THE NEW LAW OF THRESHOLD STANDING: THE EFFECT OF SIERRA CLUB ON JUS TERTII AND ON GOVERNMENT CONTRACTS

INTRODUCTION

The question of standing to challenge administrative action is a subject much confused by the use of the same word—standing—to describe several things. In the administrative law context, standing has been used to describe problems arising from two questions: (1) who may come into court to complain of an action of a government agency; and (2) what arguments may he make in support of his case.[1] Partial answers to these questions come from several sources. For example, the constitutional requirement of case or controversy[2] helps answer the former question, but not the latter.

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1. See text following note 65 *infra*.

Part of this ambiguity surrounding the word standing arises from its common use, prior to Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970), in negative contexts—a plaintiff would be said not to have standing, see notes 10-13 *infra*, or an argument that he did not have standing for a particular reason would be refuted, see notes 24-31 *infra*. To have standing, a plaintiff had to show an injury in fact to a legally protected interest. The agency action complained of could not be committed by law to agency discretion (but no one is legally protected from an action by law entirely discretionary). Of course, a plaintiff who could *prove* that he could satisfy these requirements would have a winning case—unless his claim was in equity, and the requirements for the exercise of equitable powers were not satisfied. Having standing, however, was not a phrase synonymous with having a meritorious case—*lack of standing* was the phrase usually used to describe situations where a failing plaintiff might have been expected to have a meritorious case if he had been actually injured, if the agency had been given less discretion, or especially, if he had been someone else. *Data Processing*, see notes 36-50 *infra* and accompanying text, might roughly be said to attempt to limit the use of the word standing to cases which involved early dismissals in similar situations. The most difficult part of the standing problem—whether a plaintiff has a legal interest—remains, whether or not he is put under the head of standing. *Data Processing's* answer to question (1), and a generous answer to question (2), may mean that a plaintiff no longer must possess a legal interest of his own to succeed, see note 66 *infra* and accompanying text, but it also seems entirely possible that the answer to question (2) will depend on factors having to do with what legal interest the plaintiff does possess, see notes 83-92 *infra* and accompanying text.

2. U.S. CONST. art. III, § 2; *see* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 151-52 (1970).

Another source for answers is the statute regulating agency action which is alleged to have been violated;[3] but the common failure of such statutes to deal with the matter of standing directly[4] has compelled the courts to resolve the questions. Judicial answers have tended not to depend so much on the particular statutes involved, but to rest on the creation and application of broad principles for the interpretation of statutes generally.

Courts have begun to view standing as a preliminary matter, perhaps because of the ordinary English implications of the term "standing," as well as the fact that the most appropriate occasion for determining the presence or absence of a case or controversy, one of the obvious requirements for standing, is at the beginning of a trial.[5] Despite the tendency to view standing in this threshold manner, it is often true that statutory answers to the "who may sue" question, as well as to the "what arguments may he assert" question, can only be determined by an investigation into the merits.[6] Under the present law, however, standing is a threshold issue;[7] as a result, there is considerable doubt as to what is to be done with those aspects of the first question which naturally go to the merits.[8] Because the liberalization of the "who may sue" question and its movement to the threshold have produced a group of litigants who need to make arguments less related to themselves than once was usual,[9] the separation of the two questions is more complete, and the second question more important.

Early Standing Cases: The Legal Right Test

The issue of standing to challenge administrative actions began to assume importance in the 1890's, and in 1923 assumed major

3. *See* 3 DAVIS § 22.03, at 213.

4. For instance, the judicial review provision of the Administrative Procedure Act, § 10, 5 U.S.C. §§ 701-06 (1970), does not expressly mention standing.

5. *See, e.g.*, North Carolina v. Rice, 404 U.S. 244, 246 (1971); Hall v. Beals, 396 U.S. 45, 48 (1969).

6. For instance, statutory classifications, like businesses "affecting [interstate] commerce," *see, e.g.*, National Labor Relations Act, 29 U.S.C. § 152(7) (1970), may produce disputed questions of fact. Yet statutes might intend to allow only plaintiffs within such a classification to sue.

7. See notes 36-40, 45-50 *infra* and accompanying text.

8. *Compare* Investment Co. Institute v. Camp, 401 U.S. 617 (1971) *and* note 50 *infra, with* Gary Aircraft Corp. v. United States, 342 F. Supp. 473 (W.D. Tex. 1972) *and* notes 165-82 *infra* and accompanying text.

9. *See, e.g.*, National Helium Corp. v. Morton, 455 F.2d 650, 655 (1971).

proportions in *Frothingham v. Mellon.*[10] In *Frothingham*, plaintiff, a taxpayer, asked for an injunction against the Secretary of the Treasury to prohibit allegedly illegal disbursements under a federal welfare program. The Court held that the alleged injury, in the form of increased taxes, was slight, and was not substantially connected with the alleged illegality; furthermore, the Court found that the constitutional guarantee whose benefit the plaintiff claimed had not been intended to protect the taxpayer. Hence, the plaintiff lacked standing to complain of these alleged violations of the Constitution.

Later, in two challenges to the TVA by competing private utilities,[11] the Court used a similar analysis to deny the competitors the right to rely on statutory prohibitions not designed to protect them. Even though the companies had contended that the TVA had exceeded its statutory authority, the Court said that this authority had not been limited in order to protect private utilities from competition.[12] Standing was thus said to depend on the infringement of a protected legal right or interest belonging to the challenging party.[13] Standing was therefore not so much a mere threshold question as a question going to the merits; the presence or absence of a legal right determined both the standing issue and, in part, the eventual outcome.

Modifications to the Legal Right Test: Standing to Assert Jus Tertii

In other cases, however, the Court under certain circumstances has allowed the assertion of what were frankly jus tertii. In the 1940's, in two cases involving the FCC,[14] the Supreme Court was faced with a statute[15] which granted a prospective licensee's competitor the right to sue. The Court read this statute as authorizing the assertion of the public interest by the competitors.[16] Thus, while the

10. 262 U.S. 447 (1923). *See generally* Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

11. Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

12. 306 U.S. at 139-40; *see* 302 U.S. at 478, 481.

13. 302 U.S. at 479-81 (1938). This requirement was, in fact, a restriction on the right to raise jus tertii—the rights of third persons not parties to the litigation.

14. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

15. Communications Act of 1934, § 402(b)(2), ch. 652, 48 Stat. 1093, *as amended*, 47 U.S.C. § 402(b)(6) (1970).

16. 316 U.S. at 14; 309 U.S. at 476.

threat of economic injury created the case or controversy, the competitor's right to assert jus tertii was dependent on the congressional grant. A few years later, the Court in *Barrows v. Jackson*[17] allowed a white defendant to assert the constitutionally protected rights of blacks to defeat an action on a racially restrictive covenant. This holding was justified by the recognized need to allow the redress of racial wrongs and the recognition that there was no way in which the blacks injured by the discriminatory treatment could bring the matter into court.[18] Later, in *NAACP v. Alabama*,[19] the NAACP was allowed to assert the constitutionally protected rights of its members to freedom of association in order to preserve the anonymity of those members. The success of a doctor's challenge to Connecticut's birth control laws in *Griswold v. Connecticut*[20] also depended, at least in part, on the assertion of jus tertii—in this case, those rights belonging properly to married couples who wanted to practice contraception.[21] More recently, in a situation similar to that in *Barrows*, the Court allowed the assertion of jus tertii, although with much less discussion of the peculiar features of the case which compelled such a result.[22] Though these cases subsequent to *Barrows* tended toward a liberalization of granting the right to assert jus tertii, the cases still seemed to condition this grant on the existence of special circumstances.[23] In all of these cases the third parties would have found it difficult to assert their constitutional rights themselves.

Flast *and* Kentucky Utilities: *Legal Rights Inferred*

The Court began its recent reconsideration of the standing-to-sue problem with two cases—again a competitor's challenge to the TVA, *Hardin v. Kentucky Utilities Co.*,[24] and a federal taxpayer's suit, *Flast v. Cohen*[25]—neither of which, however, involved the as-

17. 346 U.S. 249 (1953).
18. *Id.* at 257.
19. 357 U.S. 449, 459-60 (1958).
20. 381 U.S. 479 (1965).
21. *Id.* at 481.
22. Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). One of the plaintiffs had been expelled from the Little Hunting Park corporation for attempting to transfer a second share of ownership to a black, and for advocating the rights of the transferee. The court held that a failure to grant this plaintiff standing "would give impetus to the perpetuation of racial restrictions on [real] property." *Id.* at 237.
23. "[W]e said in *Barrows* . . . that the white owner is at times 'the only effective adversary' of the unlawful restrictive covenant." 396 U.S. at 237.
24. 390 U.S. 1 (1968).
25. 392 U.S. 83 (1968).

sertion of rights of third parties. Because standing was granted to the plaintiffs in both of these cases, the decisions were regarded as liberalizations of the law of standing;[26] however, the reasoning in both nonetheless followed the *Frothingham* line of cases. The first case, *Kentucky Utilities*, depended on a 1959 amendment to the TVA act[27] which clearly had as a major purpose the protection of TVA's competitors.[28] Consequently, the Court was willing to make the inference that the private utilities had been given legal rights. In *Flast*, the Court clarified *Frothingham* by recognizing that federal taxpayers had a substantive right to challenge federal spending if two conditions were met: the spending complained of had to be a substantial expenditure per se, rather than merely an expense incidental to a regulatory program;[29] and the alleged illegality had to be in contravention of a direct curb put on the government for the taxpayers' benefit, rather than an alleged over-extension of granted authority.[30] *Flast* can be viewed as simply granting standing in the traditional legal right sense—the right claimed in *Flast* was a taxpayer's right and therefore was assertable; the right claimed in *Frothingham* was jus tertii and therefore was not assertable.[31] The emphasis the Court put upon the particular constitutional clause as a measure designed to protect taxpayers from excessive taxation[32] makes it clear that the Court was attempting, under the heading of standing, to define the

26. *See* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 452 (1970); Comment, *Standing of Private Power Companies to Challenge Loan Grants by the Rural Electrification Administration—A Failure to Apply the Rule in Hardin v. Kentucky Utilities*, 49 B.U.L. REV. 154, 158-59 (1969).

