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Federal Standing: 1976

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The doctrine of standing to sue in the federal courts has undergone extensive transformation in recent years.\(^1\) Decisions of the Supreme Court from 1968 to 1973\(^2\) led many to conclude that the Court had “greatly expanded the concept of standing”\(^3\) and “[had] so diluted [it] that even the most trivial interest [would] suffice.”\(^4\) Three recent cases\(^5\) promulgating more rigid criteria for standing indicate a clear retreat from the expanded doctrine.

I. DEVELOPMENTS IN THE FEDERAL LAW OF STANDING: 1968-1973

Limitations on standing are designed to guarantee that the litigant 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 [a] court so largely depends for illumination of difficult constitutional questions.”\(^6\) This irreducible element of standing is derived from article III, which limits the judicial power to “cases” and “controversies.”\(^7\) Beyond this minimum constitutional requirement, the judiciary has adopted rules of self-restraint in deciding whether to adjudicate in particular situations.\(^8\)

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7. U.S. Const. art. III, § 2.

The courts have not adequately distinguished the minimum article III requirements from restraints based on policy considerations. Chief Justice Warren discussed the article III considerations in *Flast v. Cohen*:

"In part, those words [cases and controversies] 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.

There is general agreement that article III requires a plaintiff to assert that he has been injured in some way. Whether that is the only inquiry required has been a much-debated question; the Supreme Court in *Warth* accepted the idea that article III limitations on standing must be supplemented by judicial rules of self-restraint.

The issue of standing is often analyzed through an inquiry into the type of interest a plaintiff must possess to be able to have his case adjudicated. Professor Davis states that the relevant questions:

"[W]hat interests deserve protection against injury, and what should be enough to constitute an injury. Whether interests deserve legal protection depends upon whether they are sufficiently significant and whether good policy calls for protecting them or for denying them protection.

A sufficient interest can arise from the common law, a statute, or the Constitution. The pre-1974 liberalization of the law of standing occurred in a suit which raised the constitutional rights of a taxpayer and in suits which challenged governmental deci-

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Professor Davis' analysis has been criticized as being more or less circular; "if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected." C. Wright, LAW OF FEDERAL COURTS § 13 (2d ed. 1970). See also Scott, supra note 1, at 651-52 & n.23.
alleged to be illegal under relevant federal statutes.

A. Parties Claiming Injury Under Federal Statutes—Standing in Conjunction with the Administrative Procedure Act

In companion cases in 1970, Association of Data Processing Service Organizations, Inc. v. Camp and Barlow v. Collins, the Court formulated a new mode of standing analysis for cases in which plaintiffs claim an injury under a federal statute not specifically providing a right to sue. The plaintiffs in Data Processing were sellers of data processing services. They challenged a ruling of the Comptroller of the Currency which enabled national banks to provide data processing services in conjunction with other banking services. Plaintiffs alleged competitive injury which the Court found “no doubt” constituted “injury in fact.” The Court then stated that:


The effect of the decisions in these cases was to “blur the distinction between such cases and those involving statutory review.” Scott, supra note 1, at 660. An example of a “true” statutory standing case is FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). In that case the plaintiff sought relief under an act providing for direct appeal to the court of appeals “by any other person aggrieved or whose interests are adversely affected by [specified decisions of the FCC].” Id. at 476-77. The statute thus contained a specific grant of standing. Cf. Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir.), rev’d on other grounds, 320 U.S. 707 (1943). It is unlikely that section 10 of the Administrative Procedure Act (see note 16 infra) can be properly construed as a similar grant of statutory standing. See Scott, supra note 1, at 658-59, 668 n.108.


[E]xcept to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law. . . . [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Numbers (1) and (2) above refer to situations where Congress, in its discretion, has provided that certain agency action is non-reviewable. See generally Barlow v. Collins, 397 U.S. 159, 173 (1970) (Brennan, J., concurring).


