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## Standing to Challenge Tax Treatment of Competitors

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## STANDING TO CHALLENGE TAX TREATMENT OF COMPETITORS

For various policy reasons, federal administrative agencies promulgate rules designed to encourage certain activities or to benefit a specific class of persons to the exclusion or disadvantage of others. For example, rulings of the Internal Revenue Service (IRS)<sup>1</sup> that accord favorable tax treatment to some parties may impair the relative economic position of their competitors. Predictably, persons disadvantaged by the more favorable treatment accorded others have attempted to challenge these rulings.

A principal obstacle confronting competitors seeking to challenge such rulings is the well-established requirement that a litigant in the federal courts must have standing to seek judicial remedy.<sup>2</sup> Traditional analysis of the standing requirement, based on the case or controversy clause of article III of the Constitution,<sup>3</sup> focuses on the personal interest of the litigant:<sup>4</sup> to ensure the necessary

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1. 26 U.S.C. § 7805 (1970) authorizes the Secretary of the Treasury or his delegate to prescribe rules and regulations for the enforcement of the Internal Revenue Code. See generally Asimow, *Standing to Challenge Lenient Tax Rules: A Statutory Solution*, 6 TAX NOTES 227 (March 6, 1978).

2. *Simon v. Eastern Ky. Welfare Rights Organ.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (per curiam); *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Organs., Inc. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968); *Baker v. Carr*, 369 U.S. 186 (1962); *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam); *Frothingham v. Mellon*, 262 U.S. 447 (1923).

See generally Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Relief*, 83 YALE L.J. 425 (1974); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

3. U.S. CONST. art. III, § 2, cl. 1 provides that:

The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, on which shall be made. . . [and] to controversies to which the United States shall be a Party; — to controversies between two or more states; — between a State and Citizens or another state; —between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

4. *Simon v. Eastern Ky. Welfare Rights Organ.*, 426 U.S. 26, 38 (1976). “[T]he standing question in its Art. III aspect ‘is whether the plaintiff has “alleged such a personal stake in the outcome of the controversy” as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.’” *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)). The inquiry focuses on the status of the party initiating the

adverseness,<sup>5</sup> the party must have suffered an injury in fact.<sup>6</sup> The jurisdiction of the federal courts has been circumscribed further by what the Supreme Court has called prudential limitations,<sup>7</sup> designed to inhibit judicial usurpation of powers reserved to other branches of the government.<sup>8</sup> The requirement that the complainant arguably be within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question is one such limitation adopted by the Court.<sup>9</sup>

In two recent cases involving competitor standing, the Court of Appeals for the District of Columbia restricted severely the ability of an individual investor or a business to challenge the validity of IRS rulings that purportedly give competitors an unfair economic advantage. In *American Society of Travel Agents, Inc. v. Blumenthal*,<sup>10</sup> decided in 1977, a private travel agency, the American Society of Travel Agents (ASTA), sued the Secretary of the Treasury, alleging competitive injury caused by the failure of the IRS to tax the travel service income of a tax exempt competitor, the American Jewish Congress (AJC). According to the plaintiff's claim, the extensive range of the AJC's travel program<sup>11</sup> mandated

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action, not on the issues he seeks to have adjudicated. *Id.*; *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

5. *Baker v. Carr*, 369 U.S. 186 (1962). The personal stake in the outcome works "to assure that concrete adverseness . . . upon which the court so largely depends for illumination of difficult . . . questions." *Id.* at 204.

6. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). For example, in an effort to restrict its own jurisdiction, the Supreme Court has held that although a plaintiff has suffered sufficient injury to meet the case or controversy requirement, he must assert his own legal rights and not rest his claim on the rights of other parties. *Id.* at 499; see *United States v. Raines*, 362 U.S. 17 (1966); *Barrows v. Jackson*, 346 U.S. 249 (1953). The Court also has denied standing to persons having only a generalized grievance shared by a large class of citizens. *Warth v. Seldin*, 422 U.S. at 99; see *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. at 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974).

7. *Warth v. Seldin*, 422 U.S. 490 (1975). "Without such limitations— . . . essentially matters of judicial self-governance—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 . . ." *Id.* at 500.

8. *Baker v. Carr*, 369 U.S. 186, 210 (1962). The separation of powers problem does not arise from the issue of standing generally, but only when implicated by a substantive issue raised by the initiating party. *Flast v. Cohen*, 392 U.S. 83, 100-01 (1968).

9. *Association of Data Processing Serv. Organs, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

10. 566 F.2d 145 (D.C. Cir. 1977).

11. Since its creation in 1961, the AJC travel program experienced dramatic growth. In 1964, nine tours were offered. By 1975 that figure reached 392. In addition, its gross income averaged four to five million dollars annually (calculated from the AJC's net income of nearly one-half million dollars). Brief for Appellants at 7, No. 1782. Its eighty-page travel brochure

that the resulting income be declared unrelated business income under sections 511<sup>12</sup> and 513<sup>13</sup> of the Internal Revenue Code and therefore excluded from the tax exemption afforded by section 501(c).<sup>14</sup> The IRS's failure to tax this income, the ASTA argued, distorted illegally the ASTA's sphere of business operations and allowed the AJC an unfair competitive advantage.<sup>15</sup> A divided appellate court denied standing,<sup>16</sup> unconvinced that the ASTA had suffered an appreciable injury.<sup>17</sup>

In a case decided the same year,<sup>18</sup> Tax Analysts and Advocates (TAA), a non-profit, public interest corporation and its executive director, Thomas Field, sought to discontinue certain tax credits granted oil companies based outside of the United States for their payment of income taxes to foreign governments.<sup>19</sup> The plaintiffs in *Tax Analysts & Advocates v. Blumenthal* alleged that these payments were not foreign income taxes that could be offset against taxable income on a dollar-for-dollar basis but instead were royal-

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explains that the tours offer "the superb service and planning which has become the hallmark of American Jewish Congress *tourism*." *Id.*

12. Section 511(a) of the Internal Revenue Code provides for the imposition of a "normal tax" upon "unrelated taxable business income" of any organization whose income normally is exempt from taxation under § 501(a). I.R.C. § 511(a).

