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THE ZONE OF INTERESTS COMPONENT OF THE  
FEDERAL STANDING RULES: ALIVE  
AND WELL AFTER ALL?

*Robert H. Marquis\**

*Introduction*

In two 1970 companion decisions, *Association of Data Processing Service Organizations v. Camp*<sup>1</sup> and *Barlow v. Collins*,<sup>2</sup> the United States Supreme Court reformulated the federal rule of standing to challenge administrative action allegedly taken in violation of a statute containing no express provision for review or of a comparable provision of the United States Constitution. The reformulation took the form of a two-part test: First, "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise"; and second, "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."<sup>3</sup>

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1. 397 U.S. 150 (1970).

2. 397 U.S. 159 (1970).

3. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 152-53 (1970). The Court also held that judicial review of the governmental actions challenged in *Data Processing* and *Barlow* was not barred under the provisions of Administrative Procedure Act, 5 U.S.C. § 701(a) (1976), which make actions nonreviewable if statutes preclude review or the actions have been committed by law to agency discretion.

The first prong of this test is, as the Court noted,<sup>4</sup> derived from Article III of the Constitution, which empowers federal constitutional courts to decide only actual "cases" and "controversies."<sup>5</sup> Accordingly, its restatement in *Data Processing* and *Barlow* obviously represented no departure from preexisting law.<sup>6</sup> The second prong of the test is not mandated by the Constitution and constituted a new " 'rule of self-restraint' " framed by the Court "for its own governance" (and, of course, the governance of lower federal courts).<sup>7</sup>

Justice Brennan filed a separate opinion in *Data Processing* and *Barlow*, in which Justice White joined, concurring in their results but dissenting from their rationale.<sup>8</sup> In the Brennan-White view, only an adequate allegation of injury in fact should be necessary to confer standing. Once a plaintiff was determined to have standing on this basis, two further and discrete issues would be examined: reviewability, one aspect of which would be "whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff"; and the merits—which, in *Barlow*, would present the question, "[D]oes the statutory language 'making a crop' create a *legally protected interest* for tenant farmers in the form of a prohibition against the assignment of their federal benefits to secure cash rent?"<sup>9</sup>

The reaction of many professorial writers and commentators to the zone test announced in *Data Processing* and *Barlow* was, from the outset, negative.<sup>10</sup> While viewing it as a liberalization of previously enunciated federal standing law, members of this group believed that it was not liberal enough. Professor Kenneth C. Davis, in particular, who had previously argued for a view of standing sim-

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4. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 151 (1970).

5. U.S. CONST. art. III, § 2, cl. 1.

6. *See, e.g., Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911); *Republic of Iraq v. First Nat'l Bank of Chicago*, 350 F.2d 645, 647 (7th Cir. 1965), *cert. denied*, 382 U.S. 982 (1966).

7. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 154 (1970).

8. *Id.* at 167.

9. *Id.* at 168-69. (Emphasis added herein unless otherwise noted.)

10. *See generally*, Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Sedler, *Standing, Justiciability and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972); Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443, 1478-82 (1971); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

ilar to that expressed by Justices Brennan and White,<sup>11</sup> has been one of the test's most consistent critics. He has also suggested on several occasions that the Supreme Court has possibly or probably abandoned the test in favor of the Brennan-White approach, and that, in any event, the treatment of the test by the lower federal courts has deprived it of much, if any, real meaning.<sup>12</sup> In view of Professor Davis' status as a leading authority in the field of administrative law, it seems likely that his pronouncements of the zone test's impending or actual demise have carried weight with some lower federal court judges.<sup>13</sup>

With deference to Professor Davis and those who share his opinion, it has seemed to me that the zone test is deserving of a more sympathetic professorial press than it has generally received, and that the obituaries for it have been premature. The latter thesis finds direct support in a number of decisions, including the very recent one of the United States Court of Appeals for the District of Columbia Circuit in *Control Data Corporation v. Baldrige*.<sup>14</sup> That decision expressly rejected the Davis hypothesis that the zone test has been or may have been abandoned by the Supreme Court, and applied the test to deny standing to plaintiffs who, in the court's opinion, had unquestionably pleaded injury in fact. In light of *Control Data*, it seems appropriate to reexamine the zone test at this time, with particular reference to its origins, parallels in other areas of the law, application in *Control Data* and some other decisions, and possible modifications in the interest of increased workability.

### *Pre-Zone Test Federal Standing Law*

The zone test, when announced in *Data Processing* and *Barlow*, had identifiable antecedents. Prior to these two cases, the legal interest test embodied the dominant prudential limitation on federal standing. That test evolved initially in suits against private rather than public defendants. It began to emerge somewhat murkily as early as 1838<sup>15</sup> and was first clearly stated some fifty years later in

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11. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 291-94 (1958).

12. *Id.* at 175-78 (Supp. 1980).

13. See, e.g., *Alabama ex rel. Baxley v. Tennessee Valley Auth.*, 467 F. Supp. 791, 796 (N.D. Ala. 1979), *rev'd on other grounds*, 636 F.2d 1061 (5th Cir.), *cert. denied*, 50 U.S.L.W. 3238 (1981).

14. 28 Cont. Cas. Fed. (CCH) 86,642 (D.C. Cir.), *cert. denied*, 50 U.S.L.W. 3237 (1981).

15. See *Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91 (1838).

*Railroad Company v. Ellerman*.<sup>16</sup> Ellerman was a lessee from the City of New Orleans of commercial wharves which the City had constructed along the Mississippi River. Pursuant to authorizing legislation enacted by the State of Louisiana in 1869 after construction of the City's wharves, the Railroad erected a similar wharf in New Orleans, which the Railroad's receivers later leased to other parties. Ellerman sought to enjoin performance of this lease agreement, contending that the City had a franchise right (which he could assert as its assignee) to act as the sole operator of commercial wharves within its municipal limits; that the State law authorizing the Railroad to construct a rival wharf was therefore invalid as a taking of property without due process; and that, in any event, the State law conferred on the Railroad only a right to operate a wharf in conjunction with its business as a rail carrier, whereas the lease agreement contemplated operation of the wharf for general commercial purposes whether or not connected with such business. The Supreme Court disposed of the due process question by citing Louisiana cases which indicated that the State rather than the City had ultimate control over wharf construction within the City's boundaries. It then went on to reverse the lower court's ruling in favor of Ellerman on the issue of ultra vires use of the wharf on the ground that Ellerman lacked standing to raise it, saying:

The sole remaining question then, is, whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. . . . But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires*? . . . The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not

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16. 105 U.S. 166 (1881).

shown to owe him any duty which it has not performed.<sup>17</sup>

During the 1930s, the legal interest test was applied to deny standing in a number of well-known cases brought against federal officers or agencies. In *Tennessee Electric Power Co. v. Tennessee Valley Authority*,<sup>18</sup> for example, a number of private power companies were held to be without standing to challenge the constitutionality of or statutory authority for the TVA power program because, at least in the absence of franchises giving them exclusive service rights in their respective areas, they, like Ellerman, had no legal interest in freedom from competition and therefore no standing to question the legality of competition to which they were in fact subjected.<sup>19</sup> The legal interest test continued to be applied in other decisions, including the decision of the Eighth Circuit<sup>20</sup> which was reversed in *Data Processing*.