18. 397 U.S. 159 (1970). The plaintiffs were tenant farmers, eligible for payments under the upland cotton program, who challenged the Secretary of Agriculture’s amendment of a regulation under the Soil Conservation Act, 16 U.S.C. § 590h(g)(1971). The statute permitted participants in the program to use government benefits as security for cash or for advances to finance making a crop. The challenged amendment redefined “making a crop” so as to exclude assignments “to secure the payment of the whole or any part of a cash . . . rent for a farm.” Barlow v. Collins, 397 U.S. 159, 160-61 (1970). The petitioners claimed that the amendment caused them economic injury. Id. at 163.


20. Id. at 163.
The question of standing . . . concerns apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

After scrutinizing the legislative history of the act in question, the Court concluded that the plaintiff competitors were arguably within the zone of interests to be protected. The Bank Service Corporation Act was clearly a relevant statute within the meaning of section 10 of the Administrative Procedure Act and the petitioners were "within that class of 'aggrieved' persons who, under [5 U.S.C.] § 702, are entitled to judicial review of 'agency action."'

Justice Brennan, joined by Justice White, concurred in the results in Data Processing and Barlow, but was dissatisfied with the majority's two-pronged test. Justice Brennan would have held that injury-in-fact was the only article III requirement:

My view is that the inquiry in the Court's first step [injury-in-fact] is the only one that need be made to determine standing. I had thought we discarded the notion of any additional requirement when we discussed standing solely in terms of its constitutional content in Flast v. Cohen. [Citation omitted.]

He added that since the Flast decision, "standing exists when the plaintiff alleges . . . that the challenged action has caused him injury in fact, economic or otherwise." At least in regard to claims that rights under a federal statute have been violated by agency action, the Court has accepted Justice Brennan's view and has significantly expanded the categories of cognizable injury. In United States v. SCRAP, the petitioners challenged an order of the Interstate Commerce Commission which permitted a surcharge on certain railroad rates. They claimed that the rate order would:

- discourage the use of "recyclable" materials, and promote the use of new raw materials that compete with scrap, thereby ad-

22. Id.
24. Id. at 168 (Brennan, J., concurring).
25. Id. at 172.
27. Id. at 676.
versely affecting the environment by encouraging unwarranted mining, lumbering, and other extractive activities. The members of these environmental groups were allegedly forced to pay more for finished products, and their use of forests and streams was allegedly impaired because of unnecessary destruction of timber.

While recognizing the extreme difficulty posed by proof of the claim, and in particular, by proof of the causal connection between the allegedly illegal act and the alleged injury, the Court held:\(^2\)

[N]either the fact that the appellees claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use these resources suffered the same harm, deprives them of standing.

In recognizing new categories of injury, the Court had not dispensed with the requirement that the injury be concrete. In *Sierra Club v. Morton*,\(^2^9\) the Court dismissed for lack of standing because the plaintiff, Sierra Club, “failed to allege that it or its members would be affected in any of their activities or pastimes . . . .”\(^3^0\) Similarly, in a more recent case, the Court explained that: \(^3^1\)

Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action . . . .

The Court has required the threatened or actual injury to be “real and immediate [and not] hypothetical.”\(^3^2\) When the requirements are met, the plaintiff presents a concrete controversy.

In *Data Processing, Barlow, SCRAP*, and *Sierra Club*, the

\(28. \) Id. at 686-87.
\(29. \) 405 U.S. 727 (1972).
\(30. \) Id. at 735.
\(31. \) Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). In this case, an unwed mother sought to enjoin discriminatory application of the Texas child support law and claimed that the state had failed to enforce the law with respect to illegitimate children. In a five to four decision, the Court dismissed for lack of standing. The majority applied the *Flast* nexus test and held that the plaintiff had not made “[a] showing that her failure to secure support payments result[ed] from the nonenforcement [of the criminal statute].” *Id.* at 618. The Court noted that even if the plaintiff were given the requested relief, “it would result only in the jailing of the child’s father.” *Id.*

Court opened the federal courts to plaintiffs who claimed that some form of agency action had violated their "rights" under a relevant federal statute. When the Court could discern a protective intent, either on the face of the statute or from its history, the injured party had standing. Because the plaintiffs merely had to allege injury which was arguably protected by the statute in question, difficulties in proof of the causal relationship between the injury and the violation of statute were left to the hearing on the merits. As the Court stated in *United States v. SCRAP*:

Here the Court was asked to follow . . . [an] attenuated line of causation to the eventual injury of which the appellees complained . . . .