13. I.R.C. § 513(a), which defines unrelated business as:

any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501 . . . .

14. I.R.C. § 501(c)(3) exempts from taxation such organizations as the AJC that are operated on a non-profit basis exclusively for religious, educational, or charitable purposes.

15. *American Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d at 148-49.

16. *Id.* at 148.

17. Chief Judge Bazelon dissented in both *American Soc'y of Travel Agents, Inc. v. Blumenthal*, *supra*, and *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977).

18. *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), *aff'g* 390 F. Supp. 927 (D.D.C. 1976).

19. I.R.C. § 901(b)(1) (1976) allows domestic corporations a tax credit in "the amount of any income . . . taxes paid or accrued during the taxable year to any foreign country . . . ." Issued in 1955 and 1968, the IRS rulings authorizing the credits declared that certain "income taxes" paid to Middle East, South African, and South American countries were creditable to the tax liability of the paying corporations. Rev. Rul. 55-296, 1955-1 C.B. 386; Rev. Rul. 68-552, 1968-2 C.B. 306. Several unpublished IRS rulings also were contested. Recently, however, the IRS has reversed its policy, holding that payments to certain countries, notably Libya and Saudi Arabia, are not to be treated as income taxes. Rev. Rul. 78-63. Because the previous rulings pertaining to the major oil exporting countries still were effective, the plaintiff's complaint was not moot.

ties, deductible only from gross income. Both TAA and Field claimed standing as federal taxpayers while Field, who owned a small oil well in Pennsylvania, also alleged standing as a competitor.

Again the court of appeals denied standing. Determining that the plaintiffs had suffered no judicially cognizable injury, the court summarily rejected their claim of standing as taxpayers.<sup>20</sup> The court agreed, however, that Field, as a competitor of foreign-based oil companies, had been injured by IRS regulations:<sup>21</sup> because he could deduct royalties paid for his oil well only from gross income, Field was unable to realize the additional savings available to competitors who offset similar payments as tax credits. Nevertheless, the court found that Field's interest did not fall within the zone protected by the relevant provisions of the Internal Revenue Code.<sup>22</sup>

This Note will analyze the tests for injury in fact and zone of interests necessary for competitor standing, and will demonstrate that the approach adopted by the Court of Appeals for the District of Columbia was too narrow in light of prior Supreme Court decisions.

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20. In the leading case on taxpayer standing, *Frothingham v. Mellon*, 262 U.S. 447 (1923), the plaintiff argued that the federal appropriations necessitated by the Maternity Act of 1921 would increase the plaintiff's tax burden and thus would constitute a taking of property without due process of law. The Supreme Court held that the claimant must demonstrate not only that the statute is invalid, but also that he either has suffered or would be in imminent danger of suffering a specific injury. Moreover, the injury experienced must differ from that suffered by the population at large. Because, with few exceptions, all citizens pay income taxes, the Court decided that the plaintiff's claims were overly broad and, thus, the plaintiff taxpayer was denied standing to litigate the constitutionality of the federal spending scheme. *Id.*

In *Flast v. Cohen*, 392 U.S. 83 (1968), the Court created a narrow exception to the rule enunciated in *Frothingham*. The plaintiffs in *Flast* also relied upon their taxpayer status to assert injury. Nevertheless, they were granted standing on the basis of alleged first amendment violations. Assessing the issue of standing in relation to a taxpayer's status and emphasizing the need to examine the substantive issues, the Court espoused the requirement that a "logical nexus" exist between the plaintiff's claim and his alleged status to seek relief. *Id.* at 102. As regards a federal taxpayer challenging tax schemes, this examination has two facets: initially, the complaining party must establish a logical link between his taxpayer status and the challenged legislative action; he then must demonstrate that a nexus exists between his taxpayer status and the specific constitutional infringement alleged by citing explicit constitutional limitations upon the congressional taxing and spending power. *Id.* at 102-03.

21. 566 F.2d at 138.

22. *Id.* at 144-45.

## COMPETITOR STANDING AND INJURY IN FACT

*Background*

The requirement that the plaintiff must have suffered injury in fact to qualify for standing rests on the constitutional limitation of federal jurisdiction to cases or controversies.<sup>23</sup> By ensuring that the plaintiff has a personal stake in the outcome of the controversy, this prerequisite guarantees the "concrete adverseness which sharpens the presentation of issues."<sup>24</sup> This requirement is important particularly in cases arising under the Constitution because it prevents federal courts from deciding constitutional issues in hypothetical or abstract factual situations.<sup>25</sup>

Despite these important limitations, a lesser burden of proving injury in fact has been demanded to challenge actions by federal administrative agencies. In a series of cases culminating in its 1973 decision, *United States v. Students Challenging Regulatory Agency Procedures*,<sup>26</sup> the Supreme Court expanded significantly the class of injuries sufficient to convey standing for challenges to agency action.

*Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>27</sup> decided in 1970, represents the watershed for the cases addressing statutory challenges to administrative actions. Retailers of data processing services sued the Comptroller of the Currency and a national bank, claiming injury from an administrative ruling<sup>28</sup> permitting national banks to provide data processing services to other banks and their customers.<sup>29</sup> Bringing their action under section 702 of the Administrative Procedure Act,<sup>30</sup> the plaintiffs asserted standing as "person[s] . . . aggrieved by agency action within the meaning of a relevant statute . . . ."<sup>31</sup> The substantive claim rested on the Bank Service Corporation Act,<sup>32</sup> which precludes

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23. U.S. CONST. art. III, § 2, cl. 1. For the relevant text, see note 3 *supra*.

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

25. *Flast v. Cohen*, 392 U.S. 83, 100 (1968).

26. 412 U.S. 669 (1973).

27. 397 U.S. 150 (1970).

28. *Comptroller's Manual for National Banks* ¶ 3500 (1966).

29. 397 U.S. at 151.

30. 5 U.S.C. § 702 (1966) (amended 1976).

