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A LIBERALIZATION OF THE “ZONE OF INTEREST” TEST

Clarke v. Securities Industry Association, 107 S. Ct. 750 (1987)

In *Clarke v. Securities Industry Association*,¹ the United States Supreme Court reformulated the “zone of interest” test² used to determine standing to challenge administrative agency actions.³

In 1982, the Comptroller of the Currency approved applications from two national banks to open discount brokerage offices.⁴ The Securities Industry Association (the Association), a trade association of securities brokers, underwriters and investment bankers, brought suit claiming the Comptroller’s decision violated the McFadden Act.⁵ The Comptroller contended that the Association lacked standing to challenge the decision.⁶ The United States District Court for the District of Columbia applied the zone of interest test, and found that the Association did have standing to challenge the Comptroller’s decision. The district court found for the Association on the merits.⁷ A divided panel of the Court of Appeals for the District of Columbia Circuit affirmed⁸ and denied re-

1. 107 S. Ct. 750 (1987).

2. See *infra* notes 22-23 and accompanying text.

3. For a discussion of standing to challenge administrative agency action, see *infra* notes 13-33 and accompanying text.

4. The *Securities Industry* Court described these brokers as those who “. . . execute trades on behalf of their customers but do not offer investment advice. As a result, the commissions they charge are substantially lower than those charged by full-service brokers.” 107 S. Ct. at 753, n.1. Both banks sought to open brokerage offices at locations inside and outside of their home states. *Id.* at 753.

5. *Id.* at 754. The McFadden Act limits the branching activity of national banks. See 12 U.S.C. § 81 (1982) (national banks can perform general business only at headquarters and branches), 12 U.S.C. § 36(c) (national bank branches allowed only in bank’s home state, limited by state law), and 12 U.S.C. § 36(f) (“branch” defined as various branch places of business at which deposits are received, checks paid, or money lent).

The Comptroller concluded that the brokerage offices were not “branches” under the McFadden Act. The Association contended that the brokerage offices are “branches within the meaning of § 36(f) and they are subject to the geographical restrictions imposed by § 36(c).” 107 S. Ct. at 754.

6. 107 S. Ct. at 754. The Comptroller argued that the Association was not within the zone of interests protected by the McFadden Act. *Id.*

7. 577 F. Supp. 252 (D.D.C. 1983). The court relied on *Association of Data Processing Service Org. v. Camp*, 397 U.S. 150 (1970) to find that the McFadden Act “evinces congressional intent to curb the scope of national banks’ activities.” Exceeding these bounds would injure the Association just as it injured the *Data Processing* plaintiffs. Therefore, the Association arguably fell within the zone of interest. *Id.* at 258-59. For a discussion of *Data Processing* see *infra* notes 18-24 and accompanying text.

8. 758 F.2d 379 (D.C. Cir. 1985).

hearing.⁹ The Supreme Court granted certiorari¹⁰ and *held*: standing under the zone of interest test does not depend upon whether Congress intended the applicable statute to protect the plaintiffs.¹¹ A plaintiff must be allowed to sue unless the plaintiff's interests are "so marginally related to or inconsistent with" the purposes of a relevant statute that "it cannot reasonably be assumed that Congress intended to permit the suit."¹²

The doctrine of standing to sue has both constitutional and prudential dimensions,¹³ the former derived from article III¹⁴ and the latter judge-made.¹⁵ Standing is based on the idea that courts properly have a limited role in society.¹⁶ Furthermore, standing reinforces the doctrine of judicial restraint and ensures that the issues that reach the courts are ready for judicial resolution.¹⁷

9. 765 F.2d 1196 (D.C. Cir. 1985). In a dissent from denial of en banc rehearing, then Circuit Judge Scalia argued that the Association did not have standing. In his view, the McFadden Act established competitive equality between national and state banks by authorizing branching by national banks to the same extent as permitted to state banks by local law. Thus, he said that "state banks are . . . obviously within the zone of interests protected by the statute — but the brokerage houses suing in the present case are no more within it than are businesses competing for the parking spaces that an unlawful branch may occupy." *Id.* at 1197. Moreover, he argued that this was the type of situation in which deference to an agency determination should be at its highest. *Id.* at 1198.

10. 475 U.S. 1044 (1986).

11. 107 S. Ct. at 757.

12. *Id.* Justice Stevens, with whom Chief Justice Rehnquist and Justice O'Connor joined, concurred only in the result. Justice Stevens said the Association was within the zone of interest of the statute, and the majority's broad discussion of this test was unnecessary. *Id.* at 762-66.

13. Warth v. Seldin, 422 U.S. 490, 498 (1975).

14. U.S. CONST. art. III, § 2 (federal judicial power extends to all "cases" arising under the constitution, and to various "controversies." See, e.g., *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) (court will not decide constitutional issues in the abstract). The "case or controversy" doctrine encompasses both the "justiciability" of the issue, and the "standing" of the particular plaintiff to bring the suit. Warth v. Seldin, 422 U.S. 490, 498-99 (1975). See generally Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 300 (1979).

15. Categorization of a doctrine as prudentially or constitutionally derived is often difficult. See Note, *The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate?* 70 GEO. L.J. 1157 (1982). The doctrines include ripeness, mootness, collective suits, advisory opinions, personal legal interest, political question, and injury in fact. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-7 to § 3-20 at 52-92 (2d ed. 1978). Congress may grant standing which would otherwise be barred by prudential limitations, but not if otherwise barred by article III. Warth v. Seldin 422 U.S. at 501.

16. Warth v. Seldin, 422 U.S. at 498.

17. By limiting the number of decisions made by the courts, standing contributes to the tradition of judicial restraint, which prevents stare decisis from binding later courts in attempts to expand the law. Brilmayer, *supra* note 14, at 302-306. The standing doctrine also ensures that people without a personal stake in a grievance will not resolve an issue, and thus later encumber those who

The Court first established the zone of interest test to determine standing to challenge administrative agency actions in *Association of Data Processing Service Organization, Inc. v. Camp*.¹⁸ In this case, plaintiffs, who provided data processing services to businesses, sought to challenge a decision by the Comptroller of the Currency allowing banks to furnish such services to their customers.¹⁹ The Supreme Court looked to the Administrative Procedure Act (APA),²⁰ which grants standing to those "aggrieved by agency action within the meaning of a relevant statute."²¹ The Court determined that the test for standing had two prongs:

actually do have a stake in the outcome. This precaution protects the values of self-determination, fairness, and due process concerns. *Id.* at 306-15. Standing also maintains the separation of powers by restricting the courts' ability to become a political forum. *Flast v. Cohen*, 392 U.S. at 96-7; Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 892 (1983). Standing serves to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Thus, the doctrine aids the court in its resolution of important constitutional issues.

Critics of modern standing doctrine charge that courts often use it to avoid addressing the merits of difficult or controversial issues. Brilmayer, *supra* note 14, at 301; Note, *Standing Barriers Faced by Citizen and Taxpayer Plaintiffs in the Federal Courts*, 32 DRAKE L. REV. 465, 471-72 (1982-83). Strict standing requirements may also mean that actual injuries may go unredressed, and important legal issues remain undecided because the court does not recognize the claimant as a proper plaintiff. See, e.g., *Schlesinger v. Reservists Comm. Stop the War*, 418 U.S. 208, 221 (1974) (generalized grievance prohibits standing, even when there would otherwise be a cognizable injury).

18. 397 U.S. 150 (1970). Standing tests are context-related, and standing often turns on "the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. at 500. In *Data Processing*, the Court categorized the case as "competitor" standing. 397 U.S. at 152. Other standing tests include third party standing, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and taxpayer standing, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968). See generally J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 69-83 (1986).

At early American common law, competition was not a judicially recognizable interest. See *Railroad Co. v. Ellerman*, 105 U.S. 166 (1881) (railroad seeking to build competing wharf did not create recognizable injury to wharf owner). Prior to *Data Processing*, the Supreme Court had liberalized competitor standing in *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968). The Court held that a competitor had standing if he could invoke a statutory provision which showed "a legislative purpose to protect a competitive interest." *Id.* at 6.

19. 397 U.S. at 151. This case involved "competitor" standing, as do the major cases preceding *Securities Industry*. In formulating the zone of interest test, the Court stated that competitor standing suits "do not necessarily track" taxpayer standing suits. *Id.* at 152. Thus, the Court impliedly limits the scope of the test to competitor suits.

20. 5 U.S.C. § 701 (1982).

21. 5 U.S.C. § 702 (1982) provides in pertinent part, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

whether the action caused the plaintiff "injury in fact,"²² and whether "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."²³ The second prong of the test requires a court to examine congressional intent. Although the plaintiffs sued under the McFadden Act, the Court looked to the legislative intent evinced in a different, but complimentary, statute, and determined that the plaintiffs satisfied the zone of interest test.²⁴ In a separate opinion to *Data Processing* and its companion case, *Barlow v. Collins*,²⁵ Justice Brennan criticized the test as unclear in formulation and application.²⁶

In *Investment Co. Institute v Camp*,²⁷ the Court again addressed the question of whether bank competitors could challenge the Comptroller's decision to allow banks to enter a new field.²⁸ It held that under *Data Processing*, the petitioners fell "arguably" within the zone of interest encompassed by the statutory scheme.²⁹ Because it found in reaching the merits that Congress actually had protected such competitors, the Court

22. 397 U.S. at 152. The plaintiffs satisfied this prong by showing that they may lose future profits if national banks could provide data processing services. *Id.*

Injury in fact requires that plaintiff allege "a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. at 501. The injury may be "actual or threatened," and must result from the defendant's conduct. *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The *Data Processing* Court emphasized that the injury may be to "aesthetic, conservational and recreational" interests, as well as economic. 397 U.S. at 154.

23. 397 U.S. at 153.

24. The plaintiffs sued for violation of 12 U.S.C. § 24, but the Court examined the later Bank Service Corporation Act of 1962, 12 U.S.C. § 1864, to determine congressional intent. 397 U.S. at 157. The *Securities Industry* Court interpreted this expansion as a license to "consider any provision that helps us to understand Congress' overall purposes" in the act in question. 107 S. Ct. at 758.

25. 397 U.S. 159 (1970). In *Barlow*, the Court held that tenant farmers eligible for payments under the upland cotton program had standing to challenge the Secretary of Agriculture's amendment of a regulation. The new regulation allowed participating farmers to assign program payments as security for farm rentals. The farmers feared that landlords might require such assignments as a condition of the lease. *Id.* at 163. Justices Brennan and White concurred in the result and dissented from the new zone of interest test. 397 U.S. at 167.

26. Justice Brennan argued that the Court did not delineate precisely what the plaintiff must establish, what type of interest he must advance, and what the Court meant by "arguably." *Id.* at 177. For a discussion of and rebuttal to the dissent, see Note, *A Defense of the "Zone of Interests" Standing Test*, 1983 DUKE L.J. 447, 456-57 [hereinafter Note, *Standing Test*].

27. 401 U.S. 617 (1971).

28. An association of investment companies challenged the Comptroller of the Currency's regulation allowing banks to establish investment funds as a violation of the Glass-Steagall Banking Act of 1933. 401 U.S. at 619.

29. *Id.* at 620-21.

felt that standing obviously was present.³⁰ Justice Harlan dissented, arguing that Congress had not intended to protect the petitioner's class against the competitive injury they protested.³¹

In *Block v. Community Nutrition Institute*³² the Supreme Court determined whether a statutory scheme foreclosed judicial review to a particular class of plaintiffs. A group of milk consumers and handlers brought suit to challenge a price-setting market order issued pursuant to statute by the Secretary of Agriculture.³³ The statute established a complex administrative scheme allowing producers and handlers to challenge such market orders.³⁴ The Court held that permitting consumers to sue would frustrate Congress' administrative scheme.³⁵ The critical test was "whether Congress intended for that class to be relied upon to challenge agency disregard of the law."³⁶

Prior to *Securities Industry*, courts and commentators criticized the zone of interest test as duplicating other tests,³⁷ and as unclear, incorrect

30. *Id.* at 621. One commentator suggests that the Court "found it simpler" to address the merits of the case rather than attempt to apply the poorly defined test of *Data Processing*. Note, *Standing Test*, *supra* note 26, at 453.

31. 401 U.S. at 640.

32. 467 U.S. 340 (1984).

33. The Agriculture Marketing Agreement Act of 1937, 7 U.S.C. § 601-624 (1982) authorizes the Secretary to set prices for various categories of dairy products. The Court found that Congress' primary purpose was to control competition and raise producer prices. 467 U.S. at 341-42.

34. A market order requires: a prior public hearing (7 U.S.C. § 608(c)(3)); approval by handlers of at least one-half of the volume of the product covered, together with two-thirds of the producers of the market (S608(c)(8)); if approval is not obtained, the Secretary can promulgate the order only after a hearing and a finding that the order "is the only practical means of advancing the interests of the producers" (§ 608(c)(9)). After the order has been promulgated, any handler subject to the order may petition for modification, obtain a hearing, and obtain federal district court review of the subsequent agency ruling (§ 608(c)(15)).