Meanwhile, in its 1924 decision in *The Chicago Junction Case*,<sup>21</sup> the Supreme Court began to develop a variant approach to standing based on a requirement that the plaintiff possess a "special" or "protected" rather than a "legal" interest. That case involved the acquisition by the New York Central of control over two previously independent Chicago terminal railroads which switched traffic between plants of shippers on their lines and the lines of various trunk line railroads which competed for the carriage of such traffic between Chicago and other points. Six trunk line competitors of the New York Central brought suit challenging an order of the Interstate Commerce Commission approving the New York Central's action. The Court held that they had standing to do so because an applicable statute<sup>22</sup> entitled them to compete on equal terms with the New York Central for traffic in and out of Chicago, and by so doing the statute gave them a "special interest" in preventing an improper transfer of control of the terminal railroads inconsistent with such equality.<sup>23</sup>

*The Chicago Junction Case* approach was followed and refined

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17. *Id.* at 173-74.

18. 306 U.S. 118 (1939).

19. *Id.* at 137-39. See also *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

20. *Association of Data Processing Serv. Organizations v. Camp*, 406 F.2d 837 (8th Cir. 1969), *rev'd*, 397 U.S. 150 (1970).

21. 264 U.S. 258 (1924).

22. Interstate Commerce Act, § 5, as amended by the Transportation Act of 1920, 49 U.S.C. § 5 (1976).

23. *The Chicago Junction Case*, 264 U.S. 258, 267 (1924).

by the Supreme Court in its 1968 decision in *Hardin v. Kentucky Utilities Co.*<sup>24</sup> That case, like *Tennessee Electric Power*, had to do with the Tennessee Valley Authority's electric power program. The TVA Act had been amended in 1959 by the addition of a new section 15d,<sup>25</sup> the primary purpose of which was to authorize TVA's issuance of revenue bonds to help finance new power facilities. During congressional consideration of the amendment, concern was expressed that the new financing authority might enable and encourage TVA to expand substantially its then existing area of power supply and to compete on a broad basis with private utilities in their established power service areas.<sup>26</sup> Congress sought to allay such concern by including in the legislation a provision allowing some relatively minor extensions of TVA service but prohibiting any major expansion. This provision directed that, subject to certain exceptions, TVA should "make no contracts for the sale or delivery of power which would have the effect of making [it] or its [municipal or cooperative power] distributors, directly or indirectly, a source of power supply outside the area for which [it] or its distributors were the primary source of power supply on July 1, 1957," or, also subject to certain limitations, an "additional area extending not more than five miles around the periphery of such area." Two small Tennessee towns which had been served by the Kentucky Utilities Company (KU) elected to receive service instead from a distribution system utilizing TVA-supplied power, and KU sued to enjoin the new service on the ground that because of the statutory limitation neither TVA nor any TVA distributor could validly provide it. Like the plaintiffs in *Tennessee Electric Power*, KU had no exclusive franchises to serve the two towns. Nevertheless, the Supreme Court held that it had standing to sue (although upholding on the merits TVA's determination that the two towns were inside the periphery of its 1957 area and that the proposed service to them was therefore proper).

In holding that KU had standing, the Court distinguished *Tennessee Electric Power* and other similar cases as involving constitutional and statutory provisions which were not concerned with affording protection against competitive injury, whereas

it has been the rule, at least since the Chicago Junction Case . . . that when the particular statutory provision invoked does reflect

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24. 390 U.S. 1 (1968).

25. 16 U.S.C. § 831n-4 (1976).

26. See *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 7 n.6 (1968).

a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.<sup>27</sup>

The Court then noted that the legislative history of section 15d showed—and, indeed, TVA agreed—that the territorial limitation provision was intended to protect private utilities from TVA competition beyond that authorized. Accordingly, “Since respondent is thus in the class which § 15d is designed to protect, it has standing under familiar judicial principles to bring this suit . . . and no explicit statutory provision is necessary to confer standing.”<sup>28</sup>

Thus, when *Data Processing* and *Barlow* were decided two years later, the groundwork for the zone test had already been laid, and the Court cited and relied on *Hardin* in announcing and applying it.<sup>29</sup> However, whereas *Hardin* upheld standing in the case of a plaintiff which was found to be clearly within the zone of interests protected by the relevant statutory provision, the zone test enunciated in *Data Processing* and *Barlow* requires only that a plaintiff be “arguably” within such a protected zone.

### *Some Closely Related Concepts*

The antecedents of the zone test mentioned above have been accorded general recognition in recent legal literature. What seems to have been much less well recognized is the kinship which the zone test can claim with other established American jurisprudential concepts.

The basic thrust of the zone test was aptly summarized by the District of Columbia Circuit in *Diggs v. Shultz*.<sup>30</sup> In that case, persons who were denied entry or reentry into Rhodesia sought to challenge a congressional decision to permit importation of Rhodesian materials into the United States as in violation of an embargo against such materials embodied in a United Nations Security Council resolution. They were held to meet the zone test because they were “unquestionably within reach of [the resolution’s] purpose and among its intended beneficiaries.”<sup>31</sup>

Once the zone test is phrased in these terms, its affinity to other

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27. *Id.* at 6.

28. *Id.* at 7.

29. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 155 (1970); *Barlow v. Collins*, 397 U.S. 159, 167 (1970).

30. 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

31. *Id.*



limiting legal rules becomes apparent. One such rule, as already suggested in the discussion of *Railroad Company v. Ellerman*,<sup>32</sup> is that which determines the circumstances in which a federal statute regulating general or private, as distinguished from exclusively governmental, conduct will be deemed to confer by implication a private right of action to enforce that statute. In its 1975 decision in *Cort v. Ash*,<sup>33</sup> the Supreme Court listed four factors to be considered in resolving this kind of problem,<sup>34</sup> and in a series of subsequent decisions the Court has elaborated on their content and application.<sup>35</sup> In one recent decision, *California v. Sierra Club*,<sup>36</sup> a case involving the prohibition in the Rivers and Harbors Act of 1899<sup>37</sup> against unauthorized obstructions to the navigable capacity of waters of the United States, the Court noted that "the initial consideration is whether the plaintiff is a member of a class for 'whose especial benefit the statute was enacted.'"<sup>38</sup> In further delineating this concept, the Court added that "[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon these beneficiaries."<sup>39</sup> It then analyzed the language and legislative history of the Act, and concluded that they did not "suggest that the Act was intended to create federal rights for the especial benefit of a class of persons but rather was intended to benefit the public at large through a general regulatory scheme to be administered by the then Secretary of War."<sup>40</sup>

Similar kinds of problems are common in the field of ordinary torts. In negligence cases, for example, courts are often called upon to determine whether a defendant's violation of a penal statute, an ordinance, or a regulation should be regarded as constituting negligence. The answer depends on whether the purpose of the law, ordinance, or regulation is to protect the class of which the plaintiff is a member and the interest which he is asserting against the kind of

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32. See text at note 16 *supra*.

33. 422 U.S. 66 (1975).

34. *Id.* at 78.

35. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061 (1981); *Universities Research Ass'n v. Coutu*, 101 S. Ct. 1451 (1981); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

36. 101 S. Ct. 1775 (1981).