27. Pub. L. No. 86-137, § 1, 73 Stat. 280 (1959), *as amended*, 16 U.S.C. § 831n-4(a) (1970).

28. 390 U.S. at 6.

29. 392 U.S. at 102.

30. *Id.* at 102-03.

31. *See* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1042 (1968). Jaffe discusses possible outcomes in the then-pending *Flast* case in a manner which suggests strongly that *Frothingham* does not foreclose establishment clause claims.

32. 392 U.S. at 103-04. See U.S. CONST. amend. I. Similarly, the Third Circuit has recently allowed standing under the U.S. CONST. art. I, § 9, cl. 8 requirement that:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

This provision gave a taxpayer standing, under *Flast* and *Data Processing*, to challenge the government's failure to account for expenditures on the CIA. Richardson v. United States, 465 F.2d 844, 854 (3d Cir. 1972), *cert. denied*, 41 U.S.L.W. 3462 (U.S. Feb. 26, 1973).

bounds of the plaintiff's legal right to complain of taxation—not to define his right to assert the rights of others.[33] In sum, the Court in *Flast* had found that the increase in the plaintiff's tax burden caused by the challenged program was an injury in fact to his interests,[34] and that there was a rational nexus between this personal interest and the purpose of the statute or constitutional provision being asserted to protect it.[35]

Standing as a Threshold Question—Data Processing *and* Barlow

The two criteria of *Flast* reappeared, with one change, in the two-pronged requirement for standing to challenge administrative action established in *Association of Data Processing Service Organizations, Inc. v. Camp*[36] and in *Barlow v. Collins*.[37] The Court held in these cases that standing to bring suit—to cross the court's threshold at all—depended on (1) establishing "injury in fact" (2) to an interest "arguably" within a zone protected by the statutes the agency is claimed to have violated.[38] The injury alleged in *Data Processing* —a disadvantage felt by competitors of banks favored by a ruling of the Comptroller of the Currency—was held sufficient to establish an "injury in fact" arguably intended to be prevented by the Glass-Steagall Banking Act.[39] The injury in *Barlow* was a relaxation by the Secretary of Agriculture of restrictions on the contractual assignment of federal crop support payments by the farmer-recipient.[40] The Court agreed with the farmers' contention that this relaxation actually allowed farmers' landlords to exert a more onerous hold over the farmers, and that, at least arguably, rulemaking power had been given the Secretary of Agriculture in order to allow him to protect

33. In contrast to the situation in *Flast*, in which only the clear history of the establishment clause as a taxpayers' protection gave the plaintiff a legal right to complain, is a case in which a defense is being raised to a direct order from a government agency. When the agency attempts to enforce the order by legal action, a claim that the agency has exceeded the authority granted to it is always assertable. Thus the statute setting the bounds of the agency's authority is always considered to be inteuded to protect those outside those bounds from legal compulsion.

34. 392 U.S. at 101-03.

35. *Id.*

36. 397 U.S. 150 (1970).

37. 397 U.S. 159 (1970).

38. 397 U.S. at 161; 397 U.S. at 152-53.

39. 12 U.S.C. § 1864 (1970).

40. 397 U.S. at 163. The payments were made under authority of 7 U.S.C. § 1444(d)(5) (1970).

farmers against this kind of oppression.[41]

These two cases, along with *Flast* and *Kentucky Utilities*, simply served to broaden considerably the definition of an injury sufficient to provide a case or controversy;[42] *Data Processing* even spoke of recognizing damage to esthetic or other non-economic interests.[43] What was more significant, however, was the insertion of the qualification "arguably" into what was essentially the old legal right test.

In *Data Processing* and *Barlow* the Court emphasized the threshold aspects of standing. The government had claimed that the plaintiff had no right even to be in court;[44] consequently, the Court was disposed to regard the government's legal right argument as requiring a prejudgment on the merits.[45] While in effect, the standing standards set forth in *Flast* were followed, the addition of the qualification that the plaintiff's claim need only *arguably* fall within a protected zone was natural for such a preliminary determination. The Court insisted that the legal right test belonged in the determination on the merits,[46] not in the determination of the plaintiff's right to be in court at all. This insistence gave a strong indication that once the merits were reached on remand, the plaintiff would have to show one of three things. He would have to demonstrate either (1) a legal right inhering in the statute as required by the *Frothingham-Flast* line of cases,[47] or (2) an explicit grant of standing, as in *FCC v. Sanders Brothers Radio Station*,[48] or (3) special circum-

41. 397 U.S. at 164-65. The Court ruled that the relevant statutes "expressly enjoin" the Secretary to protect the interests of tenant farmers. *Id.* at 164.

42. *See* Davis, *supra* note 26, at 450-56.

43. 397 U.S. 150, 154 (1970).

44. The district court had dismissed the complaints in *Data Processing*, *see* 397 U.S. at 151, and in *Barlow*, *see* 398 F.2d 398, 400 (5th Cir. 1968).

45. 397 U.S. at 153, 158.

46. "Whether anything in the [statutes] gives petitioners a 'legal interest' that protects them against violations of those Acts . . . [is a question] which go[es] to the merits . . . ." 397 U.S. at 158. The distinction between *arguably* possessing a legal interest—as a threshold question—and *actually* possessing one—as a question for the merits—is not merely an ordinary differentiation between cases which warrant dismissal and those which must be tried. Since FED. R. CIV. P. 56, see notes 175-77 *infra* and accompanying text, allows adjudication before trial of questions of law, presumably including those questions concerning the actual presence of a legal interest, it would appear that the Court was concerned that dismissals for lack of standing were being granted too summarily. To alleviate this concern, a finding that a plaintiff arguably has a legal interest will demand that his case receive consideration beyond a mere motion to dismiss.

47. See notes 10-13, 24-30 *supra* and accompanying text.

48. 309 U.S. 470, 476 (1940). See notes 14-16 *supra* and accompanying text.

stances which, as in *Barrows v. Jackson*,[49] would allow the assertion of jus tertii. Of course, either of these latter two alternatives would allow a plaintiff to circumvent the second prong of the *Data Processing* test entirely.[50]

Sierra Club v. Morton—*Does Threshold Standing Imply Standing to Assert Jus Tertii?*

Sierra Club v. Morton,[51] a 1972 case, provides evidence that *Data Processing* might represent a more revolutionary change in the law of standing than had been immediately apparent. The Court in *Sierra* held that the allegation that planned construction in an area of great natural beauty injured the club's own—not its members—interests in the environment[52] was insufficient to give the club standing

49. 346 U.S. 249, 257 (1953). See notes 17-22 *supra* and accompanying text.

50. In Investment Co. Institute v. Camp, 401 U.S. 617 (1971), the Court reached the merits of a *Data Processing* type case. Standing had been granted to the plaintiff to challenge a ruling by the Comptroller of the Currency that, in effect, allowed commercial banks to operate mutual funds. *Id.* at 618-19. It was alleged that the ruling violated various provisions of the Glass-Steagall Banking Act, including 12 U.S.C. §§ 24, 378(a) (1970). The Court through Justice Stewart characterized the case, in its standing aspects, as following *Data Processing*: "[W]e concluded [in *Data Processing*] that Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury. We noted that whether Congress had indeed prohibited such competition was a question for the merits." 401 U.S. at 620.

This description, couched in terms of prohibitions, rather than in terms of protected interests of the petitioner, amounts to an equation of the "zone of interests intended to be protected" with all interests actually injured by the conduct prohibited. The process described is simply a separation of summary judgment from judgment on the merits: if taken literally, it grants standing on a showing of injury in fact, subject to a dismissal not jurisdictional in nature, but for failure to state a claim for which relief can be granted—this latter will occur only if the injurious *conduct* is not even arguably prohibited. The case's merits are discussed in a manner exactly consistent with this description. *Id.* at 629-39.

Since the act in question had been held *arguably* to have been intended to protect competitive interests in the *Data Processing* case, there is no way to determine whether *Investment Co. Institute* actually predicates jurisdictional, threshold standing on injury in fact alone. Although Harlan's dissent, 401 U.S. at 639, points out that plaintiffs are almost certainly without a protected legal interest, the discussiou on the merits makes no further mentiou of any intent on Congress' part to protect the interests of competitors like the plaintiff. If this case with its peculiar description of the *Data Processing* standard is to be taken at face value, appareutly a showing of a legal interest is uo longer required in order to succeed on the merits. Sierra Club v. Morton, 405 U.S. 727, 733 (1972), however, reaffirmed *Data Processing's* exact language.

51. 405 U.S. 727 (1972).

52. 405 U.S. at 735 n.8.

to sue. In *Sierra*, the government proposed to allow Walt Disney Enterprises to construct a recreational development in part of a national forest in California.[53] The club sought injunctions forbidding the federal officials involved from allowing the project to proceed. It based its right to bring the suit on the judicial review provisions of the Administrative Procedure Act,[54] alleging that it was an organization one of whose purposes and special interests was the protection of natural resources, and that the proposed project interfered with this purpose and injured this interest.[55] The club claimed that the Forest Service and the Department of the Interior had violated federal laws protecting the National Forests and National Parks[56] as well as regulations requiring public hearings,[57] and further contended that both agencies had exceeded their grants of authority.[58]

The Sierra Club apparently felt that it would be unable to show the special circumstances required by the *Barrows* line of cases for the assertion of rights of third parties. Thus the club's ability to raise public interest matters as jus tertii[59] would be limited. At the same time, the new liberalized standing standards announced in *Data Processing* and *Barlow* must have suggested that the club might obtain standing to assert the public interest, or at least to use similarly broad arguments in its own right.[60] The requirement that the interests alleged to be injured be within the protected zone of the statutory or constitutional guarantee relied upon apparently made the club feel, as a corollary, that too particularized an allegation of injury would result in a restriction on the possibility of raising broad public interest arguments,[61] as well as perhaps making it difficult for it to obtain a preliminary injunction.[62] Consequently, the club

53. The $35 million project involved extensive construction on 80 acres of the valley floor, and general opening and development of other parts of the valley with ski-lifts and trails, and a cog-railway. The project also required an access road and an electrical transmission line to the valley across part of Sequoia National Park. 405 U.S. at 729.