31. *Id.*

32. 397 U.S. at 155-56. The Act in question directed that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks." 12 U.S.C. § 1864 (1962).

banks covered by the Act from engaging in any business other than bank services. Because of the allegedly unlawful invasion by banks into the market of data processing services, the plaintiffs claimed economic injury from the loss of potential customers. In addition, the complaining parties demonstrated that, as a result of the ruling, several customers had transferred their business to competitor banks.<sup>33</sup>

The Court applied a two part test for standing, requiring the plaintiff to show not only that he had suffered injury in fact but that his interest arguably was within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.<sup>34</sup> The burden of proving injury in fact in competitor suits was distinguished from that required in taxpayer suits, in which the plaintiff, to attain standing, must demonstrate a sufficient logical nexus between his status as a taxpayer and the challenged legislative actions.<sup>35</sup> The Court noted: "[W]hile the two [types of suits] have the same Article III starting point, they do not necessarily track one another."<sup>36</sup> In light of the potential loss of profits as well as the actual loss of several customers, the Court concluded that the plaintiffs had alleged sufficient injury in fact.<sup>37</sup> Moreover, the legislative history of section 4 of the Bank Service Corporation Act, together with the trend toward the "enlargement of the class of people who may protest administrative action,"<sup>38</sup> indicated that the plaintiff's interests arguably were protected by the statute.

The test enunciated in *Data Processing* subsequently was applied in *Arnold Tours, Inc., v. Camp*.<sup>39</sup> The plaintiffs, independent travel agents, challenged a ruling by the Comptroller of the Currency authorizing national banks to provide both travel and banking services to their customers. Contending that this ruling, like that in *Data Processing*, offended section 4 of the Bank Service Corporation Act, the travel agents alleged that they had lost and would continue to lose substantial business as a result of the ruling.<sup>40</sup> Although plaintiffs' original complaint alleged an actual loss of customers and

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33. 397 U.S. at 152.

34. *Id.* at 152-53.

35. *Id.* at 152 (citing *Flast v. Cohen*, 392 U.S. 83, 102 (1968)).

36. *Id.*

37. *Id.*

38. *Id.* at 154.

39. 400 U.S. 45 (1970).

40. *Id.* at 45.

profits as a result of the Comptroller's ruling,<sup>41</sup> the Supreme Court upheld the plaintiffs' standing without further discussion of the injury suffered.

One year later, the Court again applied the *Data Processing* test for injury in fact. In *Investment Co. Institute v. Camp*,<sup>42</sup> an association of open-end investment companies charged that a regulation<sup>43</sup> allowing national banks to operate an investment fund in competition with the mutual fund industry violated the Glass-Steagall Banking Act of 1933.<sup>44</sup> Observing that the injury alleged by the plaintiffs was indistinguishable from that asserted in *Data Processing*, the Court upheld the plaintiff's standing to challenge the regulation. However, it failed to discuss the nature of the alleged injury, concluding only that it was sufficient to satisfy the *Data Processing* test.<sup>45</sup>

In *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP),<sup>46</sup> a 1973 decision, the Supreme Court articulated its broadest interpretation of the injury in fact requirement. After the Interstate Commerce Commission (ICC) approved certain freight rate surcharges pending permanent rate increases, the plaintiff student organization filed suit contending that the ruling would damage the environment and cause its members economic, recreational, and aesthetic harm. Maintaining that its members used local recreational areas that would be polluted as a result of the surcharge's adverse effect on recycling efforts, SCRAP further alleged noncompliance by the ICC with the National Environmental Policy Act<sup>47</sup> in failing to issue an environmental impact statement.<sup>48</sup> The

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41. *Arnold Tours, Inc. v. Camp*, 286 F. Supp. 770, 771 (D. Mass. 1968).

42. 401 U.S. 617 (1971).

43. 12 C.F.R. Pt. 9 (1970).

44. 48 Stat. 162 (codified in scattered sections of 12 U.S.C.).

45. 401 U.S. at 620-21.

46. 412 U.S. 669 (1973).

47. 42 U.S.C. § 4332(2)(c) (1973).

48. 412 U.S. at 688. Specifically, SCRAP alleged that each of its members would be required to pay more for finished products; that each of its members "[u]ses the forests rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes," and that these activities had been affected adversely by the increased freight rates; that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air had suffered increased pollution caused by the modified rate structure; and, finally, that each member had been forced to pay increased taxes as a result of the sums necessarily expended to dispose of otherwise reusable waste materials. *Id.* at 678.

Court acknowledged that the harm suffered by SCRAP existed only through an "attenuated line of causation,"<sup>49</sup> but nevertheless it held that the pleadings satisfied the requirement that the plaintiff allege "that he has been or will in fact be perceptibly harmed by the challenged agency action."<sup>50</sup>

The breadth of the Court's decision is evidenced by its recognition that aesthetic as well as economic injury can confer standing. Moreover, because the rate increases had not yet been effectuated, the claimed injury was prospective only and therefore speculative.<sup>51</sup> Although the Court noted that the allegations must be true and capable of proof at trial,<sup>52</sup> it emphasized that the issue of standing must be determined not by the prospects of proof at trial but only on the basis of the pleadings.<sup>53</sup> To date the decision in *SCRAP* represents the most attenuated injury recognized by the Court in support of a plaintiff's standing to challenge an agency action. Notably, though, this broad view was not articulated in the context of a competitor suit.

In cases following *SCRAP* the Court appears to have limited the opportunities for successfully asserting standing. For example, in the 1975 case of *Warth v. Seldin*<sup>54</sup> the plaintiff was denied standing to challenge an allegedly exclusionary zoning plan. Although the Court acknowledged that the claimed injury may be indirect and still satisfy the test, it nevertheless cautioned that a remote nexus between the challenged action and the alleged injury would render more difficult proof that "in fact, the asserted injury was the consequence of the defendant's actions, or that prospective relief will remove the harm."<sup>55</sup> Holding that the plaintiffs had failed to demonstrate in their pleadings that the defendant's actions actually caused the alleged injury, the Court denied standing.

