principles."[142] Obviously, the finding of facts is a crucial step in achieving substantial justice for parties in administrative proceedings. The District of Columbia Circuit's opinion in *Cinderella* recognized the necessity for steering a course between according the findings of the hearing examiner a significance which might impair the policy-making function of the agency involved and completely ignoring those findings, thereby prejudicing the legitimate claims of parties and degrading the important function of the hearing examiner in the administrative process. What is required of the agency is a delicate exercise of restraint and a fine sensitivity not only to its own role in the application of administrative law but also to those of the trial examiner and the reviewing court. *Cinderella's* restatement of the applicable legal principles should clarify the problems involved and serve as protection for rights affected by the very significant power of an agency to find the facts.

VIII. JUDICIAL REVIEW—RIGHT OF REVIEW

Standing to Seek Judicial Review

Prior to 1970, two primary methods for obtaining standing to appeal a decision of a federal administrative agency existed.[1] Appellants could allege an invasion of an interest protected by the common law[2] or assert statutory authorization for judicial review.[3] Allegations of both were labeled "legal rights," a term defined by the Supreme Court in *Tennessee Power Co. v. TVA*[4] as rights of property,

142. Address by Charles Evans Hughes before the Federal Bar Association, *quoted in* LANDIS, THE ADMINISTRATIVE PROCESS 135, 136 (1938).

1. Note, *Standing to Challenge Federal Administrative Actions in the Wake of Association of Data Processing Service Orgainzations, Inc. v. Camp*, 1 LOYOLA U. (CHI.) L.J. 285, 289 (1970). The question should be distinguished from the ability of persons to intervene in administrative proceedings. Intervention is controlled by agency regulations; hence, permission to intervene is not necessarily recognition that a petitioner is a sufficiently aggrieved party for standing purposes. FPC Order Issuing Preliminary Permit and Granting Petition to Intervene, Project No. 2702 (Nov. 18, 1970). See ANCILLARY MATTERS section of the *Project supra*.

2. Tennessee Power Co. v. TVA, 306 U.S. 118, 137 (1939).

3. *See, e.g.*, Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135b(d) (1964) ("any person who will be adversely affected by such an order may obtain judicial review"); Federal Power Commission Act, 16 U.S.C. § 8251(b) (1964) ("any party . . . aggrieved by an order . . . may obtain a review of such order in the United States court of appeals"). *But see* Sugar Act of 1947, 7 U.S.C. § 1136 (1964), for an example of statutory preclusion of judicial review.

4. 306 U.S. 118 (1939).

rights arising out of contracts or protected against tortious invasion, or rights founded on a statute conferring a privilege.[5] Until recently, few statutes expressly provided standing;[6] thus, most of the law in this area has been based on judicial interpretation.[7]

The difficulty in precisely determining when a legal right has been violated has resulted in a judicial expansion of the legal right concept in two ways. First, a legal right or interest—one protected by law—is any right to which a court grants protection.[8] The Supreme Court has exploited the circularity of this coneept by substantially expanding the functional definition provided by *Tennessee Power* on several occasions.[9] Second, a finding of standing under the legal interest standard may require a determination on the merits[10] since courts must often rule on the existence of a statutorily granted privilege in order to recognize the appellant's legal right.[11] Obviously, however, the determination of the privilege may be dispositive of the case.[12] If so, the concept of standing has been expanded in this instance to include the substantive cause of action as well as the preliminary issue of justiciability.

In addition to expanding the definition of "legal right," courts have also broadened the accessibility to standing by carving out certain well known exceptions to the legal interest requirement.[13] Notable examples of this judicial liberalization are competitors' challenges to administrative decrees[14] and actions which are brought

5. *Id.* at 137.

6. *E.g.*, Administrative Procedure Act, 5 U.S.C. § 702 (Supp. V, 1970); Communications Act of 1934, 48 Stat. 1093 (1934), *as amended*, 47 U.S.C. § 402(b)(6) (1964).

7. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTIONS 502 (1965) [hereinafter cited as JAFFE].

8. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.04, at 222 (1958). *But see* JAFFE 501.

9. *See, e.g.*, Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968); Chicago v. Atchison, T.&S.F.Ry., 357 U.S. 77 (1957). The Supreme Court proffered an open-ended mode of liberalizing the legal interest test in FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940), where it indicated that a *previously recognized* legal right is not essential to standing. *See also* Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 629 (1968).

10. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

11. *See* Barlow v. Collins, 397 U.S. 159, 168-69 (1970). For an example of a case where the cause of action was merged into the determination of standing, see Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

12. Barlow v. Collins, 397 U.S. 159, 168-69 (1970).

13. A few courts have retained the legal interest standard in its original form. *See, e.g.*, Rasmussen v. Hardin, 27 AD. L.2D 269 (D. Ariz. 1970); Powelton Civic Home Owners Ass'n v. HUD, 284 F. Supp. 809 (E.D. Pa. 1968).

14. *See* Matson Nav. Co. v. Federal Maritime Comm'n, 405 F.2d 796, 798 (9th Cir. 1968); B. SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 185-86 (1962). *But cf.*

to vindicate a public right.[15] These exceptions to the standard have increasingly resulted in allowing standing to persons adversely affected by agency action regardless of the existence of strictly defined legal rights.[16]

In 1968 the Supreme Court tacitly recognized the judicial trend toward liberalization of standing by its decision in *Flast v. Cohen*.[17] In *Flast*, the Court noted that the test of standing focused on the *party* seeking review, rather than the interest being asserted.[18] This emphasis on the party rather than the issue indicates a fundamental shift away from the legal interest standard.[19]

In 1970, the Supreme Court continued this process of liberalization in *Association of Data Processing Service*

Comment, *Competitor's Standing to Challenge Administrative Action—Recent Federal Developments*, 48 N.C.L. REV. 807, 820-21 (1970). If the competition fostered by the agency was illegal, the injured competitor would have standing despite the absence of a legal right to be free from competition. *See* Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); National Ass'n of Sec. Dealers, Inc. v. SEC, 420 F.2d 83 (D.C. Cir. 1969); West Coast Constr. Co. v. Oceano Sanitary Dist., 311 F. Supp. 378, 381 n.1 (N.D. Cal. 1970).

