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Constitutional Law - Standing - The Zone of Interest Test of Data Processing Held Inapplicable to Plaintiff's Standing in a Suit between Private Parties

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However, because the Sound Recording Act of 1971 prohibits the unauthorized duplication of works "fixed" after February 15, 1972, states may perceive no need to enact such provisions.[80] This is so because the pirate industry concentrates on recently released, fast-selling works, which do not retain their popularity; such practices are now proscribed by federal law and the states need do nothing more to deter the pirate. Substantial questions may arise, however, if Congress fails to renew the protection of the Act which expires, under its own terms, on January 1, 1975 and the states then choose to provide the missing protection. In such a case, failure to renew may be taken as an affirmative indication of a congressional intent to allow recordings to remain unprotected and the argument that the states' power to regulate in the area had been preempted would be persuasive.

Beyond the narrow issue of tape piracy, however, the decision, with its emphasis on local importance, reflects a mood of the Court and portends a trend away from the expansion of federal power witnessed during the Warren Court years. In fact, when viewed with such recent decisions as *Miller v. California,*[81] *Goldstein* evidences a tendency to allow local authorities control over matters of "local importance" formerly thought to be the sole province of the federal government.

Joseph H. Huston, Jr.

CONSTITUTIONAL LAW — STANDING — THE "ZONE OF INTEREST" TEST OF *Data Processing* HELD INAPPLICABLE TO PLAINTIFF'S STANDING IN A SUIT BETWEEN PRIVATE PARTIES.

American Postal Workers Union v. Independent Postal System of America, Inc. (6th Cir. 1973)

The American Postal Workers Union[1] brought an action seeking to enjoin delivery of newspapers and magazines by the Independent Postal System of America, Inc.[2] Plaintiff based its action on the alleged repugnance of such practices to the constitutional provision conferring a mo-

80. *See* note 41 *supra.*

81. 413 U.S. 51 (1973). The Court in *Miller* prescribed that "contemporary community standards" were to control the interpretation of "obscenity."

1. The union, an AFL-CIO affiliate, represented employees in the United States Postal Service in the metropolitan Detroit area. American Postal Workers Union v. Independent Postal Sys. of America, Inc., 481 F.2d 90, 91 (6th Cir.), *cert. granted,* 42 U.S.L.W. 3358 (U.S. Dec. 17, 1973) (No. 73-532).

2. The Independent Postal System of America was an Oklahoma corporation engaged in the private postal business of delivering addressed magazines and newspapers in numerous localities throughout the country. The individual defendants had obtained a franchise from the corporation. American Postal Workers Union v. Independent Postal Sys. of America, Inc., 349 F. Supp. 1297, 1298 (E.D. Mich. 1972).

nopoly upon the United States Government to carry and deliver mail,[3] and the private express statutes[4] enacted pursuant thereto. The district court granted defendants' motion for summary judgment on the basis that plaintiff lacked standing to sue.[5] On appeal, plaintiff contended that it had standing under the criteria established by the Supreme Court in *Association of Data Processing Service Organizations v. Camp.*[6] The United States Court of Appeals for the Sixth Circuit affirmed the grant of summary judgment *holding* that the standing test of *Data Processing* had no relevance to a suit between private parties, but applied only to challenges to governmental action.[7] *American Postal Workers Union v. Independent Postal System of America, Inc.*, 481 F.2d 90 (6th Cir.), *cert. granted*, 42 U.S.L.W. 3358 (U.S. Dec. 17, 1973) (No. 73-532).

The doctrine of standing to sue[8] in the federal courts has its foundation in article III, section 2 of the Constitution which limits federal jurisdiction to "cases" or "controversies."[9] The Supreme Court has interpreted this constitutional provision in part as limiting the jurisdiction of the federal courts to those cases in which the plaintiff has a sufficient interest in the outcome of the controversy to assure an adversary presentation of the issues.[10] Standing focuses on whether the plaintiff is the proper party to request adjudication of the issues,[11] and the constitutional re-

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3. U.S. CONST. art. I, § 8, cl. 7.

4. 18 U.S.C. §§ 1693-99, 1724 (1970). *See* note 22 *infra*. Defendants conceded that the materials involved were "letters" within the meaning of 18 U.S.C. § 1696 (1970). 481 F.2d at 92. For a discussion of the applicable regulations and law in a similar case which reached an opposite conclusion, *see* National Ass'n of Letter Carriers v. Independent Postal Sys. of America, 336 F. Supp. 804, 808-09 (W.D. Okla. 1971), *aff'd*, 470 F.2d 265 (10th Cir. 1972).