. . . . [However], [w]e cannot say on these pleadings that the appellees could not prove their allegations which, if proved, would place them squarely among those persons injured in fact by the Commission's action, and entitled under the clear import of *Sierra Club* to seek review.

*Sierra Club* and *SCRAP*, following as they did on the heels of *Barlow* and *Data Processing*, had the additional effect of further obscuring the distinction between statutory and nonstatutory standing. Under the broader standing doctrine of these cases, a litigant can apparently challenge any agency action which "arguably" affects his "rights" under a federal statute, even if the federal statute does not in itself provide a cause of action. As Professor Scott points out, one can argue that the Court has treated section 10 of the Administrative Procedure Act "as though it gave rise to a statutory review case."

B. Taxpayer and Citizen Standing

Courts also face decisions on nonstatutory standing when a citizen or taxpayer claims injury arising from the violation of a constitutional prohibition. Analysis of such cases has its genesis

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34. Scott, supra note 1, at 668. In a traditional statutory standing case, the act which creates the "right" affords standing by its own terms to a citizen who claims a personal deprivation of the right. See, e.g., *Trafficante v. Metropolitan Life Ins. Co.* 409 U.S. 205 (1972) in which the plaintiff claimed a violation of the Civil Rights Act of 1968, 42 U.S.C. § 3604(a)(1971). The statute provided: "[I]t shall be unlawful to refuse to sell or rent after the making of a bona fide offer . . . a dwelling to any person because of race, color, religion, or national origin." In 42 U.S.C. § 3610(d) (1971), Congress specifically created a cause of action to enforce the provisions of the Act: "The person aggrieved may . . . commence a civil action . . . to enforce the rights granted or protected by this title."
in *Frothingham v. Mellon*. The plaintiff in that case was a taxpayer who challenged the constitutionality of the Maternity Act of 1921. She claimed that appropriations under the Act would “increase the burden of future taxation and thereby take her property without due process of law.” The Court addressed itself to whether a citizen *qua* taxpayer could institute a suit to have the law declared unconstitutional:

> [T]he interest [of a taxpayer] in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

... If one taxpayer may champion and litigate such a cause, then every taxpayer may do the same. ... The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character can not be maintained.

The Court did not clearly indicate whether the decision represented a constitutional or a policy determination.

In *Flast v. Cohen*, the plaintiffs contended that the public financing of religious schools under Titles I and II of the Elementary and Secondary Education Act of 1965 contravened the establishment and free exercise clauses of the first amendment. Noting the confusion emanating from the *Frothingham* decision, the Court decided to undertake a “fresh examination” of the standing doctrine with regard to taxpayer suits.

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35. 262 U.S. 447 (1923).
38. *Id.* at 487. In a case decided together with *Frothingham*, the Court held that a state, as parens patriae, “[cannot] institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof.” *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923).
40. 392 U.S. 83 (1968).
43. *Id.* at 94.
Proceeding in a manner which was cryptic at best, the Court first stated that 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" but then observed that "in ruling on 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." In Flast, a taxpayer challenged an act of Congress executed pursuant to article I, section 8, the taxing and spending clause. He therefore satisfied the first part of a two-part nexus test. The test's second part required that the challenged law allegedly "exceeds specific constitutional limitations." The majority found that the establishment clause was a specific limitation on the taxing and spending power, and that the taxpayer therefore had standing.