15. *See generally* JAFFE 459-501. Courts often recognize the standing of persons who do not possess a legal right but have suffered injury due to agency action alleged to be arbitrary or in excess of statutory authority. Such an action is dependent upon the existence of a statute intended to protect the public interest. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The appellant is said to be acting as a private attorney general in his representation of the public and presentation of his personal interest. Associated Indus., Inc. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated on suggestion of mootness per curiam*, 320 U.S. 707 (1943).

16. *See, e.g.*, Air Reduction Co. v. Hickel, 420 F.2d 592 (D.C. Cir. 1969); Gonzalez v. Freeman, 334 F.2d 570, 574-75 (D.C. Cir. 1964); Davis, *supra* note 9, at 629.

17. 392 U.S. 83 (1968).

18. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated . . . . [W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable . . . .

. . . .

[T]he question of standing is related only to whether the dispute . . . will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. *Id.* at 99-101.

Prior to this decision and, to some extent after it, many courts emphasized the nature of the issues of a case as an aspect of standing. *E.g.*, Colegrove v. Green, 328 U.S. 549, 552 (1946); Martin-Trigona v. FCC, 27 AD. L.2D 219 (D.C. Cir. 1970); *see* Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 75-76 (1961).

19. The determination of a legal right has often been resolved through examination of the merits. See notes 10-12 *supra* and accompanying text. The shift from issue orientation and its resultant liberalization of standing has been dramatized by the Court's unwillingness, since the *Flast* decision, to dismiss a case for lack of standing. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 457 (1970).

Organizations v. Camp[20] and *Barlow v. Collins.*[21] The Court altered its focus by establishing two new requirements for standing: allegations of injury in fact and assertion of an interest that is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.[22] Injury in fact would satisfy the case or controversy requirement of article III of the Constitution,[23] while the "zone of interests" test would provide the courts with a tool to limit their caseload to controversies involving substantial legal questions pertinent to the legislative or constitutional schemes involved.[24] Following these decisions, many commentators expressed the view that the Court had opened the doors to judicial relief for a larger class of litigants.[25]

Some Judicial Reactions to Data Processing and Barlow. An examination of only a few of the lower court decisions since *Data Processing* and *Barlow* will illustrate the diverse judicial reaction to the Supreme Court's rulings. For example, the Courts of Appeal for the Fifth Circuit, Third Circuit, and the District of Columbia have faithfully applied the *Data Processing-Barlow* tests.[26] However, in *Sierra Club v. Hickel*[27] the Court of Appeals for the Ninth Circuit

20. 397 U.S. 150 (1970).

21. 397 U.S. 159 (1970).

22. 397 U.S. at 152-53. *See generally* 21 SYRACUSE L. REV. 1276 (1970). At least one Federal court of appeals has restricted application of the *Data Processing* requirements to challenges of administrative activity. Solien v. Miscellaneous Drivers & Helpers Local 610, ___ F.2d ___ (8th Cir. 1971).

23. U.S. CONST. art. III, § 2.

24. *See* 397 U.S. at 153-54. The "injury in fact" requirement may also have been partially motivated by judicial policy considerations, such as limiting the number of persons eligible to seek judicial relief. *See* 23 VAND. L. REV. 814, 821 (1970). However, this would be inconsistent with the Court's announced policy of enlarging the class of persons eligible to seek judicial review to protest administrative action. 397 U.S. at 154-55.

25. *E.g.*, Davis, *supra* note 19; 1 LOYOLA U. (CHI.) L.J., *supra* note 2, at 297; The Wall St. Journal, Mar. 4, 1970, at 3, col. 1. *Contra*, 23 VAND. L. REV. 814 (1970), where the writer argues that the *Data Processing-Barlow* test is no different than the legal interest test. He contends that in order to succeed on the merits under *Data Processing-Barlow* one must still show that a legal right—as opposed to an interest—has been violated.

26. *E.g.*, National Welfare Rights Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970); Lodge 1858, AFGE v. Paine, 436 F.2d 882 (D.C. Cir. 1970); Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970); Harry H. Price & Sons, Inc. v. Hardin, ___ F.2d ___ (5th Cir. 1970). *But see* Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970). The *Ballerina* case is discussed *infra* at notes 82-85 and accompanying text. The Court of Appeals for the District of Columbia Circuit, however, has not followed the Supreme Court's standard without vigorous dissent against the majority's methodology, though not its result. *See* Lodge 1858, AFGE v. Paine, 436 F.2d at 898 (D.C. Cir. 1970) (Tamm, J., concurring).