5. 349 F. Supp. 1297, 1299. The district court also held that no private right of action existed under the private express statutes. *Id.*

6. 397 U.S. 150 (1970). *See* text accompanying note 18 *infra* for the substance of these criteria.

7. The court also held that no private right of action existed under the provisions relied on by plaintiff. *See* note 31 *infra*.

8. Much has been written on the law of standing. *See, e.g.*, 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22 (1958, Supp. 1970); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTIONS ch. 12-13 (1965); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. L. REV. 256 (1971); Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

It is evident from the following excerpt that difficulties are to be encountered in any examination of the law of standing:

> Standing has been called one of the most amorphous concepts in the entire domain of the public law. . . .
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> The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance. The Court itself has characterized its law of standing as a "complicated specialty of federal jurisdiction."

Scanwell Laboratories v. Shaffer, 424 F.2d 859, 861 (D.C. Cir. 1970) (citations omitted).

9. *See* Flast v. Cohen, 392 U.S. 83 (1968) (upholding taxpayer's standing to challenge federal educational appropriations to religious and sectarian schools).

10. Baker v. Carr, 369 U.S. 186, 204 (1962).

11. Flast v. Cohen, 392 U.S. 83, 99-100 (1968).

quirement is satisfied when the plaintiff has been injured in fact, economically or otherwise, by the challenged action.[12]

In addition to the injury in fact test for establishing standing, the Supreme Court has adopted rules of self-restraint not required by the Constitution.[13] The Court's decision in *Data Processing* substantially liberalized its prior rule of self-restraint which had required that the plaintiff assert a legal right.[14] The petitioners in *Data Processing,* in the business of selling data processing services, challenged a ruling by the Comptroller of the Currency which provided that, as an incident to banking services, national banks could make data processing services available to other banks and bank customers. Petitioners attempted to establish standing under section 4 of the Bank Service Corporation Act of 1962, which provided in relevant part: "No bank service corporation may engage in any activity other than the performance of bank services for banks."[15] The district court dismissed the complaint for lack of standing to sue[16] because the petitioners had been unable to demonstrate the exist-

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12. *See* Barlow v. Collins, 397 U.S. 159, 172 (1970) (Brennan & White, JJ., concurring in the result and dissenting). This opinion also applied to Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970), decided the same day.

13. *See* Barrows v. Jackson, 346 U.S. 249, 255 (1953). *See generally* E. BARRETT & P. BRUTON, CONSTITUTIONAL LAW 58–149 (4th ed. 1973), for a discussion of these court-made rules.

14. The legal right doctrine required, where a statute was relied upon, that the statute contain either an express right to sue or reflect an intent to protect the plaintiff's interests. *See, e.g.,* Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (plaintiff denied standing to secure review of erroneous statutory interpretation in absence of statute providing a legal right); The Chicago Junction Case, 264 U.S. 258 (1924) (standing found where interest intended to be protected).

In Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939), a case characteristic of the legal right genre, 18 corporations sought to enjoin the operation of the TVA on the grounds of its alleged unconstitutionality. The Supreme Court denied standing, holding that one threatened with injury by governmental action could not challenge that action "unless the right invaded is a legal right, — one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.* at 137. Despite criticism of *Tennessee Electric, see* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.04, at 217–18 (1958), it firmly entrenched the legal right test in the federal law of standing. Professor Davis made the following comment on the efficacy of this doctrine:

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

Id. at 217.

For a discussion of the evolution of the legal right doctrine, *see* Comment, *The Congressional Intent to Protect Test: A Judicial Lowering of the Standing Barrier,* 41 U. COLO. L. REV. 96, 99–103 (1969). For a discussion of the legal right doctrine in a context other than competitor suits, *see* Note, *Federal Judicial Review of State Welfare Practices,* 67 COLUM. L. REV. 84, 124–29 (1967).

15. 12 U.S.C. § 1864 (1970).