While not overruling Frothingham, the Court in Flast did open the courts to certain taxpayer suits. The problems created by the Flast test soon became apparent since "it is arguable that all constitutional prescriptions are intended for the protection of that class of citizens which is at any one time disadvantaged by the failure to observe the constitutional requirement." The Court did not establish guidelines for distinguishing the constitutional provisions which are specific limitations on the taxing and spending power from those which are not. The Court also failed to explain the relationship, if any, between the nexus test and minimum article III limitations on the judicial power. As

44. Id. at 99.
45. Id. at 102.
46. Id. at 102-03. "It [would] not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." Id. at 102.
47. Id. at 102-03.
50. Professor Scott believes that the position of the Court in Flast was "an expedient by a court retreating from the absolute barrier of Frothingham, but not sure of how far to go . . . ." Scott, supra note 1, at 661. See generally Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?, 78 YALE L.J. 816 (1969); Davis, Standing: Taxpayers and Others, 35 U. Chi. L. REV. 601 (1968); 82 HARV. L. REV. 224 (1968).
53. See Scott, supra note 1, at 661. The Court stated that the article III considerations were twofold: that the case be presented in an adversary context and that it be consistent with the judiciary's role in the tripartite allocation of powers in the federal government. Flast v. Cohen, 392 U.S. 83, 95 (1968).
Justice Harlan observed, the *Flast* nexus test represented judicial cognizance of the problems which could arise if unrestricted taxpayer (or citizen) standing were available.\(^44\) In the nexus test, *Flast* struck a troublesome compromise.

II. THE COURT RETREATS

A. *United States v. Richardson*

The respondent in *United States v. Richardson\(^55\)* had written to the Government Printing Office to request all documents published in accordance with the statement and accounts clause.\(^56\) The documents he received failed to include a statement of the expenditures of the Central Intelligence Agency. The Central Intelligence Agency Act\(^57\) permits the agency to account for expenditures "solely on the certificate of the Director."\(^58\) The respondent alleged injury in that he was asked to accept an "incomplete" or "fraudulent" document in violation of the provisions of the statements and accounts clause.\(^59\)

In deciding the standing issue, the Court focused its analysis on part one of the *Flast* nexus test.\(^60\) The opinion, by Chief Justice Burger, reasoned:\(^61\)

> Although the status [respondent] rests on is that he is a taxpayer, his challenge is not addressed to the taxing or spending power, but to the statutes regulating the CIA . . . .

> . . . [Respondent] asks the courts to compel the Govern-

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\(^44\) *Flast v. Cohen*, 392 U.S. 83, 118-33 (1968) (Harlan, J., dissenting). Justice Harlan noted that he believed such public actions were within the jurisdiction of the federal courts as conferred by article III, but that "they strain the judicial function and press to the limit judicial authority." *Id.* at 130.


\(^56\) No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

U.S. CONST. art. I, § 9, cl. 7.


\(^58\) The sums made available to the [CIA] may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; [such funds shall be] accounted for solely on the certificate of the Director . . . .


\(^60\) See notes 46-54 *supra* and accompanying text.

ment to give him information on precisely how the CIA spends its funds. Thus there is no logical nexus between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency. [Footnote omitted.]

The allegations therefore failed to satisfy the Flast test; the plaintiff was merely asserting "generalized grievances about the conduct of government." 62

The Court then addressed itself to the decision below. The court of appeals observed: 63

*Flast* is concerned with adverseness and specificity of issues for "standing," not spending *per se*.

... [T]he nexus between a taxpayer and an allegedly unconstitutional act need not always be the appropriation and the spending of his money for an invalid purpose. The personal stake may come from any injury in fact. ... A responsible and intelligent taxpayer and citizen, of course, wants to know how his tax money is being spent. ... The Framers of the Constitution deemed fiscal information essential if the electorate was to exercise any control over its representatives ... and they mandated publication, although stated in general terms, of the Government's receipts and expenditures. Whatever the ultimate scope and extent of that obligation, its elimination generates a sufficient, adverse interest in a taxpayer.

The Supreme Court rejected the idea that the respondent was "in danger of suffering any particular concrete injury ..." 64 His asserted injury, shared by all citizens, was merely "a generalized grievance." 65

