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Administrative Law - Administrative Procedure Act - Standing to Challenge Agency Action Requires a Showing That the Plaintiff Has Suffered Injury in Fact to a Protected Interest from the Face of the Particular Statutory Provision Allegedly Violated, or When Protective Intent is Clear from Its Legislative History

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Recent Developments

**Administrative Law — Administrative Procedure Act — Standing To Challenge Agency Action Requires a Showing That the Plaintiff Has Suffered Injury In Fact to a Protected Interest From the Face of the Particular Statutory Provision Allegedly Violated, or When Protective Intent Is Clear From Its Legislative History.**

*Tax Analysts & Advocates v. Blumenthal (D.C. Cir. 1977)*

Tax Analysts and Advocates (TAA), a nonprofit corporation organized to promote tax reform, and Thomas F. Field, executive director of TAA, sought a declaratory judgment that certain published and private rulings of the Internal Revenue Service (IRS) allowing tax credits for payments made to foreign nations by domestic corporations operating abroad in the area of oil extraction and production were contrary to section 901 of the Internal Revenue Code (Code) and therefore unlawful. Both TAA, as the representa-

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1. Tax Analysts and Advocates, at the time of this action, represented over 175 individual financial supporters. Tax Analysts & Advocates v. Simon, 390 F. Supp. 927, 929 (D.D.C. 1975). A stated purpose of the organization was to ensure that the Internal Revenue Service (IRS) properly applied the Internal Revenue Code (Code) and did not grant favorable tax treatment to special interest groups beyond that which the IRS could lawfully provide. *Id.* at 929.

2. Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 134 (D.C. Cir. 1977), *cert. denied*, 46 U.S.L.W. 3527 (Feb. 21, 1978). The plaintiffs also sought a permanent injunction requiring the IRS to withdraw the rulings and collect taxes from the oil companies for all periods not barred by the statute of limitations where foreign credits were taken pursuant to the rulings. *Id.* at 134.

The defendants in the instant case were the Secretary of the Treasury and the Commissioner of Internal Revenue (Commissioner), who were sued in their official capacities. *Id.* at 134 n.7.


4. I.R.C. § 901(a), (b) (amended 1976). Section 901 provides in pertinent part:
   
   *(a) Allowance of credit — If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall... be credited with the amounts provided in the applicable paragraph of subsection (b)...

   (b) Amount allowed — The following amounts shall be allowed as the credit under subsection (a):

   1. Citizens and domestic corporations — In the case of a... domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country...

   *Id.* Section 901 allows qualified domestic corporations to claim a tax credit for income taxes paid or accrued during the taxable year to any foreign country. *Id.* No credit is allowed for the payment of mineral royalties, excise taxes, severance taxes, or similar payments to foreign governments. *Id.* Plaintiffs contended that the payments made by the American companies to foreign nations were not creditable taxes within the meaning of § 901(b). 566 F.2d at 135. The complaint alleged that the payments were calculated on a fixed per barrel basis and, although denominated as income taxes, they were actually royalties paid for the right to extract oil from the land or excise, severance, or similar noncreditable taxes. 390 F. Supp. at 930. Excise taxes, severance taxes, and royalty payments are ordinary business expenses which may be deducted from gross income, but which cannot be used to offset tax liability. 566 F.2d at 135. 

   *See generally* I.R.C. § 162 (amended 1976). Plaintiffs averred that the loss to the United States Treasury as a result of this distinction was three billion dollars in 1974. 566 F.2d at 134 n.10.

5. 566 F.2d at 134. The action was based on § 10 of the Administrative Procedure Act, which provided: "A person suffering legal wrong because of agency action, or
RECENT DEVELOPMENTS

tive of its membership, and Field, as an individual taxpayer, claimed to have standing to sue as federal taxpayers. Field further contended that he had standing as a competitor, based on his status as the owner of the entire working interest in a domestic oil well. The district court dismissed the complaint, having determined that the plaintiffs lacked standing to bring the action. The United States Court of Appeals for the District of Columbia affirmed, holding that the plaintiffs lacked standing to sue as federal taxpayers because they had suffered no judicially cognizable injury in that capacity. The court further concluded that Field lacked standing to sue in his capacity as the owner of a domestic oil well because, while suffering economic injury as a competitor engaged in oil extraction and production, he failed to assert an interest that fell within the "zone of interests" protected by the relevant provisions of the Code. Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130 (D.C. Cir. 1977).

The doctrine of standing to sue is derived from limitations imposed on federal courts by the "case or controversy" requirement of article III of the Constitution. A plaintiff must show that he is "adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Administrative Procedure Act, Pub. L. No. 89-554, ch. 7, § 702, 80 Stat. 378 (1966) (current version at 5 U.S.C. § 702 (1976)). See note 25 infra.

6. 566 F.2d at 134. Plaintiffs claimed a "personal pecuniary interest in requiring that the IRS assess and collect taxes owed by other taxpayers to the fullest possible extent under the provisions of the Code." Id. at 134 n.10. Field and TAA alleged that this interest had been injured by the higher federal income tax burden they had to assume as a result of the defendants' failure to tax this foreign oil production income.

7. Id. at 134 & n.6. Field's oil well was located in Venango County, Pennsylvania. 390 F. Supp. at 929. According to the purchase agreement, Field paid the owner of the land on which the well was located a fixed royalty payment for the right to extract the oil. Id. These payments were deductible from Field's gross income but could not be credited against his tax liability. Id. at 931. Field contended that he competed in the domestic oil market with those companies which had been granted favorable tax treatment by the Commissioner. Id. at 929. As a competitor, Field claimed that the Code granted him a "protected interest in competitive fairness and equity in matters of federal taxation" which had been injured by the IRS rulings. 566 F.2d at 136. Specifically, he alleged that the rulings resulted in his loss of potential income from the sale of domestically produced oil. Id. at 136-37. Since prices charged by international companies largely determined the domestic market price for crude oil, the favorable tax treatment afforded these companies enabled them to sell their foreign oil at lower prices in the United States. Id. As a result of these rulings, Field also asserted that the value of foreign oil investments were increased since they yielded higher returns, while the value of similar domestic investments were decreased. Id.

8. 390 F. Supp. at 932, 942. The district court found that the plaintiffs lacked standing as federal taxpayers since theirs was a generalized grievance common to the taxing public. Id. at 932–33. The lower court also concluded that plaintiff Field failed to establish that he had been injured economically as a result of the rulings since the market price of oil produced at his well had increased steadily over the years. Id. at 942. Finally, the court determined that Field had failed to assert an interest that fell within the "zone of interests" protected by the relevant provisions of the Code. Id. See note 50 infra.

9. 566 F.2d at 134. The D.C. Circuit adopted the reasoning of the district court as to the disposition of the issue of federal taxpayer standing. Id. at 134 & n.10. See note 47 infra.

10. 566 F.2d at 134–35.
Constitution, and by rules of self-restraint adopted by the judiciary as prudential limitations on the exercise of federal power. The minimum constitutional requirement that the litigant allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues," coupled with judicial policy limitations, effectively operates to bar the use of the federal courts as a forum for the airing of generalized grievances about the conduct of the government.

Flast v. Cohen marked a departure from the long standing bar to taxpayer suits challenging the constitutionality of federal taxing and spending programs. In Flast, the plaintiffs asserted an injury to their

12. Warth v. Seldin, 422 U.S. 490, 498 (1975). In Warth, the Court stated: "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. The inquiry involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise." Id. at 498. It is generally agreed that actual or threatened injury to an interest of the plaintiff is required to satisfy article III limitations. Id. at 499. However, prudential limitations are not constitutional requirements but rather restrictions imposed by the Supreme Court in its supervisory power over the federal judiciary. Id. at 499-501; 566 F.2d at 137.

The courts, however, often fail to distinguish adequately between minimum constitutional requirements and standing limitations based on rules of judicial self-restraint. See Davis, The Liberalized Law of Standing, 37 U. CHI. L. REV. 450, 468-70 (1970); Comment, Federal Standing: 1976, 4 HOFFSTRA L. REV. 383, 384, 414 (1976) [hereinafter cited as Federal Standing]. Prudential limitations operate to bar a plaintiff from asserting a "generalized grievance" against governmental conduct. Warth v. Seldin, 422 U.S. at 499. However, in Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), the Court held: [S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. Id. at 220-21. The Court concluded that abstract injury did not satisfy the minimum constitutional requirements of article III. Id. at 218-19. Thus, in Schlesinger, denial of standing to plaintiffs asserting "generalized grievances" was framed in terms of constitutional limitations, and not as a rule of judicial self-restraint as in Warth. Id.; see 422 U.S. at 499-500.

Although Congress may remove prudential limitations by statute, the plaintiff must still meet the article III requirement of an injury in fact. 422 U.S. at 501. While Congress cannot confer standing in violation of this constitutional limitation, it can create legal rights not existing without the statute. Id. at 501-02. If the congressional intent to do so is clear, the invasion of these statutorily created legal rights may confer standing. Id. Thus, Congress may affirmatively act to increase judicially cognizable injuries. See Comment, Recent Standing Cases and a Possible Alternative Approach, 27 HASTINGS L.J. 213, 215 (1975) [hereinafter cited as Alternative Approach].

16. See Frothingham v. Mellon, 262 U.S. 447 (1923). In Frothingham, a taxpayer challenged the constitutionality of the Maternity Act of 1921, ch. 135, 42 Stat. 224, which authorized federal appropriations to reduce infant and maternal mortality. 262
interests as taxpayers to challenge the constitutionality of a statute[17] authorizing the allocation of federal funds to support educational programs in parochial schools.[18] In deciding the standing issue, the Court formulated a two-part "nexus test,"[19] which required consideration of the substantive issues to determine whether there was a logical nexus between the status asserted by the plaintiff and the claim sought to be adjudicated.[20] The first requirement of the test was that the plaintiff challenge a statute which had been enacted pursuant to the taxing and spending clause of the Constitution.[21] Secondly, it was necessary to allege a violation of a specific constitutional limitation on congressional taxing and spending power.[22] Since the Court determined that the establishment and free exercise clause of the first amendment[23] operated as a specific limitation on Congress' taxing and spending authority, the nexus test was satisfied and the plaintiff was found to have the necessary personal stake in the outcome of the controversy to establish standing.[24]

U.S. at 479. Mrs. Frothingham alleged that the Maternity Act was unconstitutional as it infringed on powers reserved to the states by the tenth amendment. Id. at 479–80. In addition, she asserted that the statute deprived her of property without due process of law by unlawfully increasing her federal tax burden. Id. In a unanimous opinion written by Justice Sutherland, the Court denied standing and held that Mrs. Frothingham had not suffered a direct injury, actual or threatened, as a result of the Maternity Act. Id. at 488. While recognizing that the Court had previously determined that local taxpayers had standing to bring suit against municipalities to enjoin alleged unlawful expenditures, the Court concluded that Mrs. Frothingham's insignificant share in a "remote, fluctuating and uncertain" federal tax burden did not provide the concrete injury necessary for standing. Id. at 486–88 (citations omitted). As stated by the Court: "The administration of any statute, likely to produce additional taxation to be imposed on a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern." Id. at 487.

18. 392 U.S. at 85.
19. Id. at 102. The Flast Court stated that in order to establish standing, a taxpayer must "establish a logical link between [his] status and the type of legislative enactment attacked. . . . [T]he taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." Id. Therefore, taxpayer suits were limited to challenges to statutes enacted under the taxing and spending clause, U.S. Const. art. I, §8. See United States v. Richardson, 418 U.S. 166, 175 (1974).

The Court in Flast never distinguished those constitutional provisions which are specific limitations on the taxing and spending power from those which are not. 392 U.S. at 105. See Comment, Taxpayer Standing to Litigate, 61 Geo. L.J. 747, 764 (1973). However, the Court distinguished Frothingham v. Mellon, 262 U.S. 447 (1923), by noting that the fifth and tenth amendments, which formed the basis of Mrs. Frothingham's challenge, failed to qualify as specific limitations on the taxing and spending power of Congress. 392 U.S. at 105. Thus, in Frothingham, the second part of the nexus test would not have been satisfied. Id.

20. 392 U.S. at 102–03.
21. Id. at 102, citing U.S. Const. art. I, §8.
22. 392 U.S. at 102–03.
23. U.S. Const. amend. I.
24. 392 U.S. at 105–06.
In 1970, a test for determining standing for claims based on challenges to agency action under section 10 of the Administrative Procedure Act (APA) was formulated by the Court. In Association of Data Processing Service Organizations, Inc. v. Camp, private companies engaged in the sale of computer services challenged rulings by the Comptroller of the Currency which allowed national banks to provide data processing services to their customers. The plaintiffs contended that the resulting increased competition in the computer service industry would result in a loss of future customers and profits. The Court developed a two-part test for establishing standing which required: 1) an allegation of injury in fact to the plaintiff; and 2) that the interest sought to be protected by the plaintiff is arguably within the "zone of interests" to be protected or regulated by the statute in question. The Court stated that economic injury resulting from increased competition satisfied the first requirement of injury in fact. In addition, the

25. Administrative Procedure Act, Pub. L. No. 89-554, ch. 7, § 702, 80 Stat. 378 (1966) (current version at 5 U.S.C. § 702 (1976)). Section 10 of the APA provided: "A person suffering legal wrong 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." Id.

In order to have a claim based on § 10, a plaintiff must allege that official agency action caused injury to an interest falling within the scope of protection of a federal statute. See Scott, Standing in the Supreme Court — A Functional Analysis, 86 Harv. L. Rev. 645, 668 (1973). A "statutory standing" case, by comparison, involves a statute which not only creates a "protected interest," but also expressly provides for judicial review for those claiming an injury to that interest. See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). See generally Federal Standing, supra note 12; Note, Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals, 88 Harv. L. Rev. 980 (1975).

26. See Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). Justice Douglas, writing for the Court in Data Processing, observed: "Flast was a taxpayer's suit. The present is a competitor's suit. And while the two have the same Article III starting point, they do not necessarily track one another." 397 U.S. at 152 (emphasis in original).

28. Id. at 151.
29. Id. at 152.
30. Id. at 152–53. The "zone of interests" test reflects the Court's effort to limit judicial review of agency action through a self-imposed rule of restraint. See note 12 supra. For a discussion of the difficulties in applying the zone test, see Davis, supra note 12, at 472; Comment, Judicial Review of Agency Action: The Unsettled Law of Standing, 69 Mich. L. Rev. 540, 555–60 (1971).

Justice Brennan, joined by Justice White, concurred in the results of Data Processing and Barlow, but would have held that injury in fact was the only requirement for standing. Barlow v. Collins, 397 U.S. 168, 169 (1970) (Brennan, J., concurring and dissenting). Justice Brennan noted that the "zone of interests" test involves an inquiry into the merits of a case which distorts the analytical basis of the standing doctrine. Id. at 168–70 (Brennan, J., concurring and dissenting). In his view, a determination of congressional intent to protect the interests of the plaintiff falls within the ambit of the law of reviewability, a concept distinct from the law of standing. Id. at 169 (Brennan, J., concurring and dissenting) (emphasis in original).

Justice Brennan indicated that his test for reviewability would be a flexible one: only "slight indicia that the plaintiff's class is a beneficiary" of the statute would be necessary, and the fact that the plaintiff would be the only party likely to challenge the action would be considered by the Court. Id. at 174–75 (Brennan, J., concurring and dissenting).

31. 397 U.S. at 152.
plaintiff's competitive interests were arguably within the zone of interests to be protected by the Bank Service Corporation Act and the National Bank Act, which were determined to be "relevant" statutes within the meaning of section 10 of the APA.

In subsequent standing cases, application of the Data Processing test resulted in a significant expansion of the categories of judicially cognizable injuries sufficient to confer standing. However, the Supreme Court abruptly reversed this apparent liberalization of the standing doctrine. In Barlow v. Collins, a group of cash-rent tenant farmers challenged an amended agriculture regulation which permitted landlords to demand the assignment of the farmers' government benefits as a condition to obtaining leases to work the land. The Court determined that the landlords' high prices and interest rates resulted in economic harm to the farmers. The amended regulation was promulgated pursuant to the Soil Conservation and Domestic Allotment Act, and was incorporated in part into the Food and Agriculture Act of 1965. The Court found protective intent primarily from other statutory provisions which required that the Secretary generally protect the interests of tenant farmers.

After reviewing the legislative history of all the provisions, the Barlow Court concluded: "[T]he tenant farmers are clearly within the zone of interests protected by the Act." The Court also reviewed §4 of the Bank Service Corporation Act, to establish the necessary protective intent. The Court dismissed the defendant's argument that §4 was irrelevant since it applied to bank service corporations, not national banks, by noting that the legislative history of §4 indicated a fear that banks in general would engage in nonbanking activity. The Court also reviewed §4 of the Bank Service Corporation Act, to establish the necessary protective intent.

34. 397 U.S. at 157. The plaintiffs alleged that the Comptroller's ruling violated that part of the National Bank Act which gives national banks only "such incidental powers as shall be necessary to carry on the business of banking." Id. at 157 & n.2. In its analysis, however, the Court also reviewed §4 of the Bank Service Corporation Act, 12 U.S.C. § 1864 (1976), to establish the necessary protective intent. The Court dismissed the defendant's argument that §4 was irrelevant since it applied to bank service corporations, not national banks, by noting that the legislative history of §4 indicated a fear that banks in general would engage in nonbanking activity. Id. at 155-56. Justice Douglas, writing for the Court, concluded: "The Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable." Id. at 157.

In Barlow v. Collins, a group of cash-rent tenant farmers challenged an amended agriculture regulation which permitted landlords to demand the assignment of the farmers' government benefits as a condition to obtaining leases to work the land. The Court noted that by assigning the benefits, the farmers had to rely exclusively on the landlords for the financing of food, clothing and tools as they lacked cash and credit prior to the harvesting of their crops. Consequently, the Court determined that the landlords' high prices and interest rates resulted in economic harm to the farmers. Id.

The amended regulation was promulgated pursuant to the Soil Conservation and Domestic Allotment Act, and was incorporated in part into the Food and Agriculture Act of 1965. The Court found protective intent primarily from other statutory provisions which required that the Secretary generally protect the interests of tenant farmers. Id. See 7 U.S.C. § 1444d(10) (1976); 16 U.S.C. § 590h(b) (1976).

After reviewing the legislative history of all the provisions, the Barlow Court concluded: "[T]he tenant farmers are clearly within the zone of interests protected by the Act." 397 U.S. at 164. See Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 YALE L.J. 425, 433 & n.322 (1974); Stewart, The Reformulation of American Administrative Law, 88 HARV. L. REV. 1669, 1732 & n.310 (1975).

35. See, e.g., United States v. SCRAP, 412 U.S. 669, 686 & n.13 (1973) (economic, recreational and aesthetic harm are judicially cognizable injuries); Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (environmental well-being).
37. See Alternative Approach, supra note 12, at 222. One year after the Data Processing decision, the Supreme Court again had the occasion to apply the "zone of
Schlesinger v. Reservists Committee to Stop the War\textsuperscript{38} and United States v. Richardson,\textsuperscript{39} the Court relied on the nexus test of Flast to deny standing to plaintiffs who failed to establish a logical connection between their status as taxpayers and the constitutional provisions at issue.\textsuperscript{40} In addition, the Court adopted the view in both cases that the federal judiciary should exercise restraint on matters of general public interest as a prudential limitation on interests” test. In Investment Co. Inst. v. Camp, 401 U.S. 617 (1971), investment companies challenged a ruling by the Comptroller of the Currency which allowed commercial banks to operate investment funds, allegedly in violation of the Glass-Steagall Banking Act of 1933, ch. 89, 48 Stat. 162 (codified in scattered sections of 12 U.S.C.). 401 U.S. at 619. The Court, relying on Data Processing, concluded that the plaintiff’s competitive interests were within the zone of interests to be protected by the Act. Id. at 620–21. As Justice Harlan noted in his dissent, however, the objective of the Glass-Steagall Act was to protect the financial stability of national banks, not to protect private companies from competitive injury. Id. at 639–41 (Harlan, J., dissenting).

The decision in Investment Co. Inst. led courts and commentators to suggest that the zone test was a flexible standard which should be liberally applied. Albert, supra note 34, at 471; Sedler, Standing, Justiciability, and All That: A Behavioral Analysis, 25 VAND. L. REV. 479, 486 (1972). See Florida v. Weinberger, 492 F.2d 488 (5th Cir. 1974); William F. Wilke, In re Department of the Army of the United States, 485 F.2d 180 (4th Cir. 1973); Merriam v. Kunzig, 476 F.2d 1233 (3rd Cir.), cert. denied, 414 U.S. 911 (1973); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972). See also note 87 infra.

Between the Data Processing and Investment Co. Inst. decisions, the Supreme Court had yet another opportunity to apply the “zone of interests” test. In Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970), private travel agents challenged a ruling by the Comptroller of the Currency, issued pursuant to the National Bank Act, 12 U.S.C. § 24 (1976), which authorized national banks to provide travel services to their customers. 400 U.S. at 45. Relying again on § 4 of the Bank Service Corporation Act, 12 U.S.C. § 1864 (1976), to establish the necessary scope of protection for their competitive interests, the plaintiffs were found to have standing to litigate their claims. 400 U.S. at 46. See note 34 supra.

40. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974); United States v. Richardson, 418 U.S. 166, 175 (1974). In Schlesinger, plaintiffs claiming standing as reservists, citizens, and taxpayers sought to enjoin the Secretary of Defense from permitting members of Congress to retain their reserve officer commissions. 418 U.S. at 211. The plaintiffs alleged that the dual responsibilities exposed the congressmen to possible conflicts of interest and undue influences from the executive branch, and violated the incompatibility clause of the Constitution. Id. This clause provides: “[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” U.S. CONST. art. I, § 6, cl. 2.

The Court dismissed claims by the plaintiffs based on their status as citizens by determining that the only interest and injury asserted was a generalized grievance common to the public. 418 U.S. at 218–22. Therefore, the Court stated that the plaintiffs had failed to establish the minimum constitutional requirement of concrete injury. Id. See note 12 and accompanying text supra.

The Court then addressed the claim of taxpayer standing and held that the plaintiffs had failed to satisfy the “nexus test” of Flast v. Cohen, 392 U.S. 83 (1968). 418 U.S. at 228. See note 19 supra. The Court stated that by not challenging an expenditure authorized by a statute enacted pursuant to under the the taxing and spending clause, U.S. CONST. art. I, § 8, the plaintiffs had failed to establish a logical connection between their status as taxpayers and the asserted claim. 418 U.S. at 228.

The district court, applying the zone test of Data Processing, had granted standing to the plaintiffs based on their status as citizens. Reservists Comm. to Stop
standing. In *Warth v. Seldin*, the Supreme Court denied standing to each of several categories of plaintiffs who challenged the constitutionality of a local zoning ordinance which would have had an allegedly exclusionary impact on low income groups. The *Warth* Court determined that the plaintiffs did not suffer a concrete injury and, therefore, lacked the necessary personal stake in the outcome of the controversy to invoke federal jurisdiction. This decision by the Supreme Court has prompted much


In *Richardson*, standing was denied to plaintiffs who asserted their status as citizens and taxpayers to challenge the constitutionality of the Central Intelligence Act of 1949, 50 U.S.C. §§ 403a-i (1970). United States v. Richardson, 418 U.S. 166, 168 (1974). To preserve the secrecy of the Central Intelligence Agency (CIA) budget, the Act permitted certain interagency transfers of funds and authorized the CIA to account for expenditures "solely on the certificate of the Director," 50 U.S.C. § 403(b) (1970); 418 U.S. at 169. The plaintiffs alleged that the Act violated the statements and accounts clause of the Constitution, which provides: "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. Const. art. I, § 9, cl. 7. 418 U.S. at 167-68. Relying again on *Flast v. Cohen*, 392 U.S. 83 (1968), the Court held that a taxpayer will have standing only when he challenges an expenditure authorized by a statute enacted pursuant to the taxing and spending clause, U.S. Const. art. I, § 8, and only if a specific constitutional limitation on this taxing and spending power is allegedly violated. 418 U.S. at 175. Since the plaintiffs challenged statutes regulating the accounting and reporting practices of the CIA, not specific constitutional limitations on the taxing and spending power of Congress, the Court held that the *Flast* "nexus test" was not satisfied. *Id.* In addition, the Court noted that the plaintiffs were asserting a "generalized grievance against governmental conduct," rather than a particular concrete injury. *Id.* at 175-77.

In a concurring opinion in *Richardson*, Justice Powell observed: "Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." *Id.* at 188 (Powell, J., concurring) (footnote omitted).


42. 422 U.S. 26, 44 (1976). In *Eastern Ky.*, the Court held that the asserted injury to the plaintiff must be one that was "caused" by agency action and is "likely to be redressed by a favorable decision." *Id.* at 38-39.
criticism among commentators\textsuperscript{45} and has further confused the nebulous concept of standing.\textsuperscript{46}

It was against this historical framework that the D.C. Circuit began its analysis of the standing claims of Field and TAA. The court adopted the reasoning of the district court\textsuperscript{47} which determined that the plaintiffs had not suffered a judicially cognizable injury in their capacity as federal taxpayers.\textsuperscript{48} Since the plaintiffs had failed to satisfy this basic constitutional requirement of injury in fact, the D.C. Circuit summarily dismissed the standing claims of Field and TAA that were based on their status as taxpayers.\textsuperscript{49}

Turning to Mr. Field's standing claim based on his interests as an independent domestic oil producer, the court stated that he had suffered economic injury in his capacity as a competitor.\textsuperscript{50} The majority noted that

\begin{itemize}
\item 46. Justice Frankfurter has called the doctrine of standing a “complicated specialty of federal jurisdiction.” United States ex rel. Chapman v. Federal Power Comm’n, 345 U.S. 153, 156 (1953). In 1970, one court observed:
  
  Standing has been called one of the most amorphous concepts in the entire domain of the public law . . . .

  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 plaintiffs contended that standing was satisfied so long as a clear causal relationship was alleged between the challenged rulings and their injuries as taxpayers. Id. at 932. The district court rejected this argument and held that the injury suffered by the plaintiffs was a general, undifferentiated injury incurred by all taxpayers. Id. at 936. The lower court then concluded that the plaintiffs failed as taxpayers to satisfy the nexus test of Flast. Id. at 937. Specifically, the court noted that the plaintiffs did not challenge a congressional statute enacted pursuant to the taxing and spending clause, U.S. Const. art. I, § 8, but alleged an injury caused by administrative rulings of the executive branch. 390 F. Supp. at 937. In addition, there was no allegation that the illegal action was in derogation of a specific constitutional limitation on Congress' taxing and spending power. Id. at 935.

  The district court rejected the plaintiffs' claims of taxpayer standing based on § 10 of the APA, Pub. L. No. 89-554, ch. 7, § 702, 80 Stat. 378 (1966) (current version at 5 U.S.C. § 702 (1976)) (see note 5 supra), by noting that this section had never been construed to be an exception to the Flast doctrine. 390 F. Supp. at 937. The court stated that the APA did not confer standing on a party who had no basis for bringing a suit other than his status as a federal taxpayer. Id. Even if the APA did apply, the district court concluded that the two-pronged test of Data Processing was not met. Id. First, no injury in fact was alleged since the harm suffered by the plaintiffs was a generalized grievance common to all members of the taxing public. Id. Second, the “zone of interests” test was not satisfied since the plaintiffs had failed to demonstrate a statutory provision of the Code which provided support for their standing as taxpayers. Id. The district court noted that the plaintiffs could not rely on the fundamental policy of the Code — equity in matters of federal taxation — to evince a congressional intent to protect their interests as taxpayers. Id.

  48. 566 F.2d at 134 & n.10.

  49. Id. Under Warth v. Seldin, 422 U.S. 490 (1975), a court must accept as true all material allegations of the complaint when ruling on a motion to dismiss for lack of standing. Id. at 501. Therefore, the D.C. Circuit assumed that the IRS had unlawfully allowed a tax credit for payments to foreign nations by companies engaged in oil extraction and production abroad. 566 F.2d at 135-36.
\end{itemize}
the crucial inquiry was not into the magnitude of the harm, but rather whether the plaintiff has alleged "a distinct and palpable injury to himself." Since this constitutional requirement was satisfied, the court examined the plaintiff's claim in light of the "zone of interests" test formulated in Data Processing and concluded that Field lacked standing as a competitor to challenge the IRS rulings. The court observed that the zone test serves no individual purpose, but rather supports the general policies of the standing doctrine to ensure the complete adversarial presentation of issues to the court and to limit the role of the courts in a democratic society.

Crucial to the court's denial of standing to Mr. Field was an evaluation of the particular methods that courts should employ in order to discern congressional intent to protect the interests of the litigant. Judge Wilkey, writing for the majority, indicated that difficulties with the zone test often arise during the court's determination of which statutory provisions to examine for evidence of protective intent, and of the role of legislative history in the court's analysis.

The majority stated that the examination of the statute should be limited to the specific provision which formed the basis for the lawsuit.

50. 566 F.2d at 138. The district court held that Field had suffered no injury in fact as a competitor since the price per barrel for oil produced from his well had increased significantly in the years prior to this action. 390 F. Supp. at 942. In addition, Field offered no evidence that the value of his investment had decreased. Id. 51. 566 F.2d at 138, quoting Warth v. Seldin, 422 U.S. 490, 501 (1975). The Supreme Court had determined in 1972 that an "identifiable trifle" was a sufficient injury to satisfy the minimum constitutional requirement for standing. United States v. SCRAP, 412 U.S. 669, 689 & n.14 (1972).

52. See notes 27-34 and accompanying text supra.

53. 566 F.2d at 143. The majority prefaced its discussion of the "zone of interests" analysis with an observation that there was doubt in some courts as to the current validity of this test. Id. at 139, citing Florida v. Weinberger, 492 F.2d 488 (5th Cir. 1974) (zone test ignored); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1212 n.4 (8th Cir. 1972) (only a showing of "injury in fact" is necessary for standing); Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1235 (10th Cir. 1971) (APA evinces congressional intent to protect citizens from harmful agency action), vacated, 409 U.S. 1021 (1972). Moreover, the court noted that the most common pattern is to "announce in conclusory terms that the zone standard has or has not been satisfied." 566 F.2d at 139 (citations omitted).

After observing that courts often deal with ambiguous and imprecise standards, the majority affirmed the applicability of the zone test in challenges to agency action taken pursuant to statutory authority and stated that it was the nondiscretionary duty of the federal judiciary to apply limitations imposed by the Supreme Court in its supervisory capacity. Id. at 137 & n.37, 139 & n.57.

54. 566 F.2d at 139. The court indicated that the zone test was particularly suited to this second task, since it "allows the court to define those instances when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular subject area." Id. See note 40 supra.

55. 566 F.2d at 140.

56. Id.

57. Id. at 140-41. By limiting the examination to the particular provision allegedly violated, the court observed that this would serve the policy of complete adverseness in the litigation by "[framing] the substantive issue which a court will decide if the action proceeds to a determination on the merits." Id. See note 54 and
The D.C. Circuit rejected the plaintiff's argument that other provisions in the statute, and even the Code's fundamental goal of equity in matters of federal taxation, may be examined for evidence of the necessary protective intent. Since the IRS rulings under challenge in the instant case were issued pursuant to section 901 of the Code, the majority stated the relevant inquiry as whether "Congress arguably legislate[d] with respect to competition in section 901 of the Code so as to protect the competitive interests of domestic oil producers." Answering in the negative, Judge Wilkey concluded that the statutory language and judicial interpretation of section 901 confirmed that the purpose of the tax credit provision was to prevent double taxation of United States companies operating abroad. Therefore, the plaintiff's interest in competitive fairness in matters of federal taxation was not arguably within the "zone of interests" to be protected by section 901.

Turning to an inquiry into the role of legislative history in the determination of standing, the majority noted that a conventional full-scale examination of the legislative policies behind a statutory provision posed particular hazards if employed within an analysis of compliance with the zone test. First, the court observed that a decision on standing may actually reflect a prejudgment of the merits of the case. A detailed examination of the policy underlying the provision may result in an assessment of the substantive weaknesses of the plaintiff's case and influence the court's disposition of the standing issue. Second, the majority stated that the legislative history will often not adequately reflect what particular interests are meant to be regulated or protected by the statute. Third, the D.C. Circuit remarked that a review of legislative history may ultimately require affirmative evidence of a congressional intent to protect the particular interests of the particular litigant, which would detract from accompanying text supra. In addition, the majority noted that the Code was a complex statute encompassing a wide variety of economic goals and purposes. The court stated that congressional protective or regulatory intent embodied in one section could not be applied to other statutory provisions without distorting the underlying policies of the Code. Id. at 141. The court stated that congressional protective or regulatory intent embodied in one section could not be applied to other statutory provisions without distorting the underlying policies of the Code. Id. at 141. The court stated that congressional protective or regulatory intent embodied in one section could not be applied to other statutory provisions without distorting the underlying policies of the Code. Id. at 141. The court stated that congressional protective or regulatory intent embodied in one section could not be applied to other statutory provisions without distorting the underlying policies of the Code. Id. at 141. The court stated that congressional protective or regulatory intent embodied in one section could not be applied to other statutory provisions without distorting the underlying policies of the Code. Id. at 141.


59. 566 F.2d at 136, 140-41.

60. Id. at 143.


62. 566 F.2d at 143.

63. Id. at 141.

64. Id.

65. Id. at 141-42. It was this possible confusion between the issue of standing and the merits of the case which led Justice Brennan to conclude that injury in fact should be the only requirement for standing. Barlow v. Collins, 397 U.S. 159, 169 (1970) (Brennan, J., concurring and dissenting). See note 30 supra.

66. 566 F.2d at 142.
the flexibility of the zone standard. Therefore, the court determined that the relevant inquiry should be "whether the complaining party has stated an interest which is arguable from the face of the statute." 68

The court concluded with an explanation that the consequences and impact of agency action are relevant only in determining whether the plaintiff has suffered injury in fact.69 The majority stated that while the tax credit provision may have competitive consequences for the plaintiff, this "zone of impact" cannot be defined as the equivalent of the "zone of interests" to be protected by section 901.70 The basis of the court's reasoning was to avoid reducing the standing analysis to the single inquiry of injury to the plaintiff.71

Chief Judge Bazelon, in a common dissent to Tax Analysts and American Society of Travel Agents, Inc. v. Blumenthal,72 criticized the majority's novel construction and application of the zone test.73 The dissent asserted that when the legislative mandate is silent or ambiguous with respect to the intended scope of protection, Supreme Court decisions require that congressional intent must be construed to include within the protected zone those interests upon which the statute has a "readily foreseeable impact."74

67. Id. The court interpreted the zone test as being a flexible standard. Id. The plaintiff's interest need only be "arguably" within the zone intended to be protected by the statute. Id. at 140 n.64 (emphasis in original).
68. Id. at 142. The court stated a caveat to this approach to legislative history. If clear evidence of a congressional intent to allow or deny plaintiff's interests as a basis for standing is indicated, a consideration of legislative history would be appropriate. Id. at 143 n.80.
69. Id. at 144 (emphasis in original).
70. Id.
71. Id. The court in Tax Analysts, following the decision of the Supreme Court in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), did not have to reach the question of whether a third party may ever challenge IRS treatment of another, and offered no opinion on the matter.
72. 566 F.2d 145 (D.C. Cir. 1977). In Travel Agents, several individual travel agents and a representative association challenged the failure of the IRS to assess and collect taxes from a tax exempt religious organization engaged in arranging travel programs for its members. Id. at 147. Concluding that the "causation" and "redressability" inquiries of Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), were identifiable aspects of the "injury in fact" test, the court denied standing to the plaintiffs due to the tenuous connection between the relief sought and the competitive injury allegedly suffered. 566 F.2d at 148-50 & n.2. For a discussion of Eastern Ky., see note 44 supra. The majority in Travel Agents rejected the plaintiffs' contention that Data Processing controlled the standing issue in the litigation, and rather cryptically noted that Data Processing was "not a tax case." 566 F.2d at 151.

Reconciling the analytical basis employed by each panel of the D.C. Circuit in Tax Analysts and Travel Agents is difficult. However, in the former case, the zone test was directly addressed, and the conclusions reached by the court were not limited to the factual situation presented. 566 F.2d at 141-43. See 566 F.2d at 153, 155 (Bazelon, C.J., dissenting). Therefore, whatever the import of the "not a tax case" statement in Travel Agents, it is submitted that the treatment afforded the zone test in Tax Analysts will have a continuing effect on litigants asserting injury to their interests as competitors.

73. 566 F.2d at 153, 155 (Bazelon, C.J., dissenting).
74. Id. at 161, 166 (Bazelon, C.J., dissenting), citing Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970). For a discussion of
In response to the majority's position that the zone test advances a general purpose of the standing doctrine — the properly limited role of the courts in a democratic society — Chief Judge Bazelon noted that the court was merely requested to evaluate the propriety of agency action under an applicable statute. The dissent stated that such "routine, accepted and legitimate exercises of judicial power" did not raise serious separation of powers problems. Chief Judge Bazelon rejected the majority's position that legislative intent must be derived from the specific statutory provision at issue. The dissent argued that it was a fundamental rule of statutory interpretation that laws should be read in their entirety. Moreover, the dissent maintained that consideration of the basic policies and goals underlying an act is necessary for an "informed interpretation of any of its particular sections." In opposition to the majority's conclusion that the appropriate "zone of interests" should be determined from the face of the statute, the dissent emphasized that any material contributing to the accurate discernment of congressional purpose would be appropriate for consideration by the court. Under this reasoning, Chief Judge Bazelon

these cases, see note 37 supra. Chief Judge Bazelon noted that in neither Arnold Tours nor Investment Co. Inst. did the applicable provisions of the act at issue or its legislative history indicate a congressional concern for the competitive interests that the plaintiffs were asserting. 566 F.2d at 161-62 (Bazelon, C.J., dissenting). Yet, in each case, the Supreme Court held that the plaintiffs had satisfied the requirements of the zone test. Id.

75. Id. at 162-63 (Bazelon, C.J., dissenting).
76. Id. at 163 (Bazelon, C.J., dissenting). The Chief Judge indicated that concern over the appointed judiciary passing on the actions of elected branches of government arises primarily in the context of constitutional challenges to government action. Id. at 162 (Bazelon, C.J., dissenting), citing United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221-23 (1974); Flast v. Cohen, 392 U.S. 83, 100 (1968).
77. 566 F.2d at 163-64 (Bazelon, C.J., dissenting).
78. Id.
79. Id. at 164 (Bazelon, C.J., dissenting). Chief Judge Bazelon reasoned that the legislative intent must be derived from the whole statute, as it is only through this method of analysis that inconsistencies and contradictions between particular provisions can be resolved. Id. The dissent noted that this approach was indeed the technique employed by other courts applying the zone test. Id. (citations omitted). See note 87 infra. In response to the majority's position that limiting the inquiry to the particular statutory provision at issue would prevent the "borrowing" of protective intent from other provisions of the Code, the Chief Judge noted that whether the policies underlying one statutory provision were relevant to the interpretation of another could only be answered after both provisions have been examined. 566 F.2d at 165 (Bazelon, C.J., dissenting) (emphasis in original).

Chief Judge Bazelon was unconvinced that the underlying policy of the standing doctrine — complete adversariness in the litigation — would be promoted by focusing on the particular statutory provision forming the basis for the lawsuit. Id. at 164 (Bazelon, C.J., dissenting). The dissent contended that a finding of injury in fact would assure the complete adversarial presentation of the issues to the court. Id.

80. Id. at 165-66 (Bazelon, C.J., dissenting). The Chief Judge rejected the majority's concern that federal judges would be unable to separate the standing claims from the substantive issues while examining the legislative history for information relevant to both. Id. Moreover, the dissent asserted that courts regularly use legislative history to ascertain the intent of Congress with respect to the applicability of the zone test. Id. at 165 (Bazelon, C.J., dissenting), citing Rental
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would have granted standing to plaintiff Field in his capacity as a competitor.\textsuperscript{81}

The Tax Analysts court confirmed the applicability of the "zone of interests" test in challenges to agency action taken pursuant to statutory authority.\textsuperscript{82} The potential burden on the IRS's administrative processes and the federal judiciary resulting from third party challenges to the tax treatment of a competitor cautions against permitting the plaintiff in the instant case to litigate his claim. However, it is submitted that the general method of analysis set out by the court for applying the zone test is not supported by case law,\textsuperscript{83} and may unduly restrict plaintiffs suffering concrete injury from invoking federal jurisdiction over their claims.

First, concerning the requirement that courts must examine the specific statutory provision allegedly violated in order to discern the necessary protective intent,\textsuperscript{84} the Supreme Court decisions do not expressly address this issue. However, in Data Processing, where the zone test was announced, a congressional purpose to protect the interests of the litigant was found in statutory provisions other than the one which authorized the challenged agency action.\textsuperscript{85} In addition, a review of lower federal court decisions reveals that it is sufficient that the protective intent be found in the particular provision forming the basis for the lawsuit, but this has not been determined to be necessary to establish standing.\textsuperscript{86} The courts often approach this issue by reviewing the underlying policies of the act, or by relying on any provision of the enactment which indicates a congressional purpose to protect the asserted interests.\textsuperscript{87} One commentator has suggested that any

\begin{itemize}
  \item Housing Ass'n of Greater Lynn, Inc. v. Hills, 548 F.2d 388, 390 (1st Cir. 1977);
  \item Hayes Int'l Corp. v. McLucas, 509 F.2d 247, 256 (5th Cir.), cert. denied, 423 U.S. 864 (1975);
  \item Pesikoff v. Secretary of Labor, 501 F.2d 757, 760 n.2 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974);
  \item Secretary of Labor v. Farino, 490 F.2d 885, 889 (7th Cir. 1973).
\end{itemize}

Chief Judge Bazelon suggested that the flexibility of the zone test would be maintained by the fact that the "arguable" and "zone" language of the legal standard requires that potential ambiguities in the legislative history be resolved in the plaintiff's favor. 566 F.2d at 166 (Bazelon, C.J., dissenting). The majority's requirement that the legislative history evidence a clear congressional intent to allow the plaintiff's interests as a basis for standing undermines this flexibility. Id. See notes 57 & 68 and accompanying text supra.

81. 566 F.2d at 167 (Bazelon, C.J., dissenting).
82. 566 F.2d at 139. See note 53 and accompanying text supra.
83. See note 37 supra; notes 86 & 87 and accompanying text infra.
84. See notes 57--60 and accompanying text supra.
87. See, e.g., Rodeway Inns of America, Inc. v. Frank, 541 F.2d 759 (8th Cir. 1976), cert. denied, 430 U.S. 935 (1977) (necessary to examine statute as a whole as well as specific statutory provisions); Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29 (3d Cir. 1976) (look to zone of interests of whole act, not particular provision purportedly violated); Cincinnati Elec. Corp. v. Kleppe, 509 F.2d 1080 (6th Cir. 1975) (declared policy of act indicates zone of protected interests); Davis v. Romney, 490 F.2d 1360 (3d Cir. 1974) (statute, not particular provision violated, should be examined to ascertain whether plaintiffs were aggrieved within meaning of relevant statute); Harry H. Price & Sons v. Hardin, 425 F.2d 1137 (5th Cir.), cert. denied, 400 U.S. 1009

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statute, even one different from the statute forming the basis of the suit, which evidences an intent to protect the plaintiff's interests, may be used to satisfy the zone test. By adopting the requirement that the particular statutory provision should be the focus of analysis when applying the zone test, it appears the Tax Analysts court has overlooked the methods of analysis adopted by the other circuits and the Supreme Court.

Second, it is difficult to see how this narrowed application of the zone test will advance the stated purposes of the standing doctrine. The court concluded that "[i]f the necessary arguable intent is found in the particular provision, this fact further ensures that the complaining party will have a strong connection to the controversy and that it will serve the policy of complete adversariness in the litigation . . .." However, the Supreme Court itself has observed that important interests have been vindicated by plaintiffs with no more stake in the outcome of an action than a fraction of a vote, a five dollar fine, a $1.50 poll tax, or generally any "identifiable trifle" of harm. As indicated by Chief Judge Bazelon, the finding that the plaintiff suffered an economic injury in his capacity as a competitor will often be enough in itself to guarantee the personal stake and interest necessary to impart the concrete adverseness required by article III. It has been noted that "[p]arties to whom the Court denies standing would often make abler presentations than parties whose standing the Court upholds."

The second purpose of the standing doctrine concerns the allocation of power at the national level and a fear of judicial supervision of the coordinate branches of the federal government. The Tax Analysts court observed that the zone test allows "courts to define those instances when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular . . ."
subject area."\textsuperscript{99} It is submitted, however, that since Congress specifically provided for review of agency action in the APA,\textsuperscript{100} separation of powers considerations should not dominate a court's determination of the standing issue. Rather, it is suggested that the congressional intent to authorize judicial review should be controlling.\textsuperscript{101} If the enactment indicated a clear congressional purpose to deny protection to the interest that the plaintiff is asserting, standing should be denied.\textsuperscript{102} Absent such evidence, however, it appears that any provision of the enactment allegedly violated which manifests a purpose to protect or regulate the interests of the plaintiff would be a "relevant statute" within the meaning of the APA sufficient to confer standing.\textsuperscript{103} This analysis would be consistent with the Supreme Court's statement on reviewability: "Judicial review of a final agency action will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress."\textsuperscript{104}

\textsuperscript{99} 566 F.2d at 140.
\textsuperscript{100} See note 25 supra.
\textsuperscript{103} See, e.g., Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 33 (3d Cir. 1976); Cincinnati Elec. Corp. v. Kleppe, 509 F.2d 1080, 1086 (6th Cir. 1975). See note 87 supra. The view has been expressed by some commentators that it is inappropriate to consider concern for the expansion of judicial power within the context of the law of standing. See K. Davis, supra note 97, § 22.21 at 521-23. Use of the law of standing to limit judicial power "distort[es] the doctrine's analytical basis and makes it excessively vague and subject to inconsistent and arbitrary application by the lower courts." Note, 29 Stan. L. Rev. 323, 347 (1977). Moreover, the Supreme Court has stated that standing to sue refers to the posture of the plaintiff and not the legal interests to be unraveled. Flast v. Cohen, 392 U.S. 83, 99-100 (1968). As stated by the Court: "The question whether a particular person is a proper person to maintain the action does not, by its own force, raise separation of powers problems relating to improper judicial interference in areas committed to other branches of the Federal Government." Id. at 100. Other jurisdictional doctrines, such as mootness, ripeness, agency discretion, advisory opinion and political question, may be more appropriate protections against an excessive judicial role in government. K. Davis, supra note 97, § 22.21, at 522. See note 30 supra. Indeed, the district court in Tax Analysts considered the doctrine of political question in dicta following its disposition of the standing issue. Tax Analysts & Advocates v. Simon, 390 F. Supp. 927, 942 (D.D.C. 1975).
\textsuperscript{104} Barlow v. Collins, 397 U.S. 159, 166-67 (1970), quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). The Barlow Court continued: "[J]udicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated." 397 U.S. at 166. This presumption of reviewability is conclusive unless review is expressly precluded by statute, or unless "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1976).

In Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970), the Court noted that the trend is toward enlargement of the class of people who may challenge administrative action. Id. at 154. The Court quoted with approval the legislative history of the Administrative Procedure Act, Pub. L. No. 89-554, ch. 7, §§ 701-706, 80 Stat. 378 (1966) (current version 5 U.S.C. §§ 701-706 (1976)), which states: "To preclude judicial review under this bill a statute, if not specific in withholding such review, must on its face give clear and convincing evidence of an intent to withhold it." 367 U.S. at 156, quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41, reprinted in [1946] U.S. Code Cong. Serv. 1195. See also Davis, supra note 12, at 472, Comment, supra note 30, at 561-63. It is submitted that the narrowing of the zone of interests test in Tax Analysts may frustrate this express congressional purpose to provide for judicial review of agency action.
The Internal Revenue Code is an extraordinarily complex statute which has as its purpose a wide variety of economic and social goals. However, the decision in Tax Analysts is not limited to cases involving the Treasury Department's administration of the Code. Rather, the method of analysis adopted by the court applies to challenges to agency action in general. The overall effect may be to further limit the exercise of federal jurisdiction over claims asserted by plaintiffs who have suffered concrete injury. The statutory language of the particular provision upon which the action is based will often provide little guidance for the interests intended to be protected, and may be subject to inconsistent interpretations by the courts. In addition, standing decisions reached on policy grounds may be rationalized by a broad or narrow construction of the statutory language and legislative history. Under the Tax Analysts decision, if the legislative history is sparse, imprecise, or even contradictory, standing will be denied to a litigant whose interests fall within the general goals of the enactment unless the specific provision at issue evidences the necessary protective intent.

By narrowing the zone of interests test, the D.C. Circuit has created a serious obstacle to federal plaintiffs challenging agency action. The doctrine of standing serves to limit access to the federal courts to those who have a sufficient personal stake in the outcome of a controversy so as to assure the complete adversarial presentation of the issues, yet the tests formulated by the Tax Analysts court seem unrelated to this goal. Another underlying rationale for standing — the allocation of power among the branches of government — involves a consideration of the issues that a court will decide, not who will litigate them, and treatment of this issue is perhaps more appropriate under other doctrines of justiciability. Separation of powers considerations should not control the standing determination when Congress has expressly provided for judicial review of agency action in the APA, and the plaintiff's interests fall within the general scope of protection of a "relevant statute." 

Professor Davis would go a step further by eliminating the requirement that the plaintiff make any affirmative showing that the zone test was satisfied. K. Davis, supra note 97, §22.21 at 515-17. The burden would shift to the agency to demonstrate that the plaintiff's interests were not to be protected: "A person whose interest is injured in fact or imminently threatened with injury by governmental action has standing to challenge that action in absence of legislative intent that the interest is not to be protected." Id.

105. 566 F.2d at 141.
106. 566 F.2d at 153, 155 (Bazelon, C.J., dissenting).
107. Id.; see 566 F.2d at 141-43; note 72 supra.
108. See Comment, supra note 30, at 556-58. See also Jones, Statutory Doubts and Legislative Intention, 40 Colum. L. Rev. 957, 958 (1940).
110. See Comment, supra note 30, at 558.
111. Id.
112. 566 F.2d at 140-43 & n.80.
113. See notes 90-97 and accompanying text supra.
114. See note 103 supra.
115. See note 25 supra.
116. Id. See notes 98-104 and accompanying text supra.