purposes. Professor Davis has remarked that the retention of the legal-wrong test for so many years was probably

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The vice in the proposal to have "taxpayers' suits," it seems to me, lies in the idea that ultimate power in our country should reside with the courts... The sorts of questions which arise with respect to the spending power are, in my view, better adopted for consideration and decision by the executive and legislative branches of the Government than by the judiciary.

38. Professor Davis, however, argues to the contrary that the experience of state courts that liberally allow standing does not support this fear, Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450, 470-71 (1970), and federal courts are increasingly rejecting this "floodgates" argument. See, e.g., Scanwell Labs. v. Shaffer, 424 F.2d 839, 872 (D.C. Cir. 1970); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 617 (2d Cir. 1965), cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966). See also the statement by Judge Burger in Office of Communications v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966): "The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process..." The court also noted that the Commission could use its inherent powers and rule-making authority to ease the impact of any increase in its caseload caused by increased intervention. It would seem that the same analysis could be applied to standing for judicial review.


40. 3 K. DAVIS, supra note 1, § 21.01.

41. Id. § 20.02.

42. 4 id. § 28.01.

43. Id.
motivated by various ideas not appearing on the face of formal opinions such as the notion that the law of standing can keep judges from assuming too much governmental power, that it can limit courts to appropriate subject matter, that it can help assure competent presentation of cases, and, above all, that it can protect against a flood of litigation that might so much overburden the courts as to produce a disastrous deterioration in the quality of all that courts do.\footnote{Davis, supra note 38, at 469.}

III. DATA PROCESSING AND BARLOW

A. The Cases and the New Test

In 1970, the Supreme Court attempted to restore some order to the confused law of standing in the companion cases of \textit{Association of Data Processing Service Organizations v. Camp}\footnote{397 U.S. 150 (1970).} and \textit{Barlow v. Collins}.\footnote{397 U.S. 159 (1970).} In \textit{Data Processing} the Comptroller of the Currency issued an interpretive ruling, pursuant to the National Banking Act,\footnote{12 U.S.C. \textsection\textsection 21-215(b) (1964), as amended, (Supp. V, 1965-1969).} authorizing national banks to provide data-processing services to their customers.\footnote{397 U.S. at 151.} The Association of Data Processing Service Organizations, whose members provide computer services throughout the United States, and Data Systems, Inc., a servicing corporation, filed suit contesting the validity of the Comptroller's ruling. The plaintiffs claimed that the ruling violated a provision of the National Banking Act that gives national banks only such "incidental powers as shall be necessary to carry on the business of banking,"\footnote{12 U.S.C. \textsection 24(seventh) (1964).} and that as a result of this ruling, the data-processing industry would be faced with increased competition from which it would incur substantial financial harm.\footnote{397 U.S. at 152.} The district court\footnote{Association of Data Processing Serv. Organizations v. Camp, 279 F. Supp. 673 (D. Minn. 1968).} and the court of appeals\footnote{Association of Data Processing Serv. Organizations v. Camp, 406 F.2d 837 (8th Cir. 1969).} both held that the plaintiffs did not have standing to challenge the Comptroller's ruling. Both lower courts felt that the plaintiffs did not possess a private legal interest, had
not pleaded any legal harm recognized at law, and had not proved that their status was one that placed them in a class protected by a statute.\textsuperscript{53}

In \textit{Barlow}, the Secretary of Agriculture amended regulations issued pursuant to section 402(a) of the Food and Agriculture Act of 1965.\textsuperscript{54} The amendments resulted in an alteration of the balance of economic power between tenant farmers and their landlords. The regulations previously had provided that a farmer could assign his government benefit payments "only as security for cash or advances to finance making a crop . . . ."\textsuperscript{55} The amended regulation redefined the phrase "making a crop" to include the rent these tenants paid, thereby permitting, for the first time, assignment of the benefit payments to the landlords.\textsuperscript{56} Clemon Barlow and other tenant farmers filed a suit against the Secretary in which they claimed that after the amendment was issued they were required by their landlords to execute a rent note as security for the cash rent, and thus were deprived of their prior bargaining power with area merchants and suppliers. The plaintiffs further claimed that such a result was contrary to the intent of Congress in enacting the Food and Agriculture Act.\textsuperscript{57} In affirming the opinion of the district court that the tenant farmers lacked standing to challenge the regulations,\textsuperscript{58} the court of appeals held that they lacked such standing because they had failed to show a legally protected property right to be free from the effect of the amendment and had failed to show any express or implied legislative grant of standing to them.\textsuperscript{59}

On appeal, the Supreme Court reversed \textit{Data Processing}\textsuperscript{60} and vacated and remanded \textit{Barlow}.\textsuperscript{61} The Court firmly rejected the legal-wrong test that \textit{Tennessee Power} had endorsed.\textsuperscript{62} By so doing, it may be inferred that the Court believed that considerations of public policy clearly required that the test for standing be substantially liberalized. The Court recognized that in the course of the thirty years since \textit{Tennessee Power}, the trend in the law of standing had been "toward enlargement of the class of people who may protest administrative action."\textsuperscript{63} The Court noted: "There is no presumption

\begin{footnotesize}
\begin{enumerate}
\item 53. 406 F.2d at 842-43; 279 F. Supp. at 678.
\item 55. 20 Fed. Reg. 6512 (1955), quoted at 397 U.S. at 161 n.2.
\item 56. 7 C.F.R. § 709.3 (1970), quoted at 397 U.S. at 162 n.3.
\item 57. Barlow v. Collins, 398 F.2d 398, 401 (5th Cir. 1968).
\item 59. 398 F.2d at 401.
\item 60. 397 U.S. 150 (1970).
\item 61. 397 U.S. 159 (1970).
\item 62. 397 U.S. at 153; 397 U.S. at 164.
\item 63. 397 U.S. at 154.
\end{enumerate}
\end{footnotesize}
against judicial review and in favor of administrative absolutism . . . ,
unless that purpose is fairly discernible in the statutory scheme." 64