The Court noted the possibility that in light of the decision

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65. *Id.* at 176. The Court relied heavily upon, and by so doing, reaffirmed its decision in *Ex parte Levitt*, 302 U.S. 633 (1937). In *Levitt*, a citizen challenged the appointment of Justice Black to the Supreme Court. The challenge was based on art. I, § 6, cl. 2 of the Constitution:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States ... the Emoluments whereof shall have been increased during such time ... The citizen-petitioner had only a "general interest" in the action, because he failed to show that he "[had] sustained or [was] immediately in danger of sustaining direct injury ..." *Ex parte Levitt*, 302 U.S. 633, 634 (1937).
there might be no one to challenge the purportedly illegal action. Justice Burger believed that this circumstance in itself could be taken to signify that the subject matter of the dispute was committed to Congress and ultimately to the political process. Justice Burger noted that respondent's "[I]ack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls." While, of course, not actually reaching the merits, the Court commented that "[i]t is . . . open to serious question whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen."66

Justice Powell concurred in the result in an opinion which outlined his views on standing. He expressed strong dissatisfaction with the criteria for taxpayer standing promulgated in *Flast*. Echoing the view first expressed by Justice Harlan in his dissent in *Flast*, Justice Powell wrote that "it is impossible to see how an inquiry about the existence of 'concrete adverseness' is furthered by an application of the *Flast* test."69 Noting the doctrinal confusion in the decisions on standing, he saw three options for the Court:70

It may either reaffirm pre-*Flast* prudential limitations on federal and citizen taxpayer standing; attempt new doctrinal departures in this area . . . or simply drop standing barriers altogether . . . .

Justice Powell would opt for a policy of judicial self-restraint which would assure the "peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests."71 He believes that a life-tenured judiciary must avoid unnecessary confrontations with the representative branches of government:72

[W]e 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*.

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67. Id. at 178 n.11.
70. Id. at 184.
71. Id. at 192.
I think we should face up to the fact that all such suits are an effort "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." Flast v. Cohen, 392 U.S., at 106. The Court should explicitly reaffirm traditional prudential barriers against such public actions. [Footnote omitted.] My reasons for this view are rooted in respect for democratic processes and in the conviction that "[t]he powers of the federal judiciary will be adequate for the great burdens placed upon them only if they are employed prudently . . . ."

It is implicit in this viewpoint that some legitimate article III plaintiffs who have alleged injury with sufficient concrete adverseness should be denied access to a judicial forum—a rejection of Justice Brennan's injury-in-fact analysis. Justice Powell would also reject the Flast two-part nexus test, and would allow the judiciary to use its discretion in applying prudential limitations on taxpayer and citizen standing.

B. Schlesinger v. Reservists Committee to Stop the War

In a companion case, Schlesinger v. Reservists Committee to Stop the War, the Court found that the respondents had no standing to challenge the reserve officer status of Members of Congress as a violation of the incompatibility clause. The respondents' alleged injury, which resulted from the failure of the executive branch to remove Members of Congress from reserve positions, was that such Members were subject to the possibility of undue influence by the executive branch which "deprives or may deprive the individual named plaintiffs and all other citizens and taxpayers of the United States of the faithful discharge . . . of their duties as members of Congress, to which all citizens and taxpayers are entitled."

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73. See text accompanying notes 24-25 supra.
75. The Committee and certain of its individual members had sought relief on behalf of four classes:
   (1) all persons opposed to United States involvement in Vietnam and purporting to use lawful means . . . to end that involvement. [The individual petitioners sought to represent] (2) all officers and enlisted members of the Reserves who were not Members of Congress; (3) all taxpayers . . . ; and (4) all citizens of the United States.
   Id. at 211.
76. U.S. CONST. art. I, § 6, cl. 2: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."
77. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 212 (1974),
The district court had held that the respondents' status as citizens gave them standing. The court had further found that the issue had not been committed to either the executive or the legislative branches, and held, on the merits, that a commission in the Reserves was an "office" within the meaning of the incompatibility clause.

Addressing itself to the issue of citizen standing, the Supreme Court, per Chief Justice Burger, classified the respondents' citizens' interests as "undifferentiated" from those of other citizens; their injury was therefore "injury in the abstract."

[I]t is nothing more than a matter of speculation whether the claimed nonobservance of that clause deprives citizens of the faithful discharge of the legislative duties of Reservists Members of Congress. And that claimed nonobservance, standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury.

At this point the standing issue was resolved, because "[a]bstract injury is not enough."