54. 5 U.S.C. § 702 (1970). *See* 405 U.S. at 730, 732.

55. 405 U.S. at 734-35, 735 n.8.

56. 16 U.S.C. §§ 1, 41, 43, 45c, 497 (1970); *see* 405 U.S. at 730 n.2.

57. 405 U.S. at 730 n.2. *But see* Sierra Club v. Hickel, 433 F.2d 24, 37 (9th Cir. 1970), *aff'd sub nom.* Sierra Club v. Morton, 405 U.S. 727 (1972).

58. 405 U.S. at 730 n.2; 433 F.2d at 34-38.

59. *See* 405 U.S. at 740 n.15.

60. *See* Davis, *supra* note 26, at 450-56.

61. *See* 405 U.S. at 740 n.15.

62. *See* 433 F.2d at 33 where the Ninth Circuit spoke about balancing the damage to both parties.

restricted itself to claiming that the project would injure the organization's own general interest in the environment. The Court, however, in an opinion by Justice Stewart, held that this allegation of injury to the club's self-claimed interest and concern was not a sufficient allegation of injury in fact to justify granting standing to sue.[63] Essentially, the case turned on a decision that an organization cannot have its esthetic sensibilities disturbed.[64]

More important, perhaps, than the holding itself, was a point the Court made fairly clear in dictum.[65] The Court intimated that the question of standing to sue will be considered quite separately from the question of standing to assert the rights of the public. In footnote 15, the Court stated that "[o]nce this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief."[66]

Footnote 15 is subject to two general categories of interpretation. The broader view, liberalizing standing as much as possible, takes the language at face value. The narrower view is that some restriction in addition to applying the *Data Processing* test on a single issue will be placed on grants of standing to assert the public interest.

The Broad Reading of Footnote 15

Under the broad view, while standing to sue must be gained by a satisfaction of the two-pronged *Data Processing* test, an organization, once in court, apparently may assert any public rights or complain of any violation of any mandate directed at the agency in question. In making its apparently sweeping statement,[67] the Court depended heavily on *FCC v. Sanders Brothers Radio Station*[68] and *Scripps-Howard Radio, Inc. v. FCC*.[69] The reference to these two

63. 405 U.S. at 734-35.

64. *See The Supreme Court, 1971 Term,* 86 HARV. L. REV. 1, 237 (1972), 43 MISS. L.J. 538, 541-42 (1972). See text accompanying note 43 *supra.*

65. In environmental lawsuits, at least, organizations like the Sierra Club will have little trouble gaining standing for themselves if they merely allege injuries to their members. 405 U.S. at 735. The Court did not foreclose the possibility that an organization might itself suffer injury—perhaps economically—and gain standing in that manner.

66. 405 U.S. at 740 n.15: "The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the public in support of his claims for equitable relief." *See also* 39 BROOKLYN L. REV. 492, 500 (1972).

67. 405 U.S. at 727, 740 n.15.

68. 309 U.S. 470 (1940). See note 14 *supra* and accompanying text.

69. 316 U.S. 4 (1942). See note 14 *supra* and accompanying text.

cases is rather peculiar. Like *Flast* and *Kentucky Utilities*,[70] the standing granted in *Sanders Brothers* and *Scripps-Howard* had depended on the construction of particular statutes which were found to authorize the plaintiffs in those cases to bring suit[71] *and* present arguments based on the rights of third parties. Thus, the *Sierra* Court's use of these cases to demonstrate, in footnote 15, that standing, once granted, allows a plaintiff to make any argument whatsoever,[72] certainly strains their holdings.[73]

The Narrow Reading of Footnote 15

This apparent problem with the Court's use of precedent, together with the peculiar circumstances[74] of the *Sierra* case and of the hypothetical situation set up in footnote 15,[75] may indicate that the Court's language there ought not be taken at its face value. Possibly *Data Processing*'s implication that a legal interest must be shown on the merits is still the law.[76] Perhaps footnote 15 indicates only that the Court thinks that the Sierra Club, by asserting the rights of its members, would effectively assert the rights of the public be-

70. See notes 24-30 *supra* and accompanying text.

71. In *Sanders Brothers* and *Scripps-Howard*, the law is the Communications Act of 1934 § 402(b)(2), ch. 652, 48 Stat. 1093, *as amended*, 47 U.S.C. § 402 (b)(6) (1970); in *Flast*, U.S. CONST. amend. I; in *Kentucky Utilities*, 16 U.S.C. § 831n-4(a) (1970).

72. The Court pointed out that the *statutes* involved in *Sanders Brothers* and *Scripps-Howard* granted the right to assert jus tertii to any plaintiff who, by showing injury in fact, could take advantage of the express statutory grant of standing. 405 U.S. at 737. Later in the opinion, however, the Court apparently refers to this result as correct when plaintiffs have gained threshold standing by passing the *Data Processing* test, or at least when they have gained standing without an express statutory grant. *Id.* at 740 n.15. Perhaps a suggestion can be found, however, that the Administrative Procedure Act § 10(a), 5 U.S.C. § 702 (1970), provides this grant to assert jus tertii, but only if the *Data Processing* interpretation of the APA's standing standards is satisfied. 405 U.S. at 733.

73. Nevertheless, this language may indicate that court-granted standing to sue will be considered on a par with Congressionally-granted standing to assert jus tertii. A right to assert jus tertii, embodied in a statute, could be said to grant a legal right itself. DAVIS § 22.09-6, at 752 (Supp. 1970). *See also* 4 DAVIS § 22.05, at 225-26 (1958). However, this interpretation conflicts with the older standing cases, which had indicated that a legal right was to arise only when Congress so intended. See notes 10-13, 24-31 *supra* and accompanying text.

74. The public interests the club wished to assert were quite parallel with those of its members—who, of course, were also members of the public. See note 84 *infra* and accompanying text.

75. Once having demonstrated the requirement for threshold standing, the plaintiff could assert the rights of the public. See note 66 *supra*.

76. See notes 44-49 *supra* and accompanying text.

cause of the unusual situation. For example, the *Barrows* exception might be thought to apply. Or perhaps, because the members' rights and the public's were identical, the public's rights would in effect be asserted.

Intermediate Interpretations of Footnote 15

The two extremes—that passing the *Data Processing* test allows the assertion of *any* argument, or that the legal interest test must still be applied on the merits—are not the only possible interpretations of footnote 15 in *Sierra*. Because the Court depends in its footnote 15[77] on such easily distinguishable cases as *Sanders Brothers* and *Scripps-Howard*,[78] and because the dictum of the *Sierra* Court in footnote 15 goes farther than would be necessary to assure the Sierra Club and organizations like it that they need not fear entrapment into restricted arguments by alleging particular injuries,[79] it would seem reasonable to suppose that the Court might think it necessary in a later case to limit its sweeping language.[80] If this occurs, the

77. 405 U.S. at 740 n.15. *See* note 66 *supra* and accompanying text.

78. See notes 14-16 *supra* and accompanying text.

79. Almost any of the more restrictive schemes, see notes 83-96 *infra* and accompanying text, would have still allowed the club to have asserted the public's rights.

80. A further suggestion that there may be limitations on the blanket language in *Sierra* indicating that parties with standing can raise jus tertii, can be found in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). There, a black plaintiff who had been refused service at the Moose Lodge complained both of the Lodge's policies with respect to guests and of its membership policies. He was denied standing on this latter half of his complaint, because he had not himself been injured by the membership policies.

Since the plaintiff was not injured by these policies, the Court was able to distinguish this case from Barrows v. Jackson, 346 U.S. 249 (1953). The reference to *Barrows* in *Moose Lodge*, 407 U.S. at 166-67, is fortified with a mention of *Sierra*: a case, the Court said, which "referred to a similar relationship between the standing of the plaintiff and the argument of which he might avail himself . . . ." *Id.* at 167 n.1, *citing* 405 U.S. at 737. While this might simply mean that the Court felt *Moose Lodge* and *Sierra* were similar in refusing to grant a party uninjured by an (arguably) state or agency action standing to challenge that particular action, the placement of the note on a citation of *Barrows* as an exceptional case may mean that both in *Barrows* and in the hypothetical single-private-party-plaintiff situation the Court discussed in *Sierra*, 405 U.S. at 740 n.15, were exceptional in having plaintiffs who wished to assert jus tertii in a way peculiarly parallel to their own interests and wishes. Their reason for wanting relief, or the sort of injury which they suffered, was closely related to the reasons the third party or the public ought to have relief, or the type of injury the public was claimed to have suffered. Thus the defendant in *Barrows* was prevented from selling, and blacks were prevented from buying property by racially restrictive covenants. *See* 346 U.S. at 258. Doc-

Court would then be granting a restricted right to assert jus tertii, and the form the restrictions took would depend on the theoretical basis the Court has in mind when allowing this assertion of the rights of others.

One of these potential bases begins with the injury to the plaintiff, and depends on similarity between this injury and the injury to the public. A second basis springs from the common-law right to raise public policy in equity courts.[81] A third is the desire to allow plaintiffs in such suits an opportunity to counteract defendants' public-interest-based arguments.[82] It is clear that the latter two bases could operate independently of the first—that is, a plaintiff failing to meet the prerequisites of similarity of injury needed to assert public rights could still be allowed, under the latter bases, to assert the public right to some degree.

Similarity of Injury

The first basis begins with the injury to the plaintiff's interest for which he is seeking redress.[83] This basis seeks to differentiate between raising the public interest to buttress a *parallel* interest of the plaintiff, and in raising it when there is only an identity between the result which the public interest suggests and the result desired by the plaintiff. The former instance is illustrated by the obviously parallel relationship between the kinds of public interests which the Sierra Club

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tors asserting their patients' rights in Griswold v. Connecticut, 381 U.S. 479 (1965), seems to be a similar situation. The members of the Sierra Club were told that they could have asserted the rights of non-members who were injured in the same ways that they were. This sort of restriction might have the effect of ensuring that the public's interests were asserted only by those whose similar posture made them more likely to be good representatives. Even if this latter view is an incorrect interpretation, the connection required in *Moose Lodge* between the injury complained of and the redress sought, and the public policy argument which can be raised, 407 U.S. at 166, allow the inference of a requirement that the thrust of the redress sought must further both the plaintiff's wishes and the public policy propounded. This statement of the principle might include a corollary that allows complainants to argue a public policy only as long as the particular redress he requests in fact furthers that policy.