37. 33 U.S.C. § 403 (1976).

38. *California v. Sierra Club*, 101 S. Ct. 1775, 1779 (1981).

39. *Id.*

40. *Id.* at 1781.

hazards and harms which the suit involves.<sup>41</sup> Here again, the first of these criteria requires a determination whether, as the Fifth Circuit noted in *Manning v. M/V Sea Road*, the plaintiff is "within the class of *intended beneficiaries*" of the law, ordinance, or regulation.<sup>42</sup> It may be noted that, according to the rule set out in the current Torts Restatement, a statute, ordinance, or regulation does not provide a standard of conduct applicable in a negligence action if its exclusive purpose is to protect either governmental interests or rights enjoyed by individuals only as members of the public generally.<sup>43</sup>

Another analogue exists in the law of contracts. Where performance of a contract will benefit one who is not a party to it, his right to enforce it depends, again, on whether he is an "intended" or only an "incidental" beneficiary.<sup>44</sup> The close relationship between this rule and the zone test is illustrated by the Tenth Circuit's decision in *Gallagher v. Continental Insurance Company*.<sup>45</sup> In *Gallagher* the plaintiffs attacked the validity of a tunnel construction contract entered into by the State of Colorado. They contended, among other things, that as citizens and taxpayers they were third-party beneficiaries of the contract. The court referred to its holding in an earlier case that "the right of a third-party to sue on a contract made for his benefit requires that the right be apparent from the express provisions of the contract and that the benefit cannot be incidental 'but must be a direct benefit intended by the contracting parties to accrue in favor of the third party.'"<sup>46</sup> It then held that the plaintiffs in the case before it had no more than an incidental interest, and that, accordingly, "the action was properly dismissed [by the trial court] *because the plaintiffs have no standing to sue.*"<sup>47</sup>

### *Some Post-Data Processing and Barlow Zone-Test Decisions*

Since *Data Processing* and *Barlow*, the Supreme Court has articulated a number of additional prudential limitations on standing.<sup>48</sup> But it has also referred specifically to the zone test in at least

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41. See RESTATEMENT (SECOND) OF TORTS § 286 (1965); *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131, 134 (5th Cir. 1964).

42. 417 F.2d 603, 608 (5th Cir. 1969).

43. RESTATEMENT (SECOND) OF TORTS § 288 (1965).

44. RESTATEMENT (SECOND) OF CONTRACTS § 133 (Tent. Draft Nos. 1-7, 1973).

45. 502 F.2d 827 (10th Cir. 1974).

46. *Id.* at 833.

47. *Id.* (emphasis added).

48. See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Simon v. East-*

eight subsequent cases.<sup>49</sup> These references have contained no suggestion that the development of additional prudential tests has rendered the zone test obsolete. To the contrary, in *Gladstone, Realtors v. Village of Bellwood*,<sup>50</sup> which contains the latest such reference (at the time this article was written), the Court noted some of the more recently developed prudential limitations, and then appended a footnote reading:

There are other nonconstitutional limitations on standing to be applied in appropriate circumstances. See, e.g., *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976) ("the interest of the plaintiff, regardless of its nature in the absolute, [must] at least be 'arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises," quoting *Data Processing Serv. v. Camp*, 397 U.S. 150, 153 (1969)).<sup>51</sup>

In *Boston Stock Exchange v. State Tax Commission*<sup>52</sup> the Court did not merely refer to the zone test but applied it in determining that the plaintiffs had standing. In that case, regional (i.e., non-New York) stock exchanges contended that a New York law unconstitutionally discriminated against interstate commerce by taxing out-of-state securities sales at a higher rate than in-state sales. The Supreme Court expressed its agreement with the New York courts "that the Exchanges have standing under the two-part test of *Data*

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ern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Richardson*, 418 U.S. 166 (1974).

Prudential limitations, unlike the constitutional "cases" and "controversies" limitation, may be waived by Congress. See *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

49. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320-21 n.3 (1977); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 n.16 (1974); *United States v. Richardson*, 418 U.S. 166, 176 n.9 (1974); *United States v. SCRAP*, 412 U.S. 669, 686 & n.13 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 733 & n.5 (1972); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970). See also *Investment Co. v. Camp*, 401 U.S. 617, 620-21 (1971).

Professor Davis seems to suggest that the zone test was not mentioned by the Supreme Court in any cases after *Data Processing* and *Barlow* until *Boston Stock Exchange* and *Gladstone*. K. DAVIS, ADMINISTRATIVE LAW TREATISE 176, 188 (Supp. 1980). If this is his implication, it is obviously mistaken; indeed, the reference to the test in *Gladstone* consists largely of a quotation from *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976).

50. 441 U.S. 91 (1979).

51. *Id.* at 100 n.6.

52. 429 U.S. 318 (1977).

*Processing Service v. Camp*” and held with regard to the zone test that:

The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are “arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question.” *Id.*, at 153. Moreover, the Exchanges brought this action also on behalf of their members. “[A]n association may have standing solely as the representative of its members . . . [if it] allege[s] that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.” *Warth v. Seldin*, 422 U.S. 490, 511 (1975). See also *National Motor Freight Assn. v. United States*, 372 U.S. 246 (1963); *NAACP v. Alabama*, 357 U.S. 449, 458-460 (1958). The Exchanges’ complaint alleged that their members traded on their own accounts in securities subject to the New York transfer tax. The members therefore suffer an actual injury within the zone of interests protected by the Commerce Clause, and the Exchanges satisfy the requirements for representational standing.<sup>53</sup>

Professor Davis, in expressing doubt about the importance of the foregoing language in relation to the current status of the zone test, has noted that it, like the language quoted earlier from *Gladstone*, appears in a footnote.<sup>54</sup> This seems to me to be unimportant since the footnote is equal in length to a page or more of text—and, in any event, it contains a direct holding that the plaintiffs had standing only because their allegations satisfied the zone test as well as the requirement of injury in fact.

Moreover, the opinion in *Boston Stock Exchange* was written by Justice White, one of the two dissenters from the rationale of *Data Processing* and *Barlow*. It hardly seems likely that Justice White would have applied the zone test as he did if he believed, with Professor Davis, that the Court had or might have abandoned it in favor of the approach which he and Justice Brennan had advocated in *Data Processing* and *Barlow*.

The suggestion has also been made that the Supreme Court’s decision in *Duke Power Company v. Carolina Environmental Study*

53. *Id.* at 320-21 n.3. The test was also applied in *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), and, apparently, in *Investment Co. v. Camp*, 401 U.S. 617 (1971).

54. K. DAVIS, ADMINISTRATIVE LAW TREATISE 175-76, 188 (Supp. 1980).

*Group, Inc.*<sup>55</sup> is inconsistent with the continued existence of the zone test.<sup>56</sup> That case upheld the standing of environmental organizations and their members to challenge (albeit unsuccessfully) the constitutionality of the Price-Anderson Act,<sup>57</sup> which limits liability for a single nuclear accident to \$560 million and provides a system of government insurance to help protect operators of nuclear power plants up to that amount. The Court noted that the plaintiffs met the requirements of injury in fact and of some prudential limitations which the Court identified without mentioning the zone test.