16. 279 F. Supp. 675, 678 (D. Minn. 1968), *aff'd,* 406 F.2d 837 (8th Cir. 1969), *rev'd,* 397 U.S. 150 (1970).

ence of a personal legal right.[17] On *certiorari,* the Supreme Court held that petitioners had standing, and specifically rejected the legal right test:

> The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is *arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.*[18]

In *National Association of Letter Carriers v. Independent Postal System of America,*[19] a case presenting facts and issues substantially identical to those in the instant case, the plaintiff postal union sought to enjoin the entry of the Independent Postal System into the postal business. The Tenth Circuit applied the zone of interest test of *Data Processing* and granted the plaintiff standing.[20]

The plaintiff in the instant case also sought to establish standing to sue by reliance upon the *Data Processing* test. Injury in fact was alleged to exist because the defendant's operation "imperiled the livelihood, careers, annuities, benefits and guaranteed employment of the postal employees" represented by plaintiff.[21] To satisfy the second prong of the *Data Processing* test, plaintiff alleged that the interests of the postal workers were "arguably within the zone of interests to be protected or regulated" by article I, section 8, clause 7 of the Constitution which creates a monopoly in the federal government "To establish Post offices and post Roads," and the private express statutes.[22] The Sixth Circuit refused to

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17. *Id.* The legal right doctrine would have required the plaintiff to demonstrate, in addition to the constitutional requirement of injury in fact, a legal right to be free of competition.

18. 397 U.S. at 153 (emphasis added).

19. 470 F.2d 265 (10th Cir. 1972).

20. *Id.* at 270. The court first looked to Sierra Club v. Morton, 405 U.S. 727 (1972), and concluded that the plaintiff's members had the personal stake in the controversy required by that case. 470 F.2d at 270. The court relied on the trial court's determination that injury would result to plaintiff's 200,000 members from defendant's operation in the form of significant loss of work time, overtime, employment opportunities, future pension and insurance benefits and in morale. *Id.* The court then turned to *Data Processing* as an alternative test, and concluded that the postal workers were arguably within the zone to be protected by the postal laws. The analysis of the circuit court was brief. The opinion of the district court was more complete, and is essentially that found in the text accompanying notes 38 & 40 *infra.*

21. 481 F.2d at 92.

22. 18 U.S.C. §§ 1693–99, 1724 (1970); 39 U.S.C. § 601 (1970). Essentially these provisions provide criminal penalties for the carrying of mail in violation of the United States postal monopoly. The court's analysis focused on only one of these provisions, 18 U.S.C. § 1696(a) (1970), which provides in pertinent part:

> Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place, between which the mail is regularly carried, shall be fined not more than $500 or imprisoned not more than six months, or both.

Id.

Plaintiff contended that certain provisions of the Postal Reorganization Act of 1970, 39 U.S.C. §§ 101 *et seq.* (1970), expressed a congressional concern for the welfare of postal employees, thus placing them within the zone of interests to be protected or regulated by the private express statutes. Section 101(c), an expression

recognize standing under these provisions, and rejected the analysis of the *Letter Carriers* case, holding that *Data Processing* was not controlling in a suit between private parties, but had relevance only where the action challenged was that of a governmental agency.[23]

The basis of the court's conclusion that the zone of interests test was inapplicable to the instant facts was that neither *Data Processing* nor the cases cited therein involved controversies between private parties. The court sought support from *Solien v. Miscellaneous Drivers & Helpers Union*[24] and *Colligan v. Activities Club, Ltd.*,[25] both of which purportedly held that *Data Processing* was inapplicable where only private parties were concerned.[26] In *Solien* the Eighth Circuit concluded that *Data Processing* was not controlling on the issue of the standing of a charging party in a National Labor Relations Board case to obtain appellate review of a judicial order in a proceeding under section 10(*l*) of the National Labor Relations Act.[27] That court characterized *Data Processing* as "[presenting] the question of what interest one must allege in order to establish that he is sufficiently aggrieved by an *administrative* order to be entitled to judicial review under the Administrative Procedure Act . . . of [an] adverse *agency* action."[28]

While the holding of *Solien* buttressed the Sixth Circuit's position, reliance upon *Colligan* may have been misplaced. The *Colligan* case involved an attempt by consumers to establish standing under the Lanham Trade-Mark Act[29] in order to enjoin deceptive advertising by a tour

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of postal policy, provides that compensation in the postal service should be comparable to that paid in the private sector, and that emphasis should be placed on opportunities for career advancement for postal employees; section 1001 provides for the establishment of procedures to guarantee protection of employment rights of the postal workers; and sections 1201–09 are concerned with employee-management agreements. The Sixth Circuit did not discuss these sections, but the district court determined that the policy reflected in them would not override the public policy against enforcement of criminal statutes by private parties. 349 F. Supp. at 1299.

23. 481 F.2d at 92.

24. 440 F.2d 124 (8th Cir. 1971).

25. 442 F.2d 686 (2d Cir.), *cert. denied,* 404 U.S. 1004 (1971).

26. In a footnote the court expressed the view that cases involving a constitutional challenge to state law or state action in which standing under *Data Processing* was found were "obviously without application." 481 F.2d at 92 n.2. *See, e.g.,* Crossen v. Breckenridge, 446 F.2d 833 (6th Cir. 1971); Moyer v. Nelson, 324 F. Supp. 1224 (S.D. Iowa 1971).

27. 29 U.S.C. § 160(*l*) (1970). This provision requires the Board Regional Director to petition for injunctive relief to remedy certain unfair labor practices. *Id.* Petitioner sought to intervene in the injunction proceeding with full party status, but was relegated to the status of participant with a limited right of appearance at the district court's hearings. 440 F.2d at 132.

28. 440 F.2d at 132 (emphasis in original).

29. Act of July 5, 1946, ch. 540, 60 Stat. 427 (codified in scattered sections of 15 U.S.C.). Section 43(a) of the Act provides in pertinent part:

> Any person who shall affix, apply, or annex, or sue in connection with any goods or services, . . . a false designation of origin, or any false description or representation, . . . and shall cause such goods or services to enter into commerce, . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of such false description or representation.

15 U.S.C. § 1125(a) (1970). Prior to *Colligan* the Act had been applied almost exclusively to competitor suits. *See* 72 COLUM. L. REV. 182, 183 (1973). The *Colligan* court, disregarding some legislative history which indicated an intent to protect consumers, refused to judicially expand the scope of coverage. *Id.* at 186.

agency. Contrary to the implication given by the *American Postal Workers* court, the *Colligan* court did apply the *Data Processing* test, but determined that the interests of the deceived plaintiffs were not "within the zone of interests to be protected" by the Lanham Act.[30]

Having arrived at the conclusion that *Data Processing* did not provide the appropriate standing test, the Sixth Circuit might have proceeded to determine what criteria *did* apply. However, the court declined the opportunity to fashion guidelines for determining standing in such cases, and instead settled upon an alternative ground for affirming the grant of summary judgment by the district court.[31]

An understanding of the significance of the holding of the instant case requires a comparison of the result that would obtain under the legal right doctrine with the probable result if *Data Processing* were found applicable. To demonstrate a legal right under the facts of *American Postal Workers,* plaintiff would be required to show that the postal statutes either conferred a privilege to sue, or evidenced a statutory intent to protect the plaintiffs.[32] The Sixth Circuit expressed the view that the postal statutes had not been enacted for the protection of a class which included

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30. 442 F.2d at 691. The *American Postal Workers* court implied, by its reliance on *Colligan* for the proposition that *Data Processing* was inapplicable in a suit between private parties, that *Colligan* did not apply the *Data Processing* test. This interpretation may have resulted from the statement in *Colligan* that *Data Processing* "does not bring these appellants under its protective wing." *Id.* For the view that the *Data Processing* test was indeed utilized in *Colligan, see* 72 COLUM. L. REV. 182, 187 (1972), wherein it was also noted that the *Data Processing* test was not strictly applicable. *Id.* at 187 n.37.

31. 481 F.2d at 93. The court held that the private express statutes involved did not provide a private right of action under the general rule that such an action is not maintainable under a criminal statute. *Id.* The concepts of standing, private right of action, and jurisdiction are closely related and often overlap in application. *See, e.g.,* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 42 U.S.L.W. 4132, 4137 (U.S. Jan. 9, 1974) (Douglas, J., dissenting).

The Sixth Circuit distinguished cases such as J.I. Case Co. v. Borak, 377 U.S. 426 (1964), in which an implied private cause of action for violation of a criminal statute was found. In *Borak,* the plaintiffs were clearly members of the public designed to be protected by the relevant statute, while in the instant case the court believed that it could not be "seriously contended that the Private Express Statute was enacted for the protection of a class which included the postal employees or a union representing them." 481 F.2d at 93. The *Letter Carriers* court also faced this issue. There the Tenth Circuit found that the plaintiff-postal workers' interests fell within the class which the private express statutes were designed to protect. 470 F.2d at 270–71. Relying on this finding, the court concluded both that the zone of interest test of *Data Processing* had been satisfied, and that the statute provided a private right of action. *Id.* It should be recognized that the Tenth Circuit approach effected a merger of the standing and private right of action doctrines on these facts. The Tenth Circuit held that the general rule with respect to denial of injunctive relief against violation of a criminal statute to be of "no moment" where property rights of an economic nature were threatened. *Id.* at 271. Additionally, the court stated that because civil as well as criminal provisions were involved, there existed a second rationale for finding a cause of action. These statutes, 39 U.S.C. §§ 601, 604 (1970), seem inapposite to the question of standing or the existence of a private right of action. Section 601 provides for a limited situation in which "letters" can be carried out of the mail. Section 604 permits certain officials involved in the inspection of postal materials to seize those materials which are being carried contrary to law.

32. *See* note 14 *supra.*

the postal employees or a union representing them.[33] Under this view, no legal right would exist and plaintiff would be denied standing to sue.[34]

Arguably, application of the zone of interest test of *Data Processing* would lead to the conclusion that plaintiff did have standing.[35] The Supreme Court made it clear in *Data Processing* that the existence of a legal right was not to be inquired into — that question went to the merits. The *Data Processing* standard requires only that plaintiff's interests be "arguably within the zone of interests to be protected or regulated."[36] This has been construed by at least one commentator to mean that an intention to protect may be found where a statutory limitation is favorable to the interest of the class seeking review.[37] The interest sought to be protected in *American Postal Workers* was the employment of the plaintiff's members in the Postal Service.[38] The constitutional and statutory provisions limiting competition were clearly favorable to that interest. Additionally, more affirmative proof of intent to protect was available to the court as evidenced in the district court opinion in the *Letter Carriers* case. While the primary purpose of the constitutional and statutory prohibitions was to promote an efficient postal operation, a secondary purpose could be found in related postal statutes relied upon by the plaintiff.[39] These provisions, which regulated employment opportunities and attempted to insure the economic security of the postal workers, expressed a congressional intent to protect those interests.[40] Even if this inferred intent to protect would not meet the rigorous legal right standard, it should have satisfied the liberal zone of interest test. Thus the significance of the Sixth Circuit's position is that it could operate to deny a plaintiff an opportunity to assert a claim against a private party for the same injury for which a claim would be heard under *Data Processing* if the actor were an administrative agency.

Analysis of the context in which *Data Processing's* immediate conceptual predecessors were decided indicates that the Sixth Circuit's limited reading of that case was justified. The treatment of standing by the Supreme Court as well as the lower federal courts has focused almost

33. 481 F.2d at 93. The court's statement referred to the question of whether a private right of action existed under the private express statutes, but as the concepts of "private right of action" and "legal right" are similar, the statement can be taken as the court's probable view on the existence or non-existence of a legal right. For the basis of this analysis, *see* note 31 *supra.*

34. Conceivably, the court could have found a legal interest, not by way of statutory protection per se, but by analogy to cases in which a legal right was found based on the grant of a public charter to the complaining competitor. *See, e.g.,* Frost v. Corporation Comm'n, 278 U.S. 515 (1929) (franchise granted by state constituted a property right within the meaning of the fourteenth amendment). The public charter cases and others involving competitors are exhaustively treated in Annot., 90 A.L.R.2d 7 (1963).

35. Of course, this is exactly what the Tenth Circuit held in the *Letter Carriers* case.

36. 397 U.S. at 153. *See* text accompanying note 18 *supra.*

37. *See* Jaffe, *Standing Again,* 84 HARV. L. REV. 633, 634 (1971).

38. 336 F. Supp. at 806.

39. *Id.*

40. *Id. See* note 22 *supra* for a discussion of the relevant statutory provisions.

exclusively on standing to challenge governmental illegality, and, very frequently, on standing to seek judicial review of administrative action.[41] The emergence of the law of standing in the realm of administrative law was necessarily influenced by the public policy of encouraging governmental responsiveness,[42] and was shaped by the congressional intent embodied in the Administrative Procedure Act (APA).[43] These factors were largely responsible for the evolution of the legal right theory into the test of *Data Processing*.[44] This evolution can be traced by examining three categories of cases: (1) "private attorney general" cases, (2) cases which held that a legal right was required under the APA, and (3) cases which held that a legal right was not required under the APA.

In the "private attorney general" cases standing to challenge governmental action was upheld despite the absence of a legal right. These cases were distinguished by the presence of an express "person aggrieved" provision in the relevant statute. The leading case was *FCC v. Sanders*

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41. Standing to seek review of administrative action is a sub-category of the broader law of standing to challenge governmental action which also includes challenges to illegal legislative action, such as taxpayer attacks on spending provisions and reapportionment issues. Recent cases in this area have significantly enlarged the scope of governmental action which can be challenged, by liberalization of standing rules. The Supreme Court has moved from the narrow view of Frothingham v. Mellon, 262 U.S. 447 (1923) (denying standing to taxpayers contesting federal appropriations for maternal and infant care), to the present view announced in Flast v. Cohen, 392 U.S. 83 (1968) (upholding taxpayer's standing to challenge federal educational appropriations to religious and sectarian schools). *See* Tucker, *The Metamorphosis of the Standing to Sue Doctrine*, 17 N.Y.L.F. 911, 911–20 (1972). This trend towards judicial activism through liberalization of standing requirements is also found in administrative law. *See* notes 42–43 *infra*.

42. Administrative agencies play an ever increasing role in the regulation of all aspects of daily life. *See* Rogge, *An Overview of Administrative Due Process*, 19 VILL. L. REV. 1, 1–2 (1973). In order for this role to be effectively and fairly performed, access to judicial review is essential, and a liberal approach to standing is necessary to achieve this goal. *See* Tucker, *supra* note 41, at 921. As with challenges to illegal legislative action (*see* note 41 *supra*), the trend has been from judicial abstention to judicial activism. *See* Tucker, *supra* note 41, at 921–22. *Compare* Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143 (1923) (denying plaintiff without a legal interest standing to challenge ultra vires agency action), *with* Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970).

43. 5 U.S.C. §§ 551–706 (1970). The APA has been construed to preserve the availability of judicial review unless Congress clearly has expressed an intent to preclude such review:

> The legislative material elucidating that seminal Act [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA's] "generous review provisions" must be given a "hospitable" interpretation.

Abbott Laboratories v. Gardner, 387 U.S. 136, 140–41 (1967) (citations omitted) (upholding pre-enforcement review of drug regulations). *See* Tucker, *supra* note 41, at 923. It should be recognized that reviewability and standing are separate and distinct concepts. In administrative review cases, standing may exist while judicial review is nevertheless foreclosed. This dichotomy is apparent in the analysis followed by the Supreme Court in *Data Processing* — once standing was found to exist, the Court proceeded to determine whether agency review had been foreclosed. 397 U.S. at 153–58. Under the Court's view the review provision of the APA is in 5 U.S.C. § 701 (1970), which provides generally that judicial review is authorized "except to the extent that — (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* For the substance of the APA's standing provision, *see* text accompanying note 50 *infra*.

44. *See* Tucker, *supra* note 41, at 923–26.

Brothers Radio Station[45] in which the Supreme Court granted standing to a plaintiff who was unable to demonstrate the infringement of a personal legal right. This seemingly anomalous result was apparently attributable to an express statutory provision for judicial review which the Court found applicable.[46] Subsequent cases in this category were consistent with *Sanders*,[47] and the rationale advanced for standing without a legal right where the relevant statute provided for judicial review was that "these private citizens have standing only as representatives of the public interest,"[48] *i.e.*, as "private attorneys general."[49]

In 1946, after the legal right and public interest doctrines were established, Congress enacted the APA. The standing provision of the APA, section 10(a), provides:

> Any person suffering legal wrong because of any agency action, or adversely affected by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.[50]

It appears that, based on the *Sanders* doctrine, the legal right doctrine would be inoperative in cases involving this provision. However, while section 10 was eventually to have a substantial impact on the law of standing,[51] initially it was interpreted by the courts as merely reflective of existing law.[52]

In 1970, the United States Court of Appeals for the District of Columbia, relying on section 10 of the APA, abandoned the legal right requirement. In *Scanwell Laboratories v. Shaffer*,[53] that court upheld a plaintiff's standing to challenge alleged illegality by the Federal Aviation Administration in letting a contract to a competitor. The plaintiff, denied standing in the district court, sought to obtain review under section 10 of the APA. The court held that a legal right was not required under sec-

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45. 309 U.S. 470 (1940). Petitioners in *Sanders* challenged the grant of a license to a new broadcasting station.

46. *See* K. DAVIS, *supra* note 14, at 221; Scanwell Laboratories v. Shaffer, 424 F.2d 859, 863 (D.C. Cir. 1970). Section 402(b)(2) of the Communications Act of 1934, ch. 652, § 402(b)(2), 48 Stat. 1093 (1934), *as amended* 47 U.S.C. § 402(b)(6)(1970), bestowed standing on persons "aggrieved or whose interests are adversely affected" by Commission action. For additional statutes containing such provisions, *see* K. DAVIS, *supra* note 14, § 22.03, at 213–16.

47. *See, e.g.*, Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942).

48. *Id.* at 14.

49. This rationale was explained in Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943):

> Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; . . . even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals (*sic*).

Id. at 704. In the absence of the necessary "person aggrieved" statute, the "private attorney general" rationale is inapplicable to *American Postal Workers*.

50. 5 U.S.C. § 702(a) (1970).

51. *See* Tucker, *supra* note 41, at 923.

52. Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955); *accord*, Rural Electrification Administration v. Northern States Power Co., 373 F.2d 686 (8th Cir. 1962).

53. 424 F.2d 859 (D.C. Cir. 1970).

tion 10.[54] While recognizing that the Supreme Court had not yet held that the APA negated this requirement,[55] the court nevertheless found that the trend of the cases interpreting the APA,[56] and its legislative history,[57] justified such a broad reading. The import of *Scanwell* to the analysis of *American Postal Workers* is that *Scanwell* demonstrates that the catalyst which moved the District of Columbia Circuit from the legal right doctrine to injury in fact as the only test of competitor standing was section 10 of the APA. Since section 10 is only available in administrative actions, not suits between private parties, it could not have served as a foundation for a liberal standing test in *American Postal Workers*.

Data Processing also utilized section 10 as the bridge to span the gap between the legal right test and the more liberal zone of interests test, although the *Data Processing* Court did not make that entirely clear.[58] However, language in a subsequent Supreme Court decision, *Sierra Club v. Morton*,[59] indicated that *Data Processing* was indeed an interpretation of the APA standing provision as well as a formulation of the constitutional case-and-controversy requirement:

> Early decisions under [section 10 of the APA] interpreted the language as adopting the various formulations of "legal interest" and "legal wrong" then prevailing as constitutional requirements of standing. But, in [*Data Processing*] we held more broadly that persons had standing to obtain judicial review of federal agency action *under § 10 of the APA* where they had alleged that the challenged action had caused them "injury in fact," and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated.[60]

54. *Id.* at 872.

55. *Id.*

56. *See, e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136 (1970). The court found *Abbott Laboratories* to be indicative of the "hospitable" view which the Supreme Court took of section 10. 424 F.2d at 872. While the statements from *Abbott Laboratories* (*see* note 43 *supra*) were actually made in the context of reviewability, the case nevertheless indicates the Court's intent to construe section 10 broadly. *Cf.* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.00–5, at 727 (Supp. 1970). The *Scanwell* court also relied heavily on *Sanders*, stating that the only difference between that case and those requiring a legal right was the express statutory provision in *Sanders* granting judicial review. Based on this distinction, the court concluded that:

> [T]he "legal right" doctrine is certainly dead wherever there is express "person aggrieved" language in the relevant statute, and there is a strong argument for the proposition that the same result should obtain when section 10 of the Administrative Procedure Act applies.

424 F.2d at 863.

57. The legislative history of section 10 is the basis of the current controversy over whether that provision requires merely a showing of injury in fact, or requires in addition proof of a statutory intent to protect. *Data Processing* adopted the latter view. However, Justices Brennan and White argued convincingly for the adoption of injury in fact as the sole requirement of standing under section 10. Barlow v. Collins, 397 U.S. 159, 177–78 (1970) (Brennan & White, JJ., concurring in the result and dissenting). The commentators are split. *See, e.g.*, K. DAVIS, *supra* note 56, § 22.00–5; Dugan, *supra* note 7; Jaffe, *supra* note 37, at 636.

58. The Court's discussion of the APA focused on reviewability. 397 U.S. at 156–57. There is but one cryptic reference to section 10, following the language setting forth the zone of interest test. *Id.* at 153.

59. 405 U.S. 727 (1972) (denying standing to environmental organization where no injury in fact had been alleged).

60. *Id.* at 733 (citations omitted) (emphasis added).

The above analysis demonstrates that the zone of interests test evolved in the context of administrative law, and that it is at least in part an interpretation of the APA. However, the question of whether the test could nevertheless be applied where only private parties are involved remains. Any requirement beyond injury in fact is not a constitutional necessity, and for this reason courts have some leeway in determining what rule of self-restraint, if any, should apply in a particular category of cases.[61] The District of Columbia Circuit recently employed this approach in *Potomac Passengers Association v. Chesapeake & Ohio Ry.*[62] That appeal presented, in part, the question of whether an association of passengers had standing to seek injunctive relief against violations of the Rail Passenger Service Act of 1970.[63] At the outset the court was confronted with a situation analogous to that found in *American Postal Workers.* The applicable standing doctrines had developed solely in the context of determining who could challenge governmental action, but the defendant Amtrak was not an agency or instrumentality of the federal government.[64] After noting that *Data Processing* was at least in part an interpretation of the standing requirements under the APA,[65] the court framed the issue as follows: Should the *Data Processing* test govern standing to sue a corporation that was neither an agency of the federal government nor subject to the APA?[66] The court concluded that it should since the rationale for liberal standing requirements in the area of administrative law — insuring the integrity of federal regulatory programs — extended to government created corporations.[67]

It is questionable whether the Sixth Circuit could have pointed to a public policy rationale, similar to that found in *Potomac Passengers,* to justify application of a liberal standing test. The action in *American Postal Workers* was not brought against an organization of a public nature as in *Potomac Passengers.* However, it could be argued that the public interest in an efficient postal system would preclude encroachment upon the United States postal monopoly by the Independent Postal System.

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61. *See* the discussion with respect to the controversy over whether a rule of self-restraint is necessary under section 10, note 57 *supra.*

62. 475 F.2d 325 (D.C. Cir. 1973), *rev'd sub nom.,* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 42 U.S.L.W. 4132 (U.S. Jan. 9, 1974) (No. 72-1289). The Supreme Court's recent decision reversing *Potomac Passengers* does not affect the significance of the textual discussion of that case. The Court's reversal was couched in terms of an absence of a right of action rather than standing. The Court did not speak to the circuit court's application of *Data Processing.*

63. 45 U.S.C. §§ 501 *et seq.* (1970). This legislation is commonly referred to as the Amtrak Act. Appellants contended that the procedure followed in the discontinuance of certain lines violated sections 404(a) and 802 of the Amtrak Act. 45 U.S.C. §§ 564(a), 642 (1970).

64. 475 F.2d at 329. The Amtrak Act specifically so provides. *See* 45 U.S.C. § 541 (1970).

65. *Id.*

66. *Id.* at 330.

67. *Id.* The court also noted that the corporation was in fact "quasi-public" because, *inter alia,* the President appoints a majority of the board of directors, the initial financing came from the United States Treasury, and government guaranteed bonds continue to finance it. *Id.*

A concomitant of such interference might be a reduction in both postal revenues and employee morale, leading to a drop in the quality of service. On the other hand, however, the public interest might be served by competition — reduction in revenues might be negligible, and the efforts of the Postal System might be stimulated by improvements in postal service pioneered by competitors. The effect of denying standing was to leave this question of whether competition in the postal business did or did not serve the public interest in the hands of the Attorney General.

The split between the Sixth and Tenth Circuits might best be explained by recognizing the policy considerations evinced by the two courts. The Sixth Circuit saw no substantial harm to the plaintiff (at one point the court suggested that the harm was de minimis and for that reason alone standing could be denied)[68] which would justify an intrusion into what the court believed to be solely the domain of the Attorney General. The Tenth Circuit focused on the finding of the district court that there would be significant economic detriment to the postal employees if competition were to continue.[69] Both courts' consideration of standing may have been shaped by their respective perceptions of the harm involved.

Whatever the reason for the contrary results, the Supreme Court must face the basic issue in the cases — the right of the postal employees to challenge the intrusion of the Independent Postal System into the postal business. The Court can resolve this issue by either responding to the standing question, or by deciding that no private right of action exists under the postal statutes. The former approach could result in an opinion of broad application, either restricting or expanding the doctrine of standing. The latter approach would result in an opinion more limited in scope, concerning only the right of postal employees to sue under the postal statutes. The Court will likely pursue this private right of action course, as it did in *Potomac Passengers,* and leave the circuit courts further time to thrash out this "complicated specialty of federal jurisdiction."

Michael S. Burg

68. 481 F.2d at 92.
69. 470 F.2d at 270.