35. 467 U.S. at 348. The Court said that only producers and handlers, and not consumers could bring suit. *Id.* at 347. The Court of Appeals for the District of Columbia Circuit had held that the consumers had standing to sue and that the statute did not indicate the "congressional intent needed to overcome the presumption in favor of judicial review." 698 F.2d 1239, 1252 and n.75. The Supreme Court in *Community Nutrition Inst.* did not articulate clearly whether it was addressing the standing issue.

36. *Id.* at 347 (citing *Barlow v. Collins*, 397 U.S. 159, 167). The *Securities Industry* Court cited the *Community Nutrition Inst.* test and said that it could be inferred that the Association represented the class of plaintiffs that Congress intended to challenge the agency action. 107 S. Ct. at 759.

37. *Association of Data Processing Service Org., Inc. v. Camp*, *Barlow v. Collins*, 397 U.S. 159, 168, 169, 177, 178 (Brennan, J., concurring and dissenting) (zone of interest test similar to discredited legal interests test; formulation actually tests reviewability); Marquis, *The Zone of Interests Component of the Federal Standing Rules: Alive and Well After All?* 4 U. ARK. LITTLE ROCK L.J. 261 (1981) (standing, reviewability and cause of action all addressable under Federal Rule of Civil Procedure 12(b) motion to dismiss).

or ineffective.³⁸ Others complained that the lower courts were confused about how and when to apply the test.³⁹

In *Securities Industry*, the Court surveyed the major zone of interest precedents and synthesized them in an attempt to reformulate and clarify the test. The Court found "significant guidance" in two aspects of *Data Processing*: approval of a trend toward more liberal standing requirements, and a broad interpretation of the APA Section 702 phrase "relevant statute."⁴⁰ Thus, the *Securities Industry* Court found that it was not "limited to considering the statute under which respondents sued, but may consider any provision that helps [it] to understand Congress' overall purposes in [the act sued under]."⁴¹ The *Securities Industry* court also determined from *Data Processing* that this test "is not meant to be especially demanding."⁴²

The Court next looked to *Investment Co. Institute*⁴³ to demonstrate the "reach" of the zone of interest test.⁴⁴ The court acknowledged that Harlan's *Investment Co. Institute* dissent argued that Congress had not intended to benefit the plaintiff class. Noting that the *Investment Co. Institute* majority did not respond to this criticism, the *Securities Industry* Court cited *Investment Co. Institute* for the proposition that "there need be no indication of congressional purpose to benefit the would-be plaintiff."⁴⁵

Finally, *Securities Industry* interpreted *Block v. Community Nutrition Institute*⁴⁶ as providing criteria to consider in addition to the zone of

38. *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 159, 176-77 (Brennan, J., concurring and dissenting) (test will "compound confusion" over standing, and "the Court's formulation . . . is obscure"); K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 24:17 (2d ed. 1983) (test fails to protect nonstatutory interest; contradicts congressional intent in enacting the APA; unclear whether it applies to plaintiffs' general interest, or to interests asserted in the particular case).

39. Note, *Standing Test*, *supra* note 24, at 452-56 (courts have failed to use test when appropriate, or used it incorrectly to decide the merits); DAVIS *supra* note 38, at 273, 276-78 ("no guides exist as to whether or when it is used").

40. 107 S. Ct. at 756.

41. *Id.* at 758.

42. *Id.* at 757. In a footnote, the Court explained that *Data Processing* found it sufficient that the general policy in the statute was "apparent" and that "those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable." *Id.* at 757 n.14.

43. 401 U.S. 617 (1971).

44. 107 S. Ct. at 756. The "reach" of the test concerns the potential class of plaintiffs. *Id.*

45. *Id.* at 757.

46. 467 U.S. 340 (1984).

interest test.⁴⁷ The Court found that the *Community Nutrition* plaintiffs were arguably within the zone of interest, but were properly denied judicial review because the statutory scheme evinced legislative intent to restrict judicial review to a different group of plaintiffs.⁴⁸ Thus, the Court reasoned that "at bottom the reviewability question turns on congressional intent."⁴⁹ Applying this standard, the Court found no congressional intent to preclude the Association from seeking review of the Comptroller's decision.⁵⁰

Securities Industry failed to resolve the primary criticisms regarding the formulation of the zone of interest test. The opinion is perhaps less clear than *Data Processing*. In synthesizing precedents, it borrowed such disparate language from each that its actual new test is difficult to identify.⁵¹ Within six months of the decision, two lower courts applied the test with varying results.⁵² The Eighth Circuit granted competitor standing by considering whether plaintiff's interests were "so marginally related" to the statute's purposes that Congress could not have intended the suit.⁵³ The Federal Circuit, however, denied competitor standing, even though the statute "arguably regulated" the plaintiff's interests.⁵⁴ It relied on *Securities Industry*'s recitation of *Community Nutrition*: the essential test is whether "Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.'"⁵⁵

47. 107 S. Ct. at 758.

48. *Id.*

49. *Id.*

50. *Id.* at 759.

51. Justice Stevens, in a concurring opinion said that this was not the proper case to re-examine the "broad issues surrounding" the zone of interest test. *Id.* at 766.

52. *See infra* notes 48, 49.

53. *DeLoss v. Department of Hous. and Urban Dev.*, 822 F.2d 1460, 1463 (quoting *Securities Industry*, 107 S. Ct. at 757) (8th Cir. 1987). Under authority of the APA, owners of rental property challenged HUD's decision to finance low income housing for the elderly under 12 U.S.C. § 1701q and 42 U.S.C. § 1437f. *DeLoss*, 822 F.2d at 1461-62. The court said that the zone of interest test was satisfied because a "plausible relationship" existed between the plaintiffs and the interests protected by the HUD programs. *Id.* at 1464-66. Furthermore, the court said the *Securities Industry* zone of interest test is "an element of reviewability, not standing." *Id.* at 1463 n.3.

54. *Sacilor, Acieries et Laminaires de Lorraine v. United States*, 815 F.2d 1488, 1491 (1987), *cert. denied*, 108 S. Ct. 285 (1987). A foreign pipe manufacturer challenged the Secretary of Commerce's refusal to grant an exception to trade quotas under the Stell Import Stabilization Act (SISA), 19 U.S.C. § 2253 (1980). *Id.* at 1489.

The court noted that SISA's legislative intent was to protect domestic purchasers of steel. The court concluded that Congress did not intend to have foreign manufacturers challenge the agency administration of SISA. *Id.* at 1491.

55. *Id.*

Thus, *Securities Industry's* attempt to clarify the zone of interest test is ambiguous, and provides insufficient direction to lower courts.⁵⁶

The general import of *Securities Industry* is that it unquestionably relaxes the zone of interest test. The Court explicitly stated that Congress need not have intended to benefit the plaintiff, and that the test is not meant to be demanding.⁵⁷ No longer must the plaintiff's interest arguably be within the zone; it must only avoid being "so marginally related to or inconsistent with" the statute's purposes that it is unreasonable to assume that Congress intended to permit the suit.⁵⁸ The Court, having discerned a trend toward broadening the class of plaintiffs eligible to challenge administrative actions, has hastened the advancement of that trend.⁵⁹

A decision by the Court to liberalize standing and judicial review will logically increase the number of plaintiffs challenging agency action. To the extent that it allows the public to redress actual injury caused by an agency, this liberalization appears commendable.⁶⁰ However, a weak barrier to review such as the *Securities Industry* test may excessively burden an agency and prevent it from acting effectively. Most agency action favors some segments of the public and disfavors others, and Congress has allocated that burden. By expanding the plaintiff class to include all those who can reasonably be construed as not precluded by Congress,⁶¹ the courts open themselves to act as a political forum.⁶² Ironically, by its interpretation of a standing test *Securities Industry* realizes a danger that

56. The Court does offer some direction on when (as opposed to how) courts should apply the test. "[T]he test is most usefully understood as a gloss on the meaning of § 702 [APA]." 107 S. Ct. at 758 n.16. This zone of interest test under the APA is "not a test of universal application." *Id.*

APA § 702 grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The Court considers this a "generous review provision." 107 S. Ct. at 758 n.16 (citing *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. at 156).

57. *Id.* at 757.

58. *Id.*

59. *Id.* at 756 (quoting *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. at 154). *But see*, *Sacilor, Acieries et Laminoirs de Lorraine v. United States*, *supra* notes 54-55 and accompanying text (standing denied).

60. Some scholars contend that standing doctrine prevents action for some injuries. *See supra* note 17.

61. Standing must be granted unless "it cannot reasonably be assumed that Congress intended to permit the suit." 107 S. Ct. at 757.

62. "Without such limitations . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

standing itself was designed to prevent.⁶³

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63. *See supra* note 17.