The thesis that *Duke's* silence concerning the zone test may indicate its abandonment seems to me unsound for two reasons: First, *Gladstone*, which reaffirmed the zone test, was decided after *Duke*. Second, the absence of any mention of the zone test in *Duke* seems readily explainable by the fact that the constitutional provision there alleged to have been violated was the fifth amendment. If a plaintiff sufficiently alleges that his liberty or property has been taken without due process, he is necessarily within the protective ambit of the fifth amendment and any discussion of its zone of protected interests or of whether he is one of its intended beneficiaries would be superfluous. Indeed, in *Rakas v. Illinois*,<sup>58</sup> the Supreme Court held that definition of rights under another portion of the Bill of Rights, the fourth amendment, "is more properly placed within the purview of substantive Fourth Amendment law than within that of standing."<sup>59</sup> It also noted that this approach was "consonant with that which the Court already has taken with respect to the Fifth Amendment privilege against self-incrimination, *which also is a purely personal right*."<sup>60</sup>

Lower federal court decisions discussing and applying the zone test cannot be analyzed in any detail within the confines of this article. As the District of Columbia Circuit noted in *Control Data*, such decisions have reflected some differences in viewpoint and approach.<sup>61</sup> The Eighth Circuit, for example, stated in *Park View*

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55. 438 U.S. 59 (1978).

56. K. DAVIS, ADMINISTRATIVE LAW TREATISE 176 (Supp. 1980); *Alabama ex rel. Baxley v. Tennessee Valley Auth.*, 467 F. Supp. 791, 796 (N.D. Ala. 1979), *rev'd on other grounds*, 636 F.2d 1061 (5th Cir.), *cert. denied*, 50 U.S.L.W. 3238 (1981).

57. 42 U.S.C. § 2210 (1976).

58. 439 U.S. 128 (1978).

59. *Id.* at 140.

60. *Id.* at 140 n.8 (emphasis added). *See also* *Davis v. Passman*, 442 U.S. 228, 239-40 n.18 (1979).

61. 28 Cont. Cas. Fed. (CCH) at 86,650-51.

*Heights Corp. v. City of Black Jack*<sup>62</sup> its "preference for simplifying the 'law on standing.' We think that all that is required for a plaintiff to have standing to sue for a constitutional or a statutory violation is a showing of 'injury in fact.'"<sup>63</sup> Despite this expressed preference, the Eighth Circuit subsequently applied the zone test to deny standing in *Churchill Truck Lines, Inc. v. United States*<sup>64</sup> and *Roadway Inns of America, Inc. v. Frank*.<sup>65</sup>

*Control Data* itself contains one of the fullest and most thoughtful analyses of the zone test so far available.<sup>66</sup> The case grew out of problems related to expanding government agency purchases of automatic data processing equipment. In 1965 a statute known as the Brooks Act<sup>67</sup> was enacted to bring about more coordinated and economical government purchases in this field. Previously, government agencies had purchased computer mainframes and peripheral equipment from "systems" manufacturers who could offer both. A General Accounting Office study had indicated that economies could be realized if companies supplying only peripheral equipment were enabled to compete with the systems manufacturers in offering to meet governmental peripheral equipment needs. This necessitated development of standards for interfaces between mainframes and peripheral components. The Brooks Act authorized the Department of Commerce to develop such standards for general government use, which it did. Four manufacturers and suppliers brought suit challenging these standards as arbitrary, capricious, and beyond the Secretary's statutory authority. Their contention was that, contrary to the Secretary's finding, the standards were so drawn as unduly to favor International Business Machines, and in addition were already obsolete at the time of their promulgation and would tend to freeze technological development.

The District of Columbia Circuit, in an opinion written by Judge Tamm, upheld the trial judge's dismissal of the case because of the plaintiffs' lack of standing.<sup>68</sup> The plaintiffs, the court held, clearly met the requirement of injury in fact since, according to the allegations of their complaint, they would either have to expend

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62. 467 F.2d 1208 (8th Cir. 1972).

63. *Id.* at 1212 n.4.

64. 533 F.2d 411 (8th Cir. 1976).

65. 541 F.2d 759 (8th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

66. Other cases are collected in 5 B. MEZINES, J. STEIN, & J. GRUFF, ADMINISTRATIVE LAW 50-23 to -32 (1981).

67. 40 U.S.C. § 759 (1976).

68. *Control Data Corp. v. Baldridge*, 28 Cont. Cas. Fed. (CCH) 86,642, 86,653, (D.C. Cir.), *cert. denied*, 50 U.S.L.W. 3237 (1981).

time and effort in complying with the standards or lose the opportunity to compete for a substantial amount of government business. They could not, however, meet the zone of interests test because the court's study of the Brooks Act, the Federal Property and Administrative Services Act which it amended, and applicable legislative history convinced it that Congress had in mind only one objective—"lower government [data processing] costs . . . Competition was not, therefore, valued for itself, but for the benefits it could bring the government."<sup>69</sup> In short, the exclusive purpose of the relevant statutory provisions was to protect governmental interests, and the plaintiffs were not among their intended beneficiaries.

The court's discussion of a number of its earlier decisions, particularly *Tax Analysts and Advocates v. Blumenthal*<sup>70</sup> and *Scanwell Laboratories, Inc. v. Shaffer*,<sup>71</sup> is of special interest. *Tax Analysts* dealt with an attempt to invalidate Internal Revenue Service Rulings concerning the application to oil companies of section 901 of the Internal Revenue Code, which provides tax credits to American companies operating abroad in order to avoid double taxation. The rulings were attacked as more favorable to the companies than the statute permitted. The plaintiffs were a nonprofit corporation organized to promote tax reform, its executive director, and an individual domestic oil producer. The court held that the interest of the first two plaintiffs in collection of appropriate taxes was insufficient to give them taxpayer standing, and that the third plaintiff failed to meet the zone test.

In reaching its determination as to the latter point, the court analyzed the zone test at some length and stated three basic conclusions regarding its proper application: First, only the particular statutory provision on which a lawsuit is based rather than the entire statute of which it is a part should ordinarily be looked to in seeking to determine the existence of arguable legislative protective intent (which meant, in the case before it, examining only section 901 rather than the entire Internal Revenue Code with its general policy provisions).<sup>72</sup> Second, mere adverse impact on a plaintiff who is not himself subject to the statutory provision—in *Tax Analysts*, one whose competitive position as a domestic producer might have suf-

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69. *Id.* at 86,651.

70. 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

71. 424 F.2d 859 (D.C. Cir. 1970).

