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THE WARTH OPTIONAL STANDING DOCTRINE:
RETURN TO JUDICIAL SUPREMACY?

Albert Broderick, O.P.*

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

This fundamental constitutional principle of Chief Justice Marshall was quoted by Justice Brennan in Baker v. Carr,1 and in the 12 years following the latter case the Supreme Court resolutely sought to implement it in matters of standing to sue. Is standing to sue now to be a precision instrument of subtle judicial activism, cutting off at the threshold the very possibility of asserting major constitutional rights? Or is Warth v. Seldin,2 which stimulates this question, merely a tentative overkill by a Court in the process of reformulating a credible and durable standing doctrine?

The Warth opinion of Justice Powell for a 5-Justice majority, in promoting optional standing dismissals,3 at least suggests that the Court may now be prepared to make judicial economy an ultimate criterion for “awarding” standing, a suggestion that provides ample cause for alarm. If so, we might well take a current national reading on the desirability of a return to judicial supremacy.4 On the other hand, the Court’s traditional reluctance to plunge

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2. 422 U.S. 490 (1975).
3. The Court, of course, does not speak of “optional standing,” preferring the loftier term “prudential considerations”; “Even if we assume, arguendo, that . . . the asserted harm . . . is sufficiently direct and personal to satisfy the case-or-controversy requirement of Art. III, prudential considerations strongly counsel against according them . . . standing to prosecute this action.” Warth v. Seldin, 422 U.S. 490, 514 (1975).
4. See C. Haines, The American Doctrine of Judicial Supremacy (2d ed. 1932), for an attribution of such a role to the judiciary in an earlier time. For another view on judicial supremacy, see R. Jackson, The Struggle for Judicial Supremacy (1941), in which Justice Jackson, writing shortly before his elevation to the Supreme Court, noted:

For a century every contest with the Supreme Court has ended in evading the
needlessly into the maelstrom of politics and economic rivalries gives an indication that the Court may withdraw from Warth's suggestion that henceforth access to courts to vindicate constitutional rights may depend on judicial favor rather than on constitutional rule.

To give focus to the recent developments concerning standing, it is necessary at the outset to summarize, in arguably neutral terms, the major elements of the standing doctrine as currently conceived. Next, brief consideration will be given to the terminology of some near neighbors of standing to sue, such as assertion of third party rights, political questions, advisory opinions, mootness, ripeness, abstention, and the Younger v. Harris line. These issue-oriented doctrines, along with certain pleading questions, namely existence of a claim (cause of action) upon which relief may be granted and motion for summary judgment, still stimulate confusion with standing, which is properly a party doctrine. In addition, rapid changes in the federal standing doctrine in the past decade justify a preliminary historical inquest, which focuses upon two periods of the recent past: Period One from Frothingham v. Mellon to Baker v. Carr (1923-1962); and Period Two from Baker v. Carr to United States v. SCRAP (1962-1973). The focus then shifts to the crucial question: are we now in a third period, one launched by the trilogy capped by Warth, that stands as a current Burger Court revision? It will then be time to argue the impropriety of a persistence in the Warth direction, and the more felicitous possibilities offered by a less combative and more restrained approach to standing. Finally comes a moment of self-indulgence: a jurisprudential postscript.

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basic inconsistency between popular government and judicial supremacy. . . . Another generation may find itself fighting what is essentially the same conflict that we, under Roosevelt, and our fathers under Theodore Roosevelt and Wilson, and our grandfathers under Lincoln, and our great-grandfathers under Jackson, and our great-great-grandfathers under Jefferson, fought before them. The truce between judicial authority and popular will may, or may not, ripen into a permanent peace.

*Id.* at vii-viii.

The threatened revival of “judicial supremacy” in our day may take a new stand—closing the door to popular vindication of constitutional government under the banner of judicial restraint.

8. The cases that, with *Warth*, make up the trilogy are *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), and *United States v. Richardson*, 418 U.S. 166 (1974).
I. STANDING: A SUMMARY OF THE CURRENT DOCTRINE

A preliminary, neutral formulation of the main aspects of the standing doctrine at present is as follows:

I. Article III ("constitutional minimum") general requirement.

Problem: "[W]hether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III."9

Required: Plaintiff must allege "'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."10

II. Specification of the general requirement of a "personal stake."

A. Nature of required injury:

   (1) The injury to the complaining party must be a direct one that the court may act "to redress or otherwise protect against . . . even though the court's judgment may benefit others collaterally."11

   (2) The injury to the plaintiff must be actual or threatened: "[W]hen the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . ."12

B. Nature of required interest:

   (1) The injury may be "economic or otherwise,"13 that is, it may involve a personal interest (for example, free exercise of religion14) or an environmental one.15

   (2) The injury need not be to a legal right—it need be only "injury in fact."16

   (3) The injury may be shared with others: plaintiff "must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."17

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11. 422 U.S. at 499.
(4) Plaintiff's interest may be specifically derived from the Constitution or from a statute, expressly or by implication: "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'"18

III. Special standing rules for particular kinds of plaintiffs.

A. Taxpayers.

"[A] 'taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.'"19

B. Citizens.

"All citizens, of course, share equally an interest in the independence of each branch of Government. In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a 'case or controversy' appropriate for judicial resolution."20

C. Plaintiffs seeking review of federal administrative action.

"[T]he Administrative Procedure Act grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute.'"21

D. Associational plaintiffs.

(1) "[A]n association may have standing in its own right to seek judicial relief from injury to itself and to


The [Flast] Court then announced a two-pronged standing test which requires allegations: (a) challenging an enactment under the taxing and spending clause of Art. I, § 8, of the Constitution; and (b) claiming that the challenged enactment exceeds specific constitutional limitations imposed on the taxing and spending power.

418 U.S. at 173.

20. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226-27 (1974). The Reservists opinion also noted, in regard to citizen standing, that "[r]espondents seek to have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens." Id. at 217.

21. Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970). Later in this opinion, the Court noted that "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." Id. at 154.
vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties."

(2) "Even in the absence of injury to itself, an association may have standing solely as the representative of its members."  

E. Plaintiffs in class actions.

(1) Unless plaintiffs in class actions "demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.' "  

(2) "To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents."  

II. PROBLEMS OF TERMINOLOGY: DOCTRINES CLOSELY RELATED TO, BUT DISTINCT FROM, STANDING TO SUE

A. Standing to Assert Rights of Third Parties

It is generally accepted that a litigant "has standing to seek redress for


23. Warth v. Seldin, 422 U.S. 490, 511 (1975). National Motor Freight Traffic Ass'n v. United States, 372 U.S. 246 (1963), was referred to as an example of this type of associational standing. The Court also noted the requirement that

[t]he association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

422 U.S. at 511.


injuries done to him, but may not seek redress for injuries done to others."\(^{26}\) In *Moose Lodge No. 107 v. Irvis*,\(^{27}\) the plaintiff, a black who had been refused service in the Lodge's dining room, was not permitted to cite the Lodge's allegedly discriminatory membership requirements in support of his action to revoke the Lodge's liquor license on the grounds of discriminatory practices. The Court agreed that "in exceptional situations a concededly injured party may rely on the constitutional rights of a third party in obtaining relief,"\(^{28}\) but found that plaintiff was himself not "injured by Moose Lodge's membership policy since he never sought to become a member."\(^{29}\)

*Barrows v. Jackson*,\(^{30}\) which heads the small list of exceptions allowed by the Court to this rule, involved a covenant similar to the one in *Shelley v. Kraemer*.\(^{31}\) The plaintiff sued Barrows for damages arising from a violation of their restrictive covenant since Barrows had sold property to a black. The Court held that Barrows, though white, was entitled to assert as a defense the constitutional rights of blacks. The Court noted that, given the circumstances of the case, "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court."\(^{32}\) *Barrows* is cited frequently, both in cases that allow persons with standing to raise the rights of third parties as part of their case,\(^{33}\) and in some cases that do not allow them to do so.\(^{34}\) However, in no sense does the *Barrows* doctrine relate to standing to sue. The confusion in recent cases on this point derives, in part, from an almost incidental reference by Justice Douglas in *Association of Data Processing Service Organizations, Inc. v. Camp*.\(^{35}\) After having identified article III standing as requiring the plaintiff to show a personal stake through "injury in fact, economic or otherwise,"\(^{36}\) Justice Douglas added this unfortunate comment: "Apart from Article III jurisdic-

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29. 407 U.S. at 167.
32. 346 U.S. at 257.
36. *Id.* at 152.
tional questions, problems of standing, as resolved by this Court for its own governance, have involved a 'rule of self-restraint.'”

This observation's potential for mischief becomes evident when considered in conjunction with the question Chief Justice Warren posed at the outset of his Flast v. Cohen opinion in which, in considering the force of Frothingham v. Mellon, he asked “whether Frothingham establishes a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled.” In Flast, the Court found that Frothingham was not a constitutional bar to a taxpayer with a “personal stake,” that is, one meeting the specific requirements set down in that case. And Barrows, not a standing to sue case, had simply said that the ordinary rule relating to raising a third party’s constitutional rights was “only a rule of practice” which might be “outweighed by the need to protect the fundamental rights which would be denied” by compelling defendant Barrows to pay damages for breach of the restrictive covenant.

B. Infirmities Relating to Issues Raised by the Complaint

Flast, relying on Baker v. Carr, emphasized that standing relates to

37. Id. at 154, quoting Barrows v. Jackson, 346 U.S. 249, 255 (1953). In an earlier era, Justice Brandeis suggested that the “Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.” Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). These rules “for its own governance,” according to Justice Brandeis, applied in nonadversary suits, in cases in which constitutional questions were not necessary to the decision, in cases in which only a narrow constitutional ruling was necessary in light of “the precise facts to which [the ruling] applied,” in cases in which an alternative ground for decision is present, in suits in which the party “fails to show that he is injured” by the operation of the challenged statute (Justice Brandeis cited, among other cases, Massachusetts v. Mellon, 262 U.S. 447 (1923)), in cases in which the challenging party “has availed himself of its benefits,” and when a challenged act of Congress may be construed so as to avoid the constitutional question. 297 U.S. at 346-48.

40. 392 U.S. at 92.
41. 346 U.S. at 257. Another source of confusion concerning the meaning of Barrows is a strange footnote in Flast. The statement in the body of the opinion reads: “there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations.” 392 U.S. at 99. The appended footnote reads:

Thus, a general standing limitation imposed by federal courts is that a litigant will ordinarily not be permitted to assert the rights of absent third parties . . . . However, this rule has not been imposed uniformly as a firm constitutional restriction on federal court jurisdiction. See, e.g., Dombrowski v. Pfister, 380 U.S. 479, 486-487 (1965); Barrows v. Jackson, 346 U.S. 249 (1953).

392 U.S. at 99 n.20.
"proper party," and not to whether the "issue itself is justiciable." Many questions concerning the justiciability of "the issue" prove to have constitutional roots in article III. Others do not. As to still others, the source of justiciability remains unclear. The constitutional issue of "cases or controversies" certainly includes political questions, advisory opinions, mootness, and, less certainly, ripeness. It does not include abstention, the Younger v. Harris line of cases, or the pleading rules that relate to dismissal for failure of the complaint either to state a cause of action or to withstand attack by summary judgment.

**Political Questions.** Baker v. Carr, followed by Powell v. McCormack, identified the bar of a "political question" as a constitutional element of article III jurisdiction and traced it specifically to the separation of powers among the branches of the federal government.

**Advisory Opinions.** Somewhat uncertain as a category, and often simply the label for a determination of a lack of "case or controversy" of any kind, the rule as to the incapacity of the Court to render advisory opinions is now firmly grounded in article III. In Muskrat v. United States, the Court so held, and denied Congress' capacity to give it such a power by ostensible exercise of Congress' jurisdictional powers.

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42. Id. at 99-100. The Flast Court framed the standing issue, stating:

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." . . . In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.

Id., quoting Baker v. Carr, 369 U.S. 186, 204 (1962). The Court added a footnote to the above, which noted in masterful understatement that "[t]his distinction has not always appeared with clarity in prior cases." Id. at 100 n.21.

43. For example, in Flast the Court stated: "[A] party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question." 392 U.S. at 100.

44. 401 U.S. 37 (1971).


47. Indeed, the advisory opinion tradition began even before Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). As early as 1793, Chief Justice Jay declined to give an advisory opinion regarding constitutionality because of "'strong arguments against the propriety of our extra-judicially deciding the questions alluded to . . . .'" Hudson, Advisory Opinions of National and International Courts, 37 HARV. L. REV. 970, 976 (1924), quoting 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 488-89.

48. 219 U.S. 346 (1911).
Mootness. In *Powell v. McCormack*, the Court stated that "[t]he rule that this Court lacks jurisdiction to consider the merits of a moot case is a branch of the constitutional command that the judicial power extends only to cases or controversies." This mootness doctrine, uneven and unpredictable, recently has been restated as "[t]he usual rule in federal cases . . . that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." If constitutional mootness cannot be waived, it can be reformulated to suit doctrinal exigencies. In *Roe v. Wade*, the argument was made that the termination by abortion of plaintiff's pregnancy had mooted her declaratory judgment claim. The Court disagreed: "Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'"

Ripeness. In *Baker v. Carr*, Justice Brennan's opinion for the Court distinguished "lack of federal jurisdiction" on constitutional or statutory grounds from "inappropriateness of the subject matter for judicial consideration—what we have designated 'nonjusticiability.'" The first prevents the Court from considering the action at all, but in the face of a claim of nonjusticiability, Justice Brennan ruled that "the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined . . . ."
In further analysis of "justiciability" in Flast and Powell, the Court followed Baker v. Carr's lead, but not without leaving certain confusions behind. In Flast, a standing case, Chief Justice Warren conceded that "[j]usticiability is itself a concept of uncertain meaning and scope," and then illustrated its reach "by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable": political questions, advisory opinions, mootness and standing. All these have come to be viewed as constitutional—article III "case or controversy"—issues. However, Chief Justice Warren immediately quoted Poe v. Ullman for the proposition that justiciability is "not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures." In Poe, the appeals from the denial of declaratory relief in actions involving Connecticut's contraceptive statute were dismissed. The Court relied on what it called an absence of a real controversy, in the article III sense, on the Court's equity discretion in declaratory judgment cases, and on what it called "the policy against premature constitutional decision." It is with this last ground that the concept loosely referred to as the ripeness doctrine arises, and with it, the Court's identification of the doctrine as a nonconstitutional aspect of "justiciability."

The ripeness doctrine in a constitutional law setting, as distinct from administrative review cases in which it is more at home, generally appears entangled with other reasons for dismissal: with advisory opinions, with "case or controversy" as such, and with standing. Even in administrative law, the doctrine's visibility has been low since Abbott Laboratories, Inc. v. Gardner; indeed, it has been recently so little regarded that Professor

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56. 392 U.S. at 95. For a discussion of "justiciability," see note 176 infra.
57. 392 U.S. at 95.
60. The statute involved, CONN. GEN. STAT. REV. § 53-32 (1958), prohibited the use of drugs or instruments to prevent conception. It was subsequently overturned in Griswold v. Connecticut, 381 U.S. 479 (1965).
62. In Warth v. Seldin, 422 U.S. 490 (1975), the Court, after noting that article III judicial power imports threatened or actual injury, added: "The standing question thus bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention—and of mootness—whether the occasion for judicial intervention persists." Id. at 499 n.10.
Kenneth Davis optimistically records that "all such [ripeness] cases were founded upon an extreme view of ripeness that probably vanished from the Supreme Court reports during the 1950's." Whether he is right or not, ripeness should be discarded as a category in constitutional adjudication, since whatever substantive purpose it serves is more adequately stated in terms of some other identified category of justiciability, whether of constitutional dimension or not.

Abstention ("Old" and "New"). Abstention from federal court decision until state courts have spoken is concededly, as the Court has recognized, a "judicially created rule which stems from Railroad Commission of Texas v. Pullman Co., [312 U.S. 496], [which] should be applied only where 'the issue of state law is uncertain.' Nevertheless, the Court continues to be restless as to abstention's proper bounds. In Harris County Commissioners Court v. Moore, the Court, which had recently backed off somewhat, held that a district court should have abstained from deciding a claim of equal protection violation which arose out of a state redistricting of justice of the peace courts. The Court stressed the uncertainty of whether the statute would pass muster under the state constitution, and restated the "old" abstention doctrine:

Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong. . . . The same considerations apply where, as in this case, the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute.

Starting from a completely different point of origin, and unique in its boldness, is the Court's "new" abstention doctrine with respect to its original jurisdiction, announced without prior warning, in Ohio v. Wyandotte Chemicals Corp. Ohio brought an original jurisdiction action on behalf of the

68. But see Warth v. Seldin, 422 U.S. 490, 499 n.10, in which Justice Powell makes reference to ripeness in such a way as to indicate a continuing constitutional vitality. See note 62 supra.
70. 420 U.S. 77 (1975).
73. 401 U.S. 493 (1971).
state and its citizens for abatement of an environmental nuisance in Lake Erie. Writing for the Court, Justice Harlan conceded "[t]hat we have jurisdiction seems clear enough. . . . [W]e are empowered to resolve this dispute in the first instance." Further, he conceded that "it is a time-honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it." Nevertheless, the Court denied Ohio's motion to file its complaint "without prejudice to its right to commence other appropriate judicial proceedings." Justice Harlan explained this "abstention," or "discretion" as he called it, as "legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities." The Court also justified its "reasons of practical wisdom," stating: "What gives rise to the necessity for recognizing such discretion is pre-eminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court." Justice Harlan cryptically added: "A broader view of the scope and purposes of our discretion would inadequately take account of the general duty of courts to exercise that jurisdiction they possess." Interestingly, in supporting a decision to renounce part of its original jurisdiction, the Court cited its faithfulness to its appellate role. Perhaps because the Court's disavowal of original jurisdiction still left the states a federal forum, the decision was seen less as a storm than as a storm cloud. But the precedent of renouncing conceded constitutional original jurisdiction in the interest of faithfulness to appellate jurisdiction would make a later, less forthright renouncement of aspects of its appellate jurisdiction less difficult. Cohens v. Virginia would, therefore, no longer be the barrier it had been before Wyandotte.

The Younger v. Harris "Federalism" Bar to Injunctive Relief. A most active line of federal cases, with equitable, statutory and constitutional

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74. Id. at 495-96.
75. Id. at 496-97, citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).
76. 401 U.S. at 505.
77. Id. at 499. Of course, "abstention" is probably not the appropriate title for the Court's action since, unlike the Pullman type abstention, this act by the Court was a definitive refusal to hear the action and not a tentative delay.
78. Id. Later in the opinion, Justice Harlan spoke to the same point: "[W]here we to adjudicate this case, and others like it, we would have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum." Id. at 505.
79. Id. at 499.
80. Id.
81. 19 U.S. (6 Wheat.) 264 (1821). Defenders of Wyandotte would explain that whereas Cohens is a "classicist" approach, Wyandotte simply represents a "functionalist" approach to constitutional adjudication. (For discussion of this terminology, see note 175 infra.)
foundations rooted in considerations of federalism, derives from *Younger v. Harris* and five other cases decided with it. In *Younger*, Justice Black for the Court expressly declined to rely on the federal anti-injunction statute as a ground for the Court’s decision against a federal injunction restraining enforcement by state criminal process of an allegedly unconstitutional criminal syndicalism statute, stating instead: “[O]ur holding rests on the absence of the factors necessary under equitable principles to justify the federal intervention . . .” The Court backed off from some implications of *Younger* in upholding a declaratory judgment in *Steffel v. Thompson*, in which it did not require a showing of “bad faith, harassment, or . . . other unusual circumstance that would call for equitable relief,” which had been required in *Younger* with respect to the pending state criminal proceedings. The Court did not require such a showing in *Steffel* in order to secure federal declaratory relief “when no state prosecution is pending and [there is] . . . a genuine threat of enforcement of a disputed state criminal statute . . . .”

Confusion of the *Younger* line with categories discussed above stems in part from Justice Black’s introduction, almost as an afterthought, of concerns “fundamental . . . to the basic functions of the Judicial Branch . . . under our Constitution . . .” as support for the *Younger* result. He recalled *Marbury v. Madison*’s insistence that judges’ “responsibility for resolving concrete disputes brought before the courts for decision” forbids them to apply “a statute apparently governing a dispute . . . when such an application . . . would conflict with the Constitution.” However, he insisted that “this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them.” Justice Black carefully stopped short of citing an article III bar:

> [E]ven when suits of this kind involve a ‘case or controversy’ sufficient to satisfy the requirements of Article III of the Constitution,

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82. 401 U.S. 37 (1971).
85. 401 U.S. at 54.
88. 415 U.S. at 475.
89. 401 U.S. at 53.
90. Id. at 52.
91. Id.
the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary.\footnote{92}  

\textit{Pleading Rules: Failure to State a Claim and Summary Judgment.} The emphasis in \textit{Flast} that the standing doctrine was directed to the question of whether the plaintiff was the proper party, and not to the issue presented, should have headed off confusion between grounds for dismissal of a complaint for want of standing, and dismissal for failure to state a cause of action or for failure to identify issues and disputed facts sufficient to resist a motion for summary judgment. As Chief Justice Warren suggested in \textit{Flast}, the question in standing is: Irrespective of whether there is a cause of action embraced among plaintiff's allegations, or whether he can prove it, is this plaintiff the "proper party" to be making this contest?\footnote{93} If he is not, the Court need go no further. If he is, the other questions can be dealt with distinctly, either as a separate contemporaneous motion to dismiss for failure to state a claim upon which relief can be granted, or on a later motion for summary judgment. Nevertheless, confusion persists here too.

Although the difference between standing questions and those other issues should be clear, genuine problems may be presented in some cases to extricate the standing question from the question of existence of a cause of action. One example of this difficulty can be seen in \textit{National Railroad Passenger Corp. (Amtrak) v. National Association of Railroad Passengers},\footnote{94} decided during the 1973 Term. In this case the Court dealt exclusively with this confusion. The case was purely statutory—whether an action could be brought by rail passengers (National Association of Railroad

\begin{footnotes}
\item[92] \textit{Id.} at 52-53.
\item[93] Chief Justice Warren framed the proper approach, stating:  
\begin{quote}
The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. . . . In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question.
\end{quote}
\item[94] 392 U.S. 83, 99-100 (1968). In \textit{United States v. Richardson}, 418 U.S. 166 (1974), Chief Justice Burger's opinion noted that "[a]lthough the Court made it very explicit in \textit{Flast} that "a 'fundamental aspect of standing' is that it focuses primarily on the party . . . ." \textit{Flast} made it "equally clear that 'in ruling on taxpayer standing, it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.'" \textit{Id.} at 174.
\end{footnotes}
Passengers) to enjoin Amtrak (National Railroad Passenger Corporation) from discontinuing specific intercity passenger service. All parties agreed that the merits of the case involved interpretation of the Rail Passenger Service Act of 1970 and contracts allegedly entered into thereunder. However, as the statute expressly authorized the Attorney General of the United States to bring actions for infringement of the statute, the defendants argued, and the district court agreed, that plaintiffs, as private parties, had no standing to bring the action. The appeals court reversed, finding that the statute did not bar suit by a private party, otherwise aggrieved, and that plaintiffs had standing. The case was argued in the Supreme Court as a standing case. However, Justice Stewart for a 6-Justice majority reversed the court of appeals and ruled that the “threshold question” was not whether there was standing to sue, but “whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act ....” This reversal of order between standing and existence of a cause of action may prove unique to this peculiar case, but it undercut the whole notion of standing as a “proper party” question. Who is best suited to make the argument that the statute may be enforced by a private “aggrieved party”? The Court’s opinion treats the matter almost casually. After pointing out various formulations of the issue—existence of a private right of action, jurisdiction, and standing—it found that “these questions overlap in the context of this case even more than they ordinarily would.” As its

95. The railroad whose service had been discontinued, Central of Georgia Railway Co., and its parent corporation, Southern Railway Co., were also defendants in the action.
97. 45 U.S.C. § 547(a) (1970) provides, in pertinent part, that, for various actions by Amtrak, “the district court[s] of the United States . . . shall have jurisdiction . . . upon petition of the Attorney General of the United States . . . to grant such equitable relief as may be necessary . . . .”
98. The district court opinion is unreported. 414 U.S. at 455 n.4.
100. Justice Stewart was joined by Chief Justice Burger and Justices White, Marshall, Blackmun and Rehnquist. Justice Brennan concurred in the result on grounds of legislative “preclusion” of the suit. 414 U.S. at 465 (Brennan, J., concurring). Justice Douglas dissented, finding that standing was clearly established under Data Processing and that it was equally clear that a cause of action existed. 414 U.S. at 466 (Douglas, J., dissenting). See p. 497-99 for a discussion of Data Processing.
101. 414 U.S. at 456.
102. Id. The Court described the “several perspectives” from which the question of the validity of the private action under the Act had been approached:

The issue has been variously stated to be whether the Amtrak Act can be read to create a private right of action . . . whether a federal district court has juris-
reason for opting for "cause of action" as its threshold question, the Court stated that "it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it." Even Justice Douglas in dissent did not deny the difficulty of extricating the standing question from the existence of a cause of action.

Fortunately, not all cases present the same overlap between standing and cause of action. It is difficult to see any gain in reversing the order of priority of consideration, although one suspects that in *Amtrak* an opinion denying standing may have been more difficult to write.

The summary judgment "confusion," a late arrival on the standing scene, is less understandable. In *United States v. SCRAP*, Justice Stewart pointed out that the dissenters' objections to standing, which bore on the unlikelihood of proof, were better addressed by a subsequent motion for summary judgment. In *Warth*, however, the Court put new stress on detailed allegations that may be necessary in order to resist a dismissal for want of standing.

### III. A Few Pages of History

Over the half century in which standing has been an arguable category of constitutional law, two distinct periods set themselves apart. The first commences with the *Mellon* cases, heard together by the Supreme Court in 1923: *Frothingham v. Mellon*, the taxpayer plaintiff action, and *Massachu-

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103. *Id.* at 455-56.
104. Justice Douglas first stated that "§ 307(a) . . . does create a cause of action" and then framed the issue before the Court by asking:

May that cause of action be enforced by passengers or only by the Attorney General or by individual employees or railroad unions? Standing of passengers to sue or the existence of a cause of action in passengers is identical in that posture of the case.

*Id.* at 467 (Douglas, J., dissenting). Justice Douglas went on to suggest that there were only semantical differences between cause of action, jurisdiction, and standing in the case. He found all satisfied and focused his opinion, as had Justice Brennan, primarily on the question of whether Congress had precluded such a suit. Unlike Justice Brennan, Justice Douglas concluded that there was no such preclusion.

106. *Id.* at 689. Justice White in dissent (joined by Chief Justice Burger and Justice Rehnquist) would have dismissed the suit since "the alleged injuries are so remote, speculative, and insubstantial in fact that they fail to confer standing." *Id.* at 723 (White, J., dissenting).
107. See pp. 508-09 infra.
sets v. Mellon, the state plaintiff action. Both were brought hurriedly to challenge the constitutionality of the Maternity Act of 1921. Both plaintiffs were denied standing; that much was clear. It was not so clear, however, whether the basis of the denial had been constitutional or otherwise. Not until 1968, in Flast, did the Supreme Court flatly decide that the 1923 denial to both the taxpayer and state plaintiffs had been rooted, at least in part, in article III's constitutional imperative of "case and controversy."

The second period dates from 1962, when Baker v. Carr identified a "personal stake" in the outcome of an action as fulfilling the jurisdictional standing requirement of article III. This period perhaps reaches its peak with Flast. Dealing particularly with "taxpayer" standing, Flast used Baker v. Carr as its point of departure for an explicit treatment of the constitutional aspects of standing. In the 1969 Term, Association of Data Processing Service Organizations, Inc. v. Camp and Barlow v. Collins, although specifically concerned with standing to review administrative action under the Administrative Procedure Act, were used by the Court to integrate and refine its recent analysis with definitive criteria for standing, applicable to the constitutional forum as well as to statutory review. In Data Processing, the Court stressed "injury in fact" as the hallmark of a "personal stake," and made explicit for the first time that "personal stake" embodied noneconomic as well as the traditional economic injury. In a somewhat erratic series of cases in the Court Terms following Data Processing and Barlow, the Court has made more exacting the requirements of associational standing and the degree of interest required to constitute "injury in fact." The second period may well have ended in 1973 with United States v. SCRAP, in which the Court upheld against constitutional and statutory challenge the standing of a public interest association to seek enforcement of the Environmental Protection Act's requirement of an envi-

108. 262 U.S. 447 (1923).
110. 392 U.S. at 105-06. See note 37 supra for Justice Brandeis' inclusion of standing among the Court's rules "for its own governance."
113. 397 U.S. at 152.
114. See id. at 154, in which the Court, after listing various interests plaintiffs might seek to protect, stated: "We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here."
ronmental impact statement. Just when it seemed that consensus had been reached, an abrupt, and somewhat unanticipated, end to the second period was apparently signaled by United States v. Richardson\(^{118}\) and Schlesinger v. Reservists Committee to Stop the War\(^{119}\) in 1974, and Warth v. Seldin\(^{120}\) in 1975.

In the trek across these two periods, the Court resolved various uncertainties about standing which the new majority does not now frontally challenge. While the neutral summary presented above addressed these developments somewhat succinctly, the fuller historical discussion below undertakes to set out the evolution of the consensus so as to demonstrate that the majority's peculiar new insights in Warth are, in part, distortions of ingredients of the earlier decisions. We must watch, for example, the transformation of decisional elements applicable to the taxpayer plaintiff in Flast,\(^{121}\) and of "prudential considerations" previously applicable to third party rights,\(^{122}\) into general requirements for standing for all cases. The question is squarely presented: Does standing to assert constitutional rights now depend on article III or on jurists' prudence?\(^{123}\)

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120. 422 U.S. 490 (1975).
121. In United States v. Richardson, 418 U.S. 166, 174 (1974), the Court misattributed to Flast an equal interest in "issues" and "party" in cases involving taxpayer standing. See p. 480 supra. The Richardson Court also noted that, since it was permissible to examine the issues before evaluating the parties to an action, the "operative effect of this 'look at the substantive issues' could lead to the conclusion that the 'substantive issues' were nonjusticiable and in consequence no one would have standing." 418 U.S. at 174 n.6, citing Gilligan v. Morgan, 413 U.S. 1, 9 (1973).
122. See p. 515-17 infra.

Even in the Richardson/Reservists Committee/Warth trilogy, the Court recognized that the starting point for any discussion of constitutional standing must be Marbury v. Madison. In asserting its constitutional prerogative to review the constitutionality of executive and legislative action, the Court there specified the article III limitations surrounding judicial review. The proposal that the Supreme Court serve as a council of revision for legislative action had been rejected at the Constitutional Convention. The Court was not empowered to give advisory opinions—it had already rejected Secretary of State Jefferson’s request in 1793 for its advice as to the “construction of our treaties.” It could merely pronounce the validity or invalidity of a congressional act when that question arose in the context of a concrete “case or controversy” over which the Court had jurisdiction, either from the Constitution directly or from an act of Congress consistent with the Constitution. Implicit in Marbury was the corollary that when such a question was presented to it in such a jurisdictional setting, the Court had not only the prerogative, but the duty to render a decision. Over the next century and a quarter, various cases arose in this article III context in which the Court denied that it had jurisdiction over a controversy. The grounds were variously

1723-47 (1975); Sutherland, Establishment According to Engel, 76 HARV. L. REV. 25 (1962).

The Bickel article, written on the very eve of Baker v. Carr, stands as a final product of Period I and, as such, is very "prudential" in character. Gunther’s ripost, in contrast, presses for a principled judicial approach.

Various articles seem to have influenced different judges. For example, Scott’s functional allocation of judicial resources approach has found favor with Justice Powell (see Warth v. Seldin, 422 U.S. 490, 500 & n.11 (1975)), while the Court’s majority seems to be entranced with the notion that Bickel’s view can once again be attained (see Flast v. Cohen, 392 U.S. 83, 99-100 & n.21 (1968)).


126. Jefferson’s request was made in a letter dated July 18, 1793. Three weeks later, Chief Justice Jay and the Associate Justices replied to President Washington directly, noting "strong arguments against the propriety of our extra-judicially deciding the questions alluded to . . ." The letters are reprinted in H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 652, 659 (tent. ed. 1958).


128. The most celebrated restatement of this “classic” view in modern times is found in Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959). Another influential voice, differently minded and perhaps the intellectual godfather of the recent Supreme Court decisions under study here, is found in Bickel, supra note 123.
stated as "political questions," advisory opinions," and "mootness." Although the Court dismissed the actions in the *Frothingham* and *Massachusetts* cases in 1923 on grounds that the respective plaintiffs lacked standing, the opinions were sufficiently obscure, as Chief Justice Warren noted 45 years later in his opinion for the Court in *Flast*, to raise a question as to whether they were rooted in the article III "case and controversy" requirement, or whether they simply represented a rule of judicial convenience that could be abrogated, or modified, by the Court. In any event, these cases were accepted by the courts and by Congress as stating the law with respect to suits by federal taxpayers and by states throughout the pre-*Flast* period.

The more general aspects of the standing issue in this period are summarized in an influential concurring opinion of Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath* in 1951. The basic requirement of standing, he pointed out, was that the plaintiff allege a "legal right," either rooted in common law or coming from a statute or the Constitution, which he seeks to vindicate in his action. A series of cases in the late 1930's and early 1940's, when New Deal legislation had been brought under attack, identified the kinds of interests that were less than a "legal right."

In *Lukens Steel Co. v. Perkins*, a plaintiff alleged that he had been deprived of an opportunity to continue doing business with the United States government as a result of illegal regulations issued by the Secretary of Labor. His action was dismissed for lack of standing, the Court ruling that he had no legal right to do business with the government. Similarly, in *Alabama Power Co. v. Ickes*, plaintiff company alleged that action taken by the Secretary of the Interior under an allegedly unconstitutional statute deprived him of his competitive advantages to sell his products. The Court again found no need to reach the merits; plaintiff, a mere competitor, had no "legal right" that was being infringed.

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132. 392 U.S. at 92.


134. See id. at 152-53 (Frankfurter, J., concurring).

135. 310 U.S. 113 (1940).

The right created by statute category, referred to by Justice Frankfurter in *McGrath*, emerged clearly in *Oklahoma v. United States Civil Service Commission*. The Civil Service Commission (CSC) notified Oklahoma that it had determined that a member of the Oklahoma State Highway Commission was serving in violation of the Hatch Act. The CSC told the state that it would be eliminated from participation in a federal highway grant program if the official continued to serve both on the Highway Commission and as chairman of the Democratic State Committee. The statute under which Oklahoma challenged this position provided that any party aggrieved by an order of the Civil Service Commission "may institute proceedings for the review thereof." The plaintiff state's standing was challenged for the first time before the Supreme Court when the Civil Service Commission cited the *Massachusetts v. Mellon*, *Perkins*, and *Alabama Power* cases. The Court held that Oklahoma had standing to challenge the administrative action since "Congress may create legally enforceable rights where none before existed," therefore making the cited cases inapposite. "By providing for judicial review of the orders of the Civil Service Commission, Congress made Oklahoma's right to receive funds a matter of judicial cognizance. Oklahoma's right became legally enforceable . . . . It was a 'party aggrieved.'" The earlier cases raised by the CSC were differentiated not only "by the authority for statutory review," but also by the statute's creation of a "legally enforceable right to receive allocated grants without unlawful deductions." In this statement, the Court identified the *Oklahoma v. CSC* case as one in which Congress had explicitly created a legal right where none had existed before.