The Court's predilection for these more stringent pleading requirements was crystallized further in a 1976 decision, *Simon v.*

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49. *Id.* at 688.

50. *Id.*

51. "[S]tanding is not to be denied merely because the ultimate harm alleged is a threatened future one rather than an accomplished fact." *Simon v. Eastern Ky. Welfare Rights Organ.*, 426 U.S. 26, 61 (1976) (Brennan, J., dissenting).

52. 412 U.S. at 689.

53. *Id.*

54. 422 U.S. 490 (1975).

55. *Id.* at 505.

*Eastern Kentucky Welfare Rights Organization*.<sup>56</sup> After the IRS reduced the quantity of indigent services that must be provided by hospitals seeking tax-exempt status,<sup>57</sup> several low-income persons and their representative organizations challenged the ruling as an illegal inducement to non-profit hospitals to offer fewer free services to indigent persons.<sup>58</sup> The plaintiffs alleged that as a consequence of the ruling they were denied services that otherwise would be available to them.

The Court relied partially on its decision in *Warth* to conclude that the claimed injury was purely speculative; none of the evidence offered by the plaintiffs established that but for the challenged ruling they would receive the services of which they allegedly were being deprived.<sup>59</sup> Expressing doubt as to whether the alleged injury was even remediable by judicial intervention, the Court noted that there was no indication that the hospitals would not choose to forego favorable tax treatment to avoid providing additional services for indigents.<sup>60</sup>

In effect, the Supreme Court's most recent decisions require the plaintiff to meet strict pleading requirements before he can challenge agency action. In addition to showing a narrow causal nexus between the alleged injury and the challenged action,<sup>61</sup> the com-

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56. 426 U.S. 26 (1976).

57. Rev. Rul. 69-545, 1969-2 C.B. 117. The 1969 ruling described two hospitals having different operating policies regarding nonpaying indigent services. One offered only emergency services to nonpaying indigents, referring those requesting ordinary services to other hospitals. Thus, the hospital did not "[operate] to the extent of its financial ability for those not able to pay" as required by the 1956 Ruling. Rev. Rul. 56-185, 1956-1 C.B. 202, 203. Under the 1969 ruling, however, it was allowed a charitable exemption. To remedy the inconsistency between the rulings, the 1969 ruling preempted the 1956 ruling to eliminate "the requirement relating to caring for patients without charge or at rates below cost." Rev. Rul. 69-545, 1969-2 C.B. 117-19.

58. 426 U.S. at 32-33.

59. *Id.* at 42-43.

60. *Id.* The Court in *Eastern Kentucky* recognized the inference created by the allegations of the plaintiff "that these hospitals, or some of them, are so financially dependent upon . . . favorable tax treatment . . . that they would admit [indigents] if a court required such admission as a condition to receipt of that treatment." *Id.* This inference, however, was held to be speculative at best and by itself did not support the plaintiff's contention of the hospital's dependency upon favorable tax treatment.

61. This requirement is relevant particularly when assessing a litigant's standing to challenge indirect injury by agency action. The "perceptible" though "attenuated" injury present in *SCRAP* will no longer be sufficient to allow a plaintiff standing. After *Warth* and *Eastern Kentucky*, to meet the threshold requirement of Article III, a plaintiff must demonstrate that

plaining party must demonstrate that the harm has arisen or will in fact rise if the action is permitted to continue. Furthermore, he must convince the court that his injury is not merely speculative and that upon a favorable decision on the merits it can redress the injury.<sup>62</sup>

Justice Brennan, in his dissenting opinion to *Warth v. Seldin*,<sup>63</sup> suggested that these stringent requirements signalled a return to outmoded notions of fact pleading, obliging parties who seek to challenge administrative actions to allege their case within unduly narrow limits. In addition to these procedural consequences, Justice Brennan questioned whether these requirements would encourage the judiciary to speculate prematurely on the merits of the claim.<sup>64</sup> Consequently, the threshold decision of standing would depend on the court's view as to the likelihood of the plaintiff proving the allegations, especially the claimed injury, at a trial on the merits.

### *American Society of Travel Agents, Inc. and Tax Analysts*

In *Tax Analysts & Advocates v. Blumenthal*<sup>65</sup> the owner of a small domestic oil well contended that he had suffered economic harm<sup>66</sup>

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the defendant's action in fact caused the alleged harm. See *Simon v. Eastern Ky. Welfare Rights Organ.*, 426 U.S. 26, 41 (1976); *Warth v. Seldin*, 422 U.S. 490, 505 (1975).

62. [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation.

426 U.S. at 38 (emphasis supplied). The basic Article III "injury in fact" limitation upon standing has been narrowed significantly and quietly from the indirect "perceptible" injury accepted by the Court in *SCRAP* to the "injury . . . that is likely to be redressed" found wanting by the Court in *Eastern Kentucky*. Compare *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973) with *Simon v. Eastern Ky. Welfare Rights Organ.*, 426 U.S. 26, 38 (1976).

63. 426 U.S. at 62.

64. *Id.* at 65-66 (quoting *Barlow v. Collins*, 397 U.S. 159, 176 (1970)) (Brennan, J., concurring and dissenting).

65. 566 F.2d 130 (D.C. Cir. 1977).

66. The plaintiff owner alleged two distinct injuries. First, he asserted that the IRS rulings illegally exempted foreign-based oil corporations from paying domestic income taxes, thereby reducing their overhead costs. This lower overhead allegedly allowed these corporations to sell their oil at a reduced price. Because prices charged by international companies determine the market price for crude oil, Field was required to sell his oil at this lower price, thus depriving him of potential income from the sale of his domestically produced oil. Second, Field contended that the exemption of these foreign-based corporations from domestic taxation increased their net income, making them a more attractive investment than domestic oil

as a result of an IRS ruling that allowed competitors to receive tax credits for income taxes paid to foreign governments. Claiming that such amounts were actually royalties and therefore deductible only from gross income as business expenses rather than as tax credits, which reduce dollar-for-dollar the amount paid in federal income tax, the plaintiff charged that he was placed unlawfully in a disadvantaged business position relative to his competitors. The Court of Appeals for the District of Columbia agreed that the alleged injury was sufficient to meet the injury in fact test enunciated by the Supreme Court in *Data Processing*.<sup>67</sup> Nevertheless, it denied standing because the plaintiff failed to allege a claim arguably within the zone of interests protected by the relevant statute.