27. 433 F.2d 24 (9th Cir. 1970), *cert. granted*, 39 U.S.L.W. 3353 (U.S. Feb. 22, 1971) (No. 939). Although the court failed to find standing in this case, the test used in making the determination constitutes the basis of liberalization.

substantially expanded the Supreme Court's standards. Referring to the "zone of interests" test, that court noted:

> The significance of the language is not entirely clear. . . . We submit that it does not establish a test separate and apart from or in addition to the test which the court first looked to in *Camp*. . . . Injury in fact is the test which will reconcile most if not all of the decided cases. . . . "Standing to sue" as the phrase indicates, refers to the posture of the plaintiff and not to the "legal interests" to be unravelled.[28]

In contrast to this movement toward a more liberal interpretation, in *Crowther v. Seaborg*[29] a federal district court moved in the opposite direction by completely disregarding the Supreme Court's two-tier standard and declaring that appellants must show an interest "entitled to legal protection which is in some way threatened with logical directness by the agency action."[30] The court determined that the health and safety interests of local property owners provided them with standing to challenge underground atomic testing by the AEC, an analysis clearly focusing on the interests rather than the parties asserting them.[31]

In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*[32] a Pennsylvania federal district court utilized analysis similar to that developed in *Sierra Club* to find that a group of contractors who were challenging federal hiring restrictions lacked standing.[33] The court noted that standing focuses on the party seeking relief and ruled that an association of contractors could not show a personal stake in the controversy, although the group's individual members would have standing since the requirements affected them "personally."[34]

28. *Id.* at 31. The court used the "injury in fact" standard to examine the standing of the Sierra Club, a nationwide conservation group, to challenge the action of the Secretary of the Interior in granting a license to a private enterprise for commercial development of a national park. The court ruled that there was no injury in fact which directly affected the members, although the actions of the Secretary might be personally distasteful to them.

29. 312 F. Supp. 1205 (D. Colo. 1970). Plaintiff's brief in this action is reprinted in *Plaintiff's Brief in the* Project Rulison Case, 55 CORNELL L. REV. 761 (1970).

30. 312 F. Supp. at 1212.

31. Somewhat inconsistently, however, the court denied the standing of another appellant who was not a local property owner by focusing on the personal stake of the party seeking relief. *Id.* at 1218.

32. 311 F. Supp. 1002 (E.D. Pa. 1970).

33. The hiring requirements were prescribed in all federal contracts and federally assisted construction projects as part of the controversial Philadelphia plan dealing with the hiring of minority-race workers.

34. *Id.* at 1007. Portions of the opinion focus on the ultimate issue presented by the plaintiff and determine that it is fit for judicial resolution. Whether this consideration is a reversion to a legal interest standard or an aspect of the case or controversy requirement bound up in an examination of adverseness is not resolved by the court. *Id.* at 1006, 1007.

The remaining sections of this commentary will consider the varying constructions which have been and might be placed upon the zone of interests, injury in fact, and "public interest action" tests; evaluate and attempt to balance the policy considerations underlying the concept of standing; and make recommendations to clarify the law in this complex area.

The Zone of Interests Requirement. The breadth of the "zone of interests" test for standing depends on the interpretation which lower courts give to the phrase "arguably within the zone of interests to be protected or regulated by the statute" enunciated in *Data Processing*. The most liberal interpretation is that which the Ninth Circuit used in *Sierra Club* in concluding that the Supreme Court could not have meant the "zone of interests" test to be more than a restatement of the injury in fact requirement.[35] Any doubts over the test to be applied should have been resolved by the application of the *Data Processing* rationale in *Barlow*, decided on the same day.[36]

Another method which some courts have used to liberalize the "zone of interests" test involves requiring a detailed judicial investigation of each statute for congressional intent. A prime example of this approach is *Lodge 1858, AFGE v. Paine*,[37] where employees of NASA challenged the action of that agency in firing civil service employees while retaining contract workers. The court of appeals found that the plaintiffs met the "zone of interests" requirement after examining not only the statute creating the agency in question and the scheme of applicable civil service laws but also recent congressional deliberations involving relevant statutes.[38] The court concluded that the statutory scheme was designed to protect the employment interests of civil service workers.[39] The willingness of the

35. *See* 433 F.2d at 31-32.

36. In fact, the Court's application of the *Data Processing* standard in *Barlow* clearly demonstrates an intention that the "zone of interests" test be a separate consideration from injury in fact. The court goes so far as to number the tests and consider them separately. Barlow v. Collins, 397 U.S. 159, 164 (1970). The Court points out in *Barlow* that injury in fact satisfies the article III requirements of standing. *Id.* In *Data Processing* the Court stated that "[s]tanding 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. 397 U.S. at 153. The treatment accorded the two standards indicates that the court did not intend one to be a restatement of the other.

37. 436 F.2d 882 (D.C. Cir. 1970).

38. *Id.* at 893.

39. *Id. Accord,* Chris Berg, Inc. v. United States, 426 F.2d 314 (Ct. Cl. 1970). There the Court of Claims declared that if a "regulation appears intended to define and state the rights

court in *Lodge 1858* to look beyond a statute to a statutory scheme and subsequent congressional consideration of that scheme, added to the court's willingness to flexibly consture the term "protect," resulted in perhaps the most liberal interpretation of the "zone of interests" requirement since *Data Processing* and *Barlow.*

A similar approach was taken by the Court of Appeals for the Fifth Circuit in *Harry H. Price & Sons, Inc. v. Hardin,*[40] where a tomato repacker and wholesaler were held to have standing to challenge marketing orders of the Secretary of Agriculture. The Agricultural Marketing Act, which authorized the Secretary to establish marketing regulations for commodities regulated by the Act,[41] was found by the court to declare a policy of protecting the interests of the farmer and the consumer by providing orderly marketing conditions.[42] Although the court admitted that the appellant was only indirectly affected by these regulations, it determined that their indirect impact was sufficient to bring him within the applicable zone of interests.[43] Apparently, the court reasoned that Congress intended to regulate persons occupying the immediate appellant's status as incident to the establishment of orderly marketing procedures. The court did not refer to any legislative history or statutory provision which specifically regulated repackers or wholesalers; rather, reliance was placed on what Congress must have intended to regulate.[44]

A third method for liberalization of the "zone of interests" requirement was noted by the Third Circuit in *National Welfare Rights Organization v. Finch,*[45] where the appellants suggested that

of a class of persons, it is presumptively intended to benefit those persons." *Id.* at 317. *See also* Fletcher v. United States, 392 F.2d 266, 270-71 (Ct. Cl. 1968). It is a simple matter to equate the intent to benefit and the intent to protect or regulate which is discussed in *Data Processing.* National Welfare Rights Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970).