The key to the Chief Justice's analysis of citizen standing is that an injury shared by all citizens is "necessarily abstract" and not an actual or threatened concrete injury. Concrete injury "serves in part to cast [a dispute] in a form traditionally capable of judicial resolution. . . . [and] adds the essential dimension of specificity . . . by requiring that the complaining party have suffered a particular injury. . . ." It is that injury upon which standing may be predicated. The Court outlined three functions which are served by the requirement: assuring that the party has the personal stake which results in adequate presentation of the

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*quoting* Petitioners' Brief for Certiorari at 46.

78. Reservists Comm. to Stop the War v. Laird, 323 F. Supp. 833, 842 (D.D.C. 1971). This is the inquiry a court must make when determining whether it is presented with a nonjusticiable political question. See note 149 infra.


grievance,\textsuperscript{83} guaranteeing that there is a real need for judicial review and insuring that the relief framed is no broader than that required by the facts.\textsuperscript{84} The result is that unless any one citizen can in some way individualize the injury he suffers as a result of an unconstitutional action, no citizen has standing to adjudicate its constitutionality.\textsuperscript{85}

The Court proceeded to answer several arguments which the district court had accepted in support of standing. One of these was that although the alleged injury was "hypothetical," the incompatibility clause was "designed to prohibit such potential for injury"\textsuperscript{86} in that it was aimed at protecting precisely the citizens' interest asserted. The Supreme Court found that such a conclusion failed to compensate for the lack of concrete injury and was a "premature evaluation of the merits of respondents' complaint [footnote omitted]."\textsuperscript{87} Another argument accepted below was that because the incompatibility clause is "precise [and] self-operative,"\textsuperscript{88} the grievance was not a generalized one. Again, the Court found such characterization to be an inadequate substitute for cognizable injury and to be impermissibly based upon "preliminary appraisal of the merits."\textsuperscript{89}

Finally, the Court rejected an argument that standing could be predicated upon "the fact that the adverse parties sharply conflicted in their interests . . . and were supported by able briefs and arguments."\textsuperscript{90} The Court distinguished this from the "actual injury needed by the courts and adversaries to focus litigation efforts and judicial decisionmaking."\textsuperscript{91} In addition, the Court stated that evaluation of the merits, or in this instance of the quality of the presentation of the merits, must not precede resolution of the standing issue.\textsuperscript{92} In what must therefore be con-

\textsuperscript{83} Id. at 221.
\textsuperscript{84} Id. at 222. The framing of narrow relief is of special importance in a case such as Schlesinger, in which the relief sought produces a conflict with one of the coordinate branches of government. In this regard, the Court suggested that prudence requires avoiding an arguable charge of "government by injunction." Id.
\textsuperscript{85} See text accompanying note 93 infra.
\textsuperscript{87} Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 224-25 (1974).
\textsuperscript{89} Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225 (1974).
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 226.
\textsuperscript{92} Id. The Court briefly alluded to the difficulties which might arise if the cognizable injury requirement were not made the threshold issue in standing, or if a court were permitted to consider the merits prior to the resolution of the standing question for any
considered dictum, the Court criticized the district court's premature determination of the merits, and in so doing, reiterated the principle that a citizen's generalized interest in an issue cannot be a basis for standing.\footnote{3}

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. The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.

... Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one will have standing, is not a reason to find standing.

Turning to what it characterized as "a different question," the Court agreed with that part of the district court's holding which had found no taxpayer standing. The respondents had failed to satisfy the \emph{Flast} nexus test because they were not challenging a congressional enactment under article I, section 8.\footnote{11}

C. \emph{Warth v. Seldin}

The most significant broadening of the requirements for federal standing occurred in the case of \emph{Warth v. Seldin}.\footnote{95} In that