81. *See, e.g.*, Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941); Virginian Ry. v. System Fed'n 40, AFL, 300 U.S. 515, 552 (1937); M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1302 (D.C. Cir. 1971).

82. *See* 405 U.S. at 740 n.15, where the Court quotes the Sierra Club's fear that its assertions of private injury *only* will be outweighed by the government's assertions of public interest. *See also* Sierra Club v. Hickel, 433 F.2d 24, 30 (1970), *aff'd sub nom.* Sierra Club v. Morton, 405 U.S. 727 (1972).

83. *See* 397 U.S. at 154.

wished to raise and the kinds of private interests belonging to its members which the Court says the club would have had standing to assert.[84] The injuries were identical. Both sets of claims would have relied on the same protective purposes being found in the statute. The distinction is one more of breadth and weight of argument than of kind. As direct a connection as was present between plaintiff's and public claims in *Sierra* might not be required, but the argument can always be made that the plaintiff whose injury is related to the public's is a better advocate for the interests of the public.[85]

There are two places at which this parallelism can be measured. The injuries to the plaintiff and the public can be similar, or the governmental prohibition protecting the public and the plaintiff from the same act can be related. Under this theory a plaintiff claiming that both he and the public suffered environmental injury from an agency's violation of a statute intended, or arguably intended, to protect both of them from this kind of injury can assert both parties' rights.[86] But suppose the agency has violated one statute, designed to protect the public or a third party but not the plaintiff from this injury, and by the same act violates another statute which does protect the plaintiff. Will the identity of injury allow the plaintiff to complain of the breach of the first statute? Or suppose the agency's act violates a statute arguably intended both to protect the plaintiff from economic harm and the public from environmental injury.[87] Does the identity of agency act and statutory prohibition obviate the need for any connection between the injuries?

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84. 405 U.S. at 739.

85. *See* Flast v. Cohen, 392 U.S. 83, 106 (1968). But Professor Davis contends that the law of standing cannot and ought not be used to insure the competent presentation of cases. DAVIS § 22.00-4, at 723-24 (Supp. 1970). There is, however, a danger that a non-interested plaintiff may, either collusively or accidentally, frame issues in such a way that interests of persons not parties to the action are not apparent to the court. Of course, this is always a danger when a case involving three or more opposing interests is litigated between two of them. The general public, however, might warrant special protection—if its interests could be identified.

86. A corporation alleging economic injury of a particular kind might be able to challenge agency action causing such injury by virtue of a statute designed only to protect corporations. Can it therefore also assert injury to natural persons, and complain of violation of statutes designed to protect these members of the public, but not corporations, from this injury?

87. Suppose the Sierra Club had contended that its economic interest in having as many dues-paying members as possible was injured by the defendants' actions in *Sierra*. If the statutes involved had been construed arguably to protect the club

Public Policy Arguments in Equity

Any restricted system of determining what the plaintiff can argue on the merits, from one using the legal right test up through one which might arise from a more liberal interpretation of *Sierra*, could be broadened by allowing public interest to be argued as a makeweight.[88] Once a plaintiff had made a case satisfying the requirements of the restricting system—that is, shown a protected interest of his own, or, if allowed, a protected interest of the public which is sufficiently related to his own injured interest—he could, in an equity court, add other unrelated public arguments pointing to the same result.

Sierra's dictum *could* be read most restrictively to indicate that the public interest can be asserted by a plaintiff only after he has shown a protected interest of his own.[89] The ability to use makeweight arguments is still particularly important because the redress sought in suits challenging administrative action is ordinarily equitable in nature. Consequently, courts will be disposed not only to determine whether the relevant statutes protect the plaintiff, but whether they warrant giving the remedy sought. Because *Sierra* was one of these suits for injunction,[90] the discussion in *Sierra* about raising arguments of public interest might more easily be interpreted

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from this kind of injury, then could the club have asserted the public's right, under the same statutes, to be free of environmental injury?

88. See note 81 *supra* and accompanying text.

89. A rule of this sort would mean that a plaintiff who passed the *Data Processing* test, but whose "arguable" legal interest was shown in law not to exist in a FED. R. CIV. P. 56 adjudication of the legal merits could go no farther by asserting the public's rights. A plaintiff successful on the merits could, as always, assert public interest to support his claim for a particular equitable remedy. If his claim were at law only, the public interest might be allowed to support his case more directly than has heretofore been the case—with public interest being asserted as evidence of Congress' probable intent. If a plaintiff after trial has failed to pass the full old-style standing test—proven his injury in fact to a legally protected interest by an action not committed to agency discretion by law—because of a failure to prove facts alleged, ought a court adjudicate the claim on the basis of public interest issues already litigated? This question could be answered yes or no, or the matter could be left to the court's discretion. If this decision is to be left to the trial court, at least three factors can be named which ought expressly to affect its decision: (1) the effect on the public of delay while waiting for a new advocate, (2) whether the plaintiff had made false allegations of fact in order to get into court, and (3) whether it was likely that the public interest issues had been litigated in a manner which fully revealed their true nature.

90. 405 U.S. at 731; *id.* at 740 n.15: ". . . in support of his claims for *equitable* relief" (emphasis added).

to mean merely that a plaintiff who has passed the *Data Processing* test and gone on to show on the merits that he has a protected legal right can then use other arguments based on other protected interests, perhaps including the public's, to show that the particular redress he is seeking is warranted. However, this most restricted interpretation seems less in accord with the Court's actual language.[91] It might be noted, though, that requiring a close connection between the injury to the public and the injury to the plaintiff, which might seem a natural qualification, would tend to operate in the same manner as the makeweight rule. If the public has a protected interest, the plaintiff's very similar interest is likely to be protected also.[92] So the plaintiff would generally be able only to use public interest to show that redress of injuries to his own legally protected rights was warranted. Perhaps the Court had this result in mind, but was unwilling to decide immediately which theory ought to be used to achieve the result.

Counteracting the Government's Public-Interest-Based Arguments

Another restriction on the right to assert the public's rights, which probably would not have prevented the Sierra Club from doing so in this case, would be to allow public interest arguments *only* as counterweights to similarly directed arguments by the government.[93] If the *Sierra* Court had this restricted reading of footnote 15 in mind or later wishes to restrict it, the dictum could be read to mean that once a plaintiff has full, legal interest standing to complain of the violation of a particular statute by a government agency, he need not, in the face of a government public policy argument, restrict himself to presenting only the contrary policy preventing injury to him, but may rebut the government's arguments on an equivalent front. Thus, a restriction of the plaintiff to public interest arguments

91. "The test of injury in fact goes only to the question of standing *to obtain judicial review*. Once *this* standing is established, the party may assert the interests of the general public in support of his claims for equitable relief." *Id.* at 740 n.15 (emphasis added). See note 66 *supra* and accompanying text.

92. For example, in a *Sierra*-type situation, the interests both of the club members and of members of the general public in using the National Forest would be protected, if at all, by the same laws, and in an identical manner.

93. See note 82 *supra*. At least a failure to allow plaintiffs to counteract a government argument—that great numbers of skiers would be benefited by the proposed construction—with one of their own—that a great many members of the public unassociated with the Sierra Club would prefer to use the site in question in its natural state—seems unfair.

parallel to his own might well have an exception allowing other arguments in the public interest to be raised if the government chose to do so.

There is, however, one defect in relying too much on this third basis. Because the government's interest includes protecting the public generally, it *can* always raise public interest arguments of its own—but it might not choose to do so in every instance. Allowing the government to choose whether or not to restrict the lawsuit to the particular grounds the plaintiff originally urged seems, however, to give the government an option which might often hinder rather than help the resolution of lawsuits in a manner truly consistent with the public interest.[94]

All of the broader interpretations of *Sierra* which allow the assertion of jus tertii without application of the legal right test, have a peculiar feature. The plaintiff's own injury need only be shown to have *arguably* been intended to be prevented, and need never show that it was *actually* so intended; consequently, the merits of the case could be carried by arguments having nothing to do with the plaintiff himself. This result seems curious, since it requires as part of a case that a point of law be shown only arguably. Would such an interpretation mean that the plaintiff need place himself only arguably close to the interests held protected in the legal right days?[95] Or is a new law of arguable interpretations of statutes to be developed for the purpose?[96]

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94. Allowing such an option compounds the problems mentioned in note 85 *supra* which arise when more different and competing interests are involved in the resolution of a lawsuit than there are parties. When the *public* interest is asserted, these problems are particularly critical, because the "public interest" is in fact a sheaf of interests belonging to members of the public—and all these members' interests are unlikely to be exactly the same.

95. See text accompanying notes 172-73 *infra*.

Springfield Television, Inc. v. City of Springfield, 462 F.2d 21 (8th Cir. 1972), presented a related and striking aspect of this problem. Plaintiff had challenged the grant by the city of a CATV license to a competitor. A claim that the area had been preempted by the FCC, stipulated out at the trial stage of the case, was held by the Eighth Circuit to present a justiciable federal claim pendant to which relief could be granted on state grounds. The court held that the plaintiff had had standing to assert the preemption claim, quoting *Data Processing* and *Investment Co. Institute*. While here the plaintiff probably had legal-interest standing to assert the preemption issue—the court said within the zone of interest, not arguably within—it is clear that a relaxation of standing standards to include the "arguably" would give a much wider range of hooks on which to hang pendant claims. *Id.* at 23.