40. 425 F.2d 1137 (5th Cir. 1970).

41. 7 U.S.C. § 601 *et seq.* (1964).

42. 425 F.2d at 1138.

43. *Id.* at 1140-41. A statute provides for application of marketing orders to handlers and processors, 7 U.S.C. § 608c(1) (1964), but the court did not discuss the possibility that this might be a direct regulation of Hardin.

44. The court of appeals also dismissed another possible interpretation of the "zone of interests" standard. Noting that the appellant's complaint showed that he had suffered economic injury and that his interests were within the proper zone of interests, the court warned that merely because a complaint alleges an interest to be within the proper zone of interests does not mean that it is "arguably" within that zone. *Id.* at 1140. The court does not delineate what standard it would use, however, to determine the burden of pleading at this stage by the term "arguably."

45. ___ F.2d ___ (D.C. Cir. 1970).

the "zone of interests" requirement may be replaced by a showing of invasion of a legal right.[46] Reasoning that legal rights cannot be taken without due process of law, appellants argued that the holder of such a right would have standing by virtue of the Fifth Amendment regardless of a congressionally conferred source of standing. To the extent that legal rights are not within the proper "zone of interests," the *Data Processing-Barlow* requirements could thus be further liberalized. Unfortunately, the court did not reach this hypothesis in its disposition of the case.[47]

The problem of determining legislative intent, a subject which has caused difficulty in many areas of law, looms as the central obstacle to applying the "zone of interests" standard.[48] In recognition of this difficulty courts may prefer a broad standard for determining congressional intent in their application of the "zone of interests" standard. The "zone of interest" test could be interpreted to refer to any interest which Congress conceivably could have intended to protect. The rationale for such a rule would be that congressional intent is often unfathomable since it is frequently unarticulated.[49] This technique would include a rebuttable presumption that Congress intended to regulate or protect an interest if the interest actually received regulation or protection under the statute. The presumption could be overcome by a showing that Congress had specifically denied the intention.

The same policy reasons could also justify a court's action in eliminating congressional intent from its consideration altogether. Such a rule would necessitate interpreting "to be protected or regulated"[50] as referring to any interest which is *in fact* regulated or protected, whether or not the regulation or protection was intended or even foreseen by Congress. So long as the effect of the statute was regulation or protection of an interest, the "zone of interests" requirement would be satisfied; application of this rule would be unaffected by congressional demonstrations of contrary intent. Such an approach would be more difficult to justify under the relevant portions of the Administrative Procedure Act,[51] since that Act

46. *Id.* at ___, n.33.

47. *Id.* at ___

48. *See* Stringham, *Crystal Gazing: Legislative History in Action*, 47 A.B.A.J. 466 (1961).

49. *Id.* at 470.

50. These are the words of the "zone of interests" requirement as articulated by the Supreme Court. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

51. 5 U.S.C. §§ 551-59, 701-06, 3105, 3344, 5362, 7521 (Supp. V, 1970).

provides standing to persons adversely affected or aggrieved "within the *meaning* of a relevant statute."[52]

From the many interpretations of the "zone of interests" test available to federal courts, it appears that, without further guidance from the Supreme Court, standing will become a matter of judicial discretion, the result varying from case to case and from court to court.[53] Due to its flexibility, the "zone of interests" requirement will be a force for liberalization of standing if there is a strong judicial trend in this direction.[54] But to the extent that standing is used as a judicial device to further external policy biases by limiting judicial forums, it may arbitrarily exclude deserving plaintiffs.[55]

The Injury in Fact Requirement. Injury in fact is as potentially subject to judicial discretion in interpretation as is the "zone of interests" requirement. The Second Circuit recognized as early as 1965 that article III did not require an aggrieved or adversely affected party to have a *personal* interest.[56] This ruling encouraged many federal courts to grant standing to such collective organizations as the Road Review League[57] and the Sierra Club.[58] The Federal District Court for the Middle District of Pennsylvania in *Pennsylvania Environmental Council v. Bartlett*[59] noted that the environmental group suffered the requisite injury in fact, enabling them to present issues in an adversary context which were capable of judicial resolution.[60] The court observed that the complaining groups suffered

52. *Id.* § 702 (emphasis added).

53. A discussion of the concept of discretionary standing is found in *Project, Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 198-99. Other conceivable interpretations of the "zone of interests" requirement are noted in Comment, *Judicial Review of Agency Action: The Unsettled Law of Standing*, 69 MICH. L. REV. 540 (1971).

54. *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970); B. SCHWARTZ, *supra* note 14 at 186; Conference Foundation Letter, Sept. 30, 1969.

55. *See* JAFFE 503.

56. Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 615 (2d Cir. 1965). This position conflicted with the traditional view that a personal stake was requisite to standing. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

57. Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967). The League was a nonprofit association which concerned itself with highway locations and here challenged the placing of a freeway.

58. Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970). The Sierra Club is a national nonprofit conservation agency which here challenged the location of a proposed expressway.

59. 315 F. Supp. 238 (M.D. Pa. 1970).

60. *Id.* at 245. A similar determination was made by the District of Columbia Circuit in a suit by citizens and users of Florida recreational facilities to enjoin the building of the Cross-Florida Barge Canal. Environmental Defense Fund v. Corps of Engineers, ___ F. Supp. ___ (D.D.C. 1971).

injury as citizens, sportsmen, and environmentalists with regard to construction by a government agency which moved a streambed. This willingness of some courts to find the requisite "personal" interest in groups has been a major liberalization of the injury in fact concept.

Not all courts, however, have acknowledged standing in the absence of a personal stake. The Sixth Circuit Court of Appeals in *South Hill Neighborhood Association v. Romney*[61] considered the standing of nonprofit corporations desiring the preservation of historic buildings ordered demolished by an urban renewal authority. The court ruled that when such corporations did not own the buildings in controversy or property nearby, or submit a redevelopment plan for the area, they had no standing.[62] The submission of a redevelopment plan demonstrated the necessary participation in the administrative process needed to show an actual interest in the litigation. By demanding merely that groups without obvious interests demonstrate their adverseness by prior participation in the administrative process, the court's standards do not appear unreasonable.

Standing for organizations received an even more restrictive ruling in *Contractors Association*. There, an organization complained of harm to its members resulting from agency action,[63] and the court ruled that only the members, not the organization, would have standing. The rationale employed to reach this result was that the organization lacked the requisite personal stake in the controversy. It is, however, logically difficult to deny that an organization composed of sufficiently adverse parties would not be sufficiently adverse in itself. This restrictive standard was applied in a situation where injury in fact was the sole criterion of standing[64] and may thus reflect a judicial tendency to narrow the meaning of injury in fact in order to impede the transition from the legal interest test to a strict injury in fact standard.

In *Sierra Club v. Hickel*,[65] the Court of Appeals for the Ninth Circuit also adopted injury in fact as a singular test for standing and

61. 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970).

62. *Id.* at 460-61 (adopted Dist. Ct. memo). Contrast the willingness of the District Court of the District of Columbia to accept indirect injury as sufficient in fulfilling the injury in fact requirement. Nader v. Volpe, 320 F. Supp. 26 (D.D.C. 1970).

63. The agency had issued contract specifications in accord with the racial hiring requirements of the Philadelphia Plan. See notes 32-34 *supra* and accompanying text.

64. This assumes that the court did not intend the determination of a proper issue to be an aspect of standing. See notes 18-19 *supra* and accompanying text.

65. 433 F.2d 24 (9th Cir. 1970).

construed the phrase narrowly. The Ninth Circuit indicated that there might be varying degrees of invaded interests—some sufficient for standing and some not:

> We do not believe such Club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities . . . by two . . . officials of the government . . . .[66]

The court in *Sierra Club* did not deny that the club had an invaded interest; it merely denied that the interest was direct.[67]

Clearly, the *Data Processing* decision, even absent the "zone of interests" requirement, carries the potential to greatly constrict the scope of standing. By redefining the limits of injury in fact and its application to possible plaintiffs, courts may alter the availability of the judicial forum for reasons extrinsic to the preliminary issue of standing and thereby exclude whole classes of plaintiffs. Without more objective criteria by which to ascertain standing, the opportunities for arbitrary exclusion from the full benefits of the judicial process remain open.

An Alternative Basis for Standing. Objection to the *Data Processing-Barlow* standard on the ground that it excludes deserving plaintiffs from a judicial forum necessarily assumes that standard to be exclusive. However, the Supreme Court in *Data Processing* indicated that an alternative ground for standing was not precluded by its decisions:

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66. *Id.* at 30. On similar facts, the Ninth Circuit has now indicated that the individual members of an environmental organization may have standing when the organization does not. Alameda Conservation Ass'n v. California, ___ F.2d ___ (9th Cir. 1971). Though a corporation and thus a legal entity apart from its members, the organization owned no property, real or personal, and hence could not allege injury in fact. To the extent that the members owned property in the area of controversy, they were allowed standing. *Id.* at ___.

67. *Id.* at 32-33. Injury in fact may be further limited in a different way. Beginning with the assumption that injury in fact can only occur when a right is violated, disappointment arguably becomes injury only when the frustration has a pecuniary value. *See* Dugan, *Standing, The New Property, and the Costs of Welfare: Dilemmas in American and West German Provider-Administration,* 45 WASH. L. REV. 497, 515 (1970). Pecuniary value, however, is unique to protected rights or interests. *Id.* Thus, while the concept of injury implies an objective determination, it bypasses the underlying consideration of values on which the concept is based. The weakness of the theory is in the assumption that pecuniary value is unique to protected rights. Injury can be premised on other values. *See, e.g.,* Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). Hence, the premise of the theory is under-inclusive. However, a court might apply the suggested reasoning to those frustrations which do have pecuniary value underpinnings.

> The third test mentioned by the Court of Appeals, which rests on an explicit provision in a regulatory statute conferring standing and is commonly referred to in terms of allowing suits by "private attorneys general," is inapplicable to the present case.[68]

The traditional analysis of the private attorney general approach was that persons did not have standing to appeal an administrative determination unless they could show that they were *personally* aggrieved,[69] but it has since been held that a plaintiff need not have *any* personal interest to meet article III requirements.[70] It was sufficient that the statute at least implicitly authorized the plaintiff to act as a private attorney general and that the only interest vindicated be that of the public.[71]

Many courts still follow the aforementioned traditional line of cases and base standing to represent the public interest[72] on a statutory authorization.[73] In *Peoples v. United States Department of Agriculture*,[74] however, the Court of Appeals for the District of Columbia Circuit extended the public interest action doctrine by declaring that presumptive standing would be given a complainant who alleged that executive programs unlawfully deviated from statutory requirements.[75] Appellants had charged that the Secretary of Agriculture was exceeding the statutory price for food stamps, and the court required that the complainant be an *intended* but not a *primary* beneficiary of the statutory provision. The importance of the decision rested in the emphasis it placed on administrative illegality.