Another series of cases dealt with a further aspect of congressionally conferred standing. In *FCC v. Sanders Brothers Radio Station* and *Scripps-Howard Radio, Inc. v. FCC*, unsuccessful contestants claimed that the award by the FCC of a radio license to an applicant would injure their business. Under *Perkins* and *Alabama Power*, such a threat of competitive injury had not been a "legal right" that would support standing. However, in *Sanders Brothers*, the Supreme Court noted that Congress had afforded review of FCC license awards to any "person aggrieved" by adverse

138. Id. at 131-32, citing § 12 of the Hatch Act, then codified at 18 U.S.C. § 611.
139. See 330 U.S. at 135; id. at 129-31 n.1. The section of the Act was § 12(c), then codified at 18 U.S.C. § 611(c).
140. 330 U.S. at 136.
141. Id. at 137.
142. Id. at 139.
143. 309 U.S. 470 (1940).
144. 316 U.S. 4 (1942).
effects resulting from an award\textsuperscript{145} and that it was “within the power of Congress to confer such standing to prosecute an appeal.”\textsuperscript{146} In \textit{Scripps-Howard}, the Court made it clear that these private litigants had standing “only as representatives of the public interest.”\textsuperscript{147}

Another issue, not directly related to standing to sue, is the circumstances under which the Court will allow plaintiffs to assert the rights of third parties in establishing the allegations of their complaint.\textsuperscript{148} In \textit{Pierce v. Society of Sisters},\textsuperscript{149} a state statute required attendance of children at public schools. A religious corporation operating private schools had standing to attack the statute on constitutional grounds—parents’ free exercise of religion. Similarly, in \textit{Barrows v. Jackson},\textsuperscript{150} the white defendant in a damage action for breach of a restrictive covenant was allowed to raise as a defense the contention that judicial enforcement of the covenant would violate equal protection.\textsuperscript{151} While recognizing these exceptions, the Court stressed the general rule that a party seeking recovery, even one with standing to sue, must rely solely on his own rights.\textsuperscript{152} In these exceptional cases, and in cases from the second period,\textsuperscript{153} the Court has explained painstakingly that these rules concerning standing to assert third party rights do not concern standing to sue and, therefore, are not article III standing rules, but rather, rules devised by the Court “for its own governance.”\textsuperscript{154} In no way do they concern standing in an article III sense; rather, they are a highly selective expression of

\begin{itemize}
  \item \textsuperscript{145} 309 U.S. at 476-77, \textit{citing} The Communications Act of 1934, 47 U.S.C. § 402 (b) (2) (1970).
  \item \textsuperscript{146} 309 U.S. at 477.
  \item \textsuperscript{147} 316 U.S. at 14. In a perceptive and highly influential opinion, Judge Jerome Frank in \textit{Associated Indus. v. Ickes}, 134 F.2d 694 (2d Cir.), \textit{vacated as moot}, 320 U.S. 707 (1943), characterized the plaintiffs in \textit{Sanders Brothers, Scripps-Howard}, and in the case before him as “private Attorney Generals,” expressly empowered by Congress to press claims in the public interest, much as it might authorize an attorney general to bring a public action. 134 F.2d at 704.
  \item \textsuperscript{148} See pp. 471-73 \textit{infra}. It is timely to raise this question in light of Court-fostered confusions in the \textit{Richardson/Reservists Committee/Warth} cases. See p. 516 \textit{infra}.
  \item \textsuperscript{149} 268 U.S. 510 (1925).
  \item \textsuperscript{150} 346 U.S. 249 (1953).
  \item \textsuperscript{151} See p. 473 \textit{infra}.
  \item \textsuperscript{152} See \textit{Barrows v. Jackson}, 346 U.S. 249, 257 (1953), in which the Court characterized the case as “a unique situation” and ruled that because of “the peculiar circumstances . . . we believe the reasons which underlie our rule denying standing to raise another’s rights . . . are outweighed by the need to protect the fundamental rights . . .”
  \item \textsuperscript{153} See pp. 500-03 \textit{infra}.
\end{itemize}
limited sets of circumstances in which a more expanded orbit of allegation and proof may be available to a litigant.

In this first period, the Supreme Court recognized the standing of membership associations to bring actions as representatives of its own members, but insisted on economic injury as a prerequisite to standing. Even a state taxpayer's action which was not barred as such by *Frothingham*, could only meet the "case or controversy" test "when it [was] a good-faith pocketbook action."  


During the first period, the Supreme Court modified its earlier strict "legal rights" criteria for standing by decisions recognizing congressional creation of a "legal right" and by decisions interpreting a congressional "party aggrieved" statute to give standing to appeal administrative decisions, and thereby to assert primarily public interest arguments on appeal. However, as the first period ended, the distinction between standing and other theories of avoidance, such as political question, mootness, ripeness and advisory opinions, was still blurred, and there was obvious inconsistency in the Court's application of the standing doctrine to similar, even identical, situations. These doctrinal obfuscations, among other important matters, were squarely confronted by the Court in *Baker v. Carr*.  

156. Until *School District v. Schempp*, 372 U.S. 203 (1963), the Court did not expressly bestow standing on a noneconomic interest other than voting. But see cases cited note 161 infra.  
157. *Doremus v. Board of Educ.*, 342 U.S. 429, 434 (1952). Doremus, a New Jersey taxpayer, failed to meet the "pocketbook" test. His claim was that a state law permitting reading of Old Testament passages in schools violated the first amendment. The Court found this complaint not to be "a direct dollars-and-cents injury," but rather "a religious difference."  
158. See discussion of the *Oklahoma v. CSC* case p. 487 supra.  
159. See discussion of the *Sanders Brothers* and *Scripps-Howard* cases pp. 487-88 supra.  
161. See *Adler v. Board of Educ.*, 342 U.S. 485 (1952); *Doremus v. Board of Educ.*, 342 U.S. 429 (1952). Both cases were decided the same day; in *Doremus*, the standing question was addressed, while in *Adler* it was ignored. *Everson v. Board of Educ.*, 330 U.S. 1 (1947), and *Cochran v. Board of Educ.*, 281 U.S. 370 (1930), are two other first period decisions in which a discussion of standing would have been appropriate, but in which none appeared.  
162. The question of what to do with an allegedly unconstitutional statute when Congress had refused to create a legal right in a taxpayer litigant similar to the right in the *Oklahoma v. CSC* case would await *Flast v. Cohen*, 392 U.S. 83 (1968). The irra-
Baker v. Carr (1962). When Chief Justice Earl Warren was asked to identify the single most important opinion of his period on the Court, the author of Brown v. Board of Education\textsuperscript{163} without hesitation pointed to Justice Brennan's opinion in Baker v. Carr.\textsuperscript{164} While the "equal protection" afforded to voting rights is undoubtedly the opinion's chief claim to political significance, its major contribution to constitutional law as a legal system may well lie elsewhere. Before reaching the equal protection issue, which brought apportionment within the federal constitutional orbit, Justice Brennan dealt briefly in turn with subject matter jurisdiction, standing, political questions, and the entire article III requirement of "case and controversy." Later landmark decisions of the Warren Court concerning political questions\textsuperscript{165} and standing\textsuperscript{166} rest squarely upon the Brennan analysis in Baker v. Carr.

The pressing question before the court in Baker v. Carr was, of course, whether the Court would hear a Tennessee voter's objection to a state apportionment statute that allegedly diluted his vote as compared to voters in neighboring legislative districts. Relevant to the inquiry here, however, is the opinion's treatment of subject matter jurisdiction and political questions, the general analysis of justiciability and article III, and standing itself.

Subject Matter Jurisdiction. The problem of federal jurisdiction, other than the diversity of citizenship grounds specified in article III, is the question of jurisdiction over the subject matter. Until 1875, the shell furnished by the Constitution for subject matter jurisdiction had not been filled in.\textsuperscript{167} In Baker v. Carr, Justice Brennan identified the three-point test a federal action must meet to qualify: the case must concern matters that "arise under" the Constitution; the matter must constitute a "case or controversy"
within the meaning of article III; and finally, there must be a specific jurisdictional statute passed by Congress which is applicable to the action.\textsuperscript{168} In \textit{Baker v. Carr}, there was little reason to pause on the first and third requirements; however, there was ample cause to analyze the “case or controversy” issue.

Without purporting to give “case or controversy” exhaustive coverage, Justice Brennan simply stated: “Our conclusion . . . that this cause presents no nonjusticiable ‘political question’ settles the only possible doubt that it is a case or controversy . . . .”\textsuperscript{169} Positively, the standing test was simply whether plaintiff had a “personal stake” in the outcome of the controversy. With deceptive simplicity, the opinion maintained that this “personal stake” in \textit{Baker v. Carr} was supplied by the plaintiff’s right to an undiluted vote.\textsuperscript{170} There was, therefore, little reason to doubt the existence of a “case or controversy” unless there existed a “political question.” Here again, Justice Brennan addressed the question with precision.

\textbf{Political Questions.} The district court had held in \textit{Baker v. Carr} that the suit “presented a ‘political question’ and was therefore nonjusticiable.”\textsuperscript{171} Finding this conclusion incorrect, and in light of general uncertainty as to the definition of “political questions,” Justice Brennan undertook a “review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, diverge, combine, appear and disappear in seeming disorderliness.”\textsuperscript{172}

Justice Brennan insisted that a review of the political question cases revealed that “it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’ ”\textsuperscript{173} Following

\textsuperscript{168} 369 U.S. at 198.
\textsuperscript{169} \textit{id.} Flast v. Cohen, 392 U.S. 83 (1968), broke down the elements of “case or controversy” into advisory opinions, mootness, political questions, and standing. \textit{id.} at 95.
\textsuperscript{170} 369 U.S. at 204, 208. Just 16 years earlier, in Colegrove v. Green, 328 U.S. 549 (1946), the Court (in a 4-3 decision) had dismissed an identical complaint of an Illinois plaintiff as constituting a political question, stating:

\begin{quote}
\textit{Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. . . .

To sustain this action would cut very deep into the very being of Congress.}
\end{quote}

Courts ought not enter this political thicket.
\textit{id.} at 553-54, 556.
\textsuperscript{171} 369 U.S. at 209.
\textsuperscript{172} \textit{id.} at 210.
\textsuperscript{173} \textit{id.}
an analysis of a number of cases in various subgroupings, he concluded with
the criteria for identifying a "political question" which have become classic
with their reaffirmation in Powell v. McCormack:\textsuperscript{174}

Prominent on the surface of any case held to involve a political
question is found a textually demonstrable constitutional commit-
ment of the issue to a coordinate political department; or a lack
of judicially discoverable and manageable standards for resolving
it; or the impossibility of deciding without an initial policy deter-
mination of a kind clearly for nonjudicial discretion; or the imposs-
bility of a court's undertaking independent resolution without ex-
pressing lack of the respect due coordinate branches of govern-
ment; or an unusual need for unquestioning adherence to a political
decision already made; or the potentiality of embarrassment from
multifarious pronouncements by various departments on one ques-
tion.\textsuperscript{175}

\textsuperscript{175} 369 U.S. at 217. In Note, The Supreme Court, 1968 Term, 83 Harv. L. Rev. 61,
62-77 (1969), the authors argue that while the Powell v. McCormack Court borrowed the
Baker v. Carr political question formula, it refined it considerably. The article draws
on A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of
Politics (1962), and on Scharpf, supra note 129, for its identification of three concep-
tions of the judicial role—classicist, prudentialist and functionalist—which are then ap-
plied to the political question analysis of Baker v. Carr and Powell v. McCormack.

To Scharpf, the "classicist" position derives from the view in Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803), that a court must decide all cases properly before it
and bring all relevant law to bear on its decision. Scharpf, supra note 129, at 518. As
applied to political questions, the Harvard Law Review note suggests that "the classi-
cist will apply the political question doctrine only where the Constitution 'itself has
committed to another agency of government the autonomous determination of the issues
raised.'" 83 Harv. L. Rev. at 64.

The judge who is a "prudentialist" does not, in general terms, "conceive of judicial
review as a constitutionally imposed duty." Id. Rather, such a judge approves judicial
review because the "Court can stand above politics and provide principled guidance for
society." Id. Carried specifically to the content of political questions, the note posits
that the prudentialist would apply the political question doctrine "not to obey a constitu-
tional command, but to exercise discretion." Id.

The person Scharpf calls the "functionalist" approaches a given case and asks
whether the fact-situation of the case, the stage of its development and the
qualifications of the parties in view of the availability of other potential litiga-
ts and of the intensity of their interest in the issue itself [are] optimally
or at least adequately suited for the full presentation and clarification, within
the adversary process, of this particular constitutional question.

Scharpf, supra note 129, at 532-33. In evaluating the functionalist's approach to the po-
litical question doctrine, the Harvard note asserts that the functionalist uses "the de-
cided cases to produce a set of categories, each corresponding to a judicial objective, and
concludes that the [political question] doctrine should apply whenever one of these
objectives is important." 83 Harv. L. Rev. at 65.

Applying the three categories to the Court's opinions in Baker v. Carr and Powell
Finding none of these elements present, Justice Brennan held that “the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action . . .”

v. McCormack, the note suggests that, in Baker v. Carr, the Court paid tribute to all three viewpoints: “textually demonstrable constitutional commitment” (classicist); “lack of respect due coordinate branches,” “unusual need for unquestioning adherence,” and “potentiality of embarrassment” (prudentialist); and “lack of judicially discoverable determination . . . clearly for nonjudicial discretion” (functionalist). Id. at 65-66. However, the note contends that in Powell v. McCormack the “classicist category, a ‘textually demonstrable constitutional commitment’ of the issue to another branch of government, was the only category to receive serious consideration.” Id. at 67. The result of this selection, according to the note, is a replacement of “the syncretism of Baker with the purely classicist position that the political question doctrine applies to constitutional issues only where the Constitution commits the issue to another branch of government.” Id.

176. 369 U.S. at 237. A word is appropriate here on “justiciability,” a term of cultivated obscurity which Justice Brennan in Baker v. Carr and then Chief Justice Warren, first in Flast and then in Powell v. McCormack, seemed determined to demythologize.

In Baker v. Carr, Justice Brennan first identified the differing consequences of lack of jurisdiction of the subject matter and nonjusticiability of the subject matter. With the former, once a court determines that it lacks jurisdiction of the subject matter, the judicial inquiry is ended, while, despite possible nonjusticiability, a court may pursue its inquiry up to the point where it determines whether “the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the rights asserted can be judicially molded.” Id. at 198. Justice Brennan then noted that the finding that the cause in Baker v. Carr presented “no nonjusticiable ‘political question’” resolved “the only possible doubt that it is a case or controversy.” Id. By this approach, the Court treated “political question” as an aspect of justiciability while at the same time recognizing it as an article III “case-or-controversy” requirement.

In Flast, Chief Justice Warren placed “justiciability” into a constitutional, article III mold when he wrote:

Embodied in the words “cases” and “controversies” are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controveresy doctrine.

392 U.S. at 94-95. (emphasis added)

While the above quotation seems a clear attempt to place justiciability within article III, other statements, such as the following, which deal with justiciability as it borders on standing, present difficulties which continue to infect the doctrine of standing:

Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. . . . Some of the complexities peculiar to standing problems result because standing “serves, on occasion, as a shorthand expression for all the various elements of justiciability.” In addition, there are at work in the standing doctrine
Flast v. Cohen (1968). Flast v. Cohen is the basic referent in the second period on the standing question. A fascinating problem was presented to the Court: the plaintiff was a federal taxpayer seeking to enjoin the Secretary of HEW from expending federal educational funds that Congress had appropriated, allegedly in violation of the first amendment. A three-judge court, with one dissent, held that the plaintiff was squarely barred by Frothingham v. Mellon. In the years before the statute attacked in Flast had been passed, an attempt had been made in Congress to secure a provision in the school appropriation statutes that would specifically give a taxpayer the right to sue as a party aggrieved with respect to any allegedly unconstitutional expenditure of funds under the statute. This Oklahoma v. CSC type of congressionally created right passed the Senate on one occasion, but failed to gain acceptance in the final statute. During the pre-presidential campaign in 1960, then candidate Senator John Kennedy was asked for his position on aid to parochial schools. His answer was that the Supreme Court had said such aid was unconstitutional, and his position was simply to the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations.

Id. at 98-99. The final proposition, which ascribes nonconstitutional attributes to standing, just identified as a prototype as well as an element of justiciability, would seem to represent a qualification to the earlier placement of justiciability within article III. However, since the Chief Justice exemplified the nonconstitutional aspects with reference to a litigant's lack of standing to assert an absent third party's rights, not a "standing" question at all (see p. 488 supra), it is possible to discount the impact of this qualification to the move to put justiciability under article III.

In Powell v. McCormack, Chief Justice Warren again addressed the question of justiciability. As in Baker v. Carr, there was an alleged "political question" and the Chief Justice first determined that there was no political question (using the Baker v. Carr criteria) and then raised the question, as a distinct aspect of justiciability, "whether 'the duty asserted can be judicially identified and its breach judicially determined and whether protection for the right can be judicially molded.'" 395 U.S. at 517. By raising this question separate from the political question issue, the Court accentuated the broad parameters of justiciability while still showing the relationship of "political question" concerns to the larger concept. This relationship was highlighted by the concluding sentence of the section of the opinion entitled "Justiciability," in which the Chief Justice wrote: "[W]e conclude that petitioner's claim is not barred by the political question doctrine, and, having determined that the claim is otherwise generally justiciable, we hold that the case is justiciable." Id. at 549.


179. See, e.g., S. 1492, 87th Cong., 1st Sess. (1961). Section 6(b) of this bill permitted a taxpayer to bring a civil action against the Commissioner of Education to restrain action allegedly in violation of the first amendment.

follow the Court. Professor Arthur Sutherland of Harvard countered Kennedy's easy answer by suggesting that such aid-to-schools legislation could be passed by Congress without substantial fear of being struck down by the Court, citing as his designated authority *Frothingham v. Mellon.* The three-judge federal court in *Flast* agreed with Sutherland.

*Flast* was brought to the Supreme Court with, argued with, and decided the same day as *Board of Education v. Allen,* a New York case dealing with a state statute providing for state-furnished textbooks to private schools, including church-related schools. The two cases provide an interesting contrast—*Flast* pierced the *Frothingham* veil by allowing the taxpayer standing to challenge the federal statute while *Allen* extended the all-but-

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181. See N.Y. Times, Feb. 17, 1959, § 1, at 1, col. 7; id., Sept. 13, 1960, § 1, at 22, col. 1 (transcript of statement of Senator Kennedy to Protestant Ministerial Association in Houston, Texas); id., Feb. 20, 1962, § 1, at 1, col. 8 (message of President to Congress opposing aid to church schools). The presidential message stated that "[i]n accordance with the clear prohibition of the Constitution, no elementary or secondary school funds are allocated for constructing church schools or paying church school teachers' salaries." *Id.*

182. See Sutherland, *Due Process and Disestablishment,* 62 Harv. L. Rev. 1306 (1948) ("The nonliability of the United States at the suit of a federal taxpayer will probably keep beyond attack a great deal of federal legislation favoring religion." *Id.* at 1328); Sutherland, *Establishment According to Engel,* 76 Harv. L. Rev. 25 (1962), in which Sutherland, troubled by the slackening of the standing requirement in *Engel v. Vitale,* 370 U.S. 602 (1962), wrote:

One finds asserted in *Engel* no requirement that a litigant, if he would invoke judicial power to forbid governmental action, must show that by it he "has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally [citing Massachusetts v. Mellon, 262 U.S. 447, 448 (1923)]. *Engel* thus suggests that the Supreme Court has somewhat revised its previous ideas concerning "standing in court," concerning, that is, the type of grievance a litigant must experience before the federal judiciary will intervene to forbid state governmental activity. *Id.* at 26-27. In fact, *Baker v. Carr,* 369 U.S. 186 (1962), had already been decided, but its full force had not been felt.

183. At about this same time, Professor Philip Kurland in Kurland, *Of Church and State and the Supreme Court,* 29 U. Chi. L. Rev. 2 (1961), referred to problems presented by the relation of religion to government. . . . that may or may not become appropriate subjects for judicial scrutiny, such as the continuing question whether the national government can contribute financially to parochial education, directly or indirectly. (Anyone suggesting that the answer, as a matter of constitutional law, is clear one way or the other is either deluding or deluded.) *Id.* at 95-96. The Supreme Court's answer did not come until the 1970 Term and it said "no" to aid for parochial grade and secondary education, see *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and a qualified "yes" to aid for college level education. See *Tilton v. Richardson,* 403 U.S. 672 (1971).

neglected precedent of *Everson v. Board of Education*185 to uphold the New York state textbook statute as welfare legislation.186 Our concern here is only with *Flast*, and the contrived formulae which it furnished for measuring federal taxpayer actions in substitution for the straight bar of *Frothingham*.

The opinion for the majority—written by the Chief Justice, not Justice Brennan who wrote a separate concurrence—first considered whether *Frothingham’s* taxpayer bar had been due to article III, or simply due to a judicial rule which the Court was free to modify. The Chief Justice cited the *Baker v. Carr* formula of “personal stake” as the correct statement of the article III requirement for standing.187 The balance of the opinion was devoted to determining whether a federal taxpayer in fact met that test. The *Flast* majority concluded that the federal taxpayer will be “deemed to have met” the personal stake test provided he satisfies a two-part formula:

First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.188

The Court ruled that the appropriations here met the first test and since the Court viewed the establishment clause as a constitutional limitation on article I, section 8, the second test was met.189 Justice Harlan attacked the majority’s formula as contrived and inconclusive. The Court, he said, was obviously seeking to give a limited scope to a public interest plaintiff’s action, devoid of a true personal stake.190 In Justice Harlan’s view, the Court’s formula was offered in substitution for the type of created right that Congress furnished in the *Oklahoma v. CSC* case; he felt that the proper course for the Court was to await comparable congressional action before affording a taxpayer the standing to sue.191 The majority was obviously determined that legislation allegedly in direct conflict with the establishment clause of

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185. 330 U.S. 1 (1947). In *Everson*, state transportation of parents of Catholic parochial school children was upheld as “public welfare legislation.” *Id.* at 16-17. 186. Interestingly, *Allen* is one of the odd cases in which the Court launched into the merits without even considering the tricky standing question that this state-taxpayer case would have presented. Compare this approach with that taken in *Doremus v. Board of Educ.* 342 U.S. 429 (1952). 187. 392 U.S. at 99. 188. *Id.* at 102. 189. *See id.* at 104. 190. *See id.* at 129 (Harlan, J., dissenting). 191. *See id.* at 131 (Harlan, J., dissenting).
the first amendment should not pass unchallenged, perhaps indefinitely, given the political opposition to Congress' adopting the Oklahoma v. CSC type amendment for which Justice Harlan said the Court must wait.\textsuperscript{192} Justice Harlan was disturbed by the analytical weakness of the opinion,\textsuperscript{193} and at the breach of the dike which the Court had previously kept intact against public interest actions that were not congressionally reinforced. However, since the Flast formula could be read as applying to appropriation statutes affecting the religion clauses of the first amendment and nothing more, the opinion left for another day the determination of what other constitutional provisions might be within reach of the taxpayer.

\textit{Association of Data Processing Service Organizations, Inc. v. Camp} (1970).\textsuperscript{194} In covering the first period, the inroads that had been made on the pure "legal right" requirement to support standing were noted. The first had been the creation of a right by legislation, which was explicitly rooted in the Oklahoma v. CSC case.\textsuperscript{195} The second concerned the standing to seek review of administrative action with the precedents being the Sanders and Scripps-Howard appeals from FCC decisions awarding radio licenses, in which the Court had stressed the public interest basis for its construction of the "party aggrieved" provision in the statute.\textsuperscript{196} In the second period, there was continued modification of the legal right requirement. In 1968, the Supreme Court found standing in the implied creation by Congress of a statutory right,\textsuperscript{197} while two earlier religion clause cases had given the indication that financial interest was no longer to be taken as determinative of a legal right.\textsuperscript{198} Finally, two cases dealing with review provisions of the Adminis-

\begin{footnotes}
\footnoteref{192} See note 179 & accompanying text supra.
\footnoteref{193} An analysis of the opinion suggests that the Chief Justice accepted \textit{Baker v. Carr}'s "personal stake" as the article III measure of standing and also accepted Frothingham's judgment that a federal taxpayer did not measure up to this kind of a "personal stake," so miniscule was his financial interest. In order to reconcile these apparently conflicting positions, the Court developed a formula, which, if complied with, would result in a taxpayer being "deemed" to have that requisite "personal stake." As Justice Harlan pointed out, if "personal stake" were of constitutional dimensions, the Court could not transform general rights and interests into such a stake without reducing "constitutional standing to a word game played by secret rules." 392 U.S. at 129 (Harlan, J., dissenting).
\footnoteref{195} See notes 137-42 & accompanying text supra.
\footnoteref{196} See notes 143-47 & accompanying text supra. By 1964, without ever referring to these cases, then Circuit Judge Warren Burger noted the confusions wrought by the "legal right" doctrine in a standing context. Gonzalez v. Freeman, 334 F.2d 570, 574-75 (D.C. Cir. 1964).
\end{footnotes}
trative Procedure Act199 came before the Court during the 1969 Term—
Association of Data Processing Service Organizations, Inc. v. Camp200 and
Barlow v. Collins.201 The majority opinions in these cases were written, it
appears, not simply as guides to standing-to-review in administrative cases,
but as a new consensus by the Court on overall rules concerning standing. The
opinions are broad enough to encompass the standing-to-review cases, the
taxpayer situation as left by Flast, and generalized considerations deriving
from Baker v. Carr’s “personal stake” identification of the article III
standing-to-sue requirement. Justice Douglas’ opinions for the Court drew
extensively upon aspects of Justice Harlan’s critique of the Flast majority
opinion and also explicitly identified for the first time the ingredients of
“personal stake”—“injury in fact, economic or otherwise.”202 However, the
Court’s consensus was formed at the price of driving Justice Brennan, the
author of the “personal stake” criterion of standing, into sharp dissent. For
Justice Brennan the identification of “personal stake” as “injury in fact,
economic or otherwise” should have been the end of the Court’s inquiry as to
standing. If it were not, all that was left thereafter, he said, in cases such as
these involving competitors and rival grantees as plaintiffs challenging
administrative decisions, was the inquiry whether Congress had in fact
precluded review. He argued that this was not a standing issue, but a
distinct preclusion of review issue.203

Justice Douglas and the Data Processing-Barlow majority, however, added
a further component in the administrative review cases once the “personal
stake” requirement had been satisfied—namely, the requirement that the
plaintiff asserting standing must show that the interest asserted is arguably
within the “zone of interests” that Congress contemplated as being protected
by the statutory provision in question.204 The majority designed a standard
to cover not only review of a statutorily-created right of the Oklahoma v. CSC
variety, but also to cover the Flast taxpayer type of constitutional review. The
Data Processing formula set out to correct the “flaw” in Chief Justice War-

203. See id. at 178 (Brennan, J., dissenting). Justice Brennan’s dissent applied to both Data Processing and Barlow.
204. See id. at 153. The Court phrased the test as follows: “[A]part from the ‘case’ or ‘controversy’ test, the question is whether the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” Id.
sen's *Flast* opinion—in effect picking up, in part, Justice Harlan's suggestion that there should be a statute-created right to furnish a basis for standing in a *Flast*-type case. Justice Douglas' opinion treated the function of the "zone of interests" in the *Data Processing* and *Barlow* situations as identifying the implicit creation of a legal right in the plaintiffs there. Likewise, the majority viewed the constitutional provisions in question in the *Flast* situation (and others which might follow) as implicitly "creating" a constitutional right once the rigorous restrictions of the *Flast* two-prong formula were met.

Clearly there was more than a terminological difference between Justice Douglas' majority opinions in *Data Processing* and *Barlow*, and Justice Brennan's "dissenting concurrence." Indeed there was a sizable policy difference between them. On Justice Douglas' side, there appears to have been something of a trade-off which was the price of the consensus he had won; Justice Brennan wished to have "personal stake" without more as the ordinary criterion for standing, but he had no desire for a formula which would encompass the taxpayer or citizen situation.

Justice Douglas' majority opinion repaired the *Flast* lacuna; in addition, it achieved for the first time a Court identification of the article III requirement as "injury in fact." Further, there was the explicit pronouncement that this "injury in fact" need not be merely a "pocketbook interest"—it could be "economic or otherwise." Obviously, the trade-off necessary to enlist Justices Black, Harlan and Stewart for these advances was the "zone of interests" component, which would suffice to impart the legislative support necessary in any situation in which there was not the sort of "personal stake" previously denominated as a "legal right" of the common law variety. This requirement of explicit or implicit congressional support left room for some judicial control over federal public interest actions, including taxpayers' constitutional claim actions.


206. This preference is clear in Justice Brennan's highlighting that *Flast* had held that "the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." 397 U.S. at 172 (Brennan, J., dissenting), citing *Flast* v. Cohen, 392 U.S. 83, 101 (1968).

207. "I do not consider what must be alleged to satisfy the standing requirement by parties who have sustained no special harm themselves but sue rather as taxpayers or citizens to vindicate the interests of the general public." 397 U.S. at 172 n.5 (Brennan, J., dissenting).

208. 397 U.S. at 152.

209. One would assume that this formula of judicial control was preferable, at least for Justices Black and Douglas, to an across the board "prudential" judicial veto on
Sierra Club v. Morton (1972). The lower federal courts seemed to view the Data Processing/Barlow test as a product of a considered consensus of the Court on standing matters. Although in taxpayer litigation the courts were generally unwilling to look past the specific contours of Flast, in other matters the standing challenge was tested by the two-tier Data Processing formula—"injury in fact, economic or otherwise," and the "zone of interests" test. Fresh from its success in Data Processing, in which it had appeared as amicus curiae, the Sierra Club brought an action to enjoin the continued progress of a project in Mineral King Park in California, alleging violation by defendants of the Environmental Protection Act. The Supreme Court reversed Sierra Club's success in the lower courts, pointing out that the public interest organization, while entitled to bring an action on behalf of its members, was not excused from meeting the article III "injury in fact" requirement and that this requirement entailed allegation of specific injury to some identifiable members on whose behalf the organization purported to bring the action. In the course of his opinion for the Court, Justice Stewart insisted that even in the statutory administrative review public interest cases, such as Sanders Brothers and Scripps-Howard, there had always been injury in fact—even though this injury had not been viewed as sufficient in itself to constitute a predicate for standing to review without the help of the statute. Sierra's clear intent was to couple the "economic or otherwise" gain from Data Processing to an enhanced standing of organizational plaintiffs. Sierra contended that the Data Processing test would permit public interest organizations, without more, to challenge statutes within the scope of their interest and admitted expertise. The Court headed off this effort, ruling that "interest" and "expertise" were not substitutes for standing grounded in other than recognized article III requirements. See Scanwell Laboratories Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). (Judge Tamm's opinion appears to have been written but not yet published when Data Processing and Barlow were decided.)


211. More specifically, the courts were unwilling to look beyond the first amendment religion clauses. See, e.g., South Hill Neighborhood Ass'n, Inc. v. Romney, 421 F.2d 454 (6th Cir. 1969), cert. denied, 397 U.S. 1025 (1970); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969); Protestants & Other Americans United for Separation of Church & State v. Watson, 407 F.2d 1264 (D.C. Cir. 1968).

212. See, e.g., Intercontinental Serv., Inc. v. Shultz, 461 F.2d 222 (3d Cir. 1972); City of Lafayette v. SEC, 454 F.2d 941 (D.C. Cir. 1971); Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970). Actually, Data Processing purported to have three tiers, with the third being whether there was preclusion of judicial review. However, this last aspect was clearly unrelated to standing as such, and was generally approached, where applicable, as a distinct matter.

213. 405 U.S. at 734.
"injury." The indicated deficiency was later cured by the Sierra Club's joining as plaintiffs Sierra members who were "in fact" injured by the environmental hazards and deficiencies of defendant's project. And, in 1973, in United States v. SCRAP the Court seemed to clear the way for public interest organizations which make specific allegations of injury to ascertainable members to have standing to contest administrative action within the Data Processing formula.

Although the Data Processing consensus, as thus amended, may have appeared headed for a prolonged life as a test in standing litigation, some other developments should have given storm warnings that a new, revisionist period might be at hand. In 1971, the Court launched its "abstention from original jurisdiction doctrine," discussed earlier, which gave notice of a new openness to ad hoc jurisdictional decision, even though it did not bear directly on standing.

Two cases in the 1972 Term raised doubts that Data Processing would constitute an unerring frame for predicting standing results. The outcome in the first of these cases, Trafficante v. Metropolitan Life Insurance Co., seemed innocuous enough. The district court and court of appeals had denied standing; the Supreme Court reversed. The plaintiffs were two tenants of a public housing project, one black, the other white. Justice Douglas' opinion for the Court concluded that "the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations." He construed the Act in question as showing a "'Congressional intention to define standing as

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214. Id. at 739.
216. See id. at 688, where the Court noted:

To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

217. See pp. 477-78 supra.
219. Id. at 209-10.
220. Plaintiffs brought their action under section 810(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(a) (1970), which provides:

Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary [of HUD].

Section 810(d) permits "the person aggrieved" to file a civil action in a district court after 30 days without satisfaction, "to enforce the rights granted or protected" that "relate to the subject [matter] of the complaint."
broadly as permitted by Article III of the Constitution,' therefore, the plaintiffs, as tenants of the same housing unit that was charged with discrimination, had standing as "persons aggrieved" under the provisions of the Act that provided standing for "any person who claims to have been injured by a discriminatory housing practice." The opinion stressed that in enforcement of the Act, "the main generating force must be private suits in which, the Solicitor General says, the complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." Furthermore, the Court added, "[t]he role of 'private attorneys general' is not uncommon in modern legislative programs." The problem in *Trafficante* arose in the puzzling statement of Justice White, in a three sentence concurring opinion, that: "Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners' complaint presented a case or controversy within the jurisdiction of a District Court under Art. III of the Constitution." Justice White thereby suggested that plaintiffs' alleged injury ("loss of important benefits from interracial associations") did not constitute an article III "personal stake," thereby raising the question of whether the whole "injury in fact, economic or otherwise" standard of *Data Processing* was to be reopened again.

The second case, *Linda R. S. v. Richard D.*, was arguably a back-off from the noneconomic basis for article III standing, although it was interwoven with overtones of avoiding the impact of the "illegitimacy" cases. Its insistence on evaluating the practical benefits which plaintiff would derive from winning her case seems by hindsight more significant than it did at that time.

223. 409 U.S. at 211.
224. Id.
225. Id. at 212 (White, J., concurring).
229. Since plaintiff must suffer "some threatened or actual injury resulting from the
A further retreat from the noneconomic basis for article III standing occurred during the 1973 Term in *O'Shea v. Littleton*, an individual and class action seeking injunctive and other relief for civil rights violations in Cairo, Illinois. Suing the state's attorney, the police commissioner and judges, among others, the plaintiffs alleged a pattern and practice of intentional racial discrimination in the performance of their duties, by which the state criminal laws... are deliberately applied more harshly to black residents of Cairo and inadequately applied to white persons who victimize blacks, to deter respondents from engaging in their lawful attempt to achieve equality. Specific examples involving some of the individual plaintiffs were detailed in the complaint. Relying principally on *Linda R. S.* and the concurrence in *Trafficante*, the opinion of the Court by Justice White denied the existence of article III standing, stating: "Nor is the principle different where statutory issues are raised." The Court asserted that these alleged injuries were not "threatened or actual... resulting from the putatively illegal action," but rather, were abstract, conjectural and hypothetical; the Court concluded that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief... if unaccompanied by any continuing, present adverse effects."  

IV. *Richardson/Reservists Committee/Warth*: A THIRD PERIOD OR BACK TO SQUARE ONE?  

The three major standing cases of the past three Terms of the Supreme Court—*United States v. Richardson*, *Schlesinger v. Reservists Committee to Stop the War*, and *Warth v. Seldin*—accept many of the developments of the second period previously discussed. In fact, the "neutral"
summary of standing set out in section I is furnished largely in words from these three cases. Yet, these cases also intimate a current will to undo Flast and Data Processing, to trim the sails of Baker v. Carr's "personal stake," and to return the standing doctrine to the dispositions of the Justices, whenever they may be from Term to Term.

United States v. Richardson (1974). The plaintiff in Richardson, a taxpayer, sought to bring himself within the Flast formula. The district court dismissed his complaint, holding that he had failed the Flast standing test, and that the case was nonjusticiable as a political question.\textsuperscript{287} The appeals court reversed on both grounds.\textsuperscript{288} The Supreme Court, in an opinion by Chief Justice Burger, considered only the standing issue and reversed, agreeing with the district court that plaintiff lacked standing.

Plaintiff alleged unsuccessful attempts to receive information from the government concerning detailed expenditures of the Central Intelligence Agency. He asked, in effect, for a declaratory judgment that the Central Intelligence Agency Act of 1949\textsuperscript{239} was unconstitutional in that it permitted a report of the CIA's expenditures "solely on the certificate of the Director."\textsuperscript{240} The constitutional provision allegedly violated was the requirement that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."\textsuperscript{241} The alleged injury to plaintiff, as interpreted by the Court, was that he could not get a document correctly setting out the expenditures of the CIA, but could only obtain a "fraudulent document."\textsuperscript{242}

The majority opinion purported to examine plaintiff's standing both in light of the Flast formula and in light of Frothingham's preclusion of a taxpayer's use of "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System."\textsuperscript{243} The court agreed that Flast, following Baker v. Carr, had stressed that the fundamental question in standing was whether plaintiff

\textsuperscript{237} As the appeals court stated at the head of a lengthy historical note: "The procedural history of this case is confused." 465 F.2d 844, 847 n.1 (3d Cir. 1972).
\textsuperscript{238} Id. at 854, 856. Regarding standing, the appeals court, sitting en banc, found a challenge to the spending clause, U.S. Const. art. I, § 8, as in Flast, and found a nexus between the plaintiff's status as a taxpayer and a specific constitutional limitation on the taxing and spending power. Id. at 853.
\textsuperscript{240} 418 U.S. at 169, citing 50 U.S.C. § 403(b) (1970).
\textsuperscript{241} U.S. Const. art. I, § 9.
\textsuperscript{242} 418 U.S. at 169. As pointed out by the dissent, plaintiff was, of course, asserting entitlement as a taxpayer to the constitutionally prescribed statement of account and alleging a duty of the government to furnish it. Id. at 205 (Stewart, J., dissenting).
\textsuperscript{243} Id. at 173, quoting Flast v. Cohen, 392 U.S. 83, 106 (1968).
was a "proper party," but the Court went further and stressed that *Flast* also
said it was appropriate to look at the issues raised by the complaint in a tax-
payer standing situation in order to see if the complaint satisfied the exacting
requirements of *Flast*'s two-tier formula.\footnote{244} Under this approach, the Court
held that plaintiff's complaint could not qualify because it was simply
a recitation of "'generalized grievances about the conduct of gov-
ernment.'"\footnote{245} Chief Justice Burger recalled *Ex parte Lévitt*,\footnote{246} a first
period case concerning the "ineligibility clause"\footnote{247} in which the Court had
barred a challenge to Justice Black's sitting as a member of the Court. The
majority held that as in *Lévitt* the plaintiff had no direct injury, but "'merely
a general interest common to all members of the public.'"\footnote{248} Without a
congressional statute giving him sufficient interest to support standing, the
plaintiff was barred.

In a revealing postscript, Chief Justice Burger made clear the underlying
basis of his dissatisfaction with the more permissive cases of the second
period. He rejected the argument, which had fallen on sympathetic ears in
cases such as *Sanders Brothers*, *Scripps-Howard*, and *Flast* itself, that if
plaintiff could not sue, then there was no way of judicially checking this
allegedly unconstitutional action.\footnote{249} To the Chief Justice, this only gave
support to "the argument that the subject matter is committed to the
surveillance of Congress, and ultimately to the political
process."\footnote{250} However, since his majority opinion had conceded that standing's fundamental
point was not the issues, but whether the plaintiff was a "proper party" to
bring the action,\footnote{251} the Chief Justice's response raised the obvious question:

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244. 418 U.S. at 174. The *Flast* formula required a showing of "a logical link be-
tween [his] status and the type of legislative enactment attacked" and "a nexus between
[his] status and the precise nature of the constitutional infringement alleged." 392 U.S.
at 102.


249. 418 U.S. at 179.

250. Id.

251. Id. at 174. Of considerable interest, especially in view of his subsequent ma-
ajority opinion in *Warth*, is Justice Powell's concurrence as it relates to standing. Briefly,
he indicated that the *Flast* formula should be scrapped and thereby limit taxpayer standing
to the strict "results in *Flast* and *Baker v. Carr*." Id. at 196 (Powell, J., concurring).
By "results" he seems to have meant the strict "facts" of those cases, that is, the religion
clauses of the first amendment as in *Flast* and voter's standing as in *Baker v. Carr*
(which, of course, was not a taxpayer's action). In other situations, Justice Powell
urged, "in the absence of a specific statutory grant of the right of review, a plaintiff
must allege some particularized injury that sets him apart from the man on the street."
Id. at 194 (Powell, J., concurring). Justices Stewart and Marshall pointed out that after
why did the Court not use the criteria for analyzing an alleged "political question," precisely enunciated in Baker v. Carr and Powell? An answer to why the Court acted as it did was forthcoming in Reservists Committee, Richardson's companion case.

Schlesinger v. Reservists Committee to Stop the War (1974). Plaintiffs brought a class action, challenging service in the military reserves by Members of Congress. Four distinct classes were described, two of which survived as the case reached the Supreme Court—citizens and taxpayers. Plaintiffs alleged injury in that Members of Congress with reserve commissions were subject to possible undue influence from the executive branch, and there thus occurred a violation of the constitutionally mandated "independence" of Congress. Plaintiffs also alleged that they and members of their classes were deprived of the "faithful discharge" owed to citizens and taxpayers by Members of Congress. The defendant service secretaries moved to dismiss the complaint on grounds of absence of standing to sue and on the basis that this suit involved a political question. The district court sustained the complaint, granted plaintiffs standing as citizens, found no "political question," and gave plaintiffs partial summary judgment awarding the requested declaratory judgment, but not the mandamus or injunction. The appeals court affirmed, without opinion. The Supreme Court granted certiorari and reversed.

In an opinion by Chief Justice Burger, the Court held that neither citizen nor taxpayer standing could be sustained. The Court, as in Richardson, again declined to face the "political question" issue, but a comment in this regard threw light on its diffidence to do so: "The more sensitive and complex task of determining whether a particular issue presents a political question causes courts, as did the District Court here, to turn initially, although not invariably, to the question of standing to sue."

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252. See note 175 & accompanying text supra.
253. 418 U.S. at 211-12. The plaintiffs sought an order in the nature of mandamus directing the Secretaries of the Air Force, Army and Navy to strike from the rolls of the service reserves the names of Members of Congress, an injunction preventing the service secretaries from placing Members of Congress on the reserve list, and a declaration that membership in the reserves is an "office under the United States" barred to Members of Congress under the "Incompatibility Clause." Id. at 211, citing U.S. CONST. art. 1, § 6.
255. 495 F.2d 1075 (D.C. Cir. 1972).
256. 418 U.S. at 215. But cf. id. at 215 n.5, in which the Court cited, with apparent approval, DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), a case in which the court
with the district court judge that taxpayer standing could not be sustained.257

The citizen standing contention, a fresher question, was given short shrift. Chief Justice Burger's majority opinion dryly took the class plaintiffs at their word and appraised their standing as citizens in the jargon familiar to any other class. He began by noting that a member of a class "must possess the same interest and suffer the same injury shared by all members of the class he represents,"258 and that since plaintiffs purported to represent all United States citizens, their interest was "'undifferentiated' from that of all other citizens."259 In fact, what plaintiffs were seeking, said the Court, was "to have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens."260 The claimed nonobservance of that clause could affect only "the generalized interest of citizens in constitutional governance" and could result only in "an abstract injury."261 Once again, Ex parte Lévitt was cited approvingly; an interest "held in common by all members of the public" was deemed too abstract.262 Justice Douglas, dissenting, reminded the Court that Baker v. Carr's "personal stake," which the Court professed to still honor, need not be economic and that here plaintiffs' "'personal stake' . . . is keeping the Incompatibility Clause an operative force in the Government by freeing the entanglement of the federal bureaucracy with the Legislative Branch."263 Justice Douglas conceded that "[t]he interest of the citizen in this constitutional question is, of course, common to all citizens" but he pointed out that the Court had declined in SCRAP "[t]o deny standing to persons who are in fact injured simply because many others are also injured."264

257. 418 U.S. at 227-28. Accepting the Flast nexus test as controlling the taxpayer status here, the Court noted that there was no challenge of an enactment under article I, section 8. In fact, the challenge was to "the action of the Executive Branch in permitting members of Congress to maintain their Reserve status." Id. at 228.

258. Id. at 216.
259. Id. at 217.
260. Id.
261. Id.
262. Id. at 220.
263. Id. at 234 (Douglas, J., dissenting).
264. Id. at 235. Justice Stewart, the author of the Court's opinion in SCRAP, disagreed with Justice Douglas on this point, noting that in SCRAP there was injury "suffered by many" while in Reservists "none of the respondents has alleged the sort of direct, palpable injury required for standing under Art. III." Id. at 229 (Stewart, J., concurring). Justice Stewart distinguished his apparently contrary view in Richardson on the ground that in Reservists, unlike Richardson, there was no "affirmative duty imposed . . . by the Constitution." Id. at 228-29.
As in Richardson, the Court noted the plea that if plaintiffs could not have standing to sue, "then as a practical matter no one can." 265 Again, the argument was rejected in terms more suitable to evaluation of a "political question": "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." 266

Both to the majority and to Justice Stewart, in concurrence, the alleged injury was "abstract," that is, involving neither a "personal stake," nor "injury in fact, economic or otherwise," simply because, as in Frothingham, it concerned "'generalized grievances about the conduct of government.'" 267 In Richardson and Reservists Committee, then, the Court, for the first time since the first period, reached back to Frothingham for the leitmotif of its standing analysis. As to taxpayers, it had not yet discarded Flast, but had firmly applied the brakes. As to possible new public interest plaintiffs—here in the form of citizen-plaintiffs—it rang up "no sale" apart from congressional creation of standing to sue by statute; as to the Data Processing notion that there might be an implicit right to sue embodied in constitutional, as well as statutory provisions ("zone of interest"), there was not even an adversion. The implications were strong that the expansive notion, as for example in Sierra Club v. Morton, 268 of what will suffice to constitute a "personal stake," the article IH minimum, was no longer operative. However, there was still no clear warning of the sweeping retrenchment of standing that would come the following term in Warth.

Warth v. Seldin (1975). There is hardly an aspect of standing which was not dealt with in Warth—either professedly to confirm it or to revise it substantially. 269 A feel for the possible scope of the revision requires

265. Id. at 227, citing Reservists Comm. to Stop the War v. Laird, 323 F. Supp. at 841 (D.D.C. 1971).
267. 418 U.S. at 229, quoting Flast v. Cohen, 392 U.S. 83, 106 (1968). Justice Marshall, dissenting, could not see so clear a basis on which to distinguish the Court's standing decision in SCRAP, see note 264 supra, stating:

It is a sad commentary on our priorities that a litigant who contends that a violation of a federal statute has interfered with his aesthetic appreciation of natural resources can have that claim heard by a federal court [citing SCRAP] while one who contends that a violation of a specific provision of the United States Constitution has interfered with the effectiveness of expression protected by the First Amendment is turned away without a hearing on the merits of his claim.

Id. at 239-40 (Marshall, J., dissenting).
269. There is one exception: in Warth, there was no federal taxpayer issue. On this point, Richardson and Reservists Committee are the latest authority.
a detailed exploration of *Warth*, just as a grasp of the full implications of the case required the extensive historical prologue. In this case, as will be developed, the Court bites the bullet and opts for an apparently generous article III constitutional minimum,\(^2\) and an expanded, and totally elastic, scope of "prudential limitations," different in character and potential scope from what had gone before.\(^3\) However, the Court in *Warth* considerably toughened the directness and nonremoteness requirements of article III standing, and in an extraordinary development, insisted upon detailed factual allegations\(^4\)

\(^2\) In this regard, the Court followed *Sierra Club*. See pp. 500-01.

\(^3\) If the Court goes forward from the beachhead secured in *Warth*, it is arguable that its asserted claims of general "prudential" (I prefer "optional") oversight on access standing will even exceed the scope of the "passive virtues" of Professor Bickel, see note 123 *supra*, and the comparatively modest rules of constitutional avoidance described by Justice Brandeis, see note 37 *supra*. It will institutionalize problem fragments of the law such as *Rescue Army* v. Municipal Court of Los Angeles, 331 U.S. 549 (1947); Poe v. Ullman, 367 U.S. 497 (1961) (plurality opinion), Naim v. Naim, 350 U.S. 891 (1955) (per curiam avoidance of constitutional question on miscegenation statute on grounds of "inadequacy of the record"), and the more recent Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) (dismissal of federal appeal, relying on *Rescue Army*).

The underlying judicial philosophy of *Warth* is clearly that expressed by Justice Powell in his concurrence in *United States v. Richardson*, 418 U.S. 166, 180 (1974) (Powell, J., concurring): "Relaxation of standing requirements is directly related to the expansion of judicial power." *Id.* at 188. It is the thesis of this article that the contrary is the case. Consider here a valued rejoinder to Professor Bickel's "passive virtue" position:

Is it a justification for the Court's action that decision of the case at the time would not have been "wise"? If that is sufficient reason, what content is left to the obligatory nature of appeal jurisdiction? Professor Bickel has argued that there is none, and that there is a general "power to decline the exercise of jurisdiction which is given . . . ."—pointing to Naim v. Naim as an example in support. But doesn't this view wholly neglect the Court's obligation of fidelity to law? Can that be so easily set aside without great harm, internal as well as external, to a body whose entire power to command ultimately rests on that precept?

\(^4\) The Court characterized this requirement by noting that it is "within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing." 422 U.S. at 501. In *Warth*, in which such "particularized allegations" were not supplied, the Court sustained a standing dismissal. Justice Brennan, in dissent, protested that this requirement meant that the low income minority group plaintiffs and the building company plaintiffs

\underline{will not be permitted to prove what they have alleged—that they could and would build and live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit.}

*Id.* at 523 (Brennan, J., dissenting).
more extensive than those usually required in federal code pleading.\textsuperscript{273}

The individual and associational plaintiffs brought this action against members of the Penfield, New York Town, Zoning, and Planning Boards, alleging that these groups had acted in an "arbitrary and discriminatory manner" in rejecting the low and moderate income housing proposals of plaintiffs and certain named builders, that such denial of these housing proposals effectively excluded persons of minority, racial and ethnic groups, and that Penfield's 1962 zoning ordinance had the purpose and effect of excluding persons of low and moderate income from the town.\textsuperscript{274}

The original plaintiffs were joined in the course of the action by builders who sought leave to intervene. The district court dismissed the complaints of all plaintiffs on the ground that they lacked standing, and on other grounds.\textsuperscript{275} The appeals court affirmed the standing dismissal, reaching only that issue.\textsuperscript{276} The Supreme Court affirmed in an opinion dealing exclusively with standing.

The Court grouped the plaintiffs, actual and aspiring, into three sets: low and moderate income minority plaintiffs, municipal taxpayer plaintiffs, and associational plaintiffs.

\textit{Low and moderate income minority plaintiffs.} This group included Ortiz, a Spanish-speaking Puerto Rican who was employed in Penfield but resided in Wayland, a town 42 miles away, and who owned realty and paid taxes in Rochester; and Broadnax and Sinkler (blacks) and Reyes (Puerto Rican), who resided in Rochester. All these plaintiffs identified themselves as "moderate and low income" persons, and alleged that Penfield's zoning practices prevented them and those in the class they sought to represent from acquiring residential property in Penfield by either lease or purchase, thereby forcing them "to reside in less attractive environments."\textsuperscript{277}

The specific issue tendered was whether these individual plaintiffs alleged a "personal stake" adequate to support article III standing.

\textsuperscript{273} In \textit{SCRAP}, Justice Stewart pointed out the difference between the kinds of factual allegations required to resist a dismissal for lack of standing with those required to withstand a motion for summary judgment. 412 U.S. at 689-90. As a member of the majority in \textit{Warth}, he seems to have applied the latter standard. In his dissent in \textit{Warth}, Justice Brennan commented that what "purports to be a 'standing' opinion . . . has overtones of outmoded notions of pleading and of justiciability . . . ." 422 U.S. at 520 (Brennan, J., dissenting).

\textsuperscript{274} 422 U.S. at 495. The action was brought under 42 U.S.C. §§ 1981, 1982 & 1983 (1970), alleging violations of these civil rights statutes and of the first, ninth and fourteenth amendments. 42 U.S.C. §§ 1331 & 1343 were cited as the applicable jurisdictional statutes. 422 U.S. at 493-94.

\textsuperscript{275} 422 U.S. 497-98. The district court opinion is unreported.

\textsuperscript{276} \textit{Warth v. Seldin}, 495 F.2d 1187 (2d Cir. 1974).

\textsuperscript{277} 422 U.S. at 494-96.
The opinion: With respect to these low and moderate income minority group plaintiffs, the Court rephrased the issue as follows: "whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions." The Court assumed that defendants' actions had the purpose of excluding "persons of low and moderate income, many of whom are members of racial or ethnic minority groups," and that "such intentional exclusionary practices, if proved in a proper case, would be adjudged violative of the constitutional and statutory rights of the persons excluded." The Court argued that these plaintiffs' desires to live in Penfield depended upon the "efforts and willingness of third parties to build low- and moderate-cost housing," and found no indication that the efforts alleged in this case "would have satisfied petitioners' needs at prices they could afford," or that court removal of the zoning obstructions would benefit them. There was therefore a causal connection missing between the assumed illegal acts and plaintiffs' inability to live in Penfield. This gap, the Court suggested, was the result of the "economics of the area housing market." In this posture, for these plaintiffs to acquire standing they would have to have alleged facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of plaintiffs will be removed.

The Court, while ostensibly inquiring into "personal stake," and looking for "some threatened or actual injury resulting from the putatively illegal action," had considerably raised the ante. Mere allegations would no longer suffice unless supported by the causal factual data, the kind ordinarily the product of discovery procedures and of trial itself. Baker v. Carr's "personal stake" is barely recognizable in the Court's summary of the article III constitutional minimum ground for standing as to these plaintiffs: "a plaintiff who seeks to challenge exclusionary zoning practices must allege

278. Id. at 504.
279. Id. at 502.
280. Id. at 505-06.
281. Id. at 506.
282. Id. at 504 (emphasis added).
283. The Court characterized the article III standing question as "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. at 498-99, quoting Baker v. Carr, 369 U.S. 186, 204 (1962).
specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the courts’ intervention."^{285} Justice Brennan, joined in dissent by Justices White and Marshall, noted that the requirement of such specificity before discovery and trial was a reversion to “the form of fact pleading long abjured in the federal courts,"^{286} something never before required by the Court to support standing. He concluded that the specificity requirement reflected “an indefensible determination by the Court to close the doors of the federal courts to claims of this kind.”^{287} For “if these petitioners prove what they have alleged, they will show that respondents’ actions did cause their injury,” making it “particularly inappropriate to assume that these petitioners’ lack of specificity reflects a fatal weakness in their theory of causation.”^{288}

**Rochester municipal taxpayers.** These plaintiffs were residents of Rochester who owned real property and paid taxes in Rochester. They alleged that because of defendants’ actions, Rochester had been forced to provide a disproportionate share of the area’s low-cost housing and that consequently they had higher tax burdens. The specific issue tendered was whether taxpayers of a city may claim damage resulting to them in the form of higher taxes caused by the city’s being forced to provide more housing for low and moderate income families because a neighboring town has wrongfully declined to do so.

**The opinion:** The Court seemed to be on firmer ground in its decision to reject the claim of these plaintiffs on the basis that they were really asserting rights of third parties. This is the true and proper area of the “prudential standing rule” or “rule of judicial self-governance” which “normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves.”^{289} The alleged wrongs to others set forth in the complaint were that defendants had deprived “persons of low and moderate income” of housing opportunities in Penfield.^{290}

285. 422 U.S. at 508.
286. Id. at 528 (Brennan, J., dissenting). Earlier, Justice Brennan asserted that the majority paid only “lip service” to the principle that standing does not depend on the merits of a plaintiff’s case. He believed that the holding “tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional [and] can be explained only by an indefensible hostility to the claim on the merits.” Id. at 520 (Brennan, J., dissenting).
287. Id. at 526.
288. Id. at 526-27.
289. Id. at 509.
290. Id. The Court was less happy in elaborating its alternative reason for denying standing to the Rochester taxpayers: “the line of causation between Penfield’s actions and such injury is not apparent from the complaint,” and, contradictorily, the injury alleged, increases in taxation, results not from the defendant’s actions, but “only from de-
Although technically the “rights of third parties” rule would have been better vindicated by dismissal of the complaint for failure to state a claim upon which relief could be granted than for want of standing, this may have been one of those situations, as in the Amtrak case, in which the line between no standing and no cause of action is difficult to draw.

**Associational plaintiffs.** Included in this group of plaintiffs were: (a) Metro-Act, a New York nonprofit corporation whose corporate purpose was to stimulate low and moderate income housing; Metro-Act was itself a Rochester taxpayer, and it alleged that 9% of its members were Penfield taxpayers who were deprived “of the benefits of living in a racially and ethnically integrated community;” (b) Home Builders Association, an association of residential construction firms, which claimed to represent member firms engaged in building residential homes in Rochester and Penfield; Home Builders claimed that the Penfield zoning restrictions arbitrarily and capriciously prevented member firms from building low-middle cost housing in Penfield with the result that some of their members were thereby deprived of “substantial business opportunities and profits,” allegedly in the amount of $750,000 for which it asked damages; and (c) Housing Council in Monroe County Area, Inc., a New York corporation with 71 members, which were private and public organizations interested in housing problems; Housing Council filed an affidavit stating that 17 of its member groups “were or hoped to be involved” in the development of low to middle income housing in Penfield and one of its members, Penfield Better Homes, “is and has been actively attempting to develop moderate income housing” in Penfield.” These members had been “stymied by [their] inability to secure the necessary approvals” from the defendants.

The specific issue tendered was whether each or any of the associational plaintiffs had alleged sufficient harm to themselves or their membership to have standing in the action. The Home Builders and Housing Council associational complaints are of chief interest here because of the light they throw on the readiness and willingness of some builders to build in Penfield, save for the offending 1962 ordinance, and consequently the reality of the impact of

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291. See pp. 480-81 supra.
292. 422 U.S. at 512.
293. Id. at 515.
294. Id. at 497.
the ordinance on the individual low to medium income and minority ethnic plaintiffs discussed above. The denial of standing to Home Builders and Housing Council is interesting chiefly for the Court's niggardliness in denying standing simply because there was neither an allegation of denial of permit or variance with respect to a current project, nor an allegation of delay or thwarting of a project currently proposed by members of the association.295

The associational plaintiff whose denial of standing presents the most startling result, however, is Metro-Act. The Court's pronouncements here make new departures from previous standing doctrine which are most alarming. The opinion is not exceptionable in its preliminary restatement of standing rules for associational plaintiffs—namely, that first, an associational plaintiff may sue for injury to itself,296 and second, that such an entity may sue solely as a "representative of its members," in which case it must still identify a member "suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."297 Immediately thereafter, the opinion took the step that threatens to put standing doctrine on its head. In citing members who met the Sierra Club requirement, just noted, Metro-Act must have relied on its members who were Penfield municipal taxpayers and these members' allegations that the Penfield ordinance deprived them "of the benefits of living in a racially and ethnically integrated community."298 In response, the Court first flatly denied article III "personal stake" standing which Metro-Act and its Penfield members claimed on the precedent of Trafficante.299

While the Court in Trafficante had closely attended the congressional intent,300 it did so in large part to ascertain whether Congress, by providing for enforcement by the Attorney General, intended to displace private enforcement suits. Although the Trafficante Court detected an overwhelming intent of Congress that there be private suits, the article III standing existed independently there301 and the Warth Court's use of the case to deny

295. Id. at 517. In part, the asserted basis has "mootness" overtones: "the controversy between respondents and Better Homes, however vigorous it may once have been, [did not remain] a live, concrete dispute when this complaint was filed." Id.

296. This possibility was not helpful here since Metro-Act's only basis for injury to itself would have been as a Rochester taxpayer, a ground already nullified. See notes 289-91 & accompanying text supra.


298. See 422 U.S. at 512.

299. Id. at 512-14. The Court rejected Metro-Act's argument that Trafficante supported its claim of "a sufficiently palpable injury to satisfy the Art. III case-or-controversy requirement, and that it has standing as the representative of its members to seek redress." Id. at 512. See notes 218-26 & accompanying text supra.

300. See note 223 & accompanying text supra.

301. In measuring plaintiffs' standing in Trafficante, the Court noted that "[j]edi-
standing to Metro-Act was a clear misuse of precedent.\textsuperscript{802}

Not confident enough of this article III analysis, or perhaps eager to accomplish more than is apparent at first glance, Justice Powell then assumed, \textit{arguendo}, that Metro-Act had article III standing on behalf of its Penfield residents only to raise the bar of "prudential considerations,"\textsuperscript{803} the facet of the case with the most dangerous implications. The opinion reads:

We do not understand Metro-Act to argue that Penfield residents themselves have been denied any constitutional rights, affording them a cause of action under 42 U.S.C. § 1983. Instead, their complaint is that they have been harmed indirectly by the exclusion of others. This is an attempt to raise putative rights of third parties, and none of the exceptions that allow such claims is present here.\textsuperscript{804}

\textit{Id.} at 211. While this last reference may have particular applicability to the 1968 Housing Act which was under discussion in \textit{Trafficante}, the references taken as a whole obviously refer to article III standing as such. Justice White was well aware of this when he wrote his concurrence in \textit{Trafficante}, which helps explain his suggestion that there was no article III standing unless one adopted the view that Congress had amended article III pro hac vice, pursuant to its powers under section five of the fourteenth amendment. See note 226 supra. It should be remembered, however, that this was the view of only three Justices in \textit{Trafficante}, not of the Court. It is also noteworthy that Justice White dissented in \textit{Warth.}

302. The Court's article III position, as based on \textit{Trafficante}, was either that the right in that case had totally derived from the 1968 Housing Act, thereby giving the \textit{Trafficante} plaintiffs a "created right" which they then had standing under article III to protect (this being the \textit{Oklahoma v. CSC} approach, see p. 487 supra), or alternatively, that the statute in \textit{Trafficante} conveyed to plaintiffs and those similarly situated the right to bring private claims for violation of the Act (this being the approach favored in \textit{Sanders Brothers} and \textit{Scripps-Howard}, see pp. 487-88 supra). See 422 U.S. at 512-14. It is here that Justice White's concurrence in \textit{Trafficante}, suggesting that Congress pro tanto amend article III pursuant to its powers under section five of the fourteenth amendment, becomes important in support of the \textit{Warth} majority's denial of article III standing. See note 226 supra. Since Metro-Act's alleged "injury in fact" was in no way dependent upon a statute, there was no basis for either reading of \textit{Trafficante.}

303. 422 U.S. at 514.

304. \textit{Id.} It is interesting to note that in contrast to the analysis of the complaint
Metro-Act was alleging on behalf of its Penfield members one thing and one alone—that those residents had been denied their constitutional rights of association by being deprived by defendants of their "benefits of living in a racially and ethnically integrated community." They were in no way depending upon constitutional rights of third parties in making this allegation. Unless the Court was saying that it will henceforth feel free to refuse standing whether or not article III has been satisfied, this denial of standing to Metro-Act can have no meaning. The Court had already assumed Metro-Act's article III standing and, in a pronouncement that seems of first impression, told us that "prudential considerations strongly counsel against according them [the Penfield members of Metro-Act] or Metro-Act standing." In no other case has a plaintiff with article III standing been turned out of court, although in some instances he has not been allowed "to raise putative rights of third parties." In these latter situations, even when this favor has been denied him, his standing has permitted him to prosecute his own claims. Warth seems to give birth to a new "optional standing" doctrine clothed in "prudential" garb. The history of the "escalating concurrence" from Trafficante to Linda R.S. to O'Shea may here be approaching its full fruition. Unless the full gains of the

in the above quoted passage, the Court, just three paragraphs earlier, had summarized its understanding of Metro-Act's complaint, stating:

It [Metro-Act] claims that, as a result of the persistent pattern of exclusionary zoning practiced by respondents and the consequent exclusion of persons of low and moderate income, those of its members who are Penfield residents are deprived of the benefits of living in a racially and ethnically integrated community . . . . Metro-Act argues that such deprivation is a sufficiently palpable injury to satisfy the Art. III case-or-controversy requirement, and that it has standing as the representative of its members to seek redress.

Id. at 512.
305. Id. at 512.
306. Id. at 514.
307. See p. 488 supra.
308. Justice White's concurrence in Trafficante, see note 225 & accompanying text supra, which has had a significant effect on noneconomic aspects of article III standing, can be traced from its minority origin through somewhat incidental use in majority opinions in Linda R. S. v. Richard D., 410 U.S. 614, 617 n.3 (1973), and O'Shea v. Littleton, 414 U.S. 488, 493 n.2 (1974), to its use in Warth.

In Trafficante, Justice White (joined by Justices Blackmun and Powell) based his concurrence as to article III standing on the existence of a statute and cited Congress' power under section five of the fourteenth amendment as the basis for congressional authorization of article III standing. Implicit and critical in this minority concurrence was the suggestion that absent the statute there would be no article III standing.

In Linda R.S., Justice Marshall, writing for the Court, found no "sufficient nexus between [plaintiff's] injury and the government action which she attacks," 410 U.S. at 617-18, and denied standing "in the absence of a statute expressly conferring standing." Id. at 617. In a footnote explaining this last phrase, the Court noted that while Congress
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past 13 years are to be deliberately renounced, the Warth expansion of “prudential considerations” should be disclaimed by the Court at the earliest opportunity. Perhaps the Court means to establish a full optional appellate standing doctrine as the logical second step, following its assertion of discretion to neglect its original jurisdiction.309

V. CONCLUSION: WHOSE COURTS?

One rationale which the Court seems to have espoused in the Richardson/Reservists Committee/Warth cases represents a definite departure from the basic American understanding of the relationship between the citizen, the Constitution, the government, and the courts. Such a departure, good or bad, should be given careful attention. The departure is that the federal courts may reserve to themselves for decision on an ad hoc basis whether or not to consider allegations that basic rights have been violated by governmental action—even when jurisdiction to consider such allegations has been established in a “case or controversy.”

There are several presuppositions of this assertion by the Court, all of which are equally wrong-headed, which will now be addressed.

“may not confer jurisdiction on Art. III federal courts to render advisory opinions,” it may “enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. See, e.g., Trafficante . . . (White, J., concurring).” Id. at 617 n.3. Four Justices dissented—Justices Blackmun, Brennan, Douglas and White.

In O'Shea, the Court speaking through Justice White, reproduced the above footnote from Linda R.S. in a footnote which continued:

But such statutes do not purport to bestow the right to sue in the absence of any indication that invasion of the statutory right has occurred or is likely to occur . . . Respondents still must show actual or threatened injury of some kind to establish standing in a constitutional sense.

414 U.S. at 493-94 n.2.

Finally, in Warth, the Court denied standing to petitioner Metro-Act which had claimed, following Trafficante, that some of its members were “deprived of the benefits of living in a racially and ethnically integrated community.” 422 U.S. at 512. Despite the fact argued by Metro-Act, that a majority of the Trafficante Court had recognized that such a deprivation was “a sufficiently palpable injury to satisfy the Art. III case-or-controversy requirement,” id., the Warth Court read Trafficante as being controlled as to article III by the statute there (as suggested in Justice White’s concurrence) and then concluded “[n]o such statute is applicable here.” Id. at 514.

Thus, the minority concurrence in Trafficante escalated through repetition to reappear in Warth as a basis for denial of article III standing, in a majority opinion to which Justice White, the original author of the concurrence, dissented. The crucial aspect of this development is this: Whereas the majority in Trafficante found article III standing in the allegation of lost benefits stemming from living in a segregated community and relied on the statute in question to satisfy the zone of interests requirement, the majority in Warth denied that article III standing had been met by an allegation of deprivation of the same interest involved in Trafficante.

309. Cf. notes 73-81 & accompanying text supra.
(1) That the separation of powers doctrine conceives the judiciary as just one of three different spheres of governmental power, which must be reciprocally sensitive to the prerogatives of the others, for the same basic constitutional reason.

This position is wrong because courts are not just one of three branches. Rather, the federal courts must function under the Constitution as mediator between the citizens and either of the other two branches when "governmental" action impinges on constitutional rights. Clear perception of this duty, which indeed is the basic raison d'être of the courts in a democratic constitutional system, was a chief glory of the Warren Court from which it seems the Burger Court wishes to recant.

(2) That a Supreme Court acting as a rigid bulwark between citizen and unconstitutional governmental action will be chargeable with reviving the era of "judicial supremacy" that was killed by national consensus as a fundamental aspect of the Roosevelt Revolution.

This is wrong because the consensus achieved by the Roosevelt Court was that the judiciary should be reluctant to pass adverse judgment on the substantive content of legislative acts. The more tolerant judicial view of legislation within the commerce clause, and of legislative judgment with respect to welfare legislation, and less judicial responsibility for the impact of such legislation upon property rights, were conclusions of this consensus that are no longer open to court debate.310 Apart from this now

310. The key commerce clause cases were Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In Darby, as an example of the emerging consensus on the role of the judiciary, the Court said:

Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.

... Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.

312 U.S. at 114-15. To reach this result in Darby, the Court reversed Hammer v. Dagenhart, 247 U.S. 251 (1918), and flatly rejected alleged constitutional limitations in the fifth and tenth amendments. As to the tenth amendment argument, the Court said:

The amendment states but a truism that all is retained which has not been surrendered. ...

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means
stable view, there began almost at this same time a new concern for first amendment rights.\footnote{1} For a time, there was the view of a “preferred

for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.

312 U.S. at 124.

In the two cases upholding the constitutionality of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1970), the Court again stressed the “rational basis” measure of the constitutionality of congressional action under the commerce clause. In Katzenbach v. McClung, 379 U.S. 294 (1964), the Court stated:

Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce.

The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere.

379 U.S. at 304-05. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), the Court, in addressing an argument raising the fifth amendment property right as protection against the congressional action, noted:

Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.

Id. at 258-59.

This limited fifth amendment protection for property rights was paralleled by limited fourteenth amendment protection for property rights in the turn-around by the Court that commenced with West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Adkins v. Children’s Hosp., 261 U.S. 525 (1923)). These developments were made firm in Ferguson v. Skrupa, 372 U.S. 726 (1963), and recently reiterated in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), and North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973). In Ferguson, the Court expressed its current view this way: “We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.” 372 U.S. at 730.