A month later in *American Society of Travel Agents, Inc. v. Blumenthal*<sup>68</sup> a different panel of the court re-examined the same issue—whether the plaintiff had standing to challenge an IRS policy that purportedly conferred upon the plaintiff's competitors an unlawful economic advantage. The plaintiffs, the American Society of Travel Agents (ASTA) and several individual travel agencies, sought to challenge the failure of the IRS to tax certain income earned by the American Jewish Congress (AJC), an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code.<sup>69</sup> ASTA asserted that the income from AJC's operation of travel services, conducted in competition with the plaintiffs' business, should be treated as unrelated business income under section 513(a) of the Code and therefore taxable.<sup>70</sup> Alleging that ASTA

companies. This result, asserted Field, was injurious to the capital structure of domestic oil companies. 566 F.2d at 136.

67. 397 U.S. 150, 152 (1970).

68. 566 F.2d 143 (D.C. Cir. 1977).

69. I.R.C. § 501(a), (c)(3) provide in pertinent part:

(a) Exemption from taxation.—An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle . . .

. . . .

(c) List of exempt organizations.—The following organizations are referred to in subsection (a):

. . . .

(3) Corporations and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes . . . ."

70. See note 10 *supra*. This argument by the ASTA was supported by a 1968 decision of the District Director for the Internal Revenue Service of New York that purported to apply the § 511 unrelated business tax to AJC's travel tour income. His proposal was based on the following grounds: (1) the travel program was carried on in a "commercial manner," (2) its

members suffered a loss of customers and profits as a result of this IRS action, the plaintiffs claimed that the ruling allowed the AJC to sell packaged tours at prices lower than those plaintiffs could charge and still earn a profit, and, consequently, the ASTA members lost expected customers and profits. The appellate court denied standing, however, holding that the plaintiffs failed to demonstrate any actual injury resulting from the defendant's administrative action. In support of its conclusion, the court noted that the plaintiffs had failed to identify either prospective customers who spurned the services of ASTA members for the lower-priced AJC tours or patrons of AJC who might have patronized ASTA members but for the AJC's allegedly unlawful economic advantage.<sup>71</sup> Relying on the causation and redressability tests formulated by the Supreme Court in *Eastern Kentucky*, the court found the claimed injury to be purely speculative,<sup>72</sup> and questioned the capacity of that injury for judicial redress.<sup>73</sup>

The court distinguished *Data Processing*, upon which earlier in *Tax Analysts* a different panel of the same court had relied to find injury in fact, stating that it did not "clearly define the contours of competitor standing . . . ."<sup>74</sup> The court emphasized that *Data Processing* was not a tax case,<sup>75</sup> that "[w]hatever may be the impact of competitor standing when ordinary administrative action is at issue, we do not believe that *Data Processing* should be read to endorse standing for any private business, individual or corporate, which wishes to contest the tax treatment of a competitor."<sup>76</sup> The court of appeals thus assumed that the Supreme Court, by emphasizing the causation and redressability factors, had attempted to limit the broad concept of injury in fact endorsed in *SCRAP*.<sup>77</sup> This assumption, however, failed to recognize that requirements of causation and redressability were formulated in cases easily distinguish-

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operation was "regular . . . not intermittent," (3) "the features accenting Jewish interests is [sic] a 'cultural veneer,'" and (4) use of the travel programs was unnecessary "for proper functioning of the [AJC] membership." Brief for Appellants at 8. This proposal was subsequently overruled by the National Office of the IRS. *Id.*

71. 566 F.2d at 148-49.

72. *Id.* at 149-50.

73. *Id.*

74. *Id.* at 151.

75. *Id.*

76. *Id.* at 151-52.

77. *Id.*

able from competitor suits. Moreover, while failing to explain why IRS cases should be differentiated from other administrative cases, the court of appeals abandoned the principles enunciated in an analogous competitor suit, *Data Processing*, for those of *Eastern Kentucky* in which a challenge to IRS policy by low-income persons was rejected. Attempting to further distinguish *Data Processing*, the appellate court noted that the plaintiff in that case had objected to any competition by national banks, whereas in *Travel Agents* the plaintiff sought only to have its competition taxed rather than eliminated.<sup>78</sup> As Chief Judge Bazelon remarked in his dissent,<sup>79</sup> this objection regarding *Data Processing*, though, goes merely to the "extent of the injury suffered, not to its speculative or hypothetical nature."<sup>80</sup>

In *Travel Agents* the court's preliminary assessment of the plaintiffs' ability to substantiate their claim clearly colored its decision as to standing. Emphasis was placed on the plaintiffs' failure to allege specific instances of customer attrition, and the complaint was criticized as being framed abstractly in terms of the injury arising from the defendant's creation of an "unfair competitive atmosphere."<sup>81</sup> As predicted by Justice Brennan's dissent in *Warth*, the Supreme Court's causation and redressability tests clearly encouraged the court in *Travel Agents* to apply outdated strict pleading requirements, as well as to speculate prematurely on the merits of the plaintiffs' case.

Having failed to distinguish *Data Processing*, the court in *Tax Analysts* proceeded to apply to a competitor suit criteria developed in non-competitor suits with an insufficient analysis of the unique characteristics of the former. Because of the far-reaching effects of agency action, plaintiffs in non-competitor suits appropriately may be required to focus clearly on the circumstances of the alleged injury in order to avoid adjudication of abstract or hypothetical issues. A competitor's claim, however, is by its nature more narrowly focused. Traditionally recognized as sufficient, the alleged injury frequently will be economic, the causal nexus focusing on the nature of the commercial market.<sup>82</sup> Although narrow pleading re-

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78. *Id.* at 150-51.

79. *Id.* at 160 (Bazelon, J., dissenting).

80. *Id.*

81. *Id.* at 148-49.

82. The Court of Appeals for the District of Columbia had not required an "absolute

quirements may be necessary to establish standing in general challenges to agency action, the nature of a competitor's suit should permit less stringent requirements without violation of the principles underlying standing. The injury alleged by the ASTA, virtually identical to that alleged in *Tax Analysts*, should have satisfied the Article III injury in fact requirement.

### ZONE OF INTEREST

#### *Background*

In considering standing to challenge an agency ruling, the Supreme Court in *Data Processing*<sup>83</sup> required the plaintiff not only to show that he had suffered injury in fact from the agency action, but also that the "interest sought to be protected . . . [was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>84</sup> By adopting this test, the Court attempted to clarify its long-standing requirement that the plaintiff show the right invaded to be a "legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."<sup>85</sup> This refinement was deemed necessary because the "legal interest" test was so intertwined with the merits of the case as to cloud the distinction between the requirements for standing and those for success on the merits.<sup>86</sup> In addition, the Court indicated that the zone of interests test was based not on Article III jurisdictional considerations, which lie at the root of the injury in fact requirement, but rather on a "rule of self-restraint."<sup>87</sup>

The scope and applicability of the zone of interests requirement has been questioned increasingly since *Data Processing*. In a concurring and dissenting opinion<sup>88</sup> filed both in *Data Processing* and its companion case, *Barlow v. Collins*,<sup>89</sup> Mr. Justice Brennan disagreed at the outset with the Court's addition of the zone of interest test

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certainty" that prospective relief would redress the harm. See *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).

83. *Association of Data Processing Serv. Organs., Inc. v. Camp*, 397 U.S. 150 (1970).

84. *Id.* at 153.

85. *Tennessee Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939).

86. 397 U.S. at 153.

87. *Id.* at 154.

88. *Barlow v. Collins*, 397 U.S. 159, 167 (1970) (Brennan, J., concurring and dissenting).

89. 397 U.S. 159 (1970).

to that of injury in fact. Nevertheless, he discussed possible sources for determining whether the plaintiff's claim fell within the zone of interests protected by the statute: "Congressional intent that a particular plaintiff have review, may be found either in express statutory language granting it to the plaintiff's class, or, in the absence of such express language, in *statutory indicia from which a right to review may be inferred*."<sup>90</sup> Relying on this language to interpret the zone of interest requirement, the Court of Appeals for the District of Columbia in a 1970 decision, *Constructores Civiles de Centroamerica, S.A. v. Hannah*,<sup>91</sup> similarly concluded that "to divine Congressional intent we must examine the statutory indicia . . . ."<sup>92</sup> The same year, the Supreme Court employed this rationale in *Arnold Tours, Inc. v. Camp*<sup>93</sup> to uphold a travel agency's standing to challenge a ruling that permitted banks to provide competitive travel services. Thus, having reaffirmed the *Data Processing* tests, the Court sought to ascertain the zone of interests protected by the relevant statute by looking to the provision's legislative history.

Since *Arnold Tours*, the Court has provided little guidance as to the proper scope or application of the zone of interests test, focusing instead on the requirement that the plaintiff allege injury in fact. For example, in *Sierra Club v. Morton*,<sup>94</sup> *United States v. Students Challenging Regulatory Agency Procedures*,<sup>95</sup> and *Simon v. Eastern Kentucky Welfare Rights Organization*,<sup>96</sup> the Court expressly declined to reach questions concerning the zone of interests test. The test was accorded only scant attention in footnotes to several other cases,<sup>97</sup> and has nowhere been developed further by the Court.<sup>98</sup>

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90. *Id.* at 174 (footnotes omitted) (emphasis supplied).

91. 459 F.2d 1183 (1970).

92. *Id.* at 1188.

93. 400 U.S. 45 (1970). *See also* *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971), in which the Court addressed a challenge to a ruling allowing banks to compete with the plaintiffs in operating a mutual investment fund, allegedly in violation of the Glass-Steagall Banking Act of 1933, 48 Stat. 162. The Court summarily upheld the plaintiff's standing without discussion of the scope of interests arguably protected by that Act.

94. 405 U.S. 727, 733 n.5 (1972).

95. 412 U.S. 669, 686 n.13 (1973).

96. 426 U.S. 26, 39 (1976).

97. *See, e.g., United States v. Richardson*, 418 U.S. 166, 176 n.9 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 n.16 (1974).

98. When applying the test enunciated in *Data Processing*, few courts of appeals have denied standing under the zone of interests test once the plaintiffs were found to have suffered injury in fact. *See Gifford-Hill & Co. v. FTC*, 523 F.2d 730 (D.C. Cir. 1975); *Clinton Community Hosp. Corp. v. Southern Md. Medical Center*, 510 F.2d 1037 (4th Cir.), *cert. denied*,

*Tax Analysts*

In *Tax Analysts & Advocates v. Blumenthal*<sup>99</sup> the Court of Appeals for the District of Columbia used the zone of interests test to deny standing to the plaintiff. Although acknowledging the existence of competitive injury in fact as a result of tax credits unlawfully granted the plaintiff's competitors, the court nevertheless held that the interest asserted was not even arguably within the zone of interests protected by the relevant Code section.<sup>100</sup> In accordance with the Supreme Court's rationale in *Data Processing*,<sup>101</sup> the appellate court stated that the purpose of the zone of interests test is to limit the role of the judiciary, thus "allowing the courts to define those instances when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular subject area."<sup>102</sup> The issue focuses on the interface between Congressional intent in promulgating the relevant code section and the interests claimed to have been infringed.

Acknowledging that use of the words "arguably" and "zone" in the *Data Processing* test necessarily established a broad standard, the court in *Tax Analysts* nevertheless asserted that the test was intended to limit accessibility to the federal courts for the purposes of challenging agency action.<sup>103</sup> The scope of this limitation, stated the court, depended on the congressional purpose underlying the statute at issue, thus forcing the reviewing court to discern that intent consistent with the basic principles underlying the standing doctrine. Adopting an approach that restricted the analysis to the statutory provision in question, the court in *Tax Analysts* refused to consider the provision's setting in the Code or even its legislative history unless the latter expressly extended or denied standing to the plaintiff.<sup>104</sup> Applying this test, the court denied standing, hold-

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422 U.S. 1048 (1975); *Higginbotham v. Barrett*, 473 F.2d 745 (5th Cir. 1973); *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971). See also K.C. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 22.02-11, at 510 (1976).

99. 566 F.2d 130 (D.C. Cir. 1977).

100. *Id.* at 143-45. The particular Code section implicated by the plaintiff's allegations was § 901(b) of the I.R.C., allowing qualified citizens of the United States and domestic corporations to claim a tax credit for any income, war profits, and excess profits taxes paid or accrued during the taxable year to certain foreign countries. I.R.C. § 901(b)(1).

101. *Association of Data Processing Serv. Organs., Inc. v. Camp*, 397 U.S. 150 (1970).

102. *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d at 140.

103. *Id.* at 140 & n.64.

104. *Id.* at 140-42.

ing that the pertinent statutory provision sought to prevent double taxation of persons paying certain foreign income and other taxes, not to protect the plaintiffs from unfair competition.<sup>105</sup>

Two justifications were offered for confining the analysis to the relevant statutory provision.<sup>106</sup> Assuming that the case proceeds to a decision on the merits, the court stated that focusing solely on the applicable section would ensure that the plaintiff has a "strong connection to the controversy," thus upholding the policy of complete adverseness which underlies the standing doctrine. This test, however, begs the question, stating in essence that if the statute specifies that the plaintiff is the proper party to raise the issue, he is the proper party; if the statute does not so indicate, then he is not. As a second justification for limiting its analysis, the court pointed to the diversity and complexity of the provisions and policies underlying the Internal Revenue Code. In conclusory form, the court stated that to extrapolate the legislative intent behind one Code section by reference to another would "distort the role of the courts in relation to the legislative branch . . ."<sup>107</sup> Given the com-

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105. The zone of interests test propounded by the majority in *Tax Analysts* was "whether the complaining party has stated an interest which is arguable from the face of the statute." 566 F.2d at 142. Refusing to examine other provisions of the I.R.C., the majority also declined to examine the legislative history in assessing the zone of protected interests.

Appellant Field had relied upon two sections of the I.R.C. to evidence a congressional intent to protect businesses from unfair competition due to illegal tax advantages given their competitors. The first is the unrelated business tax as applied to tax exempt organizations. I.R.C. §§ 501, 511-513. The only relevant passage in the reports of the House and Senate subcommittees concerning the unrelated business tax provides:

The problem at which the tax on unrelated business income is directed here is primarily that of unfair competition. The tax-free status of these section 101 [now 501] organizations enables them to use their profits tax free to expand their operations, which their competitors can expand only with the profits remaining after taxes.

H. R. REP. NO. 2319, 81st Cong., 2d Sess. 36 (1950); S. REP. NO. 2375, 81st Cong., 2d Sess. 28 (1950). Treasury regulations further support this view by interpreting the primary purpose of the § 511 unrelated business tax as the elimination of "a source of unfair competition by placing the unrelated business tax activities of certain exempt organizations upon the same tax basis as the non-exempt business with which they compete . . ." I.R.C. § 1.513-1(b). The second provision relied upon by Field was the section delineating the extent of ruling retroactivity. I.R.C. § 7805(b) provides that "[t]he Secretary may prescribe the extent . . . to which any ruling or regulation . . . shall be applied without retroactive effect." This section, as interpreted in *IBM v. United States*, 343 F.2d 914 (Ct. Cl. 1965), directs the Secretary of the Treasury to ensure equality in administration of tax rulings so that disparate tax treatment does not bestow unfair competitive advantages. 343 F.2d at 919, 923.

106. *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d at 140-41.

107. *Id.* at 141.

plexity of tax policy, the court apparently feared that allowing plaintiffs to construe one section of the Code by analogy to other dissimilar sections would permit limitless extension of the provisions, rendering meaningless the zone of interests test. In addition, the court may have believed that to analyze the relationship between various statutory provisions to determine standing would anticipate the merits of the case, and thus the fine distinctions between these inquiries would become blurred.

Such considerations, however, do not justify limiting the inquiry to the sole provision at issue. Ensuring the adverseness of the controversy is a consideration more relevant to the requirement of injury in fact than to the assessment of congressional purpose, and, moreover, no logical connection exists between the number of provisions involved and the requirement that the plaintiff suffer injury in fact.<sup>108</sup> Rather than hampering unnecessarily the determination of congressional intent, an examination of a provision within the general context of a whole legislative scheme traditionally has been a valuable means of ascertaining statutory goals.<sup>109</sup> Such a method, in fact, becomes more valuable when considering statutory systems as complex as the Internal Revenue Code. As Chief Judge Bazelon noted in his dissent in *American Society of Travel Agents*,<sup>110</sup> a mis-

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108. *American Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d at 164-65 (Bazelon, J., dissenting).

109. As Justice Holmes observed, "[i]t is said that when the meaning of language is plain we are not to resort to evidence to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand and Gravel Co. v. United States*, 278 U.S. 41, 48 (1928). Chief Justice Marshall counseled that "[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived . . ." *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Similarly, Justice Powell, speaking for the Court in *University of California v. Bakke*, 46 U.S.L.W. 4896 (1978), sought "whatever aid [was] available [to determine] the precise meaning of the statute" before the Court. 46 U.S.L.W. at 4900 (emphasis supplied). Analyzing the existence of a private right of action under Title VI, the Court in *Bakke* examined the legislative history "against the background of . . . the problem that Congress was addressing" to discern congressional intention. *Id.* See also *Ellis v. Department of Hous. and Urban Dev.*, 551 F.2d 13, 16 (3d Cir. 1977); *City of Hartford v. Towns of Glastonbury, West Hartford, and East Hartford*, Nos. 76-6049, -6050, -6059, *slip op.* at 1096 (2d Cir. 1976); *Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d 29, 33-34 (3d Cir. 1976); *Cincinnati Elecs. Corp. v. Kleppe*, 509 F.2d 1080, 1086 (6th Cir. 1975); *Davis v. Romney*, 490 F.2d 1360, 1365 (3d Cir. 1974); *Thompson v. Washington*, 497 F.2d 626, 632 (D.C. Cir. 1973); *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1188-89 (D.C. Cir. 1972); *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 691 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

110. *American Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d at 165 (Bazelon, J., dissenting).

placed fear exists that courts will be unable to separate the issues of standing from the merits of the case. Although a consideration of the merits of the case necessarily will involve a determination of whether the statutory provisions at issue prescribe what the plaintiffs have alleged, the test for standing only requires that the complainant assert an arguable claim. The general tenor of the zone of interests test is in no way compromised by construing code provisions conjunctively. Such an inquiry may be conducted easily without prejudging the ultimate merits of the claim.

Contrary to precedent in the same circuit,<sup>111</sup> the court in *Tax Analysts* further limited its inquiry into the zone of protected interests by concluding that examination of the legislative history of the relevant statute, beyond identifying an express grant or denial of plaintiff standing, was improper in determining standing.<sup>112</sup> Reliance on the legislative history, the court argued, would present three dangers, the first of these being the potential for prejudgment of the case's merits.<sup>113</sup> The court purported to base its refusal to examine the legislative history on language by the Supreme Court in *Arnold Tours*, which suggested that reliance on the legislative history of the statute in question would be improper.<sup>114</sup> In *Arnold Tours* the Supreme Court had stated that "[i]n *Data Processing* we did not rely on any legislative history showing that Congress desired to protect data processors *alone* from competition,"<sup>115</sup> and proceeded to hold that the relevant statute also arguably protected travel

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111. *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183 (D.C. Cir. 1972). In *Constructores Civiles* the court examined the "statutory indicia" of the statute, including its preamble, when presented with a vaguely worded statute. The court in *Constructores Civiles* concluded that the zone requirement was met if "the challenging party . . . [showed] that [he was] an intended beneficiary of the statute not necessarily the primary one." 459 F.2d at 1189. Quoting the instructive concurring opinion of Justice Brennan in *Barlow v. Collins*, 397 U.S. at 167, the court in *Constructores Civiles* observed that "[e]vidence that [plaintiff's] class is a statutory beneficiary . . . need not be as strong for the purpose of obtaining review as for the purpose of establishing [plaintiff's] claim on the merits. [A] . . . slight beneficiary indicia will suffice to establish his right to have review and thus to reach the merits." 459 F.2d at 1189.

112. *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d at 141.

113. *Id.*

114. *Id.* at 142 n.74, in which the court misread the Supreme Court's language and concluded that, "[b]y not relying on legislative history, as the Supreme Court indicated in *Arnold Tours, Inc. v. Camp* . . . was proper, we avoid the danger of the court settling the merits in the guise of ruling on standing and thus meet the concern voiced by Justices Brennan and White."

115. *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970) (emphasis supplied).

agencies against unlawful competition. Thus, far from ignoring legislative history, the Supreme Court implicitly reaffirmed its reliance on the same legislative history discussed in *Data Processing*. It appears that the court of appeals in *Tax Analysts* simply misread the language of the Supreme Court. Moreover, the court's apprehension that reliance on legislative history would result in a premature consideration of the merits of the case, as previously noted, is based on an erroneous lack of confidence in the federal courts' ability to apply the "arguably" portion of the zone of interests test.

The court's second justification for limiting its analysis is equally unpersuasive: an examination of the legislative history, the court argued, would be "unilluminating."<sup>116</sup> The traditional reliance on this material to expand and illuminate statutes clearly repudiates this contention. Finally, the court urged that use of the legislative history would undermine the breadth of the zone of interests test, essentially urging preservation of the generous nature of the test as a reason to limit its scope. If the concern is to identify precisely those persons whose interests Congress intended to protect, it is unclear why the court refused to use a valuable source of this information.

For these reasons, therefore, the court of appeals limited its inquiry to the face of the statute in dispute. In so doing, however, the court unnecessarily deprived itself of traditionally informative sources and encouraged judicial speculation as to congressional intent without benefit of the legislative expression of this intent. Such speculation can lead only to the result eschewed by the court, unwarranted judicial interference with the legislative branch.

### CONCLUSION

Decisions by the Court of Appeals for the District of Columbia Circuit in *Tax Analysts* and *Travel Agents* indicate unfortunate and unnecessary confusion in the federal courts as to the proper application of the injury in fact and zone of interests tests developed by the Supreme Court in *Data Processing* and extended in subsequent decisions. The narrow view endorsed by the appellate court severely restricts standing to challenge administrative actions, leaving broad agency discretion open to potential distortion by powerful special interest groups, such as the oil industry. Increased competitive dis-

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116. *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d at 142.

parity inevitably will result, without affording adequate opportunities to challenge such action in the courts. With regard to IRS policy in particular, several factors favor a more liberal approach to competitor standing.<sup>117</sup> Parties suffering injury should have an opportunity for redress; this opportunity should not be curtailed merely because the tax liability of a third party is in dispute. Moreover, parties challenging potentially unlawful reductions of another's tax liability seek to increase, rather than decrease, tax revenue and thus act in conformity with the general scheme of just tax administration.<sup>118</sup>

Until the issue of competitor standing is resolved, either by Congress or the Supreme Court, plaintiffs must prepare to allege and prove direct causation and redressibility of their claims, demonstrating that the protected status claimed under the zone of interest test is apparent from the face of the statute in question. Unfortunately, few claimants will be able to meet such strict requirements, leaving competitors indirectly suffering serious economic disadvantages from agency rulings in the position of suffering only technically speculative harm.

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117. Tannenbaum, *Public Interest Tax Litigation Challenging Substantive I.R.S. Decisions*, 27 NAT'L TAX J. 373 (1974).

118. *Id.* at 379-80.