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\begin{itemize}
  \item \footnote{3. \emph{Id.} at 226-27. Chief Justice Burger stated that enforcement of the incompatibility clause is one of those "crucial decisions [left] to the political processes." \emph{Id.} at 227. To reach this conclusion, however, he had to look to the merits of the plaintiff's case for a purpose other than the permissible one of making a limited inquiry for determination of taxpayer standing under the \emph{Flast} nexus test. \emph{See id.} at 225 n.15. Chief Justice Burger employed the same mode of analysis as the district court—a limited examination of the merits—and simply arrived at the opposite conclusion. The district court had concluded that the incompatibility clause was "self-operative" and was addressed "to the potential for undue influence rather than to its realization." Reservists Comm. to Stop the War v. Laird, 323 F. Supp. 833, 840 (D.D.C. 1971). Chief Justice Burger disagreed, and concluded that enforcement of the clause was a function of the "political processes." \emph{Schlesinger v. Reservists Comm. to Stop the War}, 418 U.S. 208, 227 (1974). While Chief Justice Burger stated that "there was no occasion [for either of the lower courts] to reach or evaluate what [it] saw as the merits," \emph{id.} at 225 n.15, he saw fit to reach the merits for a limited purpose. This was a product of the Court's blurring of the distinctions between the standing and political question considerations. \emph{See note 149 infra.}}
  \item \footnote{93. \emph{Schlesinger v. Reservists Comm. to Stop the War}, 418 U.S. 208, 228 (1974).}
  \item \footnote{95. 95 S. Ct. 2197 (1975), \emph{aff'd} 495 F.2d 1187 (2d Cir. 1974).}
\end{itemize}
case, several groups of plaintiffs claimed that the zoning ordinance of Penfield, New York, a suburb of Rochester, by its terms and as enforced by the defendant [Zoning, Planning, and Town] Board members . . . effectively excluded persons of low and moderate income from living in the town, in contravention of petitioners' First, Ninth, and Fourteenth Amendment rights and in violation of 42 U.S.C. §§ 1981, 1982, and 1983.

The plaintiffs asserted that the zoning ordinance had both "the purpose and effect of excluding persons of low and moderate income from residence in the town." In a five to four decision, the Court, per Justice Powell, affirmed the dismissal of each plaintiff group for want of standing.

Before addressing the facts of the case, the Court attempted to outline the principles which would guide its standing analysis. The initial focus was on "whether a plaintiff ha[d] made out a case or controversy between himself and the defendant within the meaning of Art. III." A federal court has jurisdiction only "when the plaintiff himself has suffered 'some threatened or actual injury [as a result of the defendant's actions].'") This inquiry seeks to resolve whether the plaintiff has met the minimum constitutional requirement of injury-in-fact.

The constitutionally mandated inquiry into whether the plaintiff has suffered some threatened or actual injury is not, however, the only stage in the resolution of a motion to dismiss for lack of standing. The Court explained two of the "prudential limitations" on standing: (1) "when the asserted harm is a 'gen-

96. The five petitioner groups were: (1) low- and moderate-income Rochester residents, some of whom were members of minority groups, who claimed to have attempted and to be presently attempting to reside in Penfield; (2) Rochester taxpayers who claimed that they had paid increased taxes as a result of the Penfield ordinance; (3) Metro-Act of Rochester, a not-for-profit corporation organized to alleviate the housing shortage for low- and moderate-income persons in the Rochester area; (4) Rochester Home Builders Association, which represented several construction firms in the Rochester area and had attempted to intervene as a party-plaintiff; and (5) Monroe County Housing Council, a not-for-profit corporation consisting of organizations concerned with the housing problem which had unsuccessfully sought to be added as a party-plaintiff. The petitioner associations sought to represent their individual members as well. Id. at 2202-04.
98. Id. at 2203.
99. Id. at 2205-07.
100. Id. at 2205.
102. Id. See notes 7-11 supra and accompanying text.
103. For a more complete discussion of Justice Powell's view of the role of prudential
eralized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction’;\textsuperscript{104} and (2) “the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”\textsuperscript{105} These two limitations, “closely related to Article III concerns but essentially matters of judicial self-governance,”\textsuperscript{106} are necessary to prevent a court from having to decide “abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.”\textsuperscript{107} Another relevant factor in the Court’s standing analysis would be the source of the plaintiff’s claim, that is, “whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.”\textsuperscript{108}

The Court made the following statement on the procedural aspects of a motion to dismiss for lack of standing:\textsuperscript{109}

For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. [Citations omitted.] At the same time, it is within the trial court’s power to


\textsuperscript{106.} Warth v. Seldin, 95 S. Ct. 2197, 2205 (1975).