311. Until Griswold v. Connecticut, 381 U.S. 479 (1965), it seemed that the only remnants of “substantive due process” were the first amendment rights which had been identified, one by one, as “fundamental,” and thus protected against state action by the fourteenth amendment. This development commenced with dictum in Gitlow v. New York, 268 U.S. 652 (1925) (“[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment . . . .” id. at 666) and continued with Whitney v. California, 274 U.S. 357 (1927) (speech); Near v. Minnesota, 283 U.S. 647 (1931) (press); Hamilton v. Regents of Univ. of Calif., 293 U.S. 245 (1934) (religion); Grosjean v. American Press Co., 297 U.S. 233 (1936) (press); De Jonge v. Oregon, 299 U.S. 353 (1937) (assembly); Herndon v. Lowry, 301 U.S. 242 (1937) (speech); Hague v. CIO, 307 U.S. 496 (1939) (assembly); Cantwell v. Connecticut, 310 U.S. 296 (1940) (religion); Everson v. Board of Educ., 330 U.S. 1 (1947) (religion); and NAACP v. Alabama, 357 U.S. 449 (1958) (association).
position" of these rights, then an emphasis on varieties of "clear and present danger" as the chief criterion justifying their curtailment, and

312. A celebrated footnote by Justice Stone in United States v. Carolene Products Co., 304 U.S. 144 (1938), launched the notion that, in an era when the Court was backing off from substantive due process, there might be a "preferred position" for first amendment rights. Justice Stone rejected a fifth amendment attack and stated that regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

Id. at 152. Justice Stone continued:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than most other types of legislation....

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities...."

Id. at 152-53 n.4. In Jones v. Opelika, 316 U.S. 584, 600 (1942), Stone, as Chief Justice, restated the above view and designated it as "preferred positions" of first amendment freedoms. See also Schneider v. Irvington, 308 U.S. 147, 161 (1939). In his opinion for the Court in Kovacs v. Cooper, 336 U.S. 77 (1949), Justice Reed referred to "the preferred position of freedom of speech." Id. at 88. Justice Frankfurter, in a concurring opinion which was critical of the formula, traced its antecedents beyond Stone's footnote to Holmes' "clear and present danger" formula. Id. at 90 (Frankfurter, J., concurring).

313. The initial suggestion of the "clear and present danger" test was in Justice Holmes' opinion for the Court in Schenck v. United States, 249 U.S. 47 (1919):

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Id. at 52. In subsequent uses, "clear and present danger" was argued in various formulæ in dissent until the Roosevelt Court. The standard was used more than incidentally, and favorably, in Herndon v. Lowry, 301 U.S. 242 (1937), immediately before the first appointment of President Roosevelt. But it was in the following cases that it became majority doctrine: Terminiello v. Chicago, 337 U.S. 1 (1949); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Bridges v. California, 314 U.S. 252 (1941); Thornhill v. Alabama, 310 U.S. 88 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940). After Terminiello, except for the special area of subversive "incitement" typified by the Smith Act cases (Yates v. United States, 354 U.S. 298 (1957), and Dennis v. United States, 341 U.S. 494 (1951)), the Court made little use of the doctrine. Instead, there was a preference for "balancing" first amendment rights with other interests. See Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Breard v. Alexandria, 341 U.S. 622 (1951);
finally standards of "compelling state interest"\textsuperscript{314} and "close scrutiny"\textsuperscript{315} to measure justifications for curtailment of all "fundamental" rights,\textsuperscript{316} and

\begin{quote}

The last authoritative interpretation of "clear and present danger" is in the special context of subversive "incitement," expressed in the opinion of Justice Harlan for the Court in \textit{Yates v. United States}, 354 U.S. 298 (1957):

\begin{quote}
Indoctrination of a group in preparation for future action . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. \textit{Id.} at 321.
\end{quote}

Interestingly, the Court's latest, and most authoritative, encounter with the problem of "incitement" limitations on first amendment freedom of speech, made no mention of the "clear and present danger" formula. See \textit{Brandenburg v. Ohio}, 395 U.S. 444 (1969). Justice Douglas, concurring, said that \textit{Dennis} had distorted the "clear and present danger" test "beyond recognition," and he wished it good riddance. \textit{Id.} at 453 (Douglas, J., concurring).

314. In \textit{NAACP v. Alabama}, 357 U.S. 449 (1958), the Court insisted that there must be a showing of a "substantial" state interest to justify interference with significant associational rights. In \textit{Shelton v. Tucker}, 364 U.S. 479 (1960), the Court rejected a state's interference with first amendment "associational freedom" on the grounds that the state had less drastic means at its disposal than those used. But it was in \textit{Bates v. Little Rock}, 361 U.S. 516 (1960), that the Court found the formula it had been looking for, when, again, a state was denied \textit{NAACP} membership lists on the ground that it had not shown a state "subordinating interest which is compelling." \textit{Id.} at 524.

In \textit{NAACP v. Button}, 371 U.S. 415 (1963), the Court rejected the state's interest in regulating the legal profession as adequate to bar group legal services maintained by \textit{NAACP}, stating: "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." \textit{Id.} at 438. The "compelling state interest" test has been used in other cases involving "due process" infringement of "fundamental rights" outside the first amendment context, although its most frequent use of late has been in equal protection cases. See \textit{Memorial Hospital v. Maricopa County}, 415 U.S. 250 (1974) (right to travel); \textit{Dunn v. Blumstein}, 405 U.S. 330 (1972) (right to travel); \textit{Shapiro v. Thompson}, 394 U.S. 618 (1969) (right to travel); \textit{Williams v. Rhodes}, 393 U.S. 23 (1968) (right to vote); \textit{Harper v. Virginia Bd. of Elections}, 383 U.S. 663 (1966) (right to vote); \textit{Reynolds v. Sims}, 377 U.S. 533 (1964) (right to vote). The above cases must now be read in light of \textit{San Antonio Independent School Dist. v. Rodriguez}, 411 U.S. 1 (1973).

315. "Close scrutiny" or "strict scrutiny," an equal protection formula with origins in Justice Stone's \textit{Carolene Products} footnote, see note 312 \textit{supra}, strictly derives from \textit{Skinner v. Oklahoma}, 316 U.S. 535 (1942), a case dealing with a state sterilization statute, "a sensitive and important area of human rights." \textit{Id.} at 536. In that case Justice Douglas said for the Court that "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." \textit{Id.} at 541.

Throughout the period from 1940 to the present, the Court, in contrast to the pre-Roosevelt days, became more and more ready to hear claims of constitutional deprivation, and to give litigants the opportunity of developing theories, arguments and facts that might merit judicial intervention against unconstitutional government action. The new concern for personal rights was related to judicial receptiveness both to constitutional claims and to more objectively stated criteria for access to the constitutional courts. By claiming in Warth a selective process of deciding when constitutional jurisdiction exists, the Court is retreating to a "judicial supremacy" position—and it is rejecting the formulation and application of clear jurisdictional rules.

(3) That judicial economy, that is, keeping a manageable workload for the Court, is a legitimate basis for the Court's determining whether and when to exercise constitutional jurisdiction.

This premise is vulnerable to challenge since the Court has two means by which, for better or worse, it can control its own workload. Specifically, it controls which cases deserve writ of certiorari, by using the "Rule of Four," and its power to decline to find a substantial federal question in

(right to privacy); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy).


318. Justice Powell's opinion for the Court in Warth shows approval of Professor Kenneth Scott's study, Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645 (1973). See 422 U.S. at 500 n.11. Professor Scott's article expressly considered it a function of the standing doctrine "to screen cases—to weed out those actions . . . which society does not intend to subsidize and which are, therefore, in a quite literal sense, not worth deciding." Scott, supra, at 672. Professor Scott states quite frankly:

The reduction in pressure on the judicial system resulting from a standing test arises not so much from the elimination of the individual case in which plaintiff is held to lack standing as from the likelihood of the exclusion of that type of case from the demand function and from future queues [in which "People line up and wait for their turn on the court calendar."]

Id. at 672-73.


This Court now declines to review the decision of the Maryland Court of
appeal cases. Further, it construes strictly the jurisdictional statutes, such as

Appeals. The sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter "of sound judicial discretion." Rule 38, paragraph 5. A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different justices to the same result . . . . A decision may satisfy all [the] technical requirements and yet may command itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play . . . .

Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

Id. at 917-19.

320. In Hicks v. Miranda, 422 U.S. 332 (1975), the Supreme Court recently had occasion to consider the effect of summary disposition of an appeal. First, it discussed the extent of its obligation to consider an appeal, which in the case under discussion was "[an] appeal from a decision of a state court upholding a state statute against federal constitutional attack":

A federal constitutional issue was properly presented, it was within our appellate jurisdiction under [28 U.S.C.] § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction.

Id. at 343-44. The Court then went on to emphasize that it was free to dispose of the appeal by giving it merely summary consideration, that is, by a per curiam order affirming, reversing, or vacating the judgment below, on the jurisdictional statement without briefs or oral argument:

We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement. . . . [T]he lower courts are bound by summary decisions by this Court "until such time as the Court informs [them] that [they] are not."

Id. at 344-45.

In a subsequent case, Hogge v. Johnson, 526 F.2d 833 (4th Cir. 1975), an appeals court noted that in Hicks the Supreme Court had "[spoken] to the question among the circuits with respect to the meaning to be accorded dismissal for want of a substantial federal question." Id. at 835. The Fourth Circuit understood Hicks to say that "such a dismissal is a decision on the merits binding upon the inferior federal courts" and that "[i]t is stare decisis on issues properly presented to the Supreme Court and declared by that Court to be without substance." Id. Consequently, since the issue had been presented to the Supreme Court in an earlier summarily dismissed appeal "and declared by it to be without substance . . . .," the court held that Hicks required it to affirm the district court's dismissal. Id.

Justice Clark, who was sitting by assignment on the circuit court panel in Hogge, raised a mild voice of protest in his concurrence and suggested that there is, in fact,
the appeal statutes, thereby forcing Congress to issue a clear statement that jurisdiction is intended and must be assumed.\textsuperscript{321}

When the Court controls its docket by the certiorari "Rule of Four" or by the want of substantial federal question process, it does not cut off access to federal jurisdiction. Standing "control," on the other hand, either establishes supplemental restrictive rules to be applied by lower federal courts denying all jurisdiction to constitutionally entitled litigants,\textsuperscript{322} or it gives tight standing requirements to be applied by lower courts subject in some situations only to a "clearly erroneous" reviewing possibility. In either case, control of court dockets by denying access to litigants constitutionally entitled to such access is an abuse of the primary function of constitutional courts—to stand

\begin{footnotesize}
\textsuperscript{321} a similarity of consideration actually given by the Supreme Court in dismissing appeals by summary action and in denying writs of certiorari, although the latter, according to Justice Frankfurter, "carries with it no implication whatever regarding the Court's views on the merits of a case . . . ." Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari). See note 319 supra. Justice Clark stated that:

The Supreme Court's statements in Hicks v. Miranda . . . to the effect that such [summary] dismissals are decisions "on the merits", seem to me to fly in the face of the long-established practice of the Court at least during the eighteen Terms in which I sat. During that time, appeals from state court decisions received treatment similar to that accorded petitions for certiorari and were given about the same precedential weight. An unquestioning application of the \textit{Hicks} rule can lead to nothing but mischief and place an unnecessary restraining hand on the progress of federal constitutional adjudication.

Here, for example, the other members of the panel thought, as did I, that there \textit{was} a substantial federal question presented by this case. The question deserves elaboration. That is foreclosed by \textit{Hicks}' holding that we must accept the Kisley dismissal as binding. Yet I cannot believe that the Court in 1972 [in Kisley v. City of Falls Church, 409 U.S. 907 (1972), dismissed for want of a substantial federal question] gave such serious consideration to the merits of that case as to justify the precedential value now assigned to it.

526 F.2d at 836 (Clark, J., concurring). However, the Supreme Court's position seems firm. For although Hicks v. Miranda was a 5-4 decision, the entire Court agreed to this part of the majority opinion. See 422 U.S. at 353 (Stewart, J., dissenting).

\textsuperscript{322} See Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974). Although principally concerned with appeals from three-judge courts, this extraordinarily revealing opinion by Justice Stewart is a mine of information on the Court's stance towards appeals: "[It] is . . . a fact that in the area of statutory three-judge-court law the doctrine of \textit{stare decisis} has historically been accorded considerably less than its usual weight." \textit{Id.} at 95. "This Court typically disposes summarily of between two-thirds and three-fourths of the three-judge-court appeals filed each term." \textit{Id.} at 99 n.17.

322. The abstention from exercise of original jurisdiction in Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), see pp. 477-78 supra, was less offending to these contentions than the optional standing control. In the Court's denial of admitted appellate jurisdiction in \textit{Wyandotte}, the litigants still had access to the lower federal courts. Denial of standing to sue leaves no such access.
\end{footnotesize}
as a bulwark of citizens against governmental abuses that have been proscribed by the Constitution itself, once judicial review of any kind has been accepted as a part of the constitutional system.

Likewise, a view that a “prudential” standing doctrine is a legitimate ground for control of dockets of the lower federal courts is misguided. For the reasons given above, the primary role of the lower federal courts as constitutional tribunals is to safeguard citizens against abuse of their interests by governmental action. A denial of standing to one litigant that purports to justify itself on grounds of leaving greater court time for others constitutes a selective manipulation of constitutional “cases and controversies” that flies in the face of article III. In addition, such a practice raises “equal protection” aspects of the fifth amendment on which the Court would quickly “pounce” if other governmental organs were so involved in such selectivity.

(4) That the standing doctrine is an alternative to, and as equally suitable an instrument as, the “political question” doctrine for determining certain claims to be nonjusticiable under article III’s “case and controversy” requirement.

That this is wrong is evident in the realization that by the recent and analytically powerful series of cases beginning with Baker v. Carr and Powell v. McCormack, the Court has reduced to meaningful standards the “political question” doctrine.323 In those cases, the Court specifically identified the previously amorphous “political question” as a function of the separation of powers, and identified the criteria by which it may be recognized that certain issues are constitutionally not justiciable. In Richardson/Reservists Committee/Warth, the Court seems to be turning its back on these hard won gains, and proclaiming “standing” as a backdoor formula for denying access to courts to specific plaintiffs. In doing so, it claims support from the separation of powers doctrine. While it is true that in some cases, perhaps some among this trilogy, there might be “political question” grounds for a judicial determination of article III nonjusticiability, this question should be answered by using the now-established “political question” standards of Baker v. Carr and Powell v. McCormack, and not by renouncing judicial responsibility for constitutional relief by “prudential” excuses for denying standing to sue.

(5) That when the Court declines to exercise jurisdiction in cases that have met the constitutional requirements of article III, by stipulating “prudential considerations” and others, it is not making a constitutional rule as to standing jurisdiction. This is so because the

Court concedes that Congress may reverse this denial of standing by furnishing the type of rejected plaintiff a statutory basis for his suit.

This proposition is faulty since the rule that a plaintiff who did not independently establish a basis for his standing might be viewed as having standing by specific or implicit congressional provision was created for two reasons, neither of which is apposite here. First, in order to overcome the "legal right" doctrine then in vogue as a prerequisite to article III standing, the Court viewed a congressional provision bestowing this right to review (or sue) as answer enough, and second, in order to vindicate a judicially perceived congressional intent, either explicit or implicit, that certain administrative action should not escape judicial review, the Court construed "party aggrieved" as being adequately constituted, for example, by a competitor, who, although "injured in fact," did not have what the Court had been construing as a legal right or legal interest sufficient to constitute standing.324

However, when a plaintiff otherwise has article III standing there is no reason to resort to the "explicit or implicit" congressional intent doctrine. Once "injury in fact" is identified as the criteria for standing to get administrative review and therefore to be sufficient to satisfy article III's "personal stake," there is no further need to resort to congressional supplement.325 Further, it is obviously incongruous for the Court to give Congress control over whether a litigant should be protected against unconstitutional congressional action. It is to the courts, and not to Congress or the Executive that the Constitution has primarily committed the safeguard of individual rights against governmental action. This emphasizes the great discordancy between two situations which the Court seemingly lumps together in Richardson/Reservists Committee/Warth, namely the question of statutory review and the question of constitutional right. While it is entirely appropriate that Congress should ordinarily be able to make the determination concerning standing to review administrative action,326 it is ob-

324. See p. 488 supra.
325. True, Data Processing's "zone of interest" requirement (see note 204 supra) may be viewed as a continuing restriction beyond "injury in fact." However, with respect to appeal, the Court is simply asking whether Congress has implicitly or explicitly conceived those parties as within the "zone of interest" which it designed by the legislation. A similar analysis follows with respect to an interest deriving from the Constitution, except that then the Constitution itself, rather than Congress, is seen as establishing the interest. In both cases, the Court may have a key interpretive role.
326. But note that, even here, the tendency of the Court in recent years has been against accepting too readily the concept of specific nonreviewable governmental action. Is this tendency, too, to be reversed? The spirit of Richardson/Reservists Committee/Warth would seem to suggest that it is.
viously inappropriate to leave to Congress the last word as to whether its allegedly unconstitutional action should be vulnerable or invulnerable to challenge in the courts. Recognition of this fact at last led the Court in *Flast* to break through the previously existing bar to a taxpayer challenge of a statute unlikely to be challenged in another way. It is true that the Court panicked somewhat in *Flast* at the prospect of widespread taxpayer litigation and came up with its esoteric limitations, but the insight was obviously correct: unconstitutional legislation impinging, however minutely from an economic standpoint, on a citizen-taxpayer should not go unchallenged. In *Richardson/Reservists Committee/Warth*, the Court seems prepared to throw out the principle by restricting *Flast* and *Baker v. Carr* to their specific factual situations, and to then proudly wave the flag of unchallengeable unconstitutionality as a function of the separation of powers. In this perspective, the possibility that Congress can supply the missing part that the Court declines to perceive offers small comforts against the Court’s transarticle III optional ingredients of standing.

(6) That some constitutional interests of citizens are speculative, trivial, or nonmeasurable, and would open the courts to every arguable assertion of unconstitutional governmental action. Obviously after *Flast* and, to an extent, *Baker v. Carr*, it is analytically unsatisfactory to deny that the general litigant, whether taxpayer or citizen or whatever, has a direct injury that is constitutionally adequate to satisfy constitutional article III limitations of standing. But if we also accept the premise that universal, general access to the courts is unfeasible, there is no other analytically sound way to rationalize a limitation of standing than to frankly recognize that the Courts may, case-by-case on prudential criteria which may progressively be elaborated, deny standing to general interest plaintiffs.

Justice Powell’s opinion for the Court in *Warth* has the virtue of finally formulating the underlying issue in terms much like the above statements. Is the proposition, so proposed, unanswerable? I think not. The issue is one of values; I suggest one answer in the next section.

327. Justice Harlan’s barb that the *Flast* formulation of the taxpayer’s interest as personal “reduces constitutional standing to a word game played by secret rules,” 392 U.S. at 129, was not wholly undeserved. Recall that Justice Douglas, concurring, did not think “the test it lays down is a durable one, for the reasons stated by my Brother Harlan.” *Id.* at 107 (Douglas, J., concurring). Justice Douglas’ solution was to “be rid of *Frothingham* here and now.” *Id.*

328. See Justice Powell’s opinion in United States v. Richardson: “In sum, I believe we should limit the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the results in *Flast* and *Baker v. Carr*.” 418 U.S. at 196 (Powell, J., concurring).
What alternative is there to the Court's suggestions in *Richardson/Reservists Committee/Warth* if we are to have a tidy and sound standing doctrine? First, it would seem that the elements of the "neutral" summary at the outset of this study\(^{329}\)—all of which were accepted by these cases—would be the starting point. A clear rejection of the "new" prudential standing doctrine is required—limiting the prudential considerations to the traditional sphere of "standing to assert rights of third parties" by a plaintiff already assured of standing to sue.\(^{330}\) Next, the *Flast* doctrine must be reexamined, and a new and fair hearing be given to the strong arguments that the Court be more hospitable to citizen or taxpayer litigation, particularly given the overwhelming extensiveness and expense of government, and the post-Watergate disenchantment of citizens with big, impersonal government. Finally, as a minimum, the distinction must be kept between standing to review administrative action and statutes on nonconstitutional grounds, on the one hand, and standing to be heard on alleged unconstitutional governmental action. The "injury in fact, economic or otherwise," standard should suffice for an article III "personal stake" in the latter; the *Data Processing* "zone of interest" test seems apt enough for the other situations. Perhaps the Court's basic earlier mistake was not the *Flast* formula, but the attempt to put discordant notes together in *Data Processing*.\(^{331}\) At any rate, the "novel" contributions from *Richardson/Reservists Committee/Warth* should be put aside.\(^{332}\)

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329. See pp. 469-71 *supra*.

330. For an example of a court anticipating a "prudential" role, see Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). In that case, plaintiff, a disappointed bidder for a federal contract, sued to have the contract as awarded declared null and void as a violation of statutory provisions controlling government contracts. The district court dismissed the complaint for lack of standing. Then, in a careful opinion written by Judge Tamm on the eve of *Data Processing*, the court of appeals reversed. The Tamm opinion (in which Chief Judge Bazelon joined) anticipated *Data Processing*'s expansion of the *Flast* rationale to nonconstitutional cases. *Id.* at 872. The opinion went on, however, to note that although article III would be satisfied, "the grant of standing must be carefully controlled by the exercise of judicial discretion in order that completely frivolous lawsuits will be averted. . . . The court should have discretion to grant standing, provided the other [art. III] criteria listed above are properly met." *Id.*

331. On this point, compare Justice Brennan's misgivings in both *Flast* and *Data Processing*. See note 207 *supra*.

332. At the outset of this article, in the "Summary of the Current Doctrine," see pp. 469-71 *supra*, the present consensus as to standing was discussed. Following that, this article has attempted to identify, from the decided cases themselves, the obscurities that survive, and to criticize from the standpoint of legal analysis and regard for stare decisis, the Court's latest answers. To summarize, the most pressing of the current difficulties seem to be these:

1. The reluctance of the Court, despite *Data Processing*'s and SCRAP's identification
of "personal stake" as "injury in fact, economic or otherwise," to recognize article III standing in a party alleging a noneconomic interest. See note 328 supra.

2. The Warth insistence that beyond the existence of a "personal stake" sufficient to meet article III requirements, the Court has authority to deny standing for "prudential considerations." This is an unwarranted insertion in access-to-courts standing of considerations that derive from an entirely different source, the question of the extentiveness of the constitutional rights of a party already enjoying standing before the Court. Although Justice Powell, in Warth, acknowledges that "[i]n such circumstances, there is no Art. III standing problem," 422 U.S. at 500 n.12, he adds that "the prudential question is governed by considerations closely related to the question whether a person in the litigant's position would have a right of action on the claim." Id. It is on this slender bridge of "closely related" that he rests his new insertion of "prudential consideration" into access standing doctrine. This must be considered shocking after Baker v. Carr and Flast had recognized standing's article III dimension.

3. The new obfuscation of access standing doctrine by placing the question of "issues" on the same level as the question of "proper party." Whether a party "would have a right of action on the claim" goes, of course, to other "issues" and to the merits and not to the question whether this is a "proper party" to argue whether there is a "right of action on the claim." The "proper party" focus was another chief contribution of Flast. In Richardson/Reservists Committee/Warth, the Court tries to do away with this focus by saying that Flast also permitted looking at "issues" without acknowledging that it did so specifically in a taxpayer-suit context to see if its formula was satisfied. The Court now improperly seeks to transport the taxpayer limitations of Flast into general standing doctrine. As a further barrier, Warth now requires a party to go beyond the question in Data Processing as to "whether the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," 397 U.S. at 153 (emphasis added), and instead now requires a party to establish that he has "a right of action on the claim." 422 U.S. at 500 n.12.

Involved somewhat collaterally here is the new tendency in these cases to use arguments appropriate to consideration of "political questions" as the basis for denying standing. Quite possibly, there may have been grounds for determining in Richardson that the Court was being improperly asked to deal with a "political question." Doubt is permitted on this score. However, there should be no doubt of the irrationality of denying a plaintiff standing on grounds that the Constitution committed final word on an issue to another branch of government. Surely, there should be a "proper party" with standing to argue this "political question" point before the Court.

4. The final problem concerns "personal stake" itself, and is two-headed. That there should be a certain directness and nonremoteness about the injury or threat, all will agree. There must be "injury" in some real sense to be a "stake." Still, the Warth demand for degree of proof borders on repeal of fundamental notions of code pleading.

Similarly, all agree that the "stake" must be "personal"—in some meaningful way associated with the party bringing the action. The difficulty here flows chiefly from parties alleging the "non-economic" type of injury. Certainly these parties must show, for example, that the impact, whether environmental, religious or whatever, is on them. Once that has been established, should there be constitutional pause from the fact that many others, even citizens generally, are also affected? One would have thought that Sierra Club and SCRAP had said no to this question. Yet the Court in Warth takes it to itself to pick and choose here: "[T]he Court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. E.g., Schlesinger v. Reservists Comm. to Stop the War, supra; United States v. Richardson,
VI. Postscript

Having written the above, and reflected upon it, it would seem a proper lawyer's exercise to try to state fairly the best case for the stance the Court has taken in these recent standing cases. It comes out like this: It has

supra; Ex parte Lévitt, 302 U.S. 633, 634 (1937).” 422 U.S. at 499 (emphasis added). Presumably this, too, will be parsed out on “prudential considerations.”

333. Cases in the 1975 Term (up to June 1, 1976) have continued the trend set in standing cases by the Richardson/Reservists Committee/Warth trilogy. They have substantially limited access to the courts in Civil Rights Act suits under 42 U.S.C. § 1983, and have specifically reaffirmed the Warth insistence that article III standing requires a plaintiff to establish an actual injury.

Rizzo v. Goode, 423 U.S. 362 (1976), was a section 1983 action by individuals and organizations against Philadelphia's Mayor, Police Commissioner, “and others,” alleging a pervasive pattern of unconstitutionally discriminatory treatment against minority citizens by police action, affecting their first amendment rights. The district court, after full trial, gave an order of affirmative relief which the United States Court of Appeals for the Third Circuit affirmed. The Supreme Court reversed, stating that plaintiffs' interests were too attenuated and lacked the “requisite 'personal stake in the outcome,'...i.e., the order overhauling police disciplinary procedures.” Id. at 605. The Court bolstered its restrictive standing approach by citing considerations of federalism and principles of equity as construed in O'Shea v. Littleton, 414 U.S. 488 (1974).

Simon v. Eastern Kentucky Welfare Rights Organ., 96 S. Ct. 1917 (1976), is in direct line with the Richardson/Reservists Committee/Warth trilogy. Individual indigents and organizations of indigents sued the Secretary of the Treasury and the Commissioner of Internal Revenue for declaratory and injunctive relief arising from the issuance of a regulation giving tax benefits to hospitals which denied services to indigents, allegedly in violation of the Internal Revenue Code. Although plaintiffs had sued under section 10 of the Administrative Procedure Act, 5 U.S.C. § 702, as parties “adversely affected or aggrieved,” the Court explicitly did not reach the nonconstitutional “zone of interests” test of Data Processing, but instead took the opportunity to reiterate the article III bar as articulated in Warth:

The standing question in this suit therefore turns upon whether any individual respondent has established an actual injury, or whether the respondent organizations have established actual injury to any of their indigent members.

96 S. Ct. at 1925. The Court conceded that plaintiffs had suffered the actual injury of nonaccess to hospital services, but it insisted that since the hospitals were not defendants it was merely speculative that success in this suit would give plaintiffs any practical relief. Hence, the Court held that Warth was the controlling precedent, and Warth, the Court said, was merely following Linda R.S. v. Richard D., 410 U.S. 614 (1973). The arguments made in this article in opposition to Warth are equally applicable to Simon, where a result in which all members of the Court would be satisfied was available (dismissal on a summary judgment motion), but the Court majority insisted upon reiterating the article III standing grounds. Justice Brennan, concurring and dissenting, complained that the Court, “through its manipulation of injury in fact, stretch[ed] that conception far beyond the narrow bounds within which it usefully measures a dimension of Art. III justiciability.” 96 S. Ct. at 1937. Lest others be lonely in their dismay, he concluded:

After today's decision the lower courts will understandably continue to lament
been part of the best tradition in constitutional adjudication by the Supreme Court that the Court should be slow to make constitutional pronouncements, particularly those which might lead to declaring a governmental act to be in violation of the Constitution. The early history of the Court bears this out: no congressional act was declared unconstitutional between *Marbury v. Madison*\(^\text{334}\) in 1803, and *Dred Scott v. Sanford*\(^\text{335}\) in 1857. Such recent judicial giants as Brandeis, Stone, Frankfurter, Cardozo, and the second Harlan made this canon a hallmark of their craftsmanship. Deciding cases, when possible, on nonconstitutional grounds was only one among many judicial techniques used to implement this goal. The denial of certiorari and refusal to find a substantial federal question on appeals of right\(^\text{336}\) are two other familiar devices the Court has used to postpone, as untimely, or to avoid, as unnecessary, a particular occasion that might provoke a constitutional pronouncement. Many other standby categories come to mind, including advisory opinions, mootness, political questions, ripeness, and standing. It was not always so clear, as it was to Justice Brennan in *Baker v. Carr*, that these were in large part constitutional article III doctrines, as distinguished from rules fashioned by the Court for its own governance. Constitutional or not, the Court has never, until recently, been reluctant to use them in service of a desired result in a particular case. To be deprived of such techniques of flexibility would not further the goal of constitutional law, or for that matter, all law, which is to reach the "just" result. Indeed, when adequate techniques of flexibility were not available among traditional tools, the Court did not hesitate to devise them. For example, mere prospective overruling in constitutional adjudication dates from 1965,\(^\text{337}\) and the technique of declining to exercise admitted original

\(^{334}\) 5 U.S. (1 Cranch) 137 (1803).

\(^{335}\) 60 U.S. (19 How.) 393 (1857).

\(^{336}\) See Henry v. Mississippi, 379 U.S. 443 (1965), for a discussion of "independent and adequate" state grounds. Rule 15 of the Supreme Court Rules provides for a "jurisdictional statement" as the means of initiating an appeal, which serves to identify that the appeal meets requirements of jurisdictional statutes and that "the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral arguments, for their resolution." S. Cr. R. 15(f). See reference to Justice Brandeis’ concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936), in note 37, supra.

The judicial technique of the past 20 years which grasped cases that were beyond review, according to the Court's earlier decisions, merely shows another side of the same coin—that is, a reaching out for specific cases to permit reaching a just enforcement of the Constitution: a tendency commenced in Baker, and continued in Flast and Data Processing to reduce the concept of standing to a question of simple objective fact, not law—"injury in fact." Undoubtedly, the aim of the Court was a wholesome one—to avoid erratic and unpredictable application of standing and to identify ingredients that would assure standing on an equal basis to all who were in fact injured. But our experience with this doctrine has shown that in attempting to avoid one pit—unequal application of law—we have fallen into another. This new one is not theory, it is fact. An enlarged standing doctrine has opened the courts to a torrent of litigation with which they cannot deal and still furnish speedy justice. The question is not just the docket of the Supreme Court; it is overloaded court calendars throughout the federal system. The Supreme Court at the apex of the constitutional legal system must have sufficient flexibility—"play in the joints" in Chief Justice Burger's phrase—to allow it to fashion rules of nonaccess to the federal system, or the system will collapse of its own weight. To the extent that article III standing is to be a question of objective fact under Baker v. Carr's "personal stake," now no longer restrained by need for "pocketbook interest," standing as constitutional doctrine can only be made flexible by insisting upon a significant degree of "directness" of injury. This emphasis admittedly imports both a certain erratic flexibility of application and new uncertainty. The Court has stressed the need for "directness" in such cases as O'Shea v. Littleton, Linda R.S. v. Richard D., and now in Warth. But there are limits to the flexibility secured even by this approach. A "direct" noneconomic scintilla was enough in Baker v. Carr and Flast. To maximize the needed judicial flexibility, the Court could reverse Baker v. Carr and Data Processing on the "personal stake-injury-in-fact" point. This


339. Judicial decisions at every level, including the Supreme Court, have also created new areas of litigation. This is in no sense to be taken as a complaint concerning increased access to the courts; the point is that when the courts have more work, they must have more judges, more supporting personnel, and more equipment.


course would be inconvenient, and needlessly subject the Court to criticism for inconsistency in significant doctrine. The alternative is to accept and retain these cases as identifying article III standing, but reacquire the Court's former flexibility by frankly avowing that, in addition to constitutional requirements which give it conceded jurisdiction, the Court is free to limit access to federal courts according to "prudential rules" which the Court shall devise, and apply, from time to time, as justice may require. This is the approach the Court has marked out in Warth. There is no more flexibility here than there had been before standing was authoritatively "constitutionalized." But, there will be no less.

If the above is a fair statement of what the Court meant, but did not say, in Warth, my difference is a question of philosophy of law. Perhaps my concern parallels that of Justice Black in his long and sharp debate with Justice Frankfurter concerning the place of the Bill of Rights in our federal system. Justice Frankfurter, like Justices Brandeis and Cardozo before him and the second Justice Harlan, was content to have the Supreme Court, trained and equipped as it was, make prudential decisions from time to time on what rights were "fundamental." Justices Black and Douglas were less self-confident, and chided Justice Frankfurter for espousing an outmoded "natural law" philosophy. The label was misplaced, but their criticism and the preference accords with my own. Long ago, Aristotle applauded the judge as "embodied justice." Aquinas, ever the realist, preferred the rule of law to the rule of judge. "Equal Justice Under Law" reads the inscription over the entrance to the Supreme Court Building. The quest for "neutral principles of constitutional law" may be as ephemeral as the "government of laws and not of men" of the 1780 Massachusetts Constitution. But even though I know in every decision there is hopefully a

343. In Ohio ex rel. Eaton v. Price, 364 U.S. 263, 274 (1960), Justice Brennan referred to "the classic debate" between Justices Black and Douglas, on the one hand, and Justice Frankfurter, on the other, which had followed upon Justice Black's dissent in Adamson v. California, 332 U.S. 46 (1947). In Adamson, Justice Frankfurter had lauded Twining v. New Jersey, 211 U.S. 78 (1908), as "one of the outstanding opinions in the history of the Court." 332 U.S. at 59 (Frankfurter, J., concurring). The Black-Douglas dissent demanded that Twining be overruled both on its precise holding (self-incrimination), and on its general theory ("the natural law' theory of the Constitution upon which it relies."). Id. at 70 (Black, J., dissenting). Later in the "debate" Justice Douglas added: "Due process under the prevailing doctrine is what the judges say it is; and it differs from judge to judge." Hannah v. Larche, 363 U.S. 420, 505 (1960) (Douglas, J., dissenting). He added that due process had become "a tool of the activists who respond to their own visceral reactions in deciding what is fair, decent, or reasonable." Id.

344. THE BASIC WORKS OF ARISTOTLE 1009 (R. McKean, ed. 1941).

345. AQUINAS, SUMMA THEOLOGIAE 1a2ae, q.95, a.1 (T. Gilby, O.P., ed. 1966).
little bit of both, somehow I feel more comfortable primarily “under law” than primarily under “prudential limitations,” especially on matters that concern access to the courts to challenge an assault on the Constitution itself. I began with Chief Justice Marshall, and I shall end with his warning of the consequences of comparable judicial abstention:

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principle and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature should do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.\footnote{346. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803). Also, as Justice Douglas noted in Flast v. Cohen, 392 U.S. 83, 111 (1968): The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where affirmative relief can be obtained. If the judiciary were to become a superlegislative group sitting in judgment on the affairs of people, the situation would be intolerable. But where wrongs to individuals are done by violation of specific guaranties, it is abdication for courts to close their doors.}