96. Fear has often been expressed that excessive liberalization of standing requirements may result in excessive litigation or in litigation not competently con-

STANDING TO ASSERT THE PUBLIC INTEREST IN CHALLENGING THE AWARD OF GOVERNMENT CONTRACTS

Introduction

Competitors' suits to overturn the award of government contracts present a particularly troublesome aspect of the standing problem. The varied purposes of statutes regulating procurement, as those of any statute, may not always be clear, and the degree to which the complaining contractor's interests parallel those of the public often depends heavily on the facts of each case. The concentration of the *Data Processing* test on the relationship between the statute and the complaining party,[97] however, sets this sort of third-party attack on government contracts into an easily separable set of cases.[98]

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ducted or not diligently pursued. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 93-98 (1968). The careful restrictions in *Flast* placed on the taxpayer's right to challenge government spending, *id.* at 102-03, may be an example of an attempt to avoid excessive litigation. It may be that the failure in *Sierra* to extend standing further, by liberalizing the injury-in-fact test, is an indication that injury in fact rather than zone of iuterest will be the more important issue in standing-to-sue questions. Justices Brennan and White, concurring in *Data Processing* and dissenting in *Barlow*, suggested that injury in fact be the only test of standing. 397 U.S. 159, 167-73 (1970). Professor Davis supports this view. DAVIS § 22.21 (Supp. 1970).

It is possible, of course, to use either test as a basic means of limiting the parties allowed to sue in specific situations. The two tests are not strictly parallel, but because statutes are ordinarily directed at preventing some kind of rather obvious injury, a strict view of what courts would be willing to regard as an injury in fact might often have the same result as a restricted view of the protected zone. Before *Data Processing*, for instance, competitive disadvantage could have been regarded as no injury in fact. See notes 11-12 *supra* and accompanying text. *Cf.* DAVIS § 22.21, at 784-85 (Supp. 1970). This would have produced the same result as though statutes were generally read not to intend to protect against competitive disadvantage. Members of the Court have suggested that some of the problems of excessive litigation or inappropriate parties might be avoided by making the appropriateuess of a party bringing a public interest lawsuit a separate consideration to be used as a weighting factor in granting standing. *See* 405 U.S. at 757-60 (Blackmnn, J., disseuting). Since injury in fact is usually not subject to exact measurement, even when purely economic, it is clear that either case by case discretion or differentiation between different sorts of lawsuits can and probably will be attached to this determination. Such discrimination could be consciously or unconsciously based on this "competence" criteria. Furthermore, the detrimental effects of partially settling issues by incomplete litigation or litigation incompetently conducted, or of settling issues too quickly, could be ameliorated by relaxing the effects of res judicata in fields such as environmental litigation where issues tend to be extremely complex and interconnected in not always obvious ways.

97. See notes 36-39 *supra* and 129-32 *infra* and accompanying text.

98. "[S]tanding may stem from [noneconomic values] as well as from the eco-

Although competitors' suits would seem to require consistent treatment, the courts have not yet settled the questions involved. An examination of varying approaches to government contracts cases reveals some of the means by which the Supreme Court's new law of standing may be implemented.

A problem which arises often in government contracts cases is the degree to which the relief sought by the contractor will actually further the public interest. Although not arising in this context, *Moose Lodge No. 107 v. Irvis*[99] indicates that the redress sought must be relief for plaintiff's own injuries, not the public's.[100] A corollary which might be inferred from *Moose Lodge* is that the public interest will support the redress for the plaintiff only when, on the whole, the public is also benefited. This corollary could be applied to competitors' suits with varying degrees of rigor. At one extreme, it might mean that a low-bidding contractor could not complain, on grounds of public expense, of an award to higher priced competition once the costs of reletting the contract exceeded the savings a new award to the plaintiff would accomplish. The valuable results of this requirement might also be accomplished, without so much restrictive rigor, by requiring that in equitable actions challenging contracts, the whole public interest always be considered and a balancing test employed before an injunction could issue. This technique would flow naturally from an emphasis on the second, public-policy-as-makeweight basis for allowing the addition of *Sierra*-type arguments not so connected with the plaintiff.[101] Emphasizing the connection between the plaintiff and his argument breeds technical distinctions;[102] but a system concentrating on restricting plaintiffs to those with *some* legal rights, while allowing *those* plaintiffs to assert the public interest, separates these technical issues from the public policy questions. Such a system would also allow a broad and balanced consideration of the effects of the court's proposed action on the public.[103]

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nomic *injury* on which petitioners rely here." 397 U.S. at 154 (emphasis added). In all these cases the injury to the contractors would be similar.

99. 407 U.S. 163 (1972).

100. *Id.* at 164-65. See note 80 *supra* for a discussion of this case.

101. See notes 81, 88 *supra* and accompanying text.

102. See notes 83-87 *supra* and accompanying text.

103. Thus a contractor, faced with an argument that transferring a contract to him at a late stage would cost the government more than it would save, might counter with a claim that the increased faith that contractors would have in the procurement process might save the public money in the long run. The contracting

Used in a broader sense, the requirement that the redress asked for must in fact further the public interest before public policy can be asserted is an implicit limitation springing from the use of a full balancing test on public policy arguments. Stated as a requirement, however, its operation as a limitation on the remedies which can be prayed for in suits of this nature is emphasized. This is a limitation which can perhaps be inferred from *Sierra*.[104]

The important point is that this perfectly natural and apparently desirable limitation can be imposed without technical considerations as to which plaintiffs can make which arguments. And there are indications that courts are beginning, implicitly at least, to take this approach[105]—to view broadly the public policy implications of the decision in order to temper the effect of a liberalization of restrictions on the range of arguments plaintiffs can assert.

The Traditional Rule—Perkins v. Lukens Steel Co.

The traditional rule that government contractors had no right to challenge procurement procedures was articulated in 1940, in

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agency might then respond that the redress sought would operate mostly as a penalty against it, and that, it being presumably unnecessary to penalize agencies to make them obey the law, in the balance, the public would be best served by leaving the contractor remediless.

104. The requirement of injury in fact does not "prevent any public interests from being protected through the judicial process." 405 U.S. at 740. This is the statement to which footnote 15 is a footnote. Footnote 15 itself seems to assume that the government will assert its version of the public interest fully.

105. See notes 146, 151-53, 162-63, 182, 192 *infra* and accompanying text. Of course, all a court is doing when it determines whether a particular procurement statute arguably either does or does not protect the interests of losing bidders is establishing a presumption. It is quite clear that Congress could, by explicit language, grant standing to losing contractors; it is equally clear that the application of statutory standards in procurement can, by explicit language, be left to the absolute discretion of the procuring agency. Although utterly fraudulent conduct or blatant bribery might still be grounds for a losing bidder's attack, a statute written to leave an agency with complete discretion would render most cases futile. Because it would be possible for Congress to pass a statute expressly leaving its operation to agency discretion, it would also seem reasonable that it could do so by implication alone. Such a statute could be properly applied by courts if they were willing to consider its zone of protected interests at a more exacting level than that indicated by a qualification "arguably"—as a question of standing or one on the merits. The Supreme Court has, however, indicated perhaps that the legal interest test is not to be applied on the merits, see notes 68-73 *supra* and accompanying text, and the arguably protected interest which must be shown to warrant a grant of threshold standing can be demonstrated by rather tenuous processes. See notes 133-41 *infra* and accompanying text. The reservation in Barlow v. Collins, 397 U.S. 159

Perkins v. Lukens Steel Co.[106] In *Lukens Steel,* the Supreme Court found that the statute which was claimed to have been violated by the government agency conferred no legal right on the plaintiffs. Therefore, no invasion of a legal right arose from the prospective damage and loss of income. The Court stated: "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."[107] Until 1970, *Lukens Steel* stood without challenge as the leading case in this area.[108]

Does the APA Make a Losing Bidder a Private Attorney General— Scanwell Laboratories, Inc. v. Shaffer

In 1970, the Court of Appeals for the District of Columbia Circuit broke with the *Lukens Steel* rule in *Scanwell Laboratories, Inc. v. Shaffer.*[109] The plaintiff, the second lowest bidder on an FAA contract, claimed that the bid of the lowest bidder was non-responsive[110] and sought a declaration that the award of the contract to the low bidder was void. Disturbed by the apparent circularity of the notion of the early standing cases that standing to sue required the possession of a legal right—that is, that standing depended on a question going to the merits—the Court of Appeals for the District of Columbia Circuit[111] attempted to assess whether *Lukens Steel* was still accurately reflective of the law of standing at the time of the *Scanwell* decision.[112] The court began this assessment by contrasting the cases on which the early standing concept was based —*Frothingham v. Mellon,*[113] *The Chicago Junction Case,*[114] *Tennes-*

(1970), concerning cases where statutes expressly deny standing, as a separate category, *id.* at 165, and the requirement that the language in them denying standing be explicit, *id.,* probably means that the Supreme Court will not read any presumption of a denial of standing into a statute which does not mention it.

106. 310 U.S. 113 (1940).

107. *Id.* at 125.

108. *See* Note, *Standing to Challenge Agency Action by Bidders on Government Contracts,* 19 U. KAN. L. REV. 558, 559 (1971).

109. 424 F.2d 859 (D.C. Cir. 1970).

110. The FAA's criteria for bids included a requirement that bidders propose only systems of which there existed at least one operational example. Scanwell contended that its competitor's bid was non-responsive to the advertisement for failure to meet this criterion. *Id.* at 860. *See* 41 C.F.R. § 1-2.404-2(a) (1972).

111. The court in *Scanwell* quotes 3 DAVIS § 22.04, at 217 on this point. 424 F.2d at 861.

112. See notes 24-35 *supra* and accompanying text.

113. 262 U.S. 447 (1923).

114. 264 U.S. 258 (1924).

see Electric Power Co. v. TVA[115]—with the line of cases which had developed the concept of the private attorney general—*FCC v. Sanders Brothers Radio Station*[116] and *Scripps-Howard Radio, Inc. v. FCC*[117] in the Supreme Court and *Associated Industries v. Ickes*[118] in the court of appeals. The *Scanwell* court noted that the latter group depended on statutes which were read to authorize specifically a right to bring suit *and* to assert the public interest by plaintiffs injured by allegedly illegal government action,[119] and that these plaintiffs were otherwise without any legal interest protected by the statutes in question. The *Scanwell* court then considered section 10 of the Administrative Procedure Act,[120] under which the plaintiff's suit had been brought. It felt that language in *Hardin v. Kentucky Utilities Co.*[121] and in *Abbott Laboratories v. Gardner*[122]—both cases which had granted standing without *express* statutory provision[123]—indicated that the District of Columbia court's earlier belief that the APA had been reflective of the law existing at the time of its passage[124] was incorrect.[125] A review of other more recent cases,[126] both its own and those of the Supreme Court, indicated to the *Scanwell* court that the law of standing was being relaxed.[127] It concluded that these developments indicated that the APA ought to be read as granting standing to any person, so long as he can al-

115. 306 U.S. 118 (1939).

116. 309 U.S. 470 (1940).

117. 316 U.S. 4 (1942).

118. 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

119. Communications Act of 1934, § 402(b)(2), 48 Stat. 1064, 1093, *as amended*, 47 U.S.C. § 402(b)(6) (1970); Bituminous Coal Act of 1937, ch. 127, § 6, 50 Stat. 85 (repealed 1966).

120. 5 U.S.C. §§ 701-06 (1970). The court quoted APA § 10(a), 5 U.S.C. § 702 (1970): "A person suffering legal wroug because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 424 F.2d at 865.

121. 390 U.S. 1 (1968).

122. 387 U.S. 136 (1967).

123. See notes 24-33 *supra* and accompanying text.

124. Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

125. 424 F.2d at 865-66, 872.

126. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958); National Ass'n of Sec. Dealers, Inc. v. SEC, 420 F.2d 83 (D.C. Cir. 1970), *vacated on other grounds*, 401 U.S. 617 (1971); Air Reduction Co. v. Hickel, 420 F.2d 592 (D.C. Cir. 1969); Superior Oil Co. v. Udall, 409 F.2d 1115 (D.C. Cir. 1969); Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955).

127. 424 F.2d at 872.

lege injury in fact from administrative action[128]—that is, the APA was to be regarded as making private attorneys general of injured parties. Presumably, on remand the district court was to regard this private attorney general concept as allowing the plaintiff to raise public interest issues on the merits. In essence, the legal right requirement would be applied neither in a consideration of standing nor in a decision on the merits.

Data Processing *and* Barlow—*The* Scanwell *Rationale Undercut*

Shortly after *Scanwell*, the Supreme Court construed the standing aspects of the APA in *Association of Data Processing Service Organizations, Inc. v. Camp*[129] and *Barlow v. Collins*.[130] Significantly, the private attorney general reading, and the concomitant notion that standing depended *only* on asserting injury in fact, were not adopted. Instead, Justice Douglas outlined the two-pronged standing test: injury in fact is a constitutional requirement; the other requirement is that the plaintiff's interest be arguably within the zone intended to be protected by the statute in question.[131] The Court made use of the argument that the legal right test went to the merits and was thus inappropriate for settling a *preliminary* question of standing.[132] This argument seemed to suggest that the legal interest test remained in force, but that it would only have to be satisfied by the plaintiff at a trial of the merits.

The Scanwell *Result Via the* Data Processing *Test*—Blackhawk *and* Ballerina

Despite the fact that *Scanwell*'s private attorney general reading of the APA was repudiated, the District of Columbia Circuit was unwilling to abandon the *Scanwell* result. *Blackhawk Heating & Plumbing Co. v. Driver*[133] reached the D.C. Circuit after the *Data Processing* and *Barlow* decisions. In *Blackhawk*, the court applied *Scanwell* in modified form, saying that the standing threshold being used was *Data Processing*'s two-pronged test, rather than *Scanwell*'s original requirement of injury in fact only.[134] In *Blackhawk*, the plaintiff contractor was held to have satisfied the *Data Processing*

128. *Id.*
129. 397 U.S. 150 (1970).
130. 397 U.S. 159 (1970).
131. 397 U.S. at 151, 153.
132. *See id.* at 153. See notes 44-50 *supra* and accompanying text.
133. 433 F.2d 1137 (D.C. Cir. 1970).
134. *Id.* at 1140.

test, but no discussion was made as to how the "arguably within the zone of protected interests" branch of this test had been met.[135] Furthermore, the subsequent discussion of the merits of the plaintiff's case made no mention of any application of a legal right test. The court seemed to feel that the contracting officer had acted within the discretion given him by the relevant regulation.[136] This discussion implies that the plaintiff had a legal right to challenge a breach[137] of the regulations. But *Lukens Steel* probably would not have allowed the plaintiff here to pass the legal right test.[138] In short, there is no indication that either as a matter of jurisdiction or on the merits, contractors would have to *show* that laws whose protection they invoke were intended to benefit them. Only the most liberal reading of *Sierra*,[139] which came down after these cases, would support this use of *Data Processing*'s threshold standing test as the sole requirement before jus tertii might be asserted.

In *Ballerina Pen Co. v. Kunzig*,[140] the Court of Appeals for the District of Columbia Circuit discussed the matter somewhat less cursorily, saying that the "arguably within the zone of protected interests" test was satisfied by showing that the legislative history of the statute claimed to have been violated demonstrated a concern for the adequate protection of competitors. The court did, however, at one point quote a passage from *Scanwell* which tended to indicate that, despite *Data Processing*, the court felt that the APA created a right for the aggrieved parties to act as private attorneys general in government contract situations without regard to the zones of interest protected by other statutes which were claimed to have been violated.[141]

Limitations on the Scanwell *Result*—Steinthal *and* Wheelabrator

M. Steinthal & Co. v. Seamans[142] and *Wheelabrator Corp. v.*

135. *See id.* at 1140-41.

136. *See id.* at 1143-44. See 41 C.F.R. § 1-1310-7 (1970).

137. 41 C.F.R. § 1-1310-7 (1970).

138. See notes 106-08 *supra* and accompanying text.

139. That is, the liberal interpretation of footnote 15, 405 U.S. at 740 n.15, that plaintiffs after showing *Data Processing* standing on the threshold may attempt to carry the merits with any argument whatsoever. See notes 45, 53 *supra* and accompanying text.

140. 433 F.2d 1204 (D.C. Cir. 1970).

141. *Id.* at 1216 n.18 (1970), *quoting* 424 F.2d at 872; *cf.* 433 F.2d at 1140 n.2.

142. 455 F.2d 1289 (D.C. Cir. 1971).

Chafee[143] marked a partial retrenchment from the interventionist attitude of the District of Columbia Circuit.[144] *Steinthal* involved a bidder's complaint of prejudice from a readvertisement for bids. Both the contracting agency and the GAO had found the original advertisement to be ambiguous.[145] Standing was granted, but the district court's order for an injunction was reversed. The reversal was based on a regard for administrative determinations made in proper exercise of discretion, as well as a notion that assertions of claims in the public interest must be based on an accurate reflection of that interest.[146] The court mentioned the availability of a proceeding for damages in the Court of Claims as an alternative which would allow a more leisurely review of the problem and interfere less with the operation of governmental activities dependent on the questioned procurement.[147]

Wheelabrator involved a similar situation. A manufacturer claimed that the Navy had chosen an improper method of letting a contract. However, the statutes did not forbid the discretionary use of the chosen procedure, though they required it in certain other situations.[148] The court held that it could not intervene unless an allegation, such as fraud or bribery, were made that undercut the "bona fide defense that the matter rests solely within the Secretary's discretion."[149] This fraud-bribery exception clearly demonstrates the court's consideration of the larger public policy implications of its choice of granting or withholding relief. The plaintiff contractor may perhaps have no more right to be free of fraud favoring a competitor than to be free of mistake, or even accidental irregularity in procurement procedure favoring his competitor. But the public policy advantages of withholding ill-gotten gains from the culpable and possibly preventing excessive profits from being extracted from the government in the first of these situations weigh in favor of making this exception. Because the GAO also had the plaintiff's protest

143. 455 F.2d 1306 (D.C. Cir. 1971).

144. Judge Tamm, who had written the opinions in *Scanwell, Blackhawk,* and *Ballerina,* dissented in *Steinthal* but did not sit in *Wheelabrator.*

145. 455 F.2d at 1294-95.

146. 455 F.2d at 1301.

147. *Id.* at 1302.

148. 455 F.2d at 1310-11. *See* Armed Services Procurement Act, 10 U.S.C. § 2301 *et seq.* (1970); Armed Services Procurement Regulations, 32 C.F.R. § 2.501 *et seq.* (1970).

149. 455 F.2d at 1312.

under consideration,[150] the *Wheelabrator* court went on to discuss the role of the GAO in reviewing agency decisions on letting government contracts.[151] The court indicated, as it did in *Steinthal*,[152] that the proper judicial attitude was that of keeping under consideration the wide public interest—at least when the statutes whose violations were alleged were primarily designed to protect the public, rather than the particular class to which the plaintiff belongs.[153]

Both of these cases show the court's increasing interest in considering public policy on a broad scale. Here, because neither plaintiff could have shown "legal right" standing, this balanced approach operates as a restriction on the effectiveness, for the plaintiff, of the generous grant of standing to assert public interest issues. Had the plaintiff been required to show "legal right" standing, this same wide-scale interest in public policy would have been grounds for allowing him to advance arguments outside the narrow sphere of his own interests. The court's attitude has the effect not only of divorcing technical standing questions from public policy matters, but of reducing the importance of the choice of a particular rule on standing. Nevertheless, it is highly questionable whether *Data Processing* and *Barlow* should have been read to allow *any* of these plaintiffs, without legal rights of their own, to succeed on the merits;[154] and it is at least arguable that *Sierra* does not do so either.[155]

The Court of Claims Follows Scanwell—Keco Industries v. United States

The Court of Claims' approach to these disappointed-bidder cases was demonstrated in *Keco Industries v. United States*.[156] The plaintiff alleged that the contracting agency had breached an implied contract to consider plaintiff's bid fairly and honestly, and asked for recovery of bid preparation costs and lost profits. The Court of

150. *Id.* at 1313.