72. *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 140-41 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). The court did say that both the specific and general might be relevant when they shared identity of purpose.

ferred by reason of overly favorable tax treatment of competitors relying on foreign production—does not arguably bring him within the statutory zone.<sup>73</sup> Third, as a general proposition, only the actual language of the relevant statutory provision, and not its legislative history, should be looked to in seeking to discern whether a plaintiff's asserted interest is arguably within the protected zone.<sup>74</sup>

*Control Data* reaffirmed *Tax Analysts* on the first of these points.<sup>75</sup> It did not deal directly with the second, but seems basically in accord with the *Tax Analysts* position. On the third point, the *Control Data* court *did* examine the legislative history of and subsequent Congressional commentary concerning the Brooks Act, while explaining that its doing so was not believed to be in conflict with the *Tax Analysts* discussion of the point because "congressional intent regarding ADP suppliers is clearly reflected in the legislative history and confirmed by the longstanding oversight of the Act's implementation. . . ."<sup>76</sup>

*Control Data's* examination of legislative history and later oversight seems to me sound, but more difficult to reconcile with the *Tax Analysts* discussion than the court's explanation implies. Essentially *Control Data* seems to say simply that legislative history and later oversight should be taken into account where they are helpful in throwing light on Congress' intent but not otherwise—an apparently reasonable approach but one that *Tax Analysts* did not take. If legislative history and oversight may be looked to when helpful, it seems questionable whether statutory context should not also be examined insofar as it may throw light on the intended meaning of the particular statutory provision involved in the lawsuit.<sup>77</sup> The opinion in *Tax Analysts* suggests that the court's reluctance to consider legislative history—and possibly statutory context as well—may have been based on its assumption that a plaintiff's status as an intended statutory beneficiary will ordinarily have to be examined first in relation to standing and again, on a somewhat dif-

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73. *Id.* at 143-45.

74. *Id.* at 141-43.

75. *Control Data Corp. v. Baldridge*, 28 Cont. Cas. Fed. (CCH) 86,642, 86,650, & n.20 (D.C. Cir.), *cert. denied*, 50 U.S.L.W. 3237 (1981).

76. *Id.* at 86,650 n.21.

77. The general rule of statutory construction is, of course, that a statute will be read as a whole and each of its provisions construed in the light of other related provisions. *See, e.g.,* *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974); *Richards v. United States*, 369 U.S. 1, 11 (1962).



ferent basis, in relation to the merits.<sup>78</sup> This assumption, which was certainly reasonable in light of the Supreme Court's language in *Data Processing* and *Barlow*, highlights what seems to me, for reasons discussed later in this article,<sup>79</sup> the major problem with regard to the zone test but one which is susceptible of relatively easy solution.

*Control Data* expressly refused to extend *Scanwell Laboratories, Inc. v. Shaffer*,<sup>80</sup> on which the plaintiffs had strongly relied.<sup>81</sup> *Scanwell*, which was decided just prior to the Supreme Court's decisions in *Data Processing* and *Barlow*, has been the subject of much comment and controversy. The case involved responses by two would-be government contractors to an invitation by the Federal Aviation Administration for bids on airport landing systems. The invitation contained a provision requiring that each bid be on a system which had already been installed and tested in at least one location. Cutler-Hammer, Inc. submitted the low bid and Scanwell the next lowest bid. All components of the system offered by Cutler-Hammer had previously been installed and tested, but some of them at one location and others at a different location. Applicable regulations (embodying previously established principles of government contracting) required that bids materially deviating from the requirements of an invitation be rejected as nonresponsive, but also provided that immaterial deviations could be waived. The FAA determined that the installation and testing of the components of Cutler-Hammer's system at different locations rather than at the same location was an immaterial deviation and awarded it the contract as the low bidder. Scanwell brought suit challenging the award, and the District of Columbia Circuit, in an opinion also written by Judge Tamm, held that it had standing.

In reaching this result, the *Scanwell* court made three major points: First, the plaintiff, having alleged injury in fact (loss of a contract), should be permitted to sue as a "private attorney general" to "satisfy the public interest in having agencies follow the regulations which control government contracting."<sup>82</sup> Second, the "law of standing was greatly modified by the passage of the Administrative

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78. *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 142 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

79. *Infra*.

80. 424 F.2d 859 (D.C. Cir. 1970).

81. *Control Data Corp. v. Baldridge*, 28 Cont. Cas. Fed. (CCH) 86,642, 86,646-50 (D.C. Cir.), *cert. denied*, 50 U.S.L.W. 3237 (1981).

82. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).

Procedure Act," and that Act's legislative history indicates that it was intended to confer standing on anyone "aggrieved in fact."<sup>83</sup> Third, the "basic approach" taken in the Supreme Court's earlier decision in *Perkins v. Lukens Steel Co.*,<sup>84</sup> denying standing in circumstances described below, had been "legislatively reversed by the Congress" in modifying the Public Contracts Act<sup>85</sup> by adoption of the so-called Fulbright Amendment<sup>86</sup> to that Act.<sup>87</sup>

There appear to be obvious flaws in the *Scanwell* court's treatment of the private attorney general concept<sup>88</sup> and the legislative history of the Administrative Procedure Act.<sup>89</sup> The court's conclu-

83. *Id.* at 865.

84. 310 U.S. 113 (1940).

85. 41 U.S.C. §§ 35-45 (1976), commonly referred to as the Walsh-Healey Act.

86. 41 U.S.C. § 43a (1976).

87. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 865 (D.C. Cir. 1970).

88. The Supreme Court held in *Federal Communications Comm'n v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), and *Scripps-Howard Radio, Inc. v. Federal Communications Comm'n*, 316 U.S. 4 (1942), that persons injured in the constitutional sense could challenge administrative action as representatives of the public—but only because a statute authorized them to do so. The Court was not able to point to any similar statutory authorization in *Scanwell*.

89. The item of legislative history primarily relied on by the court was language which it said was included in "the Senate Report which accompanied the act." This language ended with a statement, emphasized by the court, that "[i]f a party can show that he is 'suffering legal wrong' . . . he should have some means of judicial redress." *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 865 (D.C. Cir. 1970).

The court's reliance on this language seems subject to serious question on three counts: First, "legal wrong," as used in the 1940s by those familiar with the legal interest test then in vogue, probably had a restricted meaning, as indicated by the Attorney General's comments quoted below. Second, the quoted language was used in relation to reviewability under section 10(c) of the draft bill being discussed, not to standing under section 10(a). *See* S. Doc. No. 248, 79th Cong., 2d Sess. (hereinafter, "S. Doc. No. 248") 37-38 (1946). Third, the language was *not* included in the Senate Committee report on the legislation as stated by the court, but in a committee print circulated in connection with an earlier draft of the legislation than the one actually enacted. S. Doc. No. 248, 11, 37-38, 191.

At the same time, the court overlooked legislative history which might well have been viewed as pointing strongly to, if not virtually mandating, a conclusion opposite to that which the court reached. After circulation of the committee print referred to above, the Department of Justice, other federal agencies, and various private organizations and groups held discussions of the proposed legislation extending over a period of months. Thereafter, a revised version of the bill was introduced and endorsed by the Attorney General in letters to the chairmen of the Senate and House Judiciary Committees. S. Doc. No. 248, 19, 223, 406. To these letters, the Attorney General attached identical appendices setting out his analysis of the revised bill's provisions. Regarding section 10(a), the Attorney General stated:

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review of such action. This reflects existing law. In *Alabama Power Co. v. Ickes* (302 U.S. 464), the Supreme Court stated the rule concerning persons entitled to judicial review. Other cases having an important

sion about the effect of the Fulbright Amendment on the authority of *Lukens Steel*—which is more directly related to the subject of this article—also appears questionable. The Public Contracts Act, enacted in 1936, has nothing to do with the requirement that, in most formally advertised government procurement, contracts must be awarded to low bidders if they are otherwise qualified. That requirement derives from a different and much earlier statute, R.S. § 3709.<sup>90</sup> The Public Contracts Act provides that in government supply contracts for more than \$10,000, sellers must agree to a number of stipulations. One of these obligates them to pay their employees engaged in producing the contracted supplies “not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work . . . in the locality in which the . . . supplies . . . are to be manufactured or furnished under such contract.”<sup>91</sup>

*Lukens Steel* dealt with a wage determination by the Secretary for the steel industry. In making the determination, she had divided

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bearing on this subject are *Massachusetts v. Mellon* (262 U.S. 447), *The Chicago Junction Case* (264 U.S. 258), *Sprunt & Son v. United States* (281 U.S. 249), and *Perkins v. Lukens Steel Co.* (310 U.S. 113). An important decision interpreting the meaning of the terms “aggrieved” and “adversely affected” is *Federal Communications Commission v. Sanders Bros. Radio Station* (309 U.S. 470).

S. Doc. No. 248, 230, 413.

Not only was this explanation never challenged, but when the author of the legislation, Senator McCarran, was questioned about the meaning of section 10(a) during Senate debate on it, he quoted the Attorney General’s explanation in full and then added:

Mr. President, I have referred the Senator to that expression coming from the Attorney General, in connection with this bill, to indicate to him and to the Senate the meticulous study which we have tried to give to this bill, so that we may construe the terms in such a way that there may be no divergence of views when we get through.

S. Doc. No. 248, 310; 92 CONG. REC. 2153 (1946).

See also, as further indicating contemporary understanding of section 10(a), Commerce Clearing House, Inc., *Administrative Procedure Act With Explanation* 20 (1946); Attorney General’s Manual on the Administrative Procedure Act 95-96 (1947). As noted in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519, 546 (1978), the Attorney General’s Manual has been accorded some deference by the Supreme Court (and other federal courts) “because of the role played by the Department of Justice in drafting the legislation.”

The *Scanwell* court also cited *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968), and *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), in support of its conclusion with respect to section 10(a). *Hardin*, as discussed at page 266 *supra*, involved a plaintiff which clearly had a statutorily protected interest. The question presented in *Abbott Laboratories* was whether a rule issued by the Commissioner of Food and Drugs was subject to judicial review in advance of its enforcement by the Commissioner; the issue was thus one of ripeness for judicial review, not standing of particular parties to obtain it.

90. Now codified in 41 U.S.C. § 5 (1976).

91. 41 U.S.C. § 35 (1976).

the country into six large areas and then determined prevailing wages in each such "locality." A number of iron and steel manufacturers challenged the determination on the ground that "locality," as used in the Act, referred to a much smaller geographic area than any of the six areas used by the Secretary. The Supreme Court, reversing a decision of the District of Columbia Circuit, held that the plaintiffs lacked standing, stating that:

Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law. They claim a standing by asserting that they have particular rights under and even apart from statute to bid and negotiate for Government contracts free from compliance with the determination made by the Secretary of Labor for their industry. Respondents point to Section 3709 of the Revised Statutes, 41 U.S.C.A. § 5, and to the Public Contracts Act itself.

Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders.

. . . .

. . . [The Public Contracts Act] was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain.

. . . .

. . . Courts should not, where Congress has not done so, subject purchasing agencies of Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies. A like restraint applied to purchasing by private business would be widely condemned as an intolerable business handicap. It is, as both Congress and the courts have always recognized, essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered.<sup>92</sup>

The Fulbright Amendment modified the Public Contracts Act to enable potential suppliers to obtain judicial review of wage determinations by the Secretary of Labor.<sup>93</sup> It purported to amend the

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92. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125-27, 130 (1940).

93. Pub. L. No. 429, 66 Stat. 308 (1952).

Public Contracts Act and nothing else; indeed, the amendment begins with the seemingly very specific words:

SEC. 301. The Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (41 U.S.C. 35-45), *is amended* (1) by redesignating sections 10 and 11 as sections 11 and 12, respectively, and (2) by inserting immediately following section 9 a new section 10 [which provided that wage determinations should be made on the record after opportunity for a hearing and with a right to judicial review].<sup>94</sup>

*Scanwell* held, in effect, that Congress' amendment of the Public Contracts Act to provide specifically for judicial review of wage determinations should be taken as "a liberation [of lower courts] from the bonds of *stare decisis*"<sup>95</sup>—i.e., from any obligation to follow a holding of the Supreme Court with respect to judicial review of contract awards generally and under a wholly different statutory provision. This amounts, in turn, to holding that an express amendment of one statutory provision impliedly amended another as the Supreme Court had interpreted it. The correctness of such a holding seems dubious, especially in light of the rule that amendments by implication are never favored and should be held to have occurred only if Congress' action is so clear as to leave no possible doubt of its intention.<sup>96</sup> Equally dubious was the District of Columbia Circuit's citation in *Scanwell* of some of its own prior decisions as having broadened the law of standing beyond that declared by the Supreme Court in *Lukens Steel*.<sup>97</sup> In *Mason v. United States*,<sup>98</sup> the Court of Claims similarly relied on lower court decisions as helping to establish that an earlier Supreme Court decision was obsolete.<sup>99</sup> In reversing, the Supreme Court noted its "difficulty in comprehending how decisions by lower courts can ever undermine

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94. Somewhat ironically, *Mitchell v. Covington Mills, Inc.*, 229 F.2d 506 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1002 (1956), upheld a few years after passage of the amendment the Secretary of Labor's determination of minimum wages for textile workers on an industry-wide basis.

95. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 867 (D.C. Cir. 1970).

96. See *United States v. Welden*, 377 U.S. 95, 99-107 & n.12 (1964); *Galvan v. Hess Oil Virgin Islands Corp.*, 549 F.2d 281, 288 (3rd Cir. 1977); *Freeman v. Chicago Title & Trust Co.*, 505 F.2d 527, 533 (7th Cir. 1974).

97. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 869-70 (D.C. Cir. 1970).

98. 461 F.2d 1364 (Ct. Cl. 1972), *rev'd*, 412 U.S. 391 (1973).

99. *Id.* at 1374-78.

the authority of a decision of this Court.”<sup>100</sup>

Subsequent to *Data Processing* and *Barlow*, the District of Columbia Circuit has continued to apply *Scanwell*, while at the same time recognizing that disappointed bidders must meet the zone of interests test.<sup>101</sup> It has managed to do both by, apparently, viewing statutory and implementing regulatory provisions as presumably for the benefit of bidders as well as of the Government—which seems directly contrary to what the Supreme Court held in *Lukens Steel*. Some other circuits have taken a similar approach.<sup>102</sup>

*Scanwell* has not won unanimous acceptance, however. The Sixth Circuit, in *Cincinnati Electronics Corporation v. Kleppe*,<sup>103</sup> expressly rejected *Scanwell*'s rationale. It held that a disappointed bidder can challenge a contract award if he can show interference with a protected interest under a separate statute (in that case, the Small Business Act), but stated that “[a]bsent such a congressionally created exception, the general rule of *Perkins v. Lukens Steel* . . . that a disappointed bidder has no legally enforceable right against the government's award of a procurement contract retains its validity.”<sup>104</sup> In *Edelman v. Federal Housing Administration*,<sup>105</sup> decided three years before *Scanwell*, the Second Circuit followed *Lukens Steel*, holding broadly that a disappointed bidder lacks standing to sue. More recently, in *Morgan Associates v. United States Postal Service*,<sup>106</sup> it held against a disappointed bidder on the merits but refused either to reaffirm or overrule *Edelman*, saying that “[w]e refrain from entering these lists until a case more compelling on the merits comes before us.”<sup>107</sup> At least two district courts in the Second Circuit have held that *Lukens Steel* and *Edelman* still control.<sup>108</sup>

100. 412 U.S. at 396. In *Federal Elec. Corp. v. United States*, 486 F.2d 1377, 1382 (Ct. Cl. 1973), *cert. denied*, 419 U.S. 874 (1974), the Court of Claims indicated that it had received and duly noted the Supreme Court's message.

101. See *Constructores Civiles de Centroamerica, S.A. (Concica) v. Hannah*, 459 F.2d 1183 (D.C. Cir. 1972); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971); *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970), *cert. dismissed*, 401 U.S. 950 (1971); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970).

102. *E.g.*, *William F. Wilke, Inc. v. Department of the Army*, 485 F.2d 180 (4th Cir. 1973); *Merriam v. Kunzig*, 476 F.2d 1233 (3rd Cir.), *cert. denied*, 414 U.S. 911 (1973).

103. 509 F.2d 1080 (6th Cir. 1975).

104. *Id.* at 1086.

105. 382 F.2d 594 (2d Cir. 1967).

106. 511 F.2d 1223 (2d Cir. 1975).

107. *Id.* at 1225 n.3.

108. *Self-Powered Lighting, Ltd. v. United States*, 492 F. Supp. 1267, 1271-72 (S.D.N.Y. 1980); *Standard Eng'r and Constructors, Inc. v. United States Equal Protection Agency*, 483 F. Supp. 1163, 1166-67 (D. Conn. 1980).

Decisions in one or two other circuits seem to indicate some uncertainty.<sup>109</sup>

Meanwhile, the District of Columbia Circuit itself, although adhering to *Scanwell*, has limited the effect of that decision. When decided, *Scanwell* seemed to imply that a disappointed bidder able to persuade a court of impropriety in a contract award to a competitor would be entitled to an injunction or declaratory judgment to prevent the Government from proceeding with the contract. This, obviously, would have thrown open judicial doors to widespread litigation. It could also have brought about substantial delays and added costs in public programs dependent on the procurement process—the basic point noted by the Supreme Court in *Lukens Steel*. In apparent though possibly belated recognition of these problems, subsequent District of Columbia Circuit decisions have eased the impact of *Scanwell* in two ways. They have emphasized that procurement officers have wide discretion in determining such questions as whether a deviation from specifications is material or immaterial, and that so long as that discretion is exercised reasonably a court should not substitute its judgment for theirs merely because it would have reached an opposite conclusion had it decided the matter initially.<sup>110</sup> Further, these decisions indicate that disappointed bidders may generally be entitled, at most, to damages rather than to an injunction or declaratory relief, and that the measure of such damages may be only the costs they incurred in preparing their bids.<sup>111</sup> In such circumstances, the cost of a lawsuit plus

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109. Compare *Airco, Inc. v. Energy Research and Dev. Administration*, 528 F.2d 1294, 1296 (7th Cir. 1975), with *Coyne-Delany Co. v. Capital Dev. Bd.*, 616 F.2d 341, 342-43 (7th Cir. 1980).

There are decisions in both the Fifth and Sixth Circuits denying standing to disappointed bidders seeking to challenge purchasing determinations by the Tennessee Valley Authority. *PRI Pipe Supports v. Tennessee Valley Auth.*, 494 F. Supp. 974 (N.D. Miss. 1980); *Inryco, Inc. v. Tennessee Valley Auth.*, 471 F. Supp. 59 (E.D. Tenn. 1978); *GF Business Equipment, Inc. v. Tennessee Valley Auth.*, 430 F. Supp. 699 (E.D. Tenn. 1975), *aff'd*, 556 F.2d 581 (6th Cir. 1977). These decisions apply the zone test, which accords with the general view expressed by the Sixth Circuit in *Cincinnati Elec. Corp. v. Kleppe*, 509 F.2d 1080 (6th Cir. 1975), and also with what appears to be the view towards which the Fifth Circuit is tending, as indicated by *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260 (5th Cir. 1978). They are not necessarily precedents as to disappointed bidders on government contracts generally, however, since the TVA procurement statute, 16 U.S.C. § 831(h)(b) (1976), confers wide discretion on TVA in determining whether to accept or reject bids, thereby affirmatively indicating that it is intended to protect TVA and not bidders.

110. See *Kentron-Hawaii, Ltd. v. Warner*, 480 F.2d 1166 (D.C. Cir. 1973); *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306, 1317 (D.C. Cir. 1971); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1297-98 (D.C. Cir. 1971).

111. See *Sun Ship, Inc. v. Hidalgo*, 484 F. Supp. 1356 (D.C.D.C. 1980); *M. Steinthal &*

the possibility of losing it often may outweigh the possible rewards. All this does not, of course, affect the question of whether the *Scanwell* court was justified in treating as "overruled" *Lukens Steel's* holding that bidders are not intended beneficiaries of general government procurement statutes, instead of leaving to Congress or the Supreme Court the prerogative of modifying the holding if either determined that modification would be appropriate.<sup>112</sup>

In *Control Data*, the District of Columbia Circuit distinguished its post-*Data Processing* and *Barlow* decisions according standing to disappointed bidders on the grounds that they had actually applied the zone test; that the disappointed bidder cases presented "special factors . . . which made a grant of standing particularly appropriate;" and that to permit the *Control Data* plaintiffs to challenge the Secretary of Commerce's data processing interface standards would

offer the potential for impermissible intrusion upon the government's prerogative to dictate the specifications for the products it wishes to purchase, [which was] [c]haracterized by the Supreme Court in *Reeves, Inc. v. Stake*, 100 S. Ct. 2271, 2278 n. 12 (1980) as the "unrestricted power . . . to fix the terms and conditions upon which it [the Government] will make needed purchases," quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940)

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Thus, *Control Data* relied on a Supreme Court decision which in turn relied on *Lukens Steel* for a proposition that was closely related

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Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971). Cf. *Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941 (D.C. Cir. 1975), cert. denied, 425 U.S. 910 (1976) (denying recovery in tort).

Recovery of bid preparation costs will require a strong showing by the disappointed bidder on several counts. See *Morgan Business Assoc. v. United States*, 619 F.2d 892 (Ct. Cl. 1980); *Burroughs Corp. v. United States*, 617 F.2d 590 (Ct. Cl. 1980).

112. Compare with the *Scanwell* approach the following statement in *Penfield Co. v. SEC*, 143 F.2d 746, 749 (9th Cir.), cert. denied, 323 U.S. 768 (1944):

We cannot agree that an inferior federal court may make its prognostication of the weather in the Supreme Court chambers, however well fortified in judicial reasoning, and forecast that the Supreme Court "seems" about to overrule its prior decision, and outrun that Court to the overruling goal. It is not a fanciful conjecture that, if such guessing contest were permitted, the ingenuity of judges, stirred by varied philosophies of governmental and social regulations, would find rational arguments for overruling a score of Supreme Court decisions. To the strain on the legal profession of many recent overrulings, some enumerated in the last paragraph of *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, should not be added that of the overruling prescience of ten circuit courts of appeals and upwards of ninety district courts.