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68. 397 U.S. 150, 153 n.1 (1970).

69. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); F. COOPER, 2 STATE ADMINISTRATIVE LAW 541 (1965).

70. *See* Associated Indus., Inc. v. Ickes, 134 F.2d 694 (2d Cir. 1943). In *Scripps-Howard Radio, Inc. v. FCC*, Justice Frankfurter, writing for the majority, pointed out:

> These private litigants have standing only as representatives of the public interest. . . . That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights.

316 U.S. 4, 14-15 (1942); *cf.* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

71. Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943). *But cf.* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 20 (1942) (Douglas, J., dissenting).

72. A more recent application of a suit in the public interest is Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), where the court noted that groups existed in every community which have a sufficient interest to have standing. The important point is that they represent the public, not a narrow private interest. *Id.* at 1005.

73. *See, e.g.*, Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Szmodis v. Romney, 307 F. Supp. 607 (E.D. Pa. 1969).

74. 427 F.2d 561 (D.C. Cir. 1970).

75. *Id.* at 563.

Similar emphasis was later used by the same court in another public interest case.[76]

In the area of competitor's suits, the District of Columbia Circuit finally departed from the necessity for even statutory authorization in *National Association of Securities Dealers v. SEC.*[77] Emphasizing dicta from an earlier decision, the court determined that the appropriate question for judicial consideration was not so much whether Congress intended to benefit the plaintiff, as whether Congress intended to leave the agency immunized from judicial review.[78] The court then ruled that a pleading of administrative illegality and injury in fact would suffice to provide standing.

In *Scanwell Laboratories, Inc. v. Shaffer*[79] the Court of Appeals for the District of Columbia Circuit was again faced with a competitor's suit. Noting that the "public interest" theory of standing had developed due to the harshness of the legal interest theory, the court elaborated on the administrative illegality requirement and declared that the public interest specifically lies in denying the agency freedom to exercise arbitrary powers.[80] The test for standing was again injury in fact and a sufficient adverse interest on the part of the plaintiff. A third but unexplained requirement was that the interest asserted by the complainant contain "otherwise reviewable subject matter."[81]

The public interest theory of standing appears to have survived the *Data Processing* and *Barlow* decisions. In *Ballerina Pen Co. v.*

76. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966). The court's decision to expand standing to a consumer group was influenced by the fact that if the consuming public was not heard to challenge the illegality, no one could bring the action. *Id.*

77. 420 F.2d 83, 96 (D.C. Cir. 1969).

78. *Id.* at 99.

79. 424 F.2d 859 (D.C. Cir. 1970). In *Scanwell Laboratories*, the plaintiff-appellant, an unsuccessful bidder on an FAA contract, challenged the legality of agency action awarding the contract to Cutler-Hammer, Inc., one of Scanwell's competitors. The plaintiff-appellant alleged that Cutler-Hammer's bid was non-responsive to the IFB (invitation for bids) since Cutler-Hammer had not satisfied the prerequisites therein. Scanwell, therefore, sought to have the contract award declared null and void as a violation of the statutory provisions controlling government contracting. The district court dismissed for lack of jurisdiction. On appeal the District of Columbia Circuit reversed and remanded, holding that Scanwell had standing to bring the suit in district court. *Id.* at 860, 876.

80. *Id.* at 863. At least one federal court has explicitly refused to apply the analysis suggested in *Scanwell*, and, ignoring *Data Processing*, has continued to apply the legal interest formula. Lloyd Wood Constr. Co. v. Sandoval, 318 F. Supp. 1167 (1970).

81. *Id.* at 872.

Kunzig,[82] another competitor's suit, the District of Columbia Circuit was again faced with a complainant alleging arbitrary agency action in violation of law. Although the court adopted the language employed in *Data Processing* to articulate the proper tests for standing,[83] it also recognized standing upon a showing of injury in fact and a prima facie showing of arbitrary action by the agency.[84] Such substitution of a showing of arbitrary action for the "zone of interests" requirement means that standing is now theoretically available in some courts to practically all plaintiffs who meet article 111 requirements, since it is doubtful that anyone would bring an action against an agency for exercising its legitimate powers.[85]

There is no compelling reason to restrict the liberalization of the public interest theory to competitor's suits,[86] and the courts have not yet suggested that it should be so restricted. In fact, the District of Columbia Circuit has extended the theory to serve as a basis of standing for persons suing to enjoin a governmental unit holding land in trust from impermissibly diverting the use so as to destroy their beneficial interests held in common with all other citizens.[87] Superficially at least, this theory would seem to warrant a different result from that of *Sierra Club*.[88]

Conclusion. Recent cases indicate that a trend toward

82. 433 F.2d 1204 (D.C. Cir. 1970).

83. *Id.* at 1207.

84. Judge Tamm had urged these same criteria upon the court only days earlier in Lodge 1858, AFGE v. Paine, 436 F.2d 882 (D.C. Cir. 1970) (concurring opinion). In accord with the majority's view in *Ballerina Pen* was the later case of Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137 (D.C. Cir. 1970).

> [O]ne who alleges that an agency has acted arbitrarily or in excess of its authority in denying him a government contract is a proper party to "satisfy the public interest in having agencies follow the regulations which control government contracting." *Id.* at 1140.

85. The Court of Claims has now recognized the public interest theory as articulated in *Scanwell* as a legitimate basis for standing. *See* Keco Indus. v. United States, 428 F.2d 1233, 1237-38 (Ct. Cl. 1970).

86. Competitor suit standing is discussed in Comment, *The Erosion of the Standing Impediment in Challenges by Disappointed Bidders of Federal Government Contract Awards*, 39 FORDHAM L. REV. 103 (1970).

87. Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970).

88. The complainants in *Sierra Club* were in approximately the same position as those in *Allen*. See notes 27-28 *supra* and accompanying text. The major difference was that in *Allen* the interest advanced was a first amendment right. 424 F.2d at 946-47. If this is a valid distinction, the court appears to be reverting to an examination of the interest asserted as an aspect of standing. Nevertheless, the court's analysis is significant. If each member of the public has a personal beneficial interest in government-held property and governmental services, they may also have an interest in the workings of government and its integrity.

liberalization of standing exists with reference to the "zone of interests" test and actions brought in the public interest. However, injury in fact has provided a method of restriction for many courts, and the lack of uniformity as to the judicial interpretation of standing requirements is obvious. The issue of standing in federal courts has thus become a legal quagmire, as one's ability to gain a judicial forum is a function of the court before which one appears. Rather than clarifying the appropriate standards, the recent Supreme Court decisions have only renewed the earlier confusion.

The Court's rulings, however, have not gone without criticism. Justice Brennan initiated the attack with his concurring opinion in *Data Processing* and *Barlow*.[89] Arguing that the majority's standards would breed litigation and allow judges to use standing to "slam the courthouse door" on plaintiffs who should be entitled to full consideration of their claims on the merits, he advanced "injury in fact" as a singular standard and asserted that the "zone of interests" test was more suitable for reviewability than for standing.[90] Professor Davis has long advocated this position.[91] Davis argues that the "zone of interests" test: does not aid many persons who should be given judicial relief; is contrary to case law which demonstrates that a function of the federal courts is to protect persons from the unlawful action of government officers; is cumbersome and artificial and thus does not allow the lower courts to give quick and clear answers due to the difficulty in examining legislative history to find a congressional intent to regulate or protect; and is contrary to the provisions of the Administrative Procedure Act which provides standing to parties who can make a prima facie showing of injury in fact.[92] Although the policy justifications urged by Professor Davis support a broader standard, injury in fact is clearly not the solution. As has been noted,[93] injury in fact can be a grossly restrictive standard. Use of the APA to

89. 397 U.S. 159, 167-78 (1970) (concurring opinion).

90. *Id.* at 178. Reviewability involves investigation of statutory language, legislative history, and public policy to ascertain whether Congress has precluded or limited judicial review. *Id.* The fundamental issue in reviewability is whether agency action should be deemed final. K. DAVIS, ADMINISTRATIVE LAW TEXT 498-520 (1959). Standing, however, involves the issue of determining the proper parties for litigation. Flast v. Cohen, 392 U.S. 83 (1968).

91. *See* 3 K. DAVIS, *supra* note 8, § 22.04, at 222.

92. Davis, *supra* note 19, at 458-68. Although Professor Davis advances other arguments against the "zone of interests" test, those listed contain the brunt of his assault. Davis had adopted a contrary position toward the "zone of interests" test two years earlier. *See* Davis, *supra* note 9, at 625.

93. See note 67 *supra* and accompanying text.

justify a standing criterion ties one to its language, which Davis interprets as requiring the injury in fact standard,[94] whereas reliance on equitable jurisdiction and its concepts of standing allow greater flexibility. By examining the judicial policies which underlie standing in federal courts, we may be able to develop more appropriate criteria for equitable standing.

If the judicial policy to be maintained by standing is the preservation of judicial discretion for judges to deeide subjectively who should be heard in a judicial forum, the policy is illegitimate.[95] Judges should not be allowed to make the availability of a forum depend on their discretion. The protection of individual rights and the enforcement of supremacy of law with regard to administrative agencies requires the existence of a place in which the actions of administrative agencies can be challenged.[96]

If judicial policy is directed toward avoiding the introduction of hypothetical suits, then the policy is superfluous, for other methods exist to eliminate these from the judicial process.[97] Standing protects against improper plaintiffs, not improper issues.[98] Procedural devices such as class suits, stays, consolidations of cases, and multidistrict transfers exist to mitigate the effects of any increase in litigation which might occur.[99]

The Supreme Court has indicated that at least a part of the standing requirement is constitutionally motivated by article III. In *Baker v. Carr*[100] the court noted that the purpose of standing was "to assure that concrete adverseness which sharpens the presentation of issues."[101] In *Flast v. Cohen*[102] the Court defined the article III requirement of standing as an assurance that the dispute "will be presented in an adversary context and in a form historically viewed as

94. *See* Davis, *supra* note 19, at 465-68.

95. *See* JAFFE 503. Perhaps the prime example of the use of standing to accomplish purposes extrinsic to the preliminary matter of determining the proper parties to litigation is its use to circumvent the difficult task of delineating the scope of an agency's discretion. 39 FORDHAM L. REV., *supra* note 86, at 108-09.

96. "Nothing has been held more fundamental to the Supremacy of Law than the right of every citizen to bring the action of government officials to trial in the broad courts of the common law." J. DICKERSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 33, 35 (1927).

97. *See* Davis, *supra* note 19, at 469.

98. *See* Davis, *supra* note 9, at 635.

99. *See* 84 HARV. L. REV. 185 n.50 (1970). *See generally* 23 VAND. L. REV. 814, 821 (1970).

100. 369 U.S. 186 (1962).

101. *Id.* at 204.

102. 392 U.S. 83 (1968).

capable of judicial resolution."[103] Adverseness is the key concept which the Court emphasizes in delineating standing criteria. In *Data Processing* the Court indicated that injury in fact would provide the essential adverseness for standing.[104] Injury in fact is not necessarily the only criteria of adverseness. A preferable standard would be a presumption that any person *has standing* to sue upon alleging administrative illegality *unless*: it can be shown that he has suffered no injury, directly or indirectly; he has not previously demonstrated to the agency an interest in the controversy sufficient to substantiate his viewpoint as actually conflicting with the agency action; *and* there are clearly more appropriate parties who are willing to litigate. The appropriateness of parties could be determined by such criteria as ability to sustain a suit and degree of demonstrable interest in the subject matter. The effect of this standard is to assure that at least one party will always be able to challenge the administrative action.[105] Injured parties and those showing a prior interest are given preferred status because it is more likely that they will frame issues with the necessary adverseness. The standard assumes that any party willing to undergo the time and expense of a suit will have demonstrated his adversity.[106]

The advantage of the suggested test is the assurance that judicial control over administrative arbitrariness will not be frustrated by standing criteria. Courts which presently constrict the availability of the judicial forum will have difficulty denying standing under the suggested standard since the likelihood that a litigant who is denied standing on the basis of a restrictive interpretation of injury in fact would also fail to meet the remaining criteria is slight. The pervasive spirit of liberality inherent in this standard would make such restricted opinions suspect on appeal as well. By breaking totally away from tests meant to limit the availability of the judicial forum[107]

103. *Id.* at 101.

104. *See* 397 U.S. 150, 152-53 (1970).

105. Professor Jaffe contends that the use of public plaintiffs, citizens or taxpayers, would enable the courts to adjudicate important or urgent legal questions which are presently unresolved due to the lack of a "conventional" plaintiff. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 637-38 (1971). He suggests that when a plaintiff does not have a "protected interest" under the *Data Processing* standard, he does not have a *right* to review. However, such a plaintiff may find his suit entertained by the court if it deems the disposition of the case to be in the public interest. *Id.* Of course, Jaffe's proposed standard encounters the objections to judicial arbitrariness noted earlier.

106. *See* 23 U. FLA. L. REV. 206, 210 (1970).

107. See the discussion of the "zone of interests" test in *Data Processing*, 397 U.S. at 153-54.

and shifting to tests designed to assure both adverseness and a check on the administrative process, the courts would be offered the opportunity to better safeguard both the public interest and that of private litigants.

IX. JUDICIAL REVIEW—ACTIONS REVIEWABLE

SEC Non-Action Decision Constitutes "Reviewable Order"

In *Medical Committee For Human Rights v. SEC*[1] the United States Court of Appeals for the District of Columbia Circuit held that a Securities and Exchange Commission decision not to object to Dow Chemical Company's[2] exclusion of a stockholder's proposal from proxy materials was a judicially reviewable order. The Medical Committee for Human Rights, a Dow stockholder, had requested that a resolution to amend the Dow charter to bar the sale of napalm, unless assurances were given that it would not be employed to injure humans, be included in the proxy materials sent to stockholders for the 1968 annual meeting. Dow rejected the Medical Committee's request, relying on SEC proxy rules 14a-8(c)(2) and 14a-8(c)(5).[3] The Medical Committee then revised its proposal to resolve that Dow stockholders request that the board of directors consider the

1. 432 F.2d 659 (D.C. Cir. 1970), *cert. granted*, 39 U.S.L.W. 3409 (U.S. Mar. 23, 1971) (No. 1162).

2. In late 1967 the Dow Chemical Company was a target of antiwar demonstrations, directed primarily at Dow recruiters visiting college campuses, as students objected to the company's manufacture of napalm for use in the Vietnam conflict. U.S. NEWS & WORLD REP., Dec. 18, 1967, at 8. Dow faced a different type of protest against its manufacture of napalm when a stockholder proposed an amendment to the company's certificate of incorporation which would have precluded the sale of napalm in the absence of assurance of nonuse against humans. Letter from Quentin D. Young, National Chairman, Medical Committee for Human Rights, to Secretary, Dow Chemical Company, Mar. 11, 1968, *found in* Certificate of Transcript of Record at 1a-3a, Medical Committee v. SEC, 432 F.2d 659 (D.C. Cir. 1970) [hereinafter cited as Record]. The stockholder's objections to the sale of napalm were based primarily on "concerns for human life," but concern was also expressed for the company's business future because of its difficulty in recruiting capable college graduates. *Id.*

3. 17 C.F.R. § 240.14a-8(c) (1970). The Commission's proxy rules provide a procedure for submission of individual stockholder proposals to corporate management for inclusion in the corporation's proxy statement. *Id.* § 240.14a-8. Under these rules an otherwise properly submitted stockholder proposal may be excluded by management when it is submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes," *id.* at 8(c)(2), or when it asks management to "take action with respect to a matter relating to the conduct of the ordinary business operations of the [company]." *Id.* at 8(c)(5). When a company decides to exclude a proposal it must file with the SEC a copy of the proposal, any stockholder statement in support thereof, and management's reasons for exclusion, supported by opinions of counsel when the exclusion is based on matters of law. *Id.* at 8(d).