151. *Id.* at 1313-17. *See generally* Comment, *The Role of GAO and Courts in Government Contract "Bid Protests": An Analysis of Post-*Scanwell *Remedies*, 1972 DUKE L.J. 745.

152. 455 F.2d at 1302, 1306.

153. 455 F.2d at 1317.

154. See note 46 *supra* and accompanying text.

155. See notes 67-80 *supra* and accompanying text.

156. 428 F.2d 1233 (Ct. Cl. 1970).

Claims cited *Scanwell* with approval,[157] and deemed it controlling in requiring a grant of standing to sue *and* to assert the public interest.[158] The court thus extended *Scanwell* to cases seeking damages for the improper awarding of contracts. "Regardless of the fact that plaintiff in the instant case is seeking money damages, it is still requiring the Government to enforce its regulations fairly and honestly, and treat all bidders without discrimination."[159] Recoveries on implied-in-law contracts are not ordinarily available in the Court of Claims.[160] *Keco* required, however, that at trial there be shown an arbitrary and capricious action in granting the contract.[161] This requirement might have put the situation within the exception allowed for recovery on an implied contract arising from fraud by a government agent.[162] Keco's claim for lost profits was denied,[163] but recovery was granted for bid preparation costs. The denial of lost profits suggests that the basis for recovery is not really contractual, and that broad public-interest considerations limit the uses to which contractors can put statutes aimed solely at protecting the public. As in *Steinthal* and *Wheelabrator*, a liberal reading of the standing rules by the *Keco* court was effectively tempered by a concern for the whole of the public interest. Furthermore, though the Court of Claims approach is very much like that of the District of Columbia Circuit,[164] the policy considerations which arise are quite different. This difference is a result of the difference between injunctive relief and damages; it demonstrates the remedy-oriented rather than injury oriented nature of the public-policy-as-a-whole basis for approaching standing problems.

157. *Id.* at 1237.

158. *Id.* at 1238.

159. *Id.*

160. *E.g.*, United States v. Minnesota Mut. Inv. Co., 271 U.S. 212, 217-18 (1926); Algonac Mfg. Co. v. United States, 428 F.2d 1241, 1256 (Ct. Cl. 1970); J.C. Pitman & Sons v. United States, 317 F.2d 366, 368 (Ct. Cl. 1963).

161. 428 F.2d at 1237. If the government failed to consider the bids fairly, its impliedly holding itself out as intending to do so might be considered fraudulent. *See* 428 F.2d at 1236; Heyer Prods. Co. v. United States, 140 F. Supp. 409, 414 (Ct. Cl. 1956).

162. J.C. Pitman & Sons v. United States, 317 F.2d 366, 369 (Ct. Cl. 1963). *See* 428 F.2d at 1238. The implied contract might also be considered to be implied in fact, provided a court was willing to regard a letting of bids as being an *express* manifestation of an offer to consider them fairly.

163. The court said that it was not provable that the plaintiff would have been awarded the contract if its bid had been fairly considered—because, for example, the government was empowered to reject all bids. 428 F.2d at 1240 & n.11.

164. *Id.* at 1237-38.

Gary Aircraft Corp. v. United States

Two 1972 cases in district courts, *Gary Aircraft Corp. v. United States*[165] and *Merriam v. Kunzig*,[166] have expressly repudiated the *Scanwell* holding that a disappointed bidder has standing to challenge the government's award of a contract to its competitor. In *Gary* the plaintiff sought to enjoin the Secretary of the Air Force from ordering a reconsideration of an unfavorable pre-award survey of a competitor.[167] The competitor, the apparent low bidder on the contract, had been found not sufficiently responsible in the initial survey.[168] The District Court for the Western District of Texas specifically rejected the *Scanwell* line of cases,[169] and dismissed the suit. The *Gary* court found *Lukens Steel*[170] to be controlling, and felt that the *Scanwell* line of cases was inconsistent with *Lukens Steel*.[171]

The *Gary* court's action is subject to two interpretations. Since the court explicitly recognized the *Data Processing* test,[172] it could have felt that the ruling in *Lukens Steel* so clearly established that losing bidders did not have the "requisite legal interest in the procurement process"[173] that the procurement statutes did not even *arguably* protect plaintiff's interest. Thus, the plaintiff would fail to pass the *Data Processing* test and would lack standing. However, if footnote 15 of *Sierra* is read as now removing the legal interest test from the

165. 342 F. Supp. 473 (W.D. Tex. 1972).

166. 347 F. Supp. 713 (E.D. Pa. 1972).

167. The pre-award surveys are designed to separate out contractors unlikely to be able adequately to perform the contracts. Financial situation, equipment, expertise, and past performance are considered. 32 C.F.R. § 1.900 *et seq.* (1972). *See* 342 F. Supp. at 475.

168. 342 F. Supp. at 475.

169. *Id.* at 476. The court mentioned Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), as well as Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971); M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971); Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137 (D.C. Cir. 1970); Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970); Keco Indus., Inc. v. Laird, 318 F. Supp. 1361 (D.D.C. 1970); and Simpson Elec. Co. v. Seamans, 317 F. Supp. 684 (D.D.C. 1970).

170. See notes 106-07 *supra* and accompanying text.

171. The decision in *Data Processing*, the court said, indicated that *Scanwell's* holding that the APA made contractors private attorneys general was incorrect; therefore, the question of standing was referred to case law on statutes regulating procurement—and *Lukens Steel* was the leading case. 342 F. Supp. at 477. See notes 129-32 *supra* and accompanying text.

172. 342 F. Supp. at 477.

173. *Id., quoting* 397 U.S. at 153.

merits,[174] this interpretation of *Gary* points to a major difficulty. If there are no cases determining on the merits whether a statute confers a legal right on a person, that is, determining what zone of interest is *actually* protected, then what is the basis for ascertaining what "arguably" falls within this "zone of interests"? If there are no longer to be any adjudications of when an interest *is* sufficiently legally protected to grant standing in the old sense, then it is more difficult to determine what is a sufficient argument to satisfy the *Data Processing* standard. Thus, if *Sierra* means that *Lukens Steel* is not to be applied on the merits, then is that case still usable to set a forbidden area which "threshold argument" in the *Data Processing* test sense may never reach?

The second interpretation of *Gary* arises principally because of language from *Data Processing* quoted by the *Gary* court. That language points out that the legal interest test belongs in a decision on the merits.[175] *Gary* could thus have applied the legal interest test to the merits as presented in the pleadings, and dismissed for failure to state a claim for which relief can be granted rather than for lack of standing. The Federal Rules of Civil Procedure permit decision on points of law on the pleadings;[176] presumably if a legal interest test were required on the merits, it could be used in full panoply at this stage of the litigation, if no material questions of fact had arisen. The *Gary* court itself allowed this ambiguity to persist, saying of the *Lukens Steel* rule: "[w]hether or not these considerations are still subsumed under the traditional standing doctrine, they should, and unless the Supreme Court overrules [*Lukens Steel*], must be respected."[177] At the time the *Gary* decision came down, this distinction was admittedly technical, and made no difference in the result. But since the decision in *Gary* was handed down, footnote 15 of *Sierra* has, perhaps, undercut *Data Processing*'s indication that the legal interest test, though not appropriate for questions of standing, still remains a valid inquiry on the merits. Under the liberal interpretation of footnote 15, *Sierra* has made the *Data Processing* test a threshold whose crossing allows the assertion of the public interest without any question, other than the prelim-

174. See note 45 *supra* and accompanying text.

175. 342 F. Supp. at 477.

176. FED. R. CIV. P. 56. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 99 (1970).

177. 342 F. Supp. at 477-78.

inary "arguably" standard, of whether the plaintiff's interests were legally protected.[178] Thus, a decision in *Gary* that plaintiff had failed to pass the *Data Processing* test because of *Lukens Steel* would now be open to less question than a Rule 56 dismissal on the grounds that the plaintiff had alleged no legal interest, and hence would certainly fail on the merits where he would be required to show one. The *Gary* court also quoted from *Wheelabrator*, regarding it as limiting *Scanwell*'s apparent readiness to meddle in procurement decisions, and as restating the principle that matters left to agency discretion ought to be immune from review in most circumstances.[179] The court pointed out that in this case the action complained of had, as in *Wheelabrator*, been committed to agency discretion by law.[180] The court further indicated that the plaintiff had no grounds on which to ask the relief of equity. The plaintiff was seeking to prevent the government from resurveying his competitor.[181] The court noted that a new survey might show the competitor still unqualified, in which case the relief would have been unnecessary; on the other hand, a new survey might show the competitor qualified, in which case the court's preventing the survey would result in the government's having to pay more than necessary to get the required services.[182] Thus the *Gary* court seemed quite impressed with the necessity of maintaining a broad regard for the public interest while adjudicating contractors' claims.

Merriam v. Kunzig

In the second of these district court cases, *Merriam v. Kunzig*,[183] the plaintiff, a prospective lessor to the government, sought to enjoin the General Services Administration from awarding a lease to another bidder. The plaintiff contended that statutes forbade the awarding of a contract for the lease of a building yet to be constructed, and that agency interpretations of these statutes which took the competitors' admittedly still non-existent building out of this to-be-built category were arbitrary and beyond the defendant's author-

178. *Id.* See note 66 *supra* and accompanying text.

179. 342 F. Supp. at 478. Because of the public interest which often exists in expeditious procurement, the refusal by the courts to hinder agency discretion may be particularly important in government contract cases. *See* 455 F.2d at 1302.

180. 342 F. Supp. at 478.

181. *Id.* at 479.

182. *Id.* at 478-79.

183. 347 F. Supp. 713 (E.D. Pa. 1972).

ity. The District Court for the Eastern District of Pennsylvania held that the standards for standing set forth in *Data Processing* and *Barlow* had not been met.[184]

Like the court in *Gary*, *Merriam* rejected *Scanwell* as having gone beyond the limits the Supreme Court set shortly thereafter in *Data Processing*.[185] The addition, the court said, of the non-constitutional requirement that the plaintiff's interest be within the zone intended to be protected by the relevant statute was an implicit rejection of the private attorney general concept—at least without an express statutory base on which to found such a grant. The extra restriction, it said, would be meaningless if the APA itself was held, as *Blackhawk* suggests,[186] to arguably create such a protected zone.[187] The *Merriam* court found that Congress' intent in passing the leasing statute was solely to limit federal spending, not to protect prospective lessors;[188] therefore, the court held that the plaintiff lacked standing.[189]

The district court went on to point out that the dismissal for lack of standing was also probably an anticipation of plaintiff's failure on the merits.[190] Since the court could not order the execution of a contract with the plaintiff, the only remedy would be to set aside the present award. This action would not necessarily result in full relief for the plaintiff.[191] Furthermore, the court suggested that any attempt to give the plaintiff additional relief would work against a particularly relevant factor of the public interest—

184. After this Note was set in type, Merriam v. Kunzig was reversed in an opinion which attempted to adopt *Scanwell*. 32 AD. L.2d 243 (3d Cir. 1973). In reply to the contention that *Scanwell* was inconsistent with *Data Processing*, the court found that a true legal interest was present. The court's argument—that the required rejection of nonconforming bids, for example, showed an intent to protect contractors and could not protect the government—is persuasive but not logically necessary; for the government itself certainly does have an interest in buying only conforming merchandise and in keeping bids comparable by requiring all bids to be for the same goods or services.

185. 347 F. Supp. at 723.

186. 433 F.2d at 1140. See notes 133-37 *supra* and accompanying text.

187. 347 F. Supp. at 723.

188. *Id.* at 721. The plaintiff had conceded this point as well. *Id.*

189. *Id.* at 724.

190. *Id.*

191. Because procurement statutes are often designed to insure the proper operation of the government and protect the public, rather than the rights of government contractors, the remedies, both express and implicit, connected with these statutes are not necessarily appropriate for the full satisfaction of the contractors' claims.

allowing the government to contract for the most appropriate satisfaction of its needs.[192]

Conclusion

The limitation put on government contractors' rights to challenge procurement decisions which is created by the Supreme Court cases establishing the present doctrine of standing is thus not clear. Although competitors of successful bidders do seem to suffer injury in fact,[193] something more than injury in fact will be required.[194] The "arguably within the zone of interest" test can be applied as strictly as the *Gary* court does when it uses *Lukens Steel* as a basis,[195] or as loosely as the District of Columbia Circuit has when using *Scanwell*.[196] Within even the strict legal right framework, the *Scanwell* result could be obtained either by a holding that Congress intended to protect such competitors when it legislated on procurement matters,[197] or that its intention to protect the public naturally included an intention to regularize the procurement process by giving aggrieved contractors some kind of remedy.[198] A holding that this

192. *Id.* For example, forbidding the competitor to bid on a new advertisement would have this effect.

193. Economic injury from competition is recognized. Investment Co. Institute v. Camp, 401 U.S. 617, 620 (1971); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970).

194. *But see* note 50 *supra.*

195. See notes 170-73 *supra* and accompanying text.

196. See notes 133-41 *supra* and accompanying text.

197. This would require that *Lukens Steel*, though not the legal right standing concept, be overruled. See notes 106-08 *supra* and accompanying text.

198. The use of either of these theories would require a determination of the place at which the balance must be struck between the short-term and the long-term public interest. That is, the efficacy of the argument such as "despite the fact that an award to me will cause delay or extra expense to the government, the encouragement of contractors' faith in the fairness of the procurement process will be a benefit in the long run" must be determined. While striking a balance of this sort has traditionally been done by equity courts on a case by case basis, it seems also a subject easily susceptible of legislative determination. A judicial interpretation of legislative intent in this area would begin to create signs of the legal interest test—that test may have resulted from a feeling that the legislature would provide explicit remedies when the public good required, and the lack of an explicit remedy must indicate a predetermination that little public good would flow from granting one. Used less rigorously, such an argument might, instead of precluding the raising of *all* public interest issues, require only that the public good asserted be expected to flow directly from the remedy sought. Instead of the statute being read as protecting only the public, it could be read as principally protecting the public from a particular injury, and arguments be restricted to those based on alleviating that injury.

was always *arguably* the case, together with a broad reading of footnote 15 in *Sierra* would have the same result.

A narrower reading of *Sierra* would leave the legal interest test more or less intact for application on the merits, but a plaintiff might be allowed to make public interest arguments when they were sufficiently related to his own particular interest. A contractor could make the argument in his own right that an award to him would increase contractors' confidence generally. While the good to the public which would result from this confidence would likely be considered also, he could not assert that an award to him would save the public's money for this is not sufficiently related to the issue of contractors' confidence. This latter result seems anomalous, and could perhaps be kept from being so only by a very narrow restriction to situations like that in the hypothetical example in *Sierra*,[199] where the harm done to the plaintiff was a species of the harm done to the public.[200] Otherwise, a concentration on granting standing to plaintiffs only to assert public benefits which are intended to operate through them accomplishes little. If a statute is intended to *affect* the plaintiff, without necessarily being intended to *benefit* him, it will find in him no better a defender of the public good than would be found in a plaintiff affected by but not within the intent of the act.[201] On the other hand, restriction of complainants to those benefited in the same manner as the public does provide the public with an advocate whose interests are more in concert with its own.[202]

If the broader view of *Sierra* is taken, any contractor passing the *Data Processing* threshold test can assert any arguments he wishes to use on the merits, without regard to their lack of relationship to him. This approach avoids some of the technical problems of the narrower reading, but it has two less beneficial effects. The rather ephemeral issue of what Congress *arguably* intended becomes more

199. See text preceding note 67 *supra*.

200. See text following note 76 *supra*.

201. In *Lukens Steel* the wage minima were supposed to operate through government contractors and hence were intended to affect them. But the interests of the contractors and those of the beneficiaries of the Act were opposed. See notes 106-07 *supra* and accompanying text.

202. The intent of Congress to affect a plaintiff is not the same as an intent to grant him standing. Perhaps the suggestion here can be justified by reasoning that Congress intended to benefit the public, and that this intent on the issue of standing ought to override all other intents unless they are clearly aimed at the standing issue itself.

critical,[203] and the possibility exists that *neither* litigant will be a good representative of the public interest Congress wanted to protect.

The complicated difficulties which arise with technical distinctions of this nature are considerably ameliorated by all these courts' —*Wheelabrator*'s, *Merriam*'s and *Gary*'s—interest in considering the public interest on a broad scale.[204] This wide-ranged basis tends to control and regularize the arguments made by a plaintiff who is given a broad grant of standing, and on the other hand to broaden the arguing base of a plaintiff whose grant of standing is restricted. The remedy-based rather than injury-based approach to these public policy questions[205] allows these cases to produce the best results for the public without the necessity of relying, probably unsatisfactorily, on one of the technical intermediate positions on injury-based standing.[206] Of course, the choice of a particular standing rule makes a difference to the plaintiffs, since it determines whether or not they will be in court at all. Given that a plaintiff has standing, however, the course of the litigation does not depend so much on the choice of the standing rule which is made.

Nevertheless it appears that an establishment of guidelines by the Supreme Court in the area of standing for disappointed contractors would be desirable. All the courts whose cases are here discussed agree that the *Data Processing* standard ought to be applied,[207] but they differ in the way in which they apply that standard. *Gary*'s apparent view that *Lukens Steel*[208] makes none of these contractors' interests even arguably protected except in the case of an unusual statute like the one in *Kentucky Utilities* is one extreme; the lax application of the *Data Processing* standard in *Blackhawk* is the other.[209] Because of the pervasive operation of the APA,[210] it seems unlikely that the District of Columbia Circuit's original idea in *Scanwell* that the APA itself arguably creates a zone of protected interests will be accepted. This result would not be sufficiently different from

203. See notes 95-96 *supra* and accompanying text.

204. 455 F.2d at 1317; 347 F. Supp. at 724; 342 F. Supp. at 479.

205. *See* 455 F.2d at 1302.

206. See note 83 *supra* and accompanying text.

207. *See, e.g.*, 433 F.2d at 1204; 433 F.2d at 1140; 347 F. Supp. at 720; 342 F. Supp. at 477. A notable exception is the Court of Claims, which has apparently never cited *Data Processing*.

208. See notes 170-73 *supra* and accompanying text.

209. See note 133 *supra* and accompanying text.

210. See note 120 *supra*.

that of the rejected Brennan-White standing theory[211]—standing ought to be accorded to anyone who can show injury in fact. However, this latter position has strong support among the commentators as well as in the Court,[212] and might eventually be adopted.

The divorce of the standing issue from the merits of a case in *Data Processing* and subsequent cases left a question of whether the legal interest test was still to be applied to arguments on the merits. The *Gary* court seemed to think it ought to be so applied; other courts are less certain. *Sierra*[213] has weakened arguments that could be made for its retention; however, the Supreme Court could still create separate rules for different types of cases and allow the assertion of public interests more often in environmental cases, for instance, than in procurement cases. The removal of the legal interest requirement seems to leave all these courts vaguely uncomfortable with contractors' insistence on hard adherence to procurement regulations. All of the courts agree that some matters are and ought to be left to the procuring agencies' discretion, and agree that intervention ought to be allowed only to correct abuses of this discretion.[214] The *Merriam* court's fecling that remedies available to the disgruntled contractor were not likely to be satisfactory is yet another aspect of the contractor's lack of a legal interest.[215] All these courts are willing to keep under consideration the broad public interest in the government's contracting for the most appropriate goods and services at the best price.[216] It is thus likely that interpretations of procurement statutes will be made with the public interest, rather than contractors' rights, in mind. With this limitation, the concession of standing to losing bidders may allow the correction of procurement abuses without excessive interference by the contractors in the procurement process.

211. This theory is expressed in a concurring opinion in Barlow v. Collins, 397 U.S. 159, 167 (1970) (Brennan, J.). See note 50 *supra*.

212. See 3 DAVIS § 22.18, at 291.

213. See text following note 177 *supra*.

214. See notes 149, 179 *supra* and accompanying text; *cf.* 347 F. Supp. at 724.

215. See note 192 *supra* and accompanying text.

216. See notes 149-53 *supra* and accompanying text and note 191 *supra*.