\textsuperscript{107.} \textit{Id.} at 2206.


\textsuperscript{109.} Warth v. Seldin, 95 S. Ct. 2197, 2206-07. A motion to dismiss for lack of standing was granted in \textit{Warth}. There was some question of whether the submission of affidavits and documents converted the motion to dismiss into a rule 56 motion for summary judgment. See Fed. R. Civ. P. 12(b). Justice Brennan explained that it did not because: (1) the portion of rule 12(b) concerning conversion of a 12(b) motion to one for summary judgment applies only to 12(b) (6) motions; and (2) the respondents, who filed no counter-affidavits, had not disproven the allegations. \textit{Id.} at 2219 n.6 (Brennan, J., dissenting). When a motion to dismiss for lack of standing is premised on failure to meet the case or controversy prerequisites of article III, it is a rule 12(b) (1) motion alleging lack of jurisdiction over the subject matter. See 6 C. Wright & A. Miller, \textit{Federal Practice and Procedure: Civil} § 1542 (1971). Presumably, rule 12(b) (1) also includes motions for a dismissal of the case on the basis of one of the prudential limitations on standing.
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. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

The Court then proceeded to decide the standing of each petitioner group in turn, beginning its discussion with the low- and moderate-income minority group plaintiffs: 110

We must assume, taking the allegations of the complaint as true, that Penfield's zoning ordinance and the pattern of enforcement by respondent officials have had the purpose and effect of excluding persons of low and moderate income, many of whom are members of racial or ethnic minority groups. We also assume, for purposes here, 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 summarized the detailed allegations that these plaintiffs had not only expressed a desire to reside in Penfield, but had made concrete attempts to find housing there. 111 The majority concluded, nevertheless, that there was no concretely demonstrable causal connection between Penfield's allegedly illegal zoning practices and the inability of these plaintiffs to procure housing. It was "doubtful" whether these particular litigants could have resided in the contemplated housing projects described in the record. 112 The economics of the area housing market (petitioners' individual financial situations and housing needs) may have been responsible for their inability to reside in Penfield. The Court noted that: 113

[P]etitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have

110. Warth v. Seldin, 95 S. Ct. 2197, 2207 (1975) (emphasis added). The implication of this statement is either that these plaintiffs were not members of the affected class or that, for some other reason, this was not a "proper" case for the Court to hear.
111. Id. at 2207.
112. Id. at 2209 n.16. The Court here agreed with the opinion of the court of appeals which stated that only the "concrete possibility of obtaining new and better housing gives potential residents a personal stake in the outcome." Warth v. Seldin, 495 F.2d 1187, 1192 (2d Cir. 1974). But see Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1213 (8th Cir. 1972); English v. Town of Huntington, 335 F. Supp. 1369 (E.D.N.Y. 1970).
been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability . . . will be removed. [Citation omitted.]

Finding that the petitioners had not proven such a "substantial probability," the Court dismissed their case.

In making its determination, the Court relied in part upon the petitioners' claim that builders and developers who sought to construct low-income housing projects had been denied permits to do so. That the harm to the petitioners was caused indirectly "[d]id not necessarily deprive" them of standing, but the Court stated:114

[It] may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.

The Court distinguished decisions in several of the courts of appeals which had found standing for low-income plaintiffs challenging exclusionary zoning laws.115 The earlier cases were challenges of zoning restrictions "as applied to particular projects that would supply housing within [the plaintiffs'] means, and of which they were intended residents."115 Rather than assert that they had been disadvantaged by the denial of a permit to a particular project, the plaintiffs in Warth "[relied] on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief."117

In sum, to allege "demonstrable, particularized injury" caused by exclusionary zoning practices, a plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangi-

114. Id. (emphasis added). A similar analysis in United States v. SCRAP, 412 U.S. 669 (1973), would have required that the plaintiffs show, at the pleading stage, that an allegedly illegal 2.5 percent railroad surcharge would, