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I. INTRODUCTION

Whenever suit is brought in a federal court to challenge the constitutionality or validity of governmental action, the initial response of the government is, almost invariably, "The Court should not hear this case." Several arguments are frequently used. If a state law or action of a state official is challenged, the state will argue that the suit should have been brought in state court[1] and that the federal court should "abstain" pending a state court determination of state law.[2] When administrative action is challenged, the principal defenses are failure to exhaust administrative remedies and nonreviewability of the action. If the plaintiff has not yet suffered a demonstrable injury, it will be claimed that the case is not "ripe"; if the injury has already occurred, the question of mootness comes into play.[3] But the argument that has been foremost among the defenses raised by the government in an effort to avoid a determination on the merits is that the plaintiff lacks stand-

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1. For a discussion regarding the desirability of challenging state laws or governmental action in the federal courts rather than in the state courts see Sedler, *The Dombrowski-Type Suit As An Effective Weapon for Social Change: Reflections from Without and Within,* 18 KAN. L. REV. 237, 254-55 (1970).

2. The most clearly established usage of the "abstention doctrine" justifies a stay of federal court action only when state action is being challenged as contrary to the United States Constitution and there are unsettled questions of state law that may preclude the necessity of reaching the federal question. The doctrine is severely limited, and it does not give state courts the sole "privilege" of declaring state laws unconstitutional. *See* Zwickler v. Koota, 389 U.S. 241, 250-51 (1967). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS 196-208 (2d ed. 1970).

3. *See generally* North Carolina v. Rice, 404 U.S. 1008 (1971); C. WRIGHT, *supra* note 2, at 35-36.

ing.[4] Litigation over standing has indeed been extensive.[5] Moreover, it has been commonplace to refer to standing as a "complicated speciality of federal jurisdiction,"[6] and it does seem that courts and commentators have sometimes gone out of their way to make the matter as complex as possible.

Standing, of course, is but one component of the broader question of justiciability: should federal judicial power be employed to hear this challenge by this litigant at this time? As the Supreme Court has observed, justiciability is "a concept of uncertain meaning and scope,"[7] and it has become a "blend of constitutional requirements and policy considerations" that are not always distinguishable.[8] This concept includes not only standing but also ripeness, mootness, political question, reviewability of administrative actions, and, generally, any question relating to whether federal judicial power is properly exercisable in a particular case.[9] It is possible to separate analytically standing from the other components of justiciability, as courts and commentators often have done. Yet it is difficult to believe that a judge deciding whether to hear a constitutional or administrative challenge always draws fine distinctions between these components. It is perhaps more reasonable to conclude that frequently the judge takes more of a "Gestalt approach," and that his real concern is simply whether he should hear the case on the merits.[10] This may explain why courts strain to find standing and to navigate the other hurdles to judicial review in some cases but not in others.[11] Furthermore, it is difficult to ignore the merits of the case,

4. *E.g.*, Flast v. Cohen, 392 U.S. 83, 106 (1968).

5. This article deals primarily with standing to sue in federal court. Standing to challenge governmental action on particular grounds is a related question treated in Sedler, *Standing To Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962). The standing requirement also is applicable to cases coming to the Supreme Court from the state courts. If the plaintiff lacked standing under federal law concepts, the Supreme Court would decline review despite the existence of standing under state law. Doremus v. Board of Educ., 342 U.S. 429 (1952).

6. United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 156 (1953).

7. Flast v. Cohen, 392 U.S. 83, 97 (1968).

8. *Id.* at 95.

9. For a discussion regarding the relationship of standing to the constitutional requirement of case or controversy see *id.* at 94-95, 100-01. Although the case or controversy requirement has little independent significance as a limitation on judicial review, its underlying rationale has shaped the development of many components of justiciability.

10. I have been involved as counsel in a number of cases challenging the constitutionality of laws and other governmental action, and many of my views have been shaped by that experience. *See* Sedler, *supra* note 1, at 239.

11. In Crossen v. Breckenridge, 446 F.2d 833 (6th Cir. 1971), one of my own cases that involved a challenge to the constitutionality of Kentucky's anti-abortion law, I included as plaintiffs a physician, a pregnant married woman who wanted an abortion, a married woman who did not want to become pregnant, a minister, and a local women's rights group. The District Judge

particularly when the denial of standing may be an effective denial of the underlying claim itself.[12]

As the above observation suggests, my orientation is toward the *behavior* of courts when confronted with questions of standing and justiciability. If law is, as Justice Holmes reminded us many years ago, no more than "prophecies of what the courts will do in fact,"[13] a behavioral analysis may have a great deal of utility not only for the practitioner but also for the academic commentator. By looking at the way courts deal with actual cases, the legal community may assess to what extent the concept of standing has been significant in determining questions of justiciability and in limiting judicial review of governmental action. At a minimum, this kind of analysis provides a more realistic setting for examining the relevance of doctrinal refinements. Therefore, in an attempt to describe the concept of standing as an independent limitation on judicial review, this article will emphasize the kinds of questions about standing and justiciability that do arise, how they have been dealt with by the courts, and what generalizations we may draw from this judicial behavior.[14]

II. THE LAW OF STANDING AS ENUNCIATED BY THE SUPREME COURT

The Supreme Court's decisions on questions of standing and the principles it has enunciated constitute the frame of reference within which lower federal courts must approach the problem. In the view of Professor Kenneth Culp Davis, "Four Supreme Court cases, two in 1968 and two in 1970, have drastically liberalized the federal law of standing, giving it a new basic orientation."[15] The practical effect of these decisions, as will be demonstrated, is that in most cases standing

dismissed the action for lack of jurisdiction because it did not present a case or controversy. He also refused to certify the necessity for the convention of 3-judge court. In his bench opinion, however, he made a number of otber points, which demonstrated his view that the anti-abortion law should not be challenged in an affirmative suit. The Sixth Circuit reversed, holding that a case or controversy was presented. "[I]n the interest of judicial economy" it also determined that the physician and pregnant woman had standing, tbat the married woman and organizational plaintiff lacked standing, and that the standing of the minister would have to be determined by a 3-judge court.

12. *See* Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV. 433 (1962).

13. Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 461 (1897).

14. There is a problem in determining judicial behavior by looking only to reported cases, since the opinions in many cases decided at the district court level are unreported. A variance between judicial behavior reflected in reported decisions and that reflected in the unreported ones is indeed possible. *See* Sedler, *supra* note 1, at 261. Although I present this caveat, I do not think the variancc is too significant in the areas of standing and justiciability.

15. Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450 (1970).

is no longer an obstacle to judicial action in federal courts. In policy terms, the new decisions represent a value judgment—and in this sense a command to lower federal courts—that standing should be liberalized and federal judicial review of governmental action broadened.

It first is necessary to consider briefly two of the discernable principles that existed in the Supreme Court law of standing as it existed prior to 1968. The first was that, although state and municipal taxpayers had standing to challenge the validity of actual expenditures undertaken by those governmental units,[16] *Frothingham v. Mellon,*[17] decided in 1923, appeared to be a conclusive bar to similar actions by federal taxpayers challenging the validity of federal expenditures. The second was that, apart from taxpayer's suits, a plaintiff was required to demonstrate injury to a "legal right." For example, since there was no legal right to be free from competition by government instrumentalities, the Court refused to allow private power companies to challenge the constitutionality of the Tennessee Valley Authority.[18] Lower federal courts construed this holding as a prohibition of suits challenging governmental action on the ground that it would benefit a competitor.[19] To satisfy the requirement of demonstrable injury the plaintiff had to show immediacy of harm. Thus, a government employee who wanted to engage in political activity despite the Hatch Act's proscription was held not to have standing to challenge its constitutionality, unless he actually had violated the Act.[20]

The thrust of these guidelines was to make standing a potential issue in any case in which the plaintiff affirmatively sought judicial review of governmental action. He could not proceed merely as a taxpayer or concerned citizen, but rather had to show both legal injury to himself,[21] as a result of the challenged governmental action, and an injury that was direct rather than speculative.[22] While the plaintiff fre-

16. Everson v. Board of Educ., 330 U.S. 1 (1947); Bradfield v. Roberts, 175 U.S. 291 (1899); Crampton v. Zabriskie, 101 U.S. 601 (1880).

17. 262 U.S. 447 (1923).

18. Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); *cf.* Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). *See also* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

19. *See, e.g.,* Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied,* 350 U.S. 884 (1955). *But see* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) (basing standing on review provisions of Federal Communications Act).

20. United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

21. When the plaintiff had no standing to sue in his own right, he generally could not assert a *jus tertii* claim. Tileston v. Ullman, 318 U.S. 44 (1943). For a discussion of standing to assert a *jus tertii* claim see Sedler, *supra* note 5, at 646-48.

22. *E.g.,* Poe v. Ullman, 367 U.S. 497 (1961) (nonenforcement of challenged statute held to preclude finding of injury); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

quently could surmount these obstacles, a number of suits were dismissed for lack of standing, and, to that extent, the concept operated as an important limitation upon the availability of judicial review.[23]

The first of the four liberalizing suits, *Flast v. Cohen*,[24] involved a taxpayer's challenge to the constitutionality of federal aid to parochial schools. The Court held that *Frothingham* was not an absolute constitutional bar to taxpayer suits against the federal government, and that a federal taxpayer had the necessary "personal stake" to satisfy the case and controversy requirement of article III when the challenge to federal expenditures was based upon a specific constitutional limitation such as that contained in the first amendment's establishment clause.[25] It distinguished *Frothingham* on the ground that the plaintiff there did not allege that Congress had breached a specific limitation upon its taxing and spending power but merely that it had exceeded the general powers delegated to it by article I, section 8 and thereby had invaded the legislative province reserved to the states by the tenth amendment.[26]

In *Flast* the Court developed a *nexus principle of standing* that is more important than the decision, which only partially opened the door to taxpayer's suits. The Court stated this principle as follows:

> The various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated. We have noted that, in deciding the question of standing it is not relevant that the substantive issues in the litigation might be nonjusticiable. However, our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine *whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.*[27]

This rationale necessarily goes far to liberalize standing by enabling courts to focus on the status of the plaintiff and the substantive ground of his attack as the basis for standing. Thus *Flast* allowed standing to

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23. *See generally* C. WRIGHT, *supra* note 2, at 39-43.

24. 392 U.S. 83 (1968).

25. The Court viewed the case and controversy requirement of article III as relating to standing only insofar as it necessitated presentation of the dispute in an adversary context and in a form appropriate for judicial resolution. *Id.* at 101. Since in this context article III did not constitute an absolute bar against suits by federal taxpayers, it was necessary for the Court to determine whether the plaintiff had the "personal stake and interest [to] impart the necessary concrete adverseness to such litigation . . . ." *Id.*

26. For a critical view of this distinction see Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 608-11 (1968).

27. 392 U.S. at 101-02 (emphasis added).

one who did not suffer any tangible injury[28] but who, because of his status as a taxpayer and citizen, could challenge an expenditure as violative of the first amendment. Whether the result is explained by saying that he still suffered injury to a legal interest or that an appropriate nexus between the plaintiff's status and the right asserted obviates this requirement makes no real difference. In practice, the Court shifted the operational test of standing from a legal injury concept to a nexus concept.

The Court in 1968 also modified previous law with regard to actions to protect a competitive interest.[29] In *Hardin v. Kentucky Utilities Co.*,[30] it held that a party could challenge the validity of governmental action that served to benefit a competitor, at least when the law relied on as the basis for the challenge was designed to prevent improper competition. Plaintiffs were utility companies who contended that the Tennessee Valley Authority (TVA) was not authorized to expand its sales into their service area. The Court acknowledged that plaintiffs had standing, although it held against them on the merits. It distinguished previous cases on the ground that "the statutory and constitutional requirements [asserted] were in no way concerned with protecting against competitive injury."[31] Since an obvious purpose of the enabling statute's area limitations was to protect private utilities from TVA competition, the Court held that the plaintiffs had standing to contend that TVA was not authorized to enter their areas.[32] While the proposition that parties whose interests are protected by statute have standing to obtain such protection may be "almost too obvious to state,"[33] the case is very significant from a behavioral standpoint because the Court expressly held that a competitive interest alone could confer standing. This holding discredited a leading lower court case[34] that had been relied on by many other courts to deny standing automatically when the plaintiff sought to protect such an interest.[35]

Liberalization of the law regarding a competitor's standing was

28. Ordinarily it cannot be contended that any taxpayer suffers tangible injury from a particular expenditure, because its impact upon his tax liability is infinitesimal. Although expenditures for waging the Vietnam War may be an exception to this observation, it would be difficult to think of any other.

29. *See* notes 18-19 *supra* and accompanying text.

30. 390 U.S. 1 (1968).

31. *Id.* at 6.

32. The Court also held that an explicit statutory provision authorizing competitors' suits was unnecessary when plaintiff was within the class the statute was designed to protect. *Id.* at 7.

33. Davis, *supra* note 15, at 451.

34. Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir. 1955).

35. *See* Davis, *supra* note 15, at 451-52.

completed in *Association of Data Processing Service Organizations v. Camp.*[36] In *Data Processing* plaintiffs had instituted an action against both the Comptroller of the Currency and a national bank, challenging a ruling by the Comptroller that allowed national banks to provide data processing services to bank customers and other banks. In reversing a dismissal for lack of standing, the Supreme Court buried the legal interest test as going to the merits rather than to the question of standing. It then formulated a two-pronged test for standing: (1) did the challenged action cause the plaintiff injury in fact, economic or otherwise? (2) was the interest sought to be protected by the plaintiff arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question?[37] The Court found that the plaintiffs would be injured in fact by competition from national banks in the data processing field and that the statute relied on to invalidate the Comptroller's action,[38] which was designed to limit the activities of national banks, "arguably [brought] a competitor within the zone of interests protected by it."[39]

The Court applied this two-pronged test in *Barlow v. Collin*[40] to allow tenant farmers who were eligible for federal agricultural subsidies to challenge an action of the Secretary of Agriculture permitting assignment of these benefits to secure crop rent for farmland. Under the former regulation, benefits could be assigned only as security for advances that would enable the recipients to make a crop. The plaintiffs contended that landlords would rely on the new regulation to demand advance assignment of the federal benefits as a condition to obtaining a lease, thereby making the plaintiffs dependent upon the landlord for supplies. This was obviously an allegation of injury in fact, and the Court found "implicit in the statutory provisions and their legislative history . . . a congressional intent that the Secretary protect the interests of tenant farmers."[41] Therefore, the plaintiffs were held to be within the zone of interests protected by the Act.

Justices Brennan and White filed a separate opinion covering both *Data Processing* and *Barlow* in which they contended that the only test of standing should be injury in fact. The zone of interests test, they argued, "comes very close to perpetuating the discredited requirement

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

37. *Id.* at 152-53. The Court did not indicate that it was laying down a separate test for standing to seek review of administrative action.

38. Bank Service Corporation Act of 1962, 12 U.S.C. § 1864 (1970).

39. 397 U.S. at 156.

40. 397 U.S. 159 (1970).

41. *Id.* at 164.

that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests."[42] They also contended that any canvass of the relevant statute should be used only to determine reviewability, a matter entirely separate from standing. Finally, they warned "[I]n making such examination of statutory materials an element in the determination of standing, the Court not only performs a useless and unnecessary exercise but also encourages badly reasoned decisions, which may well deny justice in this complex field."[43]

Professor Davis has said that the difference between the majority approach and the Brennan-White approach—whether injury in fact should be the sole basis for standing—is a "live issue."[44] The issue, however, is not as "live" as Professor Davis suggests. When the plaintiff is challenging governmental action on constitutional grounds, he necessarily is asserting that his interest is protected by the constitutional guarantee upon which he is relying. Any further inquiry goes to the merits. In the area of judicial review of administrative action, the difference in approach conceivably could bring about a different result, but only if the courts would employ the zone of interests test to deny standing to one who has been injured in fact. In practice they have not done so, and there appears to have been no reported case in which a court finding injury in faet has not also found that the plaintiff's claim was arguably within the zone of interests to be protected or regulated.

The Supreme Court's decision last term in *Investment Company Institute v. Camp*,[45] bears out this view, and, as a practical matter, may render the zone of interests test functionally irrelevant. The plaintiffs, open-ended investment companies and an association of securities dealers, brought an action under the Glass-Stegall Banking Act of 1933[46] challenging regulations promulgated by the Comptroller of the Currency and an order of the Securities and Exchange Commission, each of which allowed national banks to operate mutual investment funds. The Court simply held that any contention about lack of standing was foreclosed by *Data Processing*, since the plaintiffs faced the same injury from new competition and since "Congress had arguably legislated

42. *Id.* at 168.

43. *Id.* at 170.

44. Davis, *supra* note 15, at 457-58. Professor Davis strongly criticizes the majority approach as "(1) analytically faulty, (2) contrary to much case law the Court should not have intended to overrule, (3) cumbersome, inconvenient, and artificial, and (4) at variance with the dominant intent behind the Administrative Procedure Act." *Id.* at 457-58.

45. 401 U.S. 617 (1971).

46. Ch. 89, 48 Stat. 162 (codified in scattered sections of 12 U.S.C.).

against the competition that the petitioners sought to challenge, and from which flowed their injury."[47] The Court's failure to make an independent inquiry regarding the zone of interests requirement indicates that a plausible claim that is not clearly insubstantial would be sufficient to satisfy the second prong of the *Data Processing* test.[48]

In summarizing the effect of the Supreme Court's recent decisions on standing, we can say first that in actions to protect a private interest[49] the test of injury to legal interest has been replaced by injury in fact; and it is doubtful whether the zone of interests aspect of *Data Processing* has any real significance.[50] Moreover, *Flast,* by recognizing a federal taxpayer's suit, has opened the door to further development of actions motivated by the desire to protect a public interest.[51] Yet combination of the nexus test of standing promulgated in *Flast,* with the injury in fact basis of standing in *Data Processing,* should have a liberalizing effect that goes beyond the holding in either case and that can be particularly important in the public interest area. The plaintiff's status in relation to the issue he is raising may itself support a finding of injury in fact, depending on how "substantial" that injury must be.[52] For example, in *Data Processing* the Court emphasized the fact that a protected interest may reflect " 'aesthetic, conservational and recreational,' as well as economic values";[53] subsequent cases have held that a resident of an area threatened by environmental damage due to governmental action has standing because of that status to challenge such action as detrimental to his environment.[54]

The liberalization of standing is reflective of the Supreme Court's

47. 401 U.S. at 620. For a detailed discussion of the Court's opinion see Comment, *Judicial Review of Agency Action: The Unsettled Law of Standing,* 69 MICH. L. REV. 540, 564-68 (1971).

48. *See also* Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) (travel agents held to have standing to challenge an order of the Comptroller authorizing national banks to engage in travel agency business).

49. This type of litigation will be referred to throughout the remainder of the article as a "private action." *See* text accompanying note 59 *infra.*

50. As the subsequent discussion will indicate, the zone of interests test has not been used to deny standing to any plaintiff who has shown injury in fact.

51. This type of litigation will be referred to throughout the remainder of the article as a "public action." *See* text accompanying note 60 *infra.*

52. For the view that a "trifling interest" should suffice, and is required, see Davis, *supra* note 26, at 611-17. *See also* North Carolina v. Rice, 404 U.S. 244 (1971); Brockingham v. Rhodes, 396 U.S. 41 (1969).

53. 397 U.S. at 154.

54. *See* notes 183-90 *infra* and accompanying text. In Sierra Club v. Morton, 40 U.S.L.W. 4397 (U.S. Apr. 19, 1972), the Supreme Court, while holding that a conservation organization did not have standing to bring a public action to protect the environment, appeared to recognize that persons who used a recreational area would have standing to challenge governmental action which would interfere with such use.

general liberalization of justiciability in recent years. This development has been particularly evident in several areas. The "political question" limitation upon judicial review, for example, was severely narrowed by the Court's decisions in *Baker v. Carr*[55] and *Powell v. McCormick*.[56] Likewise, the Court increasingly has rejected claims of mootness[57] and nonreviewability of administrative action.[58] Because of this increase in judicial activism and because judicial protection of constitutional and other federal rights has become more visible, levels of consciousness have been raised, and people have become more encouraged to resort to the courts. The courts are now seen by many as imposing restraints on governmental action that previously could not be challenged. More people are coming into court—and for our purposes this means the federal courts—to raise more issues, thereby more frequently forcing the court to confront the question "should we hear the case."

III. STANDING OF INDIVIDUAL PLAINTIFFS

These plaintiffs may be classified in terms of gradations relating primarily to their motivation. At one end of the scale there is the plaintiff who does not differ from the ordinary plaintiff in a civil suit, notwithstanding the fact that he is seeking to challenge governmental action or to review an administrative determination. His suit may be described as a "private action"[59] because the essential motivation in bringing it is to protect his private interest, usually an economic one. At the other end of the scale is what Professor Jaffe has called the "non-Hohfeldian" or "ideological plaintiff."[60] His suit may be described as a "public action" because the purpose in bringing it is to challenge governmental action that he considers contrary both to the general good and to the values in which he believes. Most likely he is the "front person" for a group challenge, and the suit will be backed by group resources. Between the

55. 369 U.S. 186 (1962) (legislative apportionment held reviewable under equal protection clause).

56. 395 U.S. 486 (1969) (exclusion of elected representative by House of Representatives held invalid).

57. *E.g.*, Moore v. Ogilvie, 394 U.S. 814 (1969) (mootness defense rejected when claim reflects a "continuing controversy capable of repetition yet evading review"); Sibron v. New York, 392 U.S. 40 (1968) (criminal conviction held not to become moot by virtue of expiration of sentence).

58. *E.g.*, Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 166 (1970).

59. Although this term has also been used by Professor Jaffe, it is used in a somewhat different sense here. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-60 (1965).

60. Jaffe, *The Citizen As Litigant in Public Actions: The NonHohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

positions of these two plaintiffs on the ideological spectrum is the person who suffers a specific injury from the challenged action, but whose motivation extends beyond that injury and relates to the values and policies he seeks to promote. Although it is truly Procrustean to deal similarly with the standing of these different categories of plaintiffs, ranging from the purely private to the purely ideological, in theory the same test is to be applied to each.

In discussing the standing of the three types of plaintiffs no differentiation will be made between cases in which the plaintiff is challenging the validity of a law or other governmental action and those in which he is seeking judicial review of federal administrative action. Although it has been argued that section 10 of the Administrative Procedure Act[61] has broadened standing to seek review of administrative action,[62] the predominant view has been that the section was merely "declaratory of existing law."[63] More importantly, cases dealing with challenges to governmental action and review of administrative action have been cited and relied on interchangeably, and there does not appear to have been any difference in result depending on the kind of case involved.

A. Private Actions

In the private action it is assumed by all concerned that the plaintiff's standing depends upon his ability to demonstrate injury to his private interest, although he also may have a broader concern. Since it appears that the zone of interests test of *Data Processing* no longer has any independent significance, the current law of standing in private actions can be determined by examining the willingness of the courts to find an injury in fact in the various types of cases.

1. *Competitor's Standing.*—As pointed out previously, *Hardin* and *Data Processing* established standing to challenge governmental action that benefits a competitor, at least when the purpose of the substantive claim is to achieve freedom from unauthorized competition. The Supreme Court's recent holding in *Investment Company Institute v. Camp*,[64] and its per curiam decision in *Arnold Tours, Inc. v. Camp*,[65] make it clear that recognition of such standing is now a routine matter.[66]

61. 5 U.S.C. § 702 (1970).

62. *See* Davis, *supra* note 15, at 465-68.

63. L. JAFFE, supra note 59, at 528-31.

64. 401 U.S. 617 (1971).

65. 400 U.S. 45 (1970).

66. After *Data Processing*, it has become sufficient to relegate the competitor's standing question to a footnote. *See* Ramapo Bank v. Camp, 425 F.2d 333, 345 n.33 (3d Cir. 1970), *cert. denied*, 400 U.S. 828 (1970). *See also* Lodge 1858, Am. Fed'n Gov't Employees v. Paine, 436 F.2d

Actually, a number of lower court decisions recognized standing on this basis in the years immediately preceding *Data Processing*.[67]

In *Scanwell Laboratories, Inc. v. Shaffer*,[68] which was decided shortly before *Data Processing*, the District of Columbia Court of Appeals held that an unsuccessful bidder on a government contract had standing to challenge the validity of the Federal Aviation Agency's (FAA) action in awarding the contract to another. The FAA had sought bids for instrument landing systems, and the plaintiff's bid was second lowest. The plaintiff contended that since the lower bid did not comply with the invitation for bids, as required by federal regulations, the action of the FAA in awarding the bid was "arbitrary, capricious and a violation of the statutory provisions governing contracting . . . ."[69] In holding that the plaintiff had standing, the court applied the nexus test of *Flast*. It found that plaintiff had suffered injury in fact and that there was a nexus between his status as an unsuccessful bidder and his claim that the agency had violated federal regulations in awarding the bid to another. The court also found that the awarding of bids was not a matter "committed to agency discretion," which would have made it unreviewable under section 10 of the Administrative Procedure Act.[70]

After *Data Processing*, it is clear that the *Scanwell* decision was "correct" insofar as an unsuccessful bidder's standing to challenge an agency's compliance with applicable regulations in awarding contracts is concerned.[71] The only remaining problem is the scope of agency dis-

882 (D.C. Cir. 1970) (civil service employees held to have standing to challenge implementation of work force at federal installations through service support contracts).

67. *See* Marine Space Enclosures, Inc. v. Federal Maritime Comm'n, 420 F.2d 577 (D.C. Cir. 1969); Safir v. Gibson, 417 F.2d 972 (2d Cir. 1969), *cert. denied*, 400 U.S. 850 (1970); Public Serv. Co. v. Hamil, 416 F.2d 648 (7th Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970); Matson Navigation Co. v. Federal Maritime Comm'n, 405 F.2d 796 (9th Cir. 1968); Mid-West Nat'l Bank v. Comptroller of the Currency, 296 F.Supp. 1223 (N.D. Ill. 1968); Stephens v. Dennis, 293 F. Supp. 589 (N.D. Ala. 1968); State Chartered Banks v. Peoples Nat'l Bank, 291 F. Supp. 180 (W.D. Wash. 1966). *Contra*, South Suburban Safeway Lines, Inc. v. City of Chicago, 416 F.2d 535 (7th Cir. 1969) (the court found, however, that the challenged action was valid); *cf.* Wilson v. Watson, 309 F. Supp. 263 (D. Kan. 1968), *aff'd sub nom.*, Wilson v. Blount, 422 F.2d 866 (10th Cir.), *cert. denied*, 400 U.S. 865 (1970).

68. 424 F.2d 859 (D.C. Cir. 1970).

69. *Id.* at 861.

70. *Id.* at 874-75.

71. *See* Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137 (D.C. Cir. 1970); Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970), *petition for cert. dismissed*, 401 U.S. 950 (1971). In Allen M. Campbell Gen'l Contractors, Inc. v. Lloyd Wood Constr. Co., 446 F.2d 261 (5th Cir. 1971), the court was not certain that bidders' standing was fully established, but found that plaintiff's standing to make the particular challenge was authorized specifically by the agency's regulations. In Keco Indus., Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970), the court held that the unsuccessful bidder was entitled to recover bid preparation costs if it established that there had been a violation of the bidding regulations.

cretion. In *Hi-Ridge Lumber Co. v. United States*,[72] for example, the Ninth Circuit Court of appeals recently held that a decision by the Secretary of Agriculture rejecting *all* bids for the purchase of timber in a national forest constituted action "committed to agency discretion" and thereby foreclosed judicial review.[73]

2. *Potential Economic Injury As a Basis for Standing.*—Before *Data Processing* the standing of a plaintiff to challenge the validity of governmental action that had caused him demonstrable economic injury was well settled.[74] Prospective injury was also a sufficient ground for recognition of standing when it necessarily would follow from the governmental action being challenged.[75] *Data Processing,* however, had made it clear that there is standing to challenge all governmental action that can have an adverse effect on economic activity. Therefore, it is no longer necessary for the plaintiff to show present or immediate economic loss. As the District of Columbia Court of Appeals recently observed in a case involving pre-enforcement review of a Department of Labor decision under the Fair Labor Standards Act "The Supreme Court's recent decisions have made the standing obstacle to judicial review a shadow of its former self, and have for all practical purposes deprived it of meaningful vitality."[76] This observation has been borne out in a series of post-*Data Processing* decisions.[77]

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72. 443 F.2d 452 (9th Cir. 1971).

73. The court focused on the numerous types of discretion contained in the statute and also noted that the Forest Service was specifically authorized to reject all bids with or without reason.

74. *E.g.,* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (because book sales had declined, paperback book publishers had standing to challenge action of law enforcement officers warning distributors of possible criminal prosecution. *But cf.* Linda S. v. Richard D., 335 F. Supp. 804 (N.D. Tex. 1971) (mother of illegitimate child held to lack standing to challenge the constitutionality of a state law limiting the imposition of criminal penalties for nonsupport to fathers of legitimate children).

75. *See* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (drug manufacturers had standing to challenge new administrative regulations before enforcement had begun); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (private school could challenge the constitutionality of a state law prohibiting attendance at private schools that was to take effect in 2 years because, in light of the statute, parents had begun to withdraw their children from the school); Aircraft Owners & Pilots Ass'n v. Port Authority, 305 F. Supp. 93 (E.D.N.Y. 1969) (aircraft owners and pilots had standing to challenge imposition of take-off fee on general aviation planes during peak traffic hours).

76. National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689, 693 (D.C. Cir. 1971).

77. *See* P.A.M. News Corp. v. Hardin, 440 F.2d 255 (D.C. Cir. 1971) (operators of agricultural data news wire service had standing under the first amendment to challenge competition by Department of Agriculture); Armco Steel Corp. v. Stans, 431 F.2d 779 (2d Cir. 1970) (domestic steel producer allowed to seek review of a decision of the Foreign-Trade Zones Board granting port commissioners the right to create a foreign trade subzone in which vessels were to be built

Standing still may be denied in a private action, however, if the plaintiff cannot establish any likelihood of injury from the action he is challenging. In *Granite Falls State Bank v. Schneider*,[78] a state bank that maintained 286,000 dollars of reserves was held not to have standing to challenge a state law requiring a minimum banking reserve of 86,000 dollars. The court observed that the plaintiff had not suffered a present injury, and there was no evidence that future damage might be incurred.

It also should be noted that a plaintiff still can be barred by other justiciability doctrines such as nonreviewability of administrative action, or ripeness for judicial review; but this has been fairly rare.[79] The plaintiff who claims present or prospective economic loss due to governmental action usually will be able to challenge its validity.

3. *Challenges to Allocation of Governmental Benefits.—Barlow v. Collins* involved standing to challenge governmental action affecting the new property[80] represented by governmental benefits. Such standing was recognized prior to *Barlow*, and is now beyond dispute. The status of plaintiffs as persons eligible for government benefits, for example, gives them standing to challenge the way these programs are administered[81] or the failure of the programs to provide benefits.[82] Likewise,

with duty-free imported steel); Harry H. Price & Sons, Inc. v. Hardin, 425 F.2d 1137 (5th Cir. 1970) (tomato wholesaler had standing to challenge Secretary of Agriculture's regulation restricting importation of tomatoes from Mexico); Sam Andrews' Sons v. Mitchell, 326 F. Supp. 35 (S.D. Cal. 1971) (grower relying on work force composed of Mexican "green card commuters" had standing to challenge regulation prohibiting such workers from accepting employment at a place where a labor dispute existed).

78. 319 F. Supp. 1346 (W.D. Wash. 1970), *aff'd mem.*, 402 U.S. 1006 (1971).

79. For one instance when the doctrine of ripeness was invoked, however, see P.A.M. News Corp. v. Hardin, 440 F.2d 255, 257 (D.C. Cir. 1971).

80. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

81. *See* Peoples v. United States Dep't of Agriculture, 427 F.2d 561 (D.C. Cir. 1970); Essex County Welfare Bd. v. Cohen, 299 F. Supp. 176 (D.N.J. 1969).

82. Alexander v. Swank, 404 U.S. 282 (1971) (minors who lost AFDC benefits as a result of attending college were allowed to challenge the constitutionality of a rule allowing AFDC benefits to minors between the ages of 18 and 21 only if they were attending high school or vocational training schools); Tucker v. Hardin, 430 F.2d 737 (1st Cir. 1970) (indigent women who were eligible for surplus commodities but who were residents of communities not receiving commodities because no funds had been provided for local distribution costs, had standing to challenge rule of Secretary of Agriculture requiring local communities to pay such costs as a condition to receipt of surplus commodities); Sparrow v. Gill, 304 F. Supp. 86 (M.D.N.C. 1969) (residents of affected area permitted to challenge denial of state-provided school bus transportation). *But see* Carlsbad Union School Dist. v. Rafferty, 300 F. Supp. 434 (S.D. Cal. 1969), *aff'd*, 429 F.2d 337 (9th Cir. 1970), and Triplett v. Tiemann, 302 F. Supp. 1239 (D. Neb. 1969), in which it was held that residents of a school district did not have standing to challenge on equal protection grounds state laws which provided for the deduction of certain percentages of federal impacted area funds from the amount of state aid that otherwise would have been allocated by the state to the impacted school districts.

prior to *Barlow,* it was held that residents who were displaced by an urban renewal program had standing to challenge the failure of urban renewal officials to provide for adequate relocation.[83] The same was true with respect to violations of the relocation provisions of the Federal Highway Act.[84] Moreover, in *Shannon v. Hud,*[85] decided after *Barlow,* the Third Circuit Court of Appeals held that all persons in an urban renewal area who would be affected by the development program—residents, businessmen, and civic organizations—had standing to challenge the urban renewal plan as violative of federal statutes.[86] Furthermore, in the recent case of *Northwest Residents Association v. HUD,*[87] property owners in an area affected by HUD activity—property appraisals and approval of building applications—were held to have standing to challenge these actions as violative of the 1968 Housing and Urban Development Act.[88]

In this area, however, nonreviewability of administrative action can be particularly important. Two circuits recently have held, for example, that approval of rents and charges in federally subsidized low-and moderate-income housing is a matter committed to agency discretion under the Administrative Procedure Act,[89] thereby barring judicial review.

4. *Other Private Interests.*—We may now consider some other situations in which the plaintiff seeks to protect essentially private interests. A property owner can challenge governmental action that would make his property less valuable.[90] Moreover, a plaintiff suing a local

83. The leading case is Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968). *See also* Aarrington v. City of Fairfield, 414 F.2d 687 (5th Cir. 1969); Hanley v. Volpe, 305 F. Supp. 977 (E.D. Wis. 1969).

84. *See* Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1968), *cert. denied,* 390 U.S. 921 (1968); Triangle Improvement Council v. Ritchie, 314 F. Supp. 20 (S.D.W. Va. 1969), *aff'd,* 429 F.2d 423 (4th Cir. 1970), *petition for cert. dismissed,* 402 U.S. 497 (1971).

85. 436 F.2d 809 (3d Cir. 1970).

86. *See also* Coalition for United Community Action v. Romney, 316 F. Supp. 742 (N.D. Ill. 1970) (organizations representing residents in model cities areas had standing to challenge the failure of the Secretary to determine that the proposed model cities program satisfied the statutory criteria). *Contra,* Benson v. City of Minneapolis, 286 F. Supp. 614 (D. Minn. 1968) (resident of a proposed model cities area held to lack standing to challenge the constitutionality of the statute).

87. 325 F. Supp. 65 (E.D. Wis. 1971).

88. 12 U.S.C. § 1701t (1970). The court had some difficulty with the second prong of the *Data Processing* test, but found that the statutory policy of guaranteeing a "decent home and suitable living environment for every American family" was sufficient. *Id.*

89. Langevin v. Chenago Court, Inc., 447 F.2d 296 (2d Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970).

90. L'Enfant Plaza N., Inc., v. District of Columbia Redevelopment Land Agency, 300 F. Supp. 426 (D.D.C. 1969) (urban renewal plan that would have established similar and competitive buildings). *See also* The Bootery, Inc. v. Washington Metropolitan Area Transit Authority, 326

governmental agency has been allowed to question the legitimacy of that agency's use of federal funds to defray expenses incurred in the defense of his suit.[91] In addition, the Supreme Court has held that a person falsely accused of a criminal offense by a state commission has standing to litigate its constitutionality.[92]

Of course, the plaintiff's claim may be denied on the basis of other justiciability considerations. A plaintiff will not, for example, be allowed to challenge the application of a statute to a set of hypothetical or abstract facts.[93] Likewise, a litigant may be denied standing to seek relief if his claim is not ripe for judicial determination.[94] Furthermore, courts probably will continue to deny review when a private claim becomes moot.[95]

B. The "Private-Public Action" Standing To Protect Freedom of Expression

It obviously is not possible to draw a neat dichotomy between private and public actions. Motivation is often a very mixed thing. In bridging the gap between the private and the public action, it may be useful to consider the problem of standing to protect first amendment freedom of expression. Here the plaintiff necessarily is concerned with the public interest in freedom of expression, but his concern is related to the kind of expression that he wants the public to hear.

The "public nature" of any first amendment claim in relation to the standing of the particular plaintiff who is asserting it was recognized in *Mandel v. Mitchell*,[96] which held that university professors who invited an alien to speak on campus had standing to challenge the constitutionality of a statute excluding him. The court observed that "[t]he special relation of plaintiffs to Mandel's projected visit gives them a specificity of interest in his admission, reinforced by the general public interest in the prevention of any stifling of political utterance, that

F. Supp. 794 (D.D.C. 1971) (leaseholding business operators who would be dislocated by mass transit plan had standing to challenge validity of the plan).

91. West Coast Constr. Co. v. Oceans Sanitary Dist., 311 F. Supp. 378 (N.D. Cal. 1970).

92. Jenkins v. McKeithan, 395 U.S. 411 (1969).

93. *See, e.g.*, King v. McCaffrey, 321 F. Supp. 344 (S.D.N.Y. 1970).

94. *See, e.g.*, Bowes v. Commission to Investigate Allegations of Police Corruption, 330 F. Supp. 262 (S.D.N.Y. 1971) (suit to enjoin commission from compelling appearance of plaintiffs on the ground that their assertion of privilege against self-incrimination before commission would lead to their discharge).

95. *E.g.*, Heumann v. Board of Educ., 320 F. Supp. 623 (S.D.N.Y. 1970) (teacher's claim of unconstitutional denial of license because she was confined to a wheelchair mooted when she obtained relief on administrative appeal).

96. 325 F. Supp. 620 (E.D.N.Y. 1971) *prob. juris. noted*, 92 S.Ct. 67.

abundantly satisfies 'standing' requirements."[97] Nevertheless, a plaintiff's standing depends upon a showing that *his* first amendment rights have been abridged by governmental action; the substantive basis of his challenge serves to protect the public interest in freedom of expression.[98]

As a practical matter, affirmative actions to protect freedom of expression were fairly rare prior to the Supreme Court's 1965 decision in *Dombrowski v. Pfister*.[99] This may have been due largely to the restrictive notion of standing enunciated in *United Public Workers v. Mitchell*,[100] which seemed to say that a person could not challenge a statute on the ground that it deprived him of first amendment rights unless he actually had violated its prohibitions. In *Dombrowski* the Supreme Court recognized that the threatened enforcement of a facially invalid law regulating or applicable to acts of expression could have a *chilling effect* on the exercise of first amendment rights, and on that basis it enjoined future enforcement of the Louisiana subversive activities statute. The "*Dombrowski*-type suit[101] has received the greatest attention in connection with injunctions against pending criminal prosecutions in state courts—a function that was considerably limited by the Supreme Court's recent decisions in *Younger v. Harris*[102] and related cases.[103] It is equally applicable, however, to actions seeking to enjoin future federal and state law enforcement or other threatened governmental action.[104] In this regard *Dombrowski* broadened the notion of "irreparable injury"[105] and, at the same time, necessarily liberalized standing to assert a violation of first amendment rights.[106]

From this perspective, *Dombrowski* must be viewed as an impor-

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97. *Id.* at 632.

98. For a discussion regarding the different functions of the constitutional guarantee see Sedler, *Review: The First Amendment in Theory and Practice*, 80 YALE L.J. 1070, 1079-80 (1971).

99. 380 U.S. 479 (1965).

100. 330 U.S. 75 (1947).

101. *See generally* Sedler, *supra* note 1; Sedler, *Dombrowski in the Wake of Younger: The View from Without and Within*, 1972 WIS. L. REV. 1.

102. 401 U.S. 37 (1971).

103. Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

104. *See, e.g.*, National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969).

105. To say that the plaintiff must show that he would suffer irreparable injury if an injunction is not granted is merely the traditional way of saying that he must demonstrate the inadequacy of other remedies in order to be entitled to affirmative equitable relief.

106. As one court has observed: "Subsequent case law weakened Mitchell as a precedent in first amendment cases, since Mitchell was decided prior to judicial recognition of the so-called 'chilling effect' doctrine." National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546, 549 (D.D.C.), *appeal dismissed*, 400 U.S. 801 (1970).

tant step in the process of liberalizing standing requirements that ultimately culminated in *Data Processing* and *Barlow*. Indeed, it is fair to say that prior to those decisions, it was assumed that the requirements of standing were lower in the first amendment area than in others.[107] As long as plaintiffs could show that their rights of expression somehow would be "chilled" by the law or action they were challenging, they could bring a *Dombrowski*-type suit—a shorthand way of saying that they satisfied both the remedies test of irreparable injury and the judicial review test of standing. Thus, in *National Student Association v. Hershey*,[108] anti-war organizations acting on behalf of their members were allowed to challenge the legality of the "Hershey Directive," which prescribed the removal of draft deferments for registrants who had engaged in illegal protest activity. Likewise, university students and faculty have been allowed to challenge speaker ban laws,[109] and the courts have permitted public employees to challenge required loyalty oaths before the enforcement of sanctions for noncompliance.[110]

The limitations recently imposed upon the *Dombrowski*-type suit deal primarily with its availability to enjoin pending criminal prosecutions. In the one case dealing with relief against future enforcement, *Boyle v. Landry*,[111] the Court held that the mere allegation of a chilling effect due to the facial invalidity of a law was insufficient to establish a justiciable claim. This, however, does not affect the holdings in *Hershey* and related cases that a demonstrable chilling effect is sufficient to satisfy the requirements of irreparable injury and standing. Thus, when a plaintiff establishes a "credible threat of enforcement and plausible allegations of intent or desire to engage in the threatened activities,"[112] he has alleged irreparable injury and has standing to challenge the validity of a law or other governmental action. The credible threat of enforcement may be established either by past prosecutions of the plaintiff under the law that he is challenging[113] or by the fact that his activities

107. *See, e.g.*, Reed Enterprises v. Corcoran, 354 F.2d 519, 523 (D.C. Cir. 1965) ("Where the plaintiff complains of chills and threats in the protected Fifth Amendment area, a court is more disposed to find that he is presenting a real . . . controversy").

108. 412 F.2d 1103 (D.C. Cir. 1969).

109. *E.g.*, Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969); Snyder v. Board of Trustees, 286 F. Supp. 927 (N.D. Ill. 1968); Dickson v. Sitterson, 280 F. Supp. 486 (N.D.N.C. 1968).

110. Baggett v. Bullitt, 377 U.S. 360 (1964).

111. 401 U.S. 77 (1971).

112. National Students Ass'n v. Hershey, 412 F.2d 1103, 1111 (D.C. Cir. 1969).

113. *See, e.g.*, Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971); Kirkwood v. Ellington, 298 F. Supp. 461 (W.D. Tenn. 1969); University Comm. To End War in Vietnam v. Gunn, 289 F. Supp. 469 (W.D. Tex. 1968), *appeal dismissed*, 399 U.S. 383 (1970); Hunter v. Allen, 286 F. Supp. 830 (N.D. Ga. 1968), *aff'd*, 422 F.2d 1158 (5th Cir. 1970).

are clearly subject to its prohibitions.[114]

A more difficult question is presented when the plaintiff's activities are not expressly covered by the law in question, and the law has not yet been invoked against him. Most laws that can be used to repress freedom of expression are directed toward specific conduct rather than toward categories of persons, groups, or activities. These laws are a potent weapon in the hands of government officials, who can enforce them against any person or group engaged in dissent. This is especially true in the case of laws that are vague and overbroad. In this area the chilling effect recognized in *Dombrowski* and the nexus criteria of standing developed in *Flast* have become most significant. When a credible threat of enforcement has been made, it is possible to find a specific chilling effect on the activities toward which the threat is directed, and the persons engaged in them feel the brunt of the chill. The nexus between their status as participants in social change efforts and their challenge of laws whose threatened enforcement chills such activities gives them standing to seek judicial review.[115]

C. *Public Actions*

In the public action a primary or major purpose of the suit is to protect certain shared values that are allegedly infringed by the governmental action which is being challenged. The violation of these values, of course, may cause specific injury to certain individuals, but this is not the principal reason such actions are instituted. The test case is perhaps the most obvious example of a public action. Such actions are usually a group effort, supported and financed by a number of concerned individuals or representative organizations.

As a part of the test case strategy an effort is made to find named plaintiff who have a personal stake in the controversy, in order to overcome any standing hurdle. Nevertheless, the degree of personal stake

114. *See, e.g.*, Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971); United Steelworkers v. Bagewell, 383 F.2d 492 (4th Cir. 1967); National Ass'n of Theater Owners v. Motion Picture Comm'n, 328 F. Supp. 6 (E.D. Wis. 1971); Gall v. Lawler, 322 F. Supp. 1223 (E.D. Wis. 1971).

115. *See, e.g.*, Long Island Vietnam Moratorium Comm. v. Cahn, 437 F.2d 344 (2d Cir. 1970), *cert. denied*, 400 U.S. 956 (1970) (organization had standing to challenge state law under which prosecution of persons wearing its emblem was threatened); Anderson v. Vaughn, 327 F. Supp. 101 (D. Conn. 1971) (plaintiffs as members of group displaying Viet Cong flags had standing to challenge "red-flag" statute under which fellow members of group were arrested); Straut v. Calissi, 293 F. Supp. 1339 (D.N.H. 1968) (anti-war organization had standing to challenge a state law prohibiting opposition to the draft or war effort). *But see* Hendricks v. Hogan, 324 F. Supp. 1277 (S.D.N.Y. 1971) (suit brought by plaintiffs who had exhibited at the same show out of which flag desecration prosecutions arose dismissed on the ground that plaintiffs had not been threatened with arrest).

involved does not result in the case being handled any differently. Consequently, it is difficult to believe that the Supreme Court really meant what it said in *Flast* when it tried to make the distinction between a "personal stake" and "generalized grievances" a factor in determining whether the plaintiff would pursue the litigation with the "necessary adverseness" and vigor.[116] To assume that cases are different in terms of adverseness and vigor of pursuit is completely unrealistic.[117] Therefore, it would seem that the justiciability of public actions should be determined on the basis of the kind of challenges the Court is prepared to hear—something akin to the political question doctrine.[118]

1. *Abortion.*—The lawyer handling a suit challenging an abortion statute will argue that his plaintiffs have standing under conventional notions, in an attempt to disguise the public nature of the suit. The courts have responded in a similar vein by finding standing when any personal interest can be shown. The "standard plan" in these suits is to include as plaintiffs a physician, a pregnant woman desiring an aboriton, a woman seeking to avoid pregnancy, and other concerned professionals. In most cases standing has not been a problem, at least for the treating physician and his patient.[119]

2. *Reapportionment.*—Standing, likewise, has not been a recognizable problem in reapportionment cases. The crucial issue in *Baker*

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116. 392 U.S. at 106.

117. *See* Davis, *supra* note 26, at 608-11; Jaffe, *supra* note 60, at 1037-38. If the suit were collusive, of course, this would constitute an independent ground for dismissal.

118. Professor Jaffe has argued that the citizen or taxpayer should have standing to bring a public action despite lack of any "personal interest." Jaffe, *supra* note 60, at 1043. He also contends that the case and controversy provision does not require a Hohfeldian plaintiff. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 635 (1971); *accord*, 392 U.S. at 119-20 (Harlan, J., dissenting); Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969). By citing these authorities in Sierra Club v. Morton, 40 U.S.L.W. 4397, 4399 n.3 (U.S. Apr. 19, 1972), the Supreme Court seemed to agree with them.

119. *See* Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971); Crossen v. Breckenridge, 446 F.2d 833 (6th Cir. 1971); Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971); Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970); Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971); Doe v. Dunbar, 320 F. Supp. 1297 (D. Colo. 1970); Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), *prob. juris. noted*, 402 U.S. 941 (1971) (only as to woman); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *prob. juris. noted*, 402 U.S. 941 (1971). In Planned Parenthood Ass'n v. Nelson, 327 F. Supp. 1290 (D. Ariz. 1971), the court dismissed a challenge by a physician, married couples, and the Planned Parenthood Association on the following grounds: lack of standing, failure to show "irreparable injury," and failure to exhaust state remedies. There was no pregnant woman plaintiff. In Doe v. Randall, 314 F. Supp. 32 (D. Minn. 1970), *aff'd sub nom.*, Hodgson v. Randall, 402 U.S. 967 (1971), the court held that the case was not justiciable because the physician who had admittedly performed an abortion on the pregnant woman plaintiff had not been prosecuted. Even if the physician had been prosecuted, however, the suit would be dismissed unless the plaintiff could establish "irreparable injury" under the *Younger* criteria. *See* Babbitz v. McCann, 320 F. Supp. 219 (E.D. Wis. 1970), *vacated*, 402 U.S. 903 (1971).

v. Carr,[120] was whether the Court would continue to apply the political question doctrine as a bar to justiciability. In subsequent reapportionment cases any challenge to standing has been rejected summarily.[121] The same principle has been applied broadly in actions affecting suffrage[122] and the right to seek or hold a public office.[123]

3. *Racial Discrimination.*—The courts have liberally interpreted standing requirements in cases involving claims of racial discrimination. Any black person has standing to challenge, on equal protection grounds, a policy of legally required segregation in public facilities. Moreover, in the area of school segregation parents of black children attending public schools have been held to have standing to challenge teacher assignment,[124] a state statute prohibiting the assignment of students to prevent racial imbalance,[125] and the tax-exempt status of private, segregated schools.[126] On the other hand, in *Whitley v. Wilson City Board of Education*,[127] white parents successfully challenged the allegedly arbitrary assignment of their children to a predominately black school on the ground that they were denied equal protection because the school was not part of a unitary system. The same reasoning would entitle white parents who wanted integrated schools to attack the failure of a school board to establish a unitary system.

In addition to his right to seek judicial relief from government-sanctioned racial discrimination in the area of education, a black person who has been denied a governmental benefit or the opportunity to par-

120. 369 U.S. 186 (1962).

121. *See* Swann v. Adams, 385 U.S. 440 (1967); Gray v. Sanders, 372 U.S. 368 (1963).

122. Harman v. Forssenius, 380 U.S. 428 (1965); Christopher v. Mitchell, 318 F. Supp. 994 (D.D.C. 1970); Mexican-Am. Fed'n-Wash. State v. Naff, 299 F. Supp. 587 (E.D. Wash. 1969), *vacated*, 400 U.S. 986 (1971).

123. Turner v. Fouche, 396 U.S. 363 (1970); Shakman v. Democratic Organization, 435 F.2d 267 (7th Cir. 1970); Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803 (D.D.C. 1971); Jackson v. Ogilvie, 325 F. Supp. 864 (N.D. Ill.), *aff'd*, 403 U.S. 925 (1971); McCarley v. Sanders, 309 F. Supp. 8 (M.D. Ala. 1970); Valenti v. Rockefeller, 292 F. Supp. 851 (W.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969); *cf.* Georgia Socialist Workers Party v. Fortson, 315 F. Supp. 1035 (N.D. Ga. 1970), *aff'd*, 403 U.S. 431 (1971).

124. Rogers v. Paul, 382 U.S. 198 (1965).

125. Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970).

126. Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), *aff'd*, 400 U.S. 986 (1971). *See also* McGlotten v. Connally, 40 U.S.L.W. 2465 (D.D.C. Jan. 11, 1972) (black who was allegedly denied membership in a local Elks lodge successfully challenged the allowance of tax deductions for contribution to and the tax exemption of fraternal orders that practice racial discrimination); Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971) (black allegedly denied membership in discriminatory organization and both black and white taxpayers not associated with discriminatory organizations allowed standing to challenge property tax exemptions of such organizations).

127. 427 F.2d 179 (4th Cir. 1970).

ticipate in the governmental process because of race has standing to challenge this discrimination. Thus, black citizens have been allowed to seek affirmative relief against their exclusion from jury service.[128] Moreover, in *Coleman v. Aycock*,[129] a federal district court allowed black city residents to challenge a number of discriminatory practices—including segregation in the jails, hospitals, and cemeteries—without regard to whether they personally had suffered discrimination with respect to such facilities. Likewise, in *Marable v. Alabama Mental Health Board*,[130] black mental patients were found to have standing to challenge discriminatory hospital employment practices. There have been a few cases, however, in which blacks who were not personally affected by the alleged discrimination were held to lack standing. In *Brown v. Lutz*,[131] a black plaintiff who had no children in the public schools was denied standing to challenge the actions of the board of education in providing financial assistance, building space, and transportation to segregated private schools. Furthermore, in *Hadnott v. City of Prattville*,[132] the court held that black citizens who had not applied for municipal employment lacked standing to seek injunctive relief against the municipality's employment discrimination.[133]

The approach of the courts in these last cases ignores the essence of a claim of racial discrimination. Societal discrimination against blacks, the maintenance of governmentally sponsored segregation, and the institutional racism that is so much a part of the American scene cannot be broken down into individual parts. Since these practices have relegated black persons to second class citizenship, they should be able to challenge governmentally imposed segregation and discrimination as a class without having to show private injury. More realistically, this means that civil rights groups should not have to find the right plaintiff in order to launch an attack on governmental apartheid. All blacks have an interest in ending racial discrimination and segregation, and to insist on individual injury makes no sense whatsoever.

White citizens also should be able to assert their right to live in a nonracist society. A white person who has been discriminated against because of his association with blacks has standing to seek relief under

128. Carter v. Jury Comm'n, 396 U.S. 320 (1970).
129. 304 F. Supp. 132 (N.D. Miss. 1969).
130. 297 F. Supp. 291 (M.D. Ala. 1969).
131. 316 F. Supp. 1096 (E.D. La. 1970).
132. 309 F. Supp. 967 (M.D. Ala. 1970).
133. A rejected applicant, however, can maintain a discrimination suit as a class action. Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970).

applicable civil rights laws.[134] In the recent case of *Trafficante v. Metropolitan Life Insurance Co.*,[135] however, white tenants in an apartment complex were held to lack standing to challenge its racially discriminatory practices. The assumption upon which the court proceeded was that the plaintiffs lacked standing because they were not injured by these practices.[136] This assumption begs the fundamental question why the law prohibits racial discrimination. If our society is truly committed to eliminating racism, then it would seem that any person, whether black or white, desiring to live in a nonracist society should have standing to compel obedience to the Constitution and laws that mandate racial equality as an officially approved value. If the courts would recognize the fact that such actions are public because of an underlying design to implement officially approved values of racial equality, they would not need to concern themselves with any question of standing.[137]

4. *Sex Discrimination.*—If principles similar to those in the racial discrimination area are applicable to sex discrimination, it would seem that any woman should be able to bring a public action to challenge institutional sexism. In *Kirstein v. Rector & Visitors of University of Virginia*,[138] four women brought suit in federal district court to compel their admission to the University of Virginia at Charlottesville, thereby attacking the state's policy of establishing all-female educational institutions. The court begrudgingly[139] conceded that plaintiffs were entitled to admission on "separate but equal grounds" since the female institutions were not of comparable quality to the University.[140] Nevertheless, it held that the plaintiffs lacked standing to challenge the legality of any other state educational institution segregated as to sex on the ground that they could suffer no harm from the operation of those institutions which they did not wish to attend.[141] This reasoning is faulty because the

134. Sullivan v. Little Hunting Park Lodge, 396 U.S. 229 (1969).

135. 446 F.2d 1158 (9th Cir. 1971), *cert. granted*, 40 U.S.L.W. 33988 (U.S. Feb. 22, 1972) (No. 708).

136. The court noted that under the Fair Housing Act of 1968, 42 U.S.C. § 3613 (1970), the Attorney General could bring a "pattern and practice" suit. It also observed that after the instant action had been dismissed in the district court, individual blacks, "represented by the counsel for the appellants here," brought suit against the defendant. 446 F.2d at 1162.

137. There is indeed a nexus between the plaintiff's status in this type of suit and the claim he is asserting: as a person desiring to live in a nonracist society, he is asserting that the action challenged perpetuates racism.

138. 309 F. Supp. 184 (E.D. Va. 1970).

139. It emphasized that the University was doing all it could and continually chided plaintiffs for refusing to settle the case.

140. This places women in the position occupied by blacks under the doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896). The Supreme Court, however, has recently indicated its willingness to move a bit farther toward invalidating sexually discriminatory classifications. Reed v. Reed, 404 U.S. 71 (1971).

141. 309 F. Supp. at 188.

existence of separate schools and other aspects of institutional sexism is precisely what perpetuates sexual inequality.[142] Perhaps, as the court indicated, the broader issue had not been developed fully in the context of the particular case,[143] but that would have been an independent ground for refusing to reach the question.

5. *Church-State Separation.*—In the area of separation of church and state, *Flast* made possible use of the public action to challenge federal expenditures as violative of the establishment clause of the first amendment.[144] Although prior to *Flast* such actions were allowed with respect to actual state and local expenditures,[145] a plaintiff attacking required Bible reading or school prayer had to establish a personal "interest," such as parental status.[146] This approach was finally abandoned by the District of Columbia Court of Appeals in *Allan v. Hickel.*[147] The court held that *Flast* and *Data Processing,* taken together, removed the requirement of pocketbook injury, thereby allowing District of Columbia residents to challenge, on establishment grounds, the inclusion of a creche in the National Park Service's Christmas pageant.[148] Assuming this approach will be followed by other courts, there would seem to be no significant limitations on the public action as a vehicle for asserting first amendment rights.

6. *Vietnam War.*—Affirmative actions attempting to obtain a judicial declaration concerning the legality of the Vietnam War often have foundered on standing grounds. Citizen-taxpayers have been denied standing on the ground that they were not basing their claim on a specific limitation of the taxing and spending power,[149] and draft registrants have fared no better.[150] Similarly, those criminally prosecuted for

142. L. KANOWITZ, WOMEN AND THE LAW 4 (1969).

143. 309 F. Supp. at 188.

144. *Accord,* Board of Educ. v. Allen, 392 U.S. 236, 241 n.5 (1968) (school board's standing to challenge a state law requiring them to furnish textbooks to parochial school students was not questioned); Protestants & Other Americans United v. Watson, 407 F.2d 1264 (D.C. Cir. 1968) (taxpayer had standing to bring suit challenging the issuance of a commemorative Christmas stamp).

145. *See* note 16 *supra* and accompanying text.

146. *See* School Dist. v. Schempp, 374 U.S. 203, 224 n.9 (1963); Doremus v. Board of Educ., 342 U.S. 429 (1952); Caldwell v. Craighead, 432 F.2d 213 (6th Cir. 1970).

147. 424 F.2d 944 (D.C. Cir. 1970).

148. The lower court recently held that inclusion of the creche did not violate the first amendment because the total pageant was secular in nature. Allen v. Morton, 333 F. Supp. 1088 (D.D.C. 1971).

149. Pietsch v. President of United States, 434 F.2d 861 (2d Cir. 1970); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied,* 396 U.S. 1042 (1970).

150. *See* Medeiros v. United States, 294 F. Supp. 198 (D. Mass. 1968).

draft refusal have been unable to challenge the legality of the war,[151] and this suggests that standing is not the principal reason for judicial reluctance to reach the merits. The real issue, of course, is whether the legality of the war comes within the political question doctrine. Most courts have held that it does, and the Supreme Court has apparently acquiesced in this view by its failure to grant certiorari in any of the decided cases. The few courts holding that the question should be considered on the merits have had no difficulty in finding standing. In *Berk v. Laird*,[152] for example, a private who had been ordered to Vietnam was allowed to challenge the war's legality,[153] and in *Mottola v. Nixon*,[154] this holding was extended to reservists who might be called for service in Vietnam. Moreover, although the court in *Massachusetts v. Laird*[155] refused to recognize any standing of the state to challenge the legality of the war on behalf of its citizens, it did find standing on the part of individual plaintiffs serving in Southeast Asia.[156] Finally, in *Atlee v. Laird*,[157] the court held that any citizen had standing to seek a determination of the war's constitutionality because of the impact that it has had on American life.[158] These cases, as well as those denying justiciability, indicate that the legality of the Vietnam War poses a justiciability problem of the highest magnitude, but that the status of the person raising the challenge is totally irrelevant.

7. *Citizen's Suits.*—A number of recent cases, whose clear purpose was to test the validity of governmental action, point up the increasing liberalization of standing requirements in the public action. In one especially significant case, *Reservists Committed to Stop the War*

151. *See, e.g.*, United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

152. 429 F.2d 302 (2d Cir. 1970).

153. Although the court left open the issue whether the political question doctrine operated as a bar, it refused to grant a preliminary injunction.

154. 318 F. Supp. 538 (N.D. Cal. 1970).

155. 451 F.2d 26 (1st Cir. 1971).

156. The Supreme Court, without comment and over the dissents of Justices Douglas, Stewart, and Harlan, refused to allow an original action by Massachusetts. Massachusetts v. Laird, 400 U.S. 886 (1970). The First Circuit Court of Appeals held that the political question doctrine was not a bar to justiciability, but it concluded that the constitutional claim was without merit.

157. 40 U.S.L.W. 2660 (E.D. Pa. Mar. 28, 1972).

158. The court observed that the loss of human resources reflected in the deaths of over 45,000 soldiers "provides a sufficient 'conservational' interest on the part of every citizen in saving the human resources of this nation." 40 U.S.L.W. at 2661. It also noted that because the nation was at war this "necessarily causes some threat to the personal safety and security of all the citizens, given the complexity of international relationships and the advanced means of war that have been developed through technology." *Id.* The citizen's interest in having the nation free from any war except one declared by Congress was found to be within the zone of interests protected by article I, § 8 of the Constitution.

v. Laird,[159] former reservists were allowed as *citizens* to challenge the eligibility of congressmen to hold reserve commissions in the Armed Forces. The court specifically rejected plaintiffs' argument that as reservists they had suffered special injury due to favoritism shown congressmen in promotions and assignments, and it further noted that this alleged injury was not within the "zone of interests" which the constitutional provision barring congressmen from appointment to "civil office under the authority of the United States"[160] was designed to protect. Likewise, plaintiffs had no standing as taxpayers, because the constitutional provision upon which they relied could not be construed as a limitation on the spending power. In the court's view, however, this was a proper case for a citizen's suit. First, while any injury suffered as a result of violation of the constitutional prohibition might have been hypothetical, this hypothesis, according to the court, formed the basis for the constitutional bar, which "addresses itself to the potential for undue influence rather than to its realization."[161] Secondly, the issue was a narrow one involving a precise, self-operative provision of the Constitution. Thirdly, the court said that all citizens share an "interest in maintaining independence among the branches of government" which constitutes "the primary if not the sole purpose of the bar against congressmen holding executive office."[162] Finally, the court concluded that the case did not involve a political question.

In *Reservist's Committee* the court clearly recognized the public action concept[163] and, at the same time, pointed up the irrelevancy of standing as a component in the question of justiciability. While plaintiffs suffered no demonstrable special injury, the polity as a whole was damaged by the constitutional violation. Consequently, a citizen was able to bring suit to enforce the public interest. Although other justiciability considerations might have rendered the suit inappropriate, those considerations were not present because the case turned on a pure question of law. Indeed, the court went out of its way to end the "standing game" by making the following observation: "In recent years the Supreme Court has greatly expanded the concept of standing and in this Circuit the concept has now been almost completely abandoned."[164]

159. 323 F. Supp. 833 (D.D.C. 1971).

160. U.S. CONST. art. I, § 6.

161. 323 F. Supp. at 840.

162. *Id.* at 841.

163. *See* note 60 *supra* and accompanying text.

164. 323 F. Supp. at 839. This was before the Supreme Court's decision in Sierra Club v. Morton, 40 U.S.L.W. 4397 (U.S. Apr. 19, 1972), which held that failure to allege sufficient personal injury was fatal to an organization plaintiff's environmental suit. Although it is uncertain

Standing in citizen suits to protect consumer interests also has been liberalized. In *Nader v. Volpe*,[165] for example, Ralph Nader was allowed to challenge an extension of time given to a manufacturer for compliance with safety standards established by the National Traffic and Motor Vehicle Safety Act.[166] The court reasoned that allowing a manufacturer to place unsafe vehicles on the road conflicted with Nader's duties as a member of the National Motor Vehicles Safety Advisory Council and as a crusader for auto safety.

Citizen suits still occasionally founder on the standing bar. In *Richardson v. Kennedy*,[167] a federal district court held that a citizen had no standing to challenge the constitutionality of the congressional pay raise effected by the Postal Revenue and Federal Salary Act of 1967.[168] Surprisingly, in the recent case of *Bradford v. Greene*,[169] the District of Columbia Circuit summarily affirmed a lower court decision denying standing in a citizen's action to challenge the constitutionality of the "no-knock" and preventive detention features of the District of Columbia Court Reform and Criminal Procedure Act of 1970.[170] Finally, in *Sharrow v. Brown*,[171] a resident of New York who sought to enjoin transmission of the results of the 1970 Census to the President on the ground that the fourteenth amendment required the Director of the Census to compile statistics on the number of disenfranchised voters in each state, was held to lack standing because he had not proved that enforcement of the constitutional mandate to reduce representation for denial of suffrage[172] would have increased New York's representation.

The results in these cases perhaps may be explained on grounds other than standing. In *Richardson,* the substance of the plaintiff's claim appeared questionable. If the claim were meritorious, the situation would not seem very different from that deemed appropriate for a citizen's suit in *Reservists Committee.* The reluctance of the *Bradford*

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whether in a case similar to *Reservists Committee* a court would now have to play the standing game, it can be argued that every citizen suffers injury in fact from the action that was challenged there.

165. 320 F. Supp. 266 (D.D.C. 1970).

166. 15 U.S.C. §§ 1381-1431 (1970).

167. 313 F. Supp. 1282 (W.D. Pa. 1970).

168. 2 U.S.C. §§ 351-61 (1970).

169. 440 F.2d 265 (D.C. Cir. 1971).

170. Pub. L. No. 91-358, 84 Stat. 473 (codified in scattered sections of 5, 18, 28, 42 U.S.C.).

171. 447 F.2d 94 (2d Cir. 1971).

172. The fourteenth amendment provides that when the right to vote has been abridged "except for participation in rebellion or other crime," the basis of representation shall be reduced in the proportion which the number of citizens disenfranchised bears to the total number of citizens 21 years of age or older.

court to consider the constitutionality of controversial provisions of the D.C. Crime Bill is clearly understandable. Evidently, the constitutionality of the statute was simply not a question that the court considered appropriate for determination in a citizen suit, but rather it viewed the issue as one requiring examination on a case-by-case basis with "live" challengers. The situation presented in *Sharrow* is somewhat more difficult. It is quite obvious that the court did not want to deal with the problem in the context of a challenge to the validity of the census. Moreover, judicial enforcement of the second section of the fourteenth amendment would have necessitated ordering executive officials to make factual determinations in every state. The court was obviously unwilling to withhold census results to accomplish that result.

IV. STANDING OF ORGANIZATIONS SEEKING TO PROTECT THE ENVIRONMENT

Organizational standing is often appropriate in both the private and the public action. When there has been injury to the private interests of a group of individuals, an organization representing them should have standing to sue without requiring it to join designated individuals as plaintiffs. Commercial organizations, for example, clearly have been able to challenge action detrimental to their members.[173] Likewise, labor unions have been able to assert the rights of their members.[174] In the public action, organizational standing is even more appropriate since an organization usually supports and finances the suit. Moreover, the possibility of extralegal pressures against designated plaintiffs in controversial cases may make suit by an organization plaintiff a real necessity.[175] Organizational standing has been recognized in public ac-

173. Association of Data Processing Serv. Organizations v. Camp, 395 U.S. 976 (1969); Chemical Specialties Mfrs. Ass'n v. Lowery, 452 F.2d 431 (2d Cir. 1971); National Automatic Laundry Council v. Schultz, 443 F.2d 689 (D.C. Cir. 1971); National Ass'n of Theatre Owners v. Motion Picture Comm'n, 328 F. Supp. 6 (E.D. Wis. 1971); Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970). *See also* Citizens Ass'n v. Simonson, 403 F.2d 175 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 975 (1969) (neighborhood association had standing to challenge the issuance of a retail liquor license).

174. Lodge 1858, Am. Fed'n of Gov't Employees v. Paine, 436 F.2d 882 (D.C. Cir. 1970); Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969); Armstead v. Municipal Separate School Dist., 325 F. Supp. 560 (N.D. Miss. 1971); National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969), *appeal dismissed,* 400 U.S. 801 (1970). *But see* State Employees Ass'n v. Natural Resources Bd., 298 F. Supp. 339 (W.D. Wis. 1969) (standing denied to union when an individual employee joined as party plaintiff).

175. *See* Sedler, *supra* note 5, at 655.

tions brought by religious,[176] civil rights,[177] antipoverty,[178] consumer-protection,[179] and environmental groups;[180] but it also has been denied in some cases,[181] including suits by a state on behalf of its citizens.[182] Since most of the significant recent cases dealing with organization standing have involved suits by environmental groups seeking to enforce environmental protection laws, the question of organization standing will be discussed in this context.

An effort has been made in framing environmental suits to come up with affected individuals and organizations as plaintiffs in order to bring the case within traditional standing notions. In some cases, however, this has not been possible. These cases raise the fundamental question whether concerned individuals and organizations have standing in their own right to seek judicial protection of the environment. On the whole, courts have been willing to find an "injury" and to sustain the claim of standing. In *Scenic Hudson Preservation Conference v. Federal Power Commission,*[183] an early case decided before *Flast* and *Data Processing,* the Second Circuit Court of Appeals held that a conservation group and towns within the area of Consolidated Edison's proposed Storm King project had standing to seek review of the Federal Power Commission's licensing order. The court found that because their activities and conduct had exhibited a special interest in the aesthetic, conservational, and recreational aspects of power development in the area, the plaintiffs were aggrieved parties within the meaning of the Federal Power Act.[184] Similarly, in *Crowther v. Seaborg,*[185] a federal district

176. Protestants & Other Americans United v. United States, 435 F.2d 627 (6th Cir. 1970); Committee for Pub. Educ. & Religious Liberty v. Rockefeller, 322 F. Supp. 678 (S.D.N.Y. 1971).

177. American Civil Liberties Union v. Albert Gallatin Area School Dist., 307 F. Supp. 637 (W.D. Pa. 1969).

178. National Welfare Rights Organization v. Finch, 429 F.2d 725 (D.C. Cir. 1970).

179. Federation of Homemakers v. Hardin, 328 F. Supp. 181 (D.D.C. 1971). *But see* Rasmussen v. Hardin, 40 U.S.L.W. 2674 (9th Cir. Mar. 29, 1972) (consumer challenge to the Secretary of Agriculture's milk marketing orders rejected on the ground that under the applicable statute only milk handlers had standing to seek judicial review of such orders).

180. *See* notes 183-200 *infra* and accompanying text.

181. *See, e.g.,* Lemon v. Kurtzman, 310 F. Supp. 35, 41 (E.D. Pa. 1960), *rev'd on other grounds,* 403 U.S. 602 (1971).

182. Hawaii v. Standard Oil Co., 40 U.S.L.W. 4246 (U.S. Mar. 1, 1972); South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966); Massachusetts v. Mellon, 262 U.S. 447 (1923); Rasmussen v. United States, 421 F.2d 776 (8th Cir. 1970); Idaho *ex rel.* Robson v. First Sec. Bank, 315 F. Supp. 274 (D. Idaho 1970).

183. 354 F.2d 608 (2d Cir. 1965).

184. *Id.* at 616. The court also found economic injury upon which to base the plaintiffs' standing since the organization had some trailways threatened by the project and the towns stood to suffer interference with local planning and a decrease in tax revenues.

185. 312 F. Supp. 1205 (D. Colo. 1970).

court recognized the standing of an organization "bringing a class action on behalf of all persons entitled to the protection of their health and the use and enjoyment of the natural resources of Colorado"[186] to seek judicial review of proposed action by the Atomic Energy Commission in a project for the flaring of gas contained within a cavity created by nuclear detonation.

Another recent example of organization standing to assert a public interest is *Citizens Committee for Hudson Valley v. Volpe*,[187] which involved a resident citizens' committee, the Sierra Club, and an affected village who, because of their proximity to the project, were allowed to challenge the Army Corps of Engineers' issuance of a permit to dredge and fill the Hudson River for state expressway construction. A sufficient special interest on the part of an organization plaintiff to challenge authorization of mining and timber cutting activities in a national forest under the National Environmental Policy Act of 1969[188] was found in *West Virginia Highlands Conservancy v. Island Creek Coal Co.*[189] The plaintiff was a membership corporation dedicated to preserving natural, scenic, and historic areas in the West Virginia highlands. According to the court, one of its main concerns was protection of an 18,000 acre area within the affected national forest, which it had studied in detail and where it had sponsored hikes. Other courts also have recognized standing based on an organization's special use of recreational areas.[190]

This judicial willingness to broaden standing to protect the environment may have received a setback by the recent decision of the Supreme Court in *Sierra Club v. Morton*.[191] The Court held, in a 4-3 decision,[192] that the Sierra Club could not, without alleging some potential injury to itself or its members, challenge approval by the Secretaries of Agri-

186. *Id.* at 1213.

187. 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970).

188. 42 U.S.C. §§ 4321-47 (1970). It has been argued persuasively that this statute recognizes a "judicially protectable environmental interest capable of being asserted by citizen groups." Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).

189. 441 F.2d 232 (4th Cir. 1971).

190. Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971); *see* Pennsylvania Envir. Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970); *cf.* Ely v. Velde, 321 F. Supp. 1088 (E.D. Va. 1971) (residents of "uniquely historical and architecturally significant" rural community had standing to challenge state's construction of penal facility in area). *But see* South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970) (association whose purpose was the preservation of historic buildings did not have standing to enjoin the demolition of historic buildings in an urban renewal area on the ground that HUD had failed to comply with the provisions of the National Historic Preservation Act).

191. 40 U.S.L.W. 4397 (U.S. Apr. 19, 1972).

192. Justices Powell and Rehnquist did not participate in the decision.

culture and Interior of a proposed all-year recreational project to be developed at Mineral King Valley in the Sequoia National Forest. The opinion of Justice Stewart, in which Chief Justice Burger and Justices White and Marshall joined, squarely rejected the notion that the Sierra Club could maintain the suit as a public action. Rather, it held that the "injury in fact" test of *Data Processing* and *Barlow* "requires that the party seeking review be himself among the injured." Justice Douglas, dissenting, argued that environmental issues should be litigated "in the name of the inanimate object about to be despoiled, defaced or invaded by roads and bulldozers," and that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."[193] Justice Blackmun, in his dissent, argued for "an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed as it is, of pertinent, bona fide and well-recognized attributes and purposes in the area of environment, to litigate environmental issues."[194] He was joined in this view by Justice Brennan as well as Justice Douglas.

It is clear that the dissenters were motivated primarily by a concern for environmental protection and that the majority was of the view that this concern could be satisfied under the injury in fact test. The Court invited the Sierra Club to amend its complaint to allege injury to itself or its members and strongly intimated that the club's use of the affected area would be sufficient to satisfy the injury in fact test. For this reason, the *Sierra* decision should not be a significant roadblock to public actions to protect the environment. Some plausible interest on the part of named individual or organizational plaintiffs will be necessary; but as the previous examples indicate, this usually will not be difficult to demonstrate.

Sierra may be contrasted with *Environmental Defense Fund, Inc. v. Hardin,*[195] in which the District of Columbia Court of Appeals held that five conservation organizations had standing to challenge the Secretary of Agriculture's refusal to place an immediate ban on all uses of DDT.[196] The court reasoned that those who might suffer harm from the

193. 40 U.S.L.W. at 4402.

194. *Id.* at 4406-07. Justice Blackmun proposed in the alternative that the judgment of the District Court, which found standing and granted preliminary relief, be approved on condition that the Sierra Club "amend its complaint to meet the specifications the Court prescribes for standing." 40 U.S.L.W. at 4406. Perhaps this statement reflects the "shared understanding" of the Court that allegations regarding use of the affected area would be sufficient to confer standing.

195. 428 F.2d 1093 (D.C. Cir. 1970).

196. Under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135-(k) (1970), the Secretary of Agriculture is required to prohibit the shipment in interstate commerce of

consumption of pesticide residues, which the Secretary allegedly permitted to collect in the environment, were affected by his action and that their interest might properly be represented by a membership organization with a demonstrated interest in preventing pesticide pollution. In *Sierra* the Court cited *Hardin* for the proposition that an injury which is widely shared could be sufficient to provide the basis for standing and said that it had approved this development by noting in *Data Processing* that the affected interest could reflect "aesthetic, conservational and recreational values."[197] On the other hand, the Supreme Court criticized the court in *Hardin* for suggesting that "an organizational interest in the problem of environmental or consumer protection" was sufficient to confer standing.[198] It then pointed out, however, that an organization could sue on behalf of its members so long as some injury was shown.[199] Since all persons suffer from pesticide pollution, it could be argued that the organizations in *Hardin* were really suing on behalf of their members and were protecting the members' personal interest in being free from pesticide pollution. It would appear that the Court did not intend to disapprove of the result in *Hardin,* but merely to bring it within the injury in fact test.

In view of the past willingness of the lower federal courts to find standing to protect the environment,[200] and in view of the Supreme

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any "economic poison" that cannot be rendered safe by labelling. The statute provides an elaborate procedure for cancelling the registration of such products and also authorizes the Secretary to suspend registration immediately if he finds such action "necessary to prevent an imminent hazard to the public." *Id.* § 135(b). Plaintiffs in the instant case filed a petition with the Secretary requesting that he issue notices of cancellation for all products containing DDT and for the immediate suspension of their registration. The Secretary issued notices of cancellation with respect to 4 uses of DDT, solicited comments concerning the remaining uses, and took no action on the request for interim suspension.

197. 40 U.S.L.W. at 4401.

198. *Id.*

199. *Id.*

200. For other cases in which organizational standing has been recognized see Upper Pecos Ass'n v. Stans, 425 F.2d 1233 (10th Cir. 1971); Cape May County Chapter, Inc. v. Macchia, 329 F. Supp. 504 (D.N.J. 1971); Honchok v. Hardin, 326 F. Supp. 988 (D. Md. 1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1970); Environmental Defense Fund, Inc. v. Corps of Engineers, 324 F. Supp. 878 (D.D.C. 1971); Izaak Walton League v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970). In most, if not all, of these cases the necessary injury in fact probably could have been established. Until the Supreme Court's decision in *Sierra,* other reasons than the organization's failure to allege sufficient injury to itself were given for its inability to maintain the suit. South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454 (6th Cir. 1969) (plaintiffs had not engaged sufficiently in administrative process to indicate they are a representative association); National Audubon Soc'y v. Johnson, 317 F. Supp. 1330 (S.D. Tex. 1970) (state was a necessary party, and plaintiffs failed to exhaust administrative remedies); Kent County Council for Historic Preservation v. Romney, 304 F. Supp. 885 (W.D. Mich. 1969) (no violation of statute); *cf.* Lamm v. Volpe, 449 F.2d 1202 (10th Cir. 1971) (action by plaintiff as

Court's apparently broad interpretation of injury in fact in *Sierra*, it is unlikely that *Sierra* will be interpreted as a signal to pull back. Rather, the courts will insist that environmental organizations play the game by alleging some injury in fact to themselves or their members from the action they are challenging. If this prediction is accurate, the practical impact of *Sierra* will not be great.

V. CONCLUSION

Recognizing that federal courts should not always be available to allow citizens to air generalized grievances about the conduct of government, and that certain limitations on the exercise of federal judicial power are necessary and desirable, how are these limitations to be determined? The behavioral analysis of courts as institutions that I have attempted in this article leads me to conclude that the concept of standing is of no real help and may be a positive hindrance. Moreover, the other components of justiciability—the political question doctrine, ripeness, mootness, and nonreviewability of administrative action—are far more functional ways of dealing with the matter of limitations on federal judicial power.

The Supreme Court has gone very far toward eliminating standing as a limitation on judicial review, and the institutional behavior of the courts following the most recent Supreme Court expositions in *Data Processing* and *Barlow* has indicated that the concept is of little real signifiance. In practice the Court's "two-pronged" test has become "one-pronged" because a plaintiff who establishes injury in fact, also will satisfy the zone of interests test in either the private or public action. The only utility of standing in the private action is to justify a dismissal in those rare cases in which the plaintiff has no interest whatsoever, and such a case can be dismissed under traditional remedies principles.[201]

The real issue today involves the public action. Often it will be possible to find a plaintiff who satisfies the injury in fact test; and the Supreme Court's decision in *Sierra* makes it clear that it will be necessary to do so, at least for the foreseeable future.[202] Unfortunately, the

individual, citizen, taxpayer, and legislator challenging constitutionality of federal act regulating outdoor advertising as a usurpation of police power reserved to state, rendered moot by legislature's enactment of just compensation statute in compliance with the federal act).

201. When the plaintiff has suffered no injury from the action he is challenging or none is threatened, he would be unable to maintain the suit due to an absence of irreparable injury. *See* H. MCCLINTOCK, EQUITY 449-50 (2d ed. 1948).

202. In effect, the Court accepted the view of Professor Davis that a "trifling interest" is required for standing. *See* Davis, *supra* note 26, at 613, 630-33. A contrary view, espoused by

standing game still has to be played. It is submitted that this is undesirable. When a concerned citizen or group seeks to challenge the validity of governmental action, the challenge should not be rejected because of lack of interest. The proper role of the federal courts vis-à-vis the states and other agencies of the federal government can be delineated with reference to the other components of justiciability. To the extent that public actions would involve the courts in the determination of political questions, or would raise questions that are not yet ripe for decision or capable of resolution in an affirmative suit, or would invade what is properly the restricted domain of administrative agencies, they could be rejected on those grounds. Looking to the behavior of the courts in actual cases, the concept of standing has generally not operated as a bar to bringing meritorious—and sometimes not so meritorious—suits. Nor it is likely to operate as a bar after *Sierra*. It has merely caused a great deal of confusion, necessitated the expenditure of a large amount of time and effort both by the judiciary and by counsel, sometimes masked the real reasons for decisions, and occasionally produced unsound results. It is time to abandon it once and for all.

Professor Jaffe, is that a court may in its discretion allow a citizen to maintain a suit as a public action if it believes that review of the legal questions raised is in the public interest. *See* L. JAFFE, *supra* note 59, at 475-97. This appears to have been the position of the dissent in *Sierra*.