It is not at all clear, however, how far the Court's opinions in
Data Processing and Barlow go toward achieving the goal of opening
up the courts to judicial review of administrative actions. In place
of the old legal-wrong test, the Supreme Court has substituted a
two-pronged test to be utilized in determining whether standing
exists in any particular case. The first requirement is simply an
acknowledgment of the article III limitation in the Constitution
that restricts the judicial power of the federal courts to "cases" and
"controversies." 65 The Court stated that a plaintiff has satisfied this
constitutional minimum when he alleges that "the challenged action
has caused him injury in fact, economic or otherwise." 66 The Court
then added a second requirement to its test. It stated that a plaintiff,
in order to establish his standing to bring the action, must assert
interests which are "arguably within the zone of interests to be
protected or regulated by the statute or constitutional guarantee in
question." 67

B. The Meaning of the New Test

In using such elastic words in its new test as "arguably" and
"zone," the Court apparently intended to vest great discretion in the
lower courts in their application of the test. The language employed
by the Court is sufficiently broad that it might reasonably be inter­
preted as creating a presumption in favor of according the plaintiff
standing. Such a presumption might apply if the plaintiff demonstr­
strates merely a minimal possibility that the legislation in question
was intended to protect or regulate the interests that he is asserting.
If the opinion of the Court in Data Processing is so broadly inter­
preted, the test laid down by the Court would serve to eliminate
only purely frivolous suits. A sympathetic court would not often be
forced to strain the law to find that a plaintiff has interests that
"arguably" fall within some nebulous "zone" that Congress meant
to regulate or protect. Unfortunately, this interpretation is somewhat
a matter of speculation since the Court did not delineate care­fully the nature of the inquiry required by the new test and
left this most ambiguous standard open to a variety of conflicting
interpretations. 68

The first area of ambiguity concerns the precise formulation of

64. 397 U.S. at 157.
65. U.S. Const. art. III, § 2, discussed at 397 U.S. at 151.
66. 397 U.S. at 152. The Court pointed out that standing "may stem from" injury
to noneconomic interests such as aesthetics or conservation. 397 U.S. at 154.
67. 397 U.S. at 158.
68. The test has been criticized in Davis, supra note 38, at 458-68.
the second requirement of the new test. In Data Processing, the Court stated that the interests asserted must be arguably within the “zone of interests”69 protected or regulated by the statute. However, in applying this test, the Court noted that a competitor of the regulated bank was within the “zone of interests,”70 and in the Barlow case it observed that the tenant farmers were within this zone.71 Whether it is the “interests” or the “persons” that are the focus of examination is not merely an issue of semantics. An inquiry into whether a “person” is within the “zone of interests” indicates a different view of the nature of standing and its scope of application than does an inquiry into whether a particular “interest” is within that zone. On the one hand, if the plaintiff must be within the zone, then he must prove that he is an intended beneficiary of the statute. In effect, he must establish that Congress has impliedly conferred upon the limited class of which he is a member the right to protection against the type of harm that Congress intended to prohibit. He is asserting primarily a private right, and the public interest that Congress considered when it sought to regulate governmental or private encroachments on the plaintiff’s statutory rights is only incidentally furthered. On the other hand, if the interest must be within the protected zone, then the relationship of the particular plaintiff to those interests is irrelevant and need not be examined. The plaintiff is asserting and furthering public interests in bringing his action. The personal injury he has suffered is only relevant in establishing the constitutional minimum of injury in fact.72

A decision to follow the “persons” approach rather than the “interests” approach would dictate substantially different outcomes in many cases because the “persons” test is more restrictive than the “interests” test. If the former is used, the plaintiff must prove that Congress intended to protect him—i.e., his interests. This may often entail a ponderous review of legislative history in order to extract sometimes obscure and inscrutable statements of legislators’ intent to protect the plaintiff. If the latter test is used, the plaintiff merely must prove that he is furthering the interests that Congress sought to protect, which may or may not have been his interests. This “interest” test becomes, therefore, a mere pleading requirement since a brief inquiry into the statutory materials can reveal a general congressional purpose to protect certain interests that the plaintiff can then incorporate into his pleadings. It does not have the effect of excluding persons who are not intended beneficiaries of congressional legislation.

69. 397 U.S. at 153.
70. 397 U.S. at 156.
71. 397 U.S. at 164.
72. See 397 U.S. at 152; 397 U.S. at 173 n.6 (Justice Brennan, concurring in the result and dissenting).
Perhaps the differences between these two extreme formulations of the *Data Processing* test may be illustrated best by a hypothetical situation based upon a variation of the fact situation in *Barlow*. Assume that a merchant had been financially injured when farmers had cancelled orders for merchandise because of the assignment of benefit payments to their landlords. Under the "interests" approach, the merchant would probably qualify to assert the interests of the tenant farmers, which were generally protected by the relevant statute, in a challenge of the new regulation. However, under the "persons" approach that requires the plaintiff to be within the zone, the merchant would not have standing unless he could demonstrate that he, and not the farmer, was within the intended protection of Congress. Thus standing would be expanded or contracted depending on which formulation of the *Data Processing* the test is employed.

Presumably, this confusion about what test the Court intended to set out in *Data Processing* results from inadvertent phraseology in the Court's opinion. However, a close reading of *Data Processing* and *Barlow* does not clearly reveal which is the more likely interpretation intended by the Court. On the one hand, it can be argued that the Court intended to establish a test based upon reference to protected "interests." In support of this contention it is possible to argue that the "interest" formulation is first set out within the context of a general discussion of standing, and that this discussion establishes a general rule for administrative review. The statements by the Court that the competitors and the farmers were within the protected zone arguably can be dismissed as statements peculiar to the facts of *Data Processing* and *Barlow*, since in those cases the persons whose interests were protected happened also to be the plaintiffs. In support of the "persons" interpretation, on the other hand, it must be noted that in both applications of the test, the Court examined only the interests of the plaintiffs. Such a limited examination may indicate a requirement that the plaintiff—in order to be granted standing—must himself be an intended beneficiary of the applicable statute. In addition, the "persons" interpretation is more consistent with the *Hardin* test of implied review. In contrast, an "interest" test would be a major departure from prior law, and such a departure arguably would have been more clearly signalled by the Court. A definitive interpretation of the test must await future cases.

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73. See text accompanying notes 54-57 supra.
74. See text accompanying note 67 supra.
75. 397 U.S. at 153-54.
76. See text accompanying notes 70-71 supra.
77. See text accompanying notes 30-34 supra.
78. Since the Supreme Court announced its decisions in *Data Processing* and *Barlow*, the lower courts have been afforded a few opportunities to utilize the new test. See
Perhaps a middle ground can be discerned from the opinions that may reconcile the two extreme interpretations of the *Data Processing* test. The Court may have meant that the interests of the plaintiff must be within the zone of interests protected or regulated by statute. This interpretation would obviate the logical difficulty in phrasing the test so that the “person” must be within the zone of interests. Although it is clear that “interests” may be within the zone of interests, it does not seem either grammatically or logically conceivable that “persons” are “interests” protected by a statute. Thus, the language of the Court in *Barlow* to the effect that the “tenant farmers” were within the requisite zone may be interpreted to mean

Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1083 (D.C. Cir. 1970) (five environmental organizations have standing to appeal refusal by Secretary of the Agriculture to ban chemical DDT under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 135-35k (1964)); Environmental Defense Fund, Inc. v. HEW, 428 F.2d 1083 (D.C. Cir. 1970) (six individuals, including five mothers who presently or intend in the future to breast-feed their babies, and an environmental group, have standing under the FIFRA to seek review of denial by the Secretary of HEW of their petition to ban DDT); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970) (several local and national conservationist groups have standing to challenge the proposal for an expressway under three federal laws designed to protect the environment); Armco Steel Corp. v. Stans, 421 F.2d 779 (2d Cir. 1970) (steel producer has standing to protest the order of the Foreign Trade Zone Board establishing a free-trade zone in Armco’s market area; the court cited *Data Processing*, but also cited the *Hardin* “classes protected” test to support its holding of standing); Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir.), petition for cert. filed, 39 U.S.L.W. 3098 (U.S. Aug. 14, 1970) (No. 545) (competitor of manufacturer of blind-made products has standing to challenge the actions of the Committee on Purchases of Blind-Made Products and the General Services Administration in including ball point pens in a special procurement procedure established by the Wagner-O’Day Act, 41 U.S.C. §§ 46-48 (1964)); Growther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970) (individuals in area and group on their behalf have standing under the APA to challenge proposed project to flare gas contained in cavity created by nuclear detonation). But see Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), petition for cert. filed, 39 U.S.L.W. 8215 (U.S. Nov. 15, 1970) (No. 939) (Sierra Club cannot challenge Mineral King Valley project because the club has failed to show any injury in fact to itself or its members). Many of these cases have arisen in the area of environmental control. On the whole the courts in these cases have liberally defined the “zone of interests” protected by the environmental statutes.

Thus far, the courts have required individual plaintiffs to demonstrate only a present or reasonably foreseeable harm to their health or safety. See Environmental Defense Fund, Inc. v. HEW, 423 F.2d 1083, 1085 n.2 (D.C. Cir. 1970). The burden of a plaintiff organization to demonstrate that it falls within a protected “zone of interests” has been even milder. These organizations have been required to demonstrate only a continuing interest in the protection of the environment. See Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1083, 1087 (D.C. Cir. 1970). Significantly, one court has interpreted *Data Processing* to hold that § 10(a) of the APA (see note 24 supra and accompanying text), rephrased as the “zone of interests” test, requires only injury in fact to confer standing. See Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970) petition for cert. filed, 39 U.S.L.W. 8215 (U.S. Nov. 15, 1970) (No. 939). That court’s holding that the Sierra Club had not suffered the requisite injury in fact is questionable. In *Environmental Defense Fund v. Hardin*, the statute under which the suit was brought contained a “persons aggrieved” review provision. The court held that injury in fact was sufficient, but rather than citing *Sanders*, the court relied on *Data Processing* and *Flast v. Cohen*, 392 U.S. 83 (1968) (428 F.2d at 1096 n.12), which may imply that the *Data Processing* test requires only injury in fact.
that the interests of tenant farmers were within that zone. This third formulation would be, in effect, a modification of the Hardin test, and yet would not present either the logical difficulties inherent in a "person" formulation or the sharp break from earlier law that an "interest" formulation would entail.

C. The Difficulties in Applying the New Test

The effect that Data Processing and Barlow may have on the authority of the Court's decision in Hardin is not clear. In that case, it will be remembered, the Court said that in order for the plaintiff to be granted standing, a primary purpose of the statute must be to protect the class of persons of which the plaintiff is a member. In Data Processing, the Court mentioned the Hardin line of cases in discussing the evolution of standing theories, but did not expressly rely on that authority or apply the test used in Hardin.

Irrespective of whether the new test is formulated in terms of the "plaintiff's interests" or in terms of the "plaintiff himself," it appears that this test has modified the Hardin "class of persons" test so that the focus of any statutory inquiry will be shifted from the question of which particular parties are protected by statute to the broader question of which interests are protected. This change will likely permit an expanded inquiry into the policy objectives of a statute and, at the same time, relieve a court from determining which group of persons initiated or sponsored the legislation that was enacted into law. In a determination of the status of the actual plaintiff before the court, the phrase "plaintiff's interests are within the zone of interests" might be more conducive to this broadened analysis than the alternative formulation—"plaintiff is within the zone"—since the court could look to interests in appraising the status of the plaintiff rather than the intended role of beneficiary that he may play in the statutory scheme. This latter distinction seems largely theoretical and semantic; as a practical matter, rephrasing the test from "class of persons" to "zone of interests" protected will encourage the different legislative analysis described above.

An examination of the facts in Data Processing reveals the differences between the "class of persons" and "zone of interests" tests. The relevant statute in that case only prohibited bank service corporations owned by banks from performing banking activities.

79. 397 U.S. at 164.
80. See text accompanying notes 33-34 supra.
81. 397 U.S. at 154-56.
82. See text accompanying notes 33-34 supra.
83. See note 90 infra.
However, the plaintiffs were complaining of competition from banks, not bank service corporations. Under a Hardin analysis, a literal reading of the statute would render it inapplicable since the plaintiffs were not members of the class protected—competitors of bank service corporations. However, an analysis of the “zone of interests” protected would be more likely to produce the result actually reached by the Court—that Congress intended to protect the plaintiffs from bank-sponsored competition in general, not merely competition from bank service corporations.

The new test enunciated in Data Processing may be useful to plaintiffs in a variety of factual contexts. First, if a statute protects against competition generally, without specifying the beneficiaries, it is more likely now that a court will infer that a particular competitor—for example, a data-processing company—is within the zone of protection from competition for purposes of determining standing. Under the Hardin test, however, the court might have required the statutory language and history to refer specifically to the plaintiff-competitor as the beneficiary of the legislation.

Second, confusion may occasionally arise over what statute a court should look to in determining whether Congress established a protected “zone of interests.” For example, while a plaintiff may have been injured through an alleged violation of one specific statute, it may be that neither he nor his interests were the intended beneficiaries of that statute. It is possible, however, that, in another statute, Congress has indicated a desire to protect the very interest the plaintiff now asserts. Prior to Data Processing it would have been unlikely that a plaintiff in such a situation could have established standing. The requirement of the APA that a plaintiff be aggrieved “within the meaning of a relevant statute” probably would have been interpreted as equating the “relevant statute” with the statute that was allegedly violated. Under Data Processing the wording of the APA now appears to have been interpreted as synonymous with the “zone of interests” test, and this broader standard might well lead to a different result. A court might now be free to analyze both

84. See, e.g., Arnold Tours, Inc. v. Camp, 286 F. Supp. 770 (D. Mass. 1968), aff'd., 408 F.2d 1147 (1st Cir. 1969), vacated and reversed, 397 U.S. 315, affd. on remand, 428 F.2d 359 (1st Cir.), rev'd and remanded, 39 U.S.L.W. 3226 (U.S. Nov. 24, 1970) (per curiam), in which the Supreme Court, interpreting its opinions in Data Processing and Barlow, overruled the lower courts' denial of standing:

Here, as in Data Processing, we are concerned with § 4 of the Bank Services Corporation Act. In Data Processing we did not rely on any legislative history showing Congress desired to protect data processors alone from competition, 39 U.S.L.W. at 3226.

Thus, the Court does not seem to require that the particular plaintiff be the express beneficiary of congressional protection, but only that he fall within a more general class of competitors who are within the zone of interests protected by statute.


86. Although the Supreme Court had not expressly considered the standing provi-
statutes that are arguably applicable in determining which general interests are protected. Although this precise issue does not appear to have been decided by the Court in *Data Processing*, it is quite likely to be raised in the future—especially in the area of environmental control—by plaintiffs who would once have been deterred from entering into litigation by the rigid law of standing.

Whatever formulation of the *Data Processing* test is finally adopted, the new test contains hazards similar to those that existed under the *Hardin* test. First, it should be noted that both extreme formulations of the *Data Processing* test necessarily require an inquiry, however brief, into the merits of the plaintiff's case. A plaintiff must undoubtedly prove that the administrative agency has misinterpreted or misapplied a statute in order to succeed on the merits. And the questions that must be answered in order to make this determination will be the same ones that are relevant to the “zone of interests” standing test: what activity was Congress attempting to encourage or preclude, what particular grievances moved Congress to action, which parties were especially in need of protection, and what countervailing considerations were considered by Congress in limiting the regulation to its expressed scope? The answers to these questions will often be culled from legislative history as well as from the statute on its face. It may be that the standards ultimately devised by the courts to determine legislative intent will be more onerous when the merits of the case are at stake than they will be when standing is the primary issue. Nevertheless, to the extent that both formulations of the “zone of interests” test require an inquiry into

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sion of § 10(a) of the APA (see note 24 *supra* and accompanying text) prior to *Data Processing*, the lower courts had consistently interpreted that provision as being merely a codification of the legal-wrong test of the *Tennessee Power* case. See notes 23-29 *supra* and accompanying text. In view of the Court's express disavowal of the legal-wrong test in *Data Processing* (see text accompanying note 62 *supra*), this position is no longer tenable. The Court did not state explicitly that it was interpreting the APA. Nevertheless, while the language of the Court is not without some ambiguity, the Court apparently has taken the opportunity in *Data Processing* to interpret § 10(a) for the first time. The Court seems to have equated the language of § 10(a) entitling a person who has been “aggrieved within the meaning of a relevant statute” to judicial review with the test formulated in *Data Processing* that a plaintiff need only be “arguably within the zone of interests to be protected or regulated by the statute ...” 397 U.S. at 153. The Court stated:

The “legal interest” test goes to the merits. The question of standing is different. It concerns, apart from the “case” or “controversy” test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person “aggrieved by agency action within the meaning of a relevant statute.” *5 U.S.C. § 702* (1964 ed., Supp. IV). 397 U.S. at 153-54.

87. As the interest required to be brought within the “zone” becomes more specific, standing will become more restrictive and the test may begin to resemble the legal-wrong test in theory and effect.
the merits, the tests are inconsistent with a theory of standing that requires only the minimum of "personal stake in the outcome of the controversy." 88

Second, an examination of legislative history often presents serious difficulties. Legislative history frequently gives little indication of who was intended to be the beneficiary of legislation or of the scope of protection beyond the express language of the statute. The testimony of witnesses, the reports of committees, and the debates among congressmen may generate a wide variety of reasons, sometimes contradictory, for the passage of the legislation under consideration. 89 As an analytical tool, such an inquiry may encourage courts to adopt a result-oriented approach—courts would conclude that standing should or should not be conferred on unexpressed policy grounds, but would support their decisions by a broad or narrow reading of the legislative history. The decisions of the courts of appeals in two factually related cases demonstrate the perils inherent in an analysis of legislative history. In Data Processing, the Court of Appeals for the Eighth Circuit rejected the application of the legislative history of the Bank Service Corporation Act (BSCA), 90 which prohibited bank service corporations from performing non-banking services for anyone other than banks, because in the factual context of Data Processing, a bank, not a service corporation, was performing the services. 91 However, in Wingate Corporation v. Industrial National Bank, 92 the Court of Appeals for the First Circuit applied the legislative history of the BSCA to the same factual setting 93 and found that Congress had intended to protect competitors from both bank service corporations and banks. 94 Although, as a

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89. See Jones, Statutory Doubts and Legislative Intention, 40 Colum. L. Rev. 967, 968 (1940).
90. 12 U.S.C. §§ 1861-65 (1964). Section 1864 of the Act provides: "No bank service corporation may engage in any activity other than the performance of bank services for banks."
93. In Wingate, as in Data Processing, the plaintiff was a computer service corporation and the defendant was a bank competing with the plaintiff.
94. 408 F.2d at 1152-53. The legislative history cited by the court in Wingate revealed that the primary purpose of the Act was the protection of the solvency of banks. The committee reports revealed no intent to protect any industry from the competition of banks.

The difficulties in deciphering legislative intent were reflected in another case involving the Comptroller's rulings. In Saxon v. Georgia Assn. of Independent Ins. Agents, 399 F.2d 1010 (5th Cir. 1968), the court found that the plaintiff insurance agents had standing to review a Comptroller's ruling that banks could act as insurance agencies incident to banking transactions, although such activities were statutorily limited to
result of the decision in *Data Processing*, only an "arguable" degree of statutory protection must be shown, courts might still differ over the proper interpretation to be given statutory language and history, and thus might also differ in resolving the question whether the requisite statutory protection has been demonstrated.

The Court's application of the new test to the facts in *Data Processing* and *Barlow* highlights the perplexities of statutory analysis and the continuing uncertainty over the proper formulation of the new test. In *Data Processing* the Supreme Court relied on the *Wingate* decision to support its holding that a competitor is within the zone of interests protected by the banking statutes. But the portion of the *Wingate* decision quoted by the Court does not support this proposition because it only reveals that the BSCA was designed to protect the financial stability of banks, not to protect competitors. In another portion of the opinion in *Wingate* the First Circuit cited the fact that the banking legislation was a response to the concerns of the National Association of Public Accountants, which sought protection for its members from bank competition. Yet this latter portion of the *Wingate* decision is not cited by the Court in *Data Processing*. If one assumes the proper formulation of the new test to be that "persons" must be "within the zone of interests," the Court in *Data Processing* clearly did not support a finding of standing under its own test since it did not satisfactorily demonstrate that Congress intended to protect competitors.

places that had populations not exceeding 5000. Unsuccessful attempts to repeal the provision were cited by the court to demonstrate a congressional intent to protect insurance agents from bank competition, but no such intent was found in the original passage of the Act. §99 F.2d at 1018.

95. See text accompanying note 67 supra.

96. The Court stated:
The Court of Appeals for the First Circuit held in *Wingate* that by reason of § 4 a data processing company has standing to contest the legality of a national bank performing data processing services for other banks and bank customers:
"Section 4 had a broader purpose than regulating only the service corporations. It was also a response to the fears expressed by a few senators, that without such a prohibition, the bill would have enabled 'banks to engage in a nonbanking activity,' S. Rep. No. 2105, [87th Cong., 2d Sess., 7-12] (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute 'a serious exception to the accepted public policy which strictly limits banks to banking.' (Supplemental views of Senators Muskie and Clark). We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against."
§97 U.S. at 155.

97. 408 F.2d at 1152-53. The Court could have also cited a statement by Senator Proxmire, a sponsor of the bill that became the Bank Service Corporation Act, that banks would have cost and market advantages over their nonbank competitors and that
[a] number of these businesses have informed me and other Senators that this kind of competition would be very unfair. It would be unfair because the bank could use their own personnel charge, merely the out-of-pocket cost, and the unfair competition could drive businesses now offering this kind of service to the wall.
However, this lack of support may imply that the Court looked only to whether the interests sought to be protected by the complainant—for example, the financial stability of banks—were the public interests of bank solvency rather than the personal interests of protecting the plaintiff. Such an interpretation of the Court's analysis would lend support to the formulation of the test that only general interests, not persons, must fall within the "zone of interests" protected or regulated by Congress.

Moreover, if the interests of the particular plaintiff must be asserted, then *Barlow* does not aid greatly in the determination of the type or particularity of interest that must be shown. In *Barlow*, the Court cursorily cited a general provision in the Food and Agriculture Act which stated that "the Secretary [of Agriculture] shall provide adequate safeguards to protect the interests of tenants ...." However, the Court could not point to any specific statutory language or legislative history that tended to show that Congress recognized the particular interest of tenant farmers in the assignment of benefits and that it intended to protect that interest. The problems inherent in any statutory analysis are, therefore, heightened by the ambiguity of the new test. If the plaintiff is only required to assert a general protection, then there is little substance left to the test; if he is required to assert particular protection, then the court is likely to have considerable difficulty in applying the test since Congress often does not indicate its reasons for enacting specific statutory provisions.

IV. THE BRENNAN-WHITE POSITION—AN ALTERNATIVE APPROACH

As an alternative to the approach taken by the majority in *Data Processing*, Justice Brennan, in a concurring opinion in *Barlow* joined by Justice White, offered his own views on how best to resolve the question of standing to challenge the rulings of an administrative agency. Unlike the majority, Justice Brennan sharply distinguished the concept of standing from the concept of reviewability.

Justice Brennan noted that under the "zone of interests" test adopted by the majority in *Data Processing*, a plaintiff is required to prove that Congress has granted him a right of review in the action brought by him. However, Justice Brennan contended that such a requirement is inappropriate in resolving issues of standing. According to Justice Brennan, an inquiry into standing should focus solely on whether the party who institutes the action has a personal

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98. 397 U.S. at 164.
100. 397 U.S. at 167 (Justice Brennan, concurring in the result and dissenting). This opinion applied to *Barlow* and to *Data Processing*.
101. 397 U.S. at 168.
adversary stake in the outcome of the litigation. Yet an inquiry into
the interests or class of persons protected by the relevant statutes de-
mands an analysis of the merits of the case and is therefore alien to
the question of standing. Thus, the determination whether or not
Congress intended to give the plaintiff a right of judicial review is a
question to be decided in the separate area of law dealing with
reviewability. Justice Brennan noted that reviewability itself is
composed of two issues: whether anyone can challenge agency action,
and whether the particular plaintiff is entitled to judicial review. In
order to establish reviewability of the substantive issues presented,
an examination of “[p]ertinent statutory language, legislative history,
and public policy considerations” is required to help determine
whether the “slight indicia that the plaintiff's class is a beneficiary” of a statute supports the inference that Congress intended that
review be available to the plaintiff.

Justice Brennan's view that any inquiry into the “zone of interests
protected” actually presents questions of reviewability rather
than standing is more than theoretically significant. Acceptance of
this view by the courts would not simply mean that under the Bren-
nan test courts would dismiss actions on reviewability grounds be-
cause the plaintiff is not within a protected class, whereas under the
majority's test the same courts would dismiss actions on standing
grounds. Clearly different results might arise. First, the Supreme Court
has broadly interpreted the reviewability provision of the APA, and
has held that it is a “seminal” Act under which “judicial review of a
final agency action by an aggrieved person will not be cut off unless
there is persuasive reason to believe that such was the purpose of
Congress.” Therefore, a strong inference—indeed, almost a pre-
sumption—arises that a plaintiff's case is reviewable. As noted
above, it is possible that the “zone of interests” test promulgated by
the majority in Data Processing will be broadly interpreted similarly
to require a presumption in favor of standing. It is clear, however,
that the majority was not willing explicitly to require such a pre-
sumption.

Moreover, it may be inferred from the flexibility of the wording
used by Justice Brennan to express his test for reviewability that he
would want to maintain the traditional presumption favoring the
plaintiff. Justice Brennan—in language that is much more explicit

102. 397 U.S. at 172.
103. 397 U.S. at 169 n.2.
104. 397 U.S. at 173.
105. 397 U.S. at 175.
106. Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967), interpreting § 10 of the APA,
107. See text following note 67 supra.
than that used by the majority—noted that public policy may be
more often furthered by conferring standing than by denying it.\textsuperscript{109} Therefore, Justice Brennan would generally require only "slight
indicia that the plaintiff's class is a beneficiary."\textsuperscript{110} This presump­
tion in favor of the plaintiff's right to challenge agency action
becomes even stronger when the "plaintiff is the only party likely to
challenge the action. Refusal to allow him review would, in effect,
commit the action wholly to agency discretion, thus risking frustra­
tion of the statutory objectives."\textsuperscript{111} Justice Brennan's approach would
obviate the continuing problem, demonstrated in a number of areas,
that the only parties that are likely to challenge important admin­
istrative determinations have not previously met the standing test.\textsuperscript{112}
The majority's test, however, does not meet these problems, although
its wording is sufficiently broad that courts might consider similar
public-interest factors under the guise of analyzing the interests
protected.

In contrast to the approach taken by Justice Brennan in his
concurring opinion, the majority classified section 10(a) of the APA
as a hybrid standing-reviewability provision.\textsuperscript{113} By not employing
section 10(a) for standing purposes, Justice Brennan's analysis is
theoretically more sound than that of the majority in its exclusion
of any inquiry into the merits in the determination of standing.\textsuperscript{114}
However, whether a challenge to the actions of an administrative
agency will be heard or not should depend on more than the conclu­
sory labelling of a section of the APA as either one relating both to
standing and reviewability or solely to reviewability. Rather, any
difference in result should be founded on an interpretation of the
entire APA as a coherent whole and on relevant policy considera­
tions. Although the legislative history of the APA would probably be
of minimal assistance in distinguishing "standing" from "reviewabil­
ity"—two extremely technical concepts—the APA's general purposes
and remedial character could be beneficial in finally developing a
coherent and consistent interpretation of section 10 of the Act.\textsuperscript{115}
In addition, the Court could balance the exigencies of liberalized
review and the presumption in favor of reviewability under the APA

\textsuperscript{109} 397 U.S. at 175 n.9.
\textsuperscript{110} 397 U.S. at 175.
\textsuperscript{111} 397 U.S. at 175 n.9.
\textsuperscript{112} See the discussions in notes 2, 14, & 16 supra and accompanying text.
\textsuperscript{113} The majority in Data Processing used APA § 10(a), 5 U.S.C. § 702 (Supp. V,
1965-1969) both as a test for standing (397 U.S. at 153) and as a test for reviewability
(397 U.S. at 157).
\textsuperscript{114} 397 U.S. at 172-73.
tive history of the APA and its own cases interpreting it as evidencing "the basic pre­
sumption of judicial review" covering a "broad spectrum of administrative actions."
against traditional notions of judicial self-restraint. Standing and reviewability should be interpreted consistently with each other. A standing test that is more restrictive than a reviewability test would undermine the latter if its effect were to make it too difficult for many potential plaintiffs to obtain effective review of agency action. However, an evaluation of these considerations is not undertaken by either opinion in Data Processing. Consequently, important practical differences depend instead on semantic and theoretical classifications.

The majority and Brennan opinions in Data Processing also differ on the applicability in agency review cases of the doctrines expressed in Flast v. Cohen.\(^\text{116}\) In Flast, the Court held that federal taxpayers, claiming a violation of their first amendment rights, had standing to challenge government financial aid to religious schools. In order to obtain standing in that case, the plaintiff taxpayer was required to show only that he had suffered sufficient personal injury to ensure that the litigation would be a truly adversary one.\(^\text{117}\) The majority in Data Processing stated that the standing requirement in Flast did not "necessarily track"\(^\text{118}\) the standing requirement in suits to review agency action, although "the two have the same Article III starting point."\(^\text{119}\) The majority, therefore, did not apply merely the constitutional minimum of injury in fact to the cases before it. However, Justice Brennan, in his concurring opinion, argued that the same standard utilized in Flast should be applied in Data Processing and Barlow.\(^\text{120}\)

The possible applicability of Flast to cases concerning review of agency action raises more complex considerations than the majority and concurring opinions in Data Processing suggest. Although Justice Brennan seemed to ignore the point in his opinion in Barlow, the Court actually went beyond the simple injury-in-fact test in its decision in Flast. The Court in Flast required the plaintiff to demonstrate that the challenged enactment exceeded specific constitutional limitations upon the congressional taxing and spending power.\(^\text{121}\) In a sense this test is analogous to the "zone of interests" test in that it requires an implicit constitutional grant of standing in much the same way that Data Processing requires an implicit legislative grant of standing. The Data Processing test adopted by the majority might, therefore, be more properly viewed as a modification of the Flast test designed specifically for agency review cases.

In the final analysis, whether the simple constitutional minimum

\(^{117}\) 392 U.S. at 99-100.
\(^{118}\) 397 U.S. at 152.
\(^{119}\) 397 U.S. at 152.
\(^{120}\) 397 U.S. at 172-73.
\(^{121}\) 392 U.S. at 102-04.
or the more rigorous gloss that the Flast opinion imposed on the availability of standing should be applied to agency actions is dependent on an evaluation of the judiciary's special role in our system and its relationship with the other branches of government. Many of the factors that are relevant in determining whether standing should be liberalized are relevant to an analysis of this broader policy issue as well. Unfortunately, the Court in Data Processing did not conduct such a policy assessment; rather, it simply stated its refusal to apply the constitutional minimum as its sole guide.

V. A Practical Application of the New Test

The degree of confusion that exists in the area of standing was reflected in National Association of Securities Dealers (NASD) v. SEC, decided by the Court of Appeals for the District of Columbia Circuit a few months prior to the Supreme Court's decisions in Data Processing and Barlow. In that case, groups representing mutual funds and mutual-fund salesmen sought review of an order of the Comptroller of the Currency allowing nationally chartered banks to operate collective investment funds. The plaintiffs alleged that the ruling was inconsistent with and violated sections 16, 20, 21, and 32 of the Glass-Steagall Act. It was generally agreed that for purposes of the APA the Glass-Steagall Act was the "relevant statute" under which the action was brought. It was also clear that the Glass-Steagall Act, unlike the statute involved in the Sanders case, did not expressly grant judicial review to all aggrieved parties. An examination of the relevant legislative history of the Glass-Steagall Act revealed that the Act was "not intended by Congress to protect mutual funds from competition from banks." Rather, the Act was designed to promote the solvency of banks by ensuring a separation of commercial banking activity from dealing in securities.

122. See pt. II supra.

123. 397 U.S. at 152-53. See text accompanying note 72 supra.


... The business of dealing in securities and stock by the [national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock ...

126. See text accompanying notes 17-22 supra.

127. 420 F.2d at 96 (Judge Bazelon, concurring).

128. 420 F.2d at 99-100 (Judge Bazelon, concurring). The fact that the separation of commercial banking and underwriting was the primary objective of the Glass-Steagall Act was brought out in an earlier case dealing with the Act. In Baker, Watts & Co. v.
The court of appeals confessed genuine uncertainty concerning how the standing issue might properly be resolved. In separate opinions, Judges Bazelon and Burger recognized that although the plaintiffs had suffered injury in fact as a result of the Comptroller's ruling, they did not seem to meet the requirements of any of the established tests in order to be accorded standing. Both judges concluded, however, that the plaintiffs were entitled to standing, and seemed to base these conclusions on the belief that public policy required prompt resolution of the issues raised by the plaintiffs on the merits and no more appropriate plaintiffs seemed likely to appear soon.

A brief survey of the pre-Data Processing law relating to standing clearly indicates the dilemma that the court faced in NASD. The plaintiffs could not show any direct harm arising from the violation of a contract, tort, or property right since the legal-wrong test first promulgated in the Tennessee Power case clearly held that competitors had no right to be free from government-encouraged competition. Similarly, section 10(a) of the APA generally had been interpreted as codifying the legal-wrong test and thus plaintiffs could not rely upon that provision to grant them standing. Even the liberalized test for standing laid down by the Supreme Court in its decision in Hardin required that the "primary purpose" of the statute must be to protect the "class of persons" of which the plaintiff is a member. As noted above, an analysis of the legislative intent


129. 420 F.2d at 96, 100.
130. 420 F.2d at 107-08.
131. Judge Bazelon stated, in holding that the Investment Company Institute, one of the plaintiffs in NASD, had standing:

It is the only party likely to assert the public interest in observance of the banking laws by the agency responsible for enforcing them. In the exceptional circumstances of this case, I would grant the ICI standing to vindicate the public interest despite the absence of a statutory aid to standing.

420 F.2d at 100. Judge Burger wrote:

... I am unable to set aside my grave doubts as to Appellees' standing to institute and maintain these suits. However, in the uncertain state of the law as to standing, there is something to be said on both sides of that question. I therefore resolve my doubts in favor of the Appellees ... I am influenced substantially, as I indicated at the outset, by the need for judicial examination of the important questions raised.

420 F.2d at 108.

132. See notes 6-11 supra and accompanying text.
133. See note 27 supra.
134. See notes 30-34 supra and accompanying text.
135. See text accompanying note 127 supra.
clearly precluded a holding that mutual funds were intended to be the primary beneficiaries of the Glass-Steagall Act.

Despite this vast amount of prior law and legislative history, however, Judge Bazelon found the public-policy arguments for granting standing persuasive:

It is fortuitous that there is no aid to standing for these plaintiffs. If underwriters, insurance agents, data processors, and securities dealers are right that banks are prohibited by law from entering their businesses, Congress would never have foreseen that administrative rulings under the banking laws would substantially affect their economic interests. 136

It is submitted that NASD is precisely the type of case that the Supreme Court attempted to anticipate in its decisions in Data Processing and Barlow. Accordingly, in an attempt to put in some sort of logical perspective the various theoretical dichotomies already discussed in this Comment, the possible formulations of the new test relating to the law of standing will be applied to the factual setting in NASD.

It will be recalled that under the first possible formulation of the Data Processing "zone of interests" test, the plaintiff himself must fall "arguably within the zone of interests to be protected or regulated by the statute . . . . " 137 The legislative history of the Glass-Steagall Act does not indicate any congressional intent to protect mutual funds. However, the Glass-Steagall Act was passed in 1933 138—long before the mutual-fund industry became a major factor in the investment market. 139 Therefore, it is arguable that the legislative history of the statute may not even be relevant or appropriate to a resolution of the standing issue in 1970. It would seem somehow absurd to determine the issue of standing upon the results of such an inquiry, but this first formulation of the Data Processing test appears to require an examination of legislative history. Unless some mention of protection for competitors in general could be discovered in the statutory materials, under this formulation of the test the plaintiffs in NASD would probably not have standing—even with the aid afforded by the use of such flexible words as "arguably" and "zone."

If the Data Processing test were interpreted to require only that a plaintiff's interests be within the zone, 140 the plaintiffs in

136. 420 F.2d at 99.
137. 397 U.S. at 153. See text following note 71 supra.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Stock Outstanding</th>
</tr>
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<tbody>
<tr>
<td>1940</td>
<td>$ 0.4</td>
</tr>
<tr>
<td>1968</td>
<td>$ 77.3</td>
</tr>
</tbody>
</table>

140. See text following note 78 supra.
NASD would have a greater likelihood of establishing standing. Although the narrow competitive interests of the plaintiffs probably are not protected, the plaintiffs could assert that the interests protected by the statute are the safety, security, and stability of financial markets and institutions in general. As financial institutions, mutual funds operate in the financial markets and are simultaneously contributors to the safety of those markets and dependent on the safety and solvency of other institutions, including banks. Thus, it is possible that mutual funds are implied beneficiaries of the interests of safety and solvency that are furthered by the Glass-Steagall Act. Such an analysis might at least fit the mutual funds "arguably" within the requisite "zone," although some courts might find the relationship between the plaintiffs' interests and those of the statute somewhat tenuous. If the opinion in Data Processing is read to instruct courts to err on the side of granting standing when an "arguable" claim is asserted, the plaintiffs would be more likely to have standing under this analysis and formulation of the test.

If the Data Processing test were interpreted to mean that the interests asserted by the plaintiffs must be within those protected by statute, but do not have to be those personal to the plaintiffs, a more straightforward analysis would be possible. The interests furthered by the Glass-Steagall Act can most accurately be characterized as "public" interests: the protection of the solvency of banks by prohibiting risky investments and underwriting arrangements, and ultimately and primarily, the protection of the public from the economic disasters and depressions that are caused or aggravated by bank failures. The mutual funds could assert that they are essentially furthering that public interest by challenging the illegality of the Comptroller's action. Such an interpretation of the Data Processing test would recognize that regulatory legislation usually is intended to protect public interests rather than private interests, and that the considerations of public interests are more appropriately examined when determining the standing of the plaintiff. It is true that special legislation sometimes carves out protection for special interest groups, but the legislative history of such statutes usually indicates clearly that the protection of the special interests is the primary purpose of the legislation. When public interests are the primary concern of Congress, however, the two previous formulations of the Data Processing test would dictate either a strained attempt to find that the plaintiffs are intended beneficiaries of the statute or a finding of no standing, which may effectively block judicial review of important legal controversies.

Under the approach advocated by Justices Brennan and White, a court would decide the issue of standing solely by determining

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141. See text preceding note 72 supra.
142. See pt. IV supra.
whether or not the plaintiff had suffered injury in fact. There appears little doubt that such injury could be proven by the plaintiffs in NASD. Under the Brennan approach, the court, having thus held that the plaintiffs had standing, would then determine whether or not the issue they raised was reviewable. Justice Brennan argued that in order to establish reviewability, a plaintiff need demonstrate only some "slight indicia" that he is a member of the class protected. As the foregoing analysis of the Glass-Steagall Act indicates, it is possible that mutual-fund representatives may not be able to meet even this minimal requirement for reviewability. Justice Brennan explicitly foresaw that in some circumstances the plaintiff might not fit within his "class protected" test. In those instances, he would take into account "public policy considerations" to determine reviewability. He noted that especially when the plaintiff is the only party likely to challenge the administrative action, a court should be very generous in defining the scope of congressional protection in order to avoid frustration of statutory objectives. Judges Bazelon and Burger clearly indicated their belief that the plaintiffs in NASD were members of the limited class likely to challenge the action of the Comptroller. Accordingly, the strong presumption in favor of reviewability accorded by Justice Brennan's approach and by the APA would no doubt be sufficient to provide for a grant of standing to the plaintiffs in that case.

VI. CONCLUSION

It must be conceded that any analysis of the various formulations of the new standing test found in Data Processing and Barlow is highly speculative. An analysis such as that attempted in this Comment must, of necessity, draw upon possible implications and alternative interpretations that the Supreme Court quite possibly did not intend to suggest. An opportunity now exists for the Court to clarify the confusion produced by its somewhat inconsistent choice of phraseology in Data Processing and Barlow. The Supreme Court has agreed to review the opinion of the United States Court of Appeals for the District of Columbia in NASD. The opinion that emerges from that case may go far toward clearly setting forth the means with which the federal judiciary may fulfill its newfound mandate to provide an effective forum for reviewing the activities of the federal regulatory agencies.

143. 397 U.S. at 175. See text accompanying note 110 supra.
144. 397 U.S. at 173.
145. 397 U.S. at 175 n.9. See text accompanying note 111 supra.
146. 420 F.2d at 100, 107-08.