113. *Control Data Corp. v. Baldrige*, 28 Cont. Cas. Fed. (CCH) 86,642, 86,649 (D.C. Cir.), cert. denied, 50 U.S.L.W. 3237 (1981).



to—and part of the rationale for—the *Lukens Steel* holding as to disappointed bidder standing which *Scanwell* treated as overruled.

*Control Data* also held that, as a general rule (and despite the language to the contrary in *Scanwell*), standing cannot be predicated “solely upon an asserted economic injury,”<sup>114</sup> but that the zone test and any other relevant prudential tests must be met. This holding is, of course, in full accord with applicable Supreme Court precedents.

### *A Debate Over the Wrong Question?*

As this subtitle may indicate, the zone test as presently formulated seems to me indeed subject to criticism but for different reasons than those which have generally been urged.

In *Data Processing* and *Barlow*, the Supreme Court majority substituted the zone test for the legal interest test as a determinant of standing but added that “[t]he ‘legal interest’ test goes to the merits.”<sup>115</sup> Justices Brennan and White, while decrying use of the zone test in considering standing, stated that evidence indicating the status of “plaintiff’s class [as] a statutory beneficiary” is necessary to show reviewability,<sup>116</sup> and that stronger evidence to the same effect is required “for the purpose of establishing plaintiff’s claim on the merits.”<sup>117</sup> Thus, there was general agreement that, absent a specific provision in a statute authorizing a plaintiff to sue government defendants for its alleged violation, he must show that he is one of its intended beneficiaries if he is to be entitled to relief.

Given such agreement, is it really important that a plaintiff’s possible status as an intended statutory beneficiary be considered separately in relation to standing, reviewability, and the merits? Indeed, is such separate consideration even practicable?

Procedural realities seem to me to suggest negative answers to both questions. If counsel for a government defendant views the plaintiff’s intended beneficiary status as subject to attack, he will presumably file a motion to dismiss, possibly coupled with an alternative motion for summary judgment.<sup>118</sup> When such a motion is

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114. *Id.*

115. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 153 (1970).

116. *Barlow v. Collins*, 397 U.S. 159, 175 (1970).

117. *Id.* at 176.

118. Materials bearing on the legislative history of a relevant statute (as well as the statute itself) are generally treated as subject to judicial notice in connection with a motion to dismiss. *See, e.g., Young v. Tennessee Valley Auth.*, 606 F.2d 143, 144, 146-47 (6th Cir.

filed, the practical question for the trial court is whether the case should be ended immediately by a judgment for the defendant or go to trial. If, to use the terminology of the *Data Processing* and *Barlow* majority, the plaintiff is not even "arguably" an intended beneficiary, the case should be dismissed. If the trial court decides that he is arguably an intended beneficiary but in fact is not, the case should also be dismissed. If, to use the terminology of the minority, there is not even the "slight indicia that the plaintiff's class is a [statutory] beneficiary"<sup>119</sup> necessary to show reviewability, the case should be dismissed. If such indicia are present but the stronger indicia necessary to state a merits claim are not, the case should also be dismissed.

These questions of standing, reviewability and whether a plaintiff has stated a merits claim will ordinarily be before the trial court together. Rule 12(b) of the Federal Rules of Civil Procedure virtually guarantees this by limiting a defendant to a single motion to dismiss assigning all of the grounds for dismissal which he wishes to advance.<sup>120</sup> The trial court will therefore examine the statute and its legislative history with reference to standing, reviewability, and the plaintiff's merits claim at the same time.

The language of rule 12(b) will tend to blur distinctions among standing, reviewability, and merits in another respect as well. The books are full of decisions which hold that actions should, or should not, be dismissed "for lack of standing." Yet rule 12(b) does not even mention lack of standing among the grounds on which a motion to dismiss can be based. Of the seven grounds it does mention, the only two which seem relevant to the type of problem under discussion are "lack of jurisdiction over the subject matter," and "failure to state a claim upon which relief can be granted."<sup>121</sup>

When a government defendant wishes to challenge a plaintiff's standing on the basis of prudential rather than Article III limitations, should the ground assigned be lack of subject matter jurisdiction or failure to state a claim on which relief can be granted? For

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1979), *cert. denied*, 445 U.S. 942 (1980); *In re Woodmar Realty Co.*, 294 F.2d 785, 788 (7th Cir. 1961); *Fletcher v. Jones*, 105 F.2d 58, 61-62 (D.C. Cir.), *cert. denied*, 308 U.S. 555 (1939); FED. R. EVID. 201(f). If a court feels otherwise, or if additional materials not subject to judicial notice are brought to the court's attention, the motion to dismiss must be treated, under rule 12(b) of the Federal Rules of Civil Procedure, "as one for summary judgment."

119. *Barlow v. Collins*, 397 U.S. 159, 175 (1970) (Brennan, J., concurring).

120. Rule 12(b) was amended in 1946 to prevent successive dismissal motions. See 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE §§ 2440-2442 (2d ed. 1981).

121. FED. R. CIV. P. 12(b) (1), (6).

the defendant's counsel, the obvious answer is to assign both, as rule 12(b) expressly permits. If the court agrees with his contention that the case should be dismissed, it can then dismiss under whichever of the two rubrics it, rather than counsel, considers appropriate.

Taking the foregoing considerations into account, it seems to me neither realistic nor particularly useful to require (in theory) that trial courts examine the fine and shadowy gradations between what is arguably protected and what is actually protected, or between the indicia of protection necessary to show reviewability and those required to state a merits claim. In determining whether to grant or deny a governmental defendant's dismissal motion in this kind of case, the question is whether, primarily on the basis of the trial court's examination of the relevant statutory provisions and their legislative history, the court believes a private right of action should be implied because the plaintiff is an intended statutory beneficiary. Almost inevitably a court will find itself deciding this question even if it has set out to do something else. In *Boston Stock Exchange v. State Tax Commission*, for example, the Supreme Court first stated that, based on the allegations of the complaint, the plaintiff exchanges "are arguably within the zone of interests to be protected" by the Commerce Clause."<sup>122</sup> It then stated, only a few sentences later, that the exchanges' members "suffer an actual injury within the zone of interests protected by the Commerce Clause."<sup>123</sup>

All this seems to me to point to the desirability of eliminating any theoretical distinction between the tests applicable in determining the existence of an implied statutory right of action against governmental and against private defendants. As noted earlier in this article, the legal interest test formulated as to a private defendant in *Railroad Company v. Ellerman* was later applied to governmental defendants in cases like *Tennessee Electric Power Company v. Tennessee Valley Authority*. The rule of *Cort v. Ash*, with the gloss added by later Supreme Court decisions, could similarly be applied to governmental defendants without thereby changing the zone test by much more than deletion of "arguably" from its composition. This, it seems to me, would result in a single and more workable test which would be applicable whether a case was brought against private defendants, governmental defendants, or—as has occurred in at

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122. 429 U.S. 318, 320-21 n.3 (1977).

123. *Id.* at 321 n.3.

least two cases<sup>124</sup> and can be expected to reoccur in others—both.

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124. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

The Court did not suggest in either case that different tests might be applicable with respect to the governmental and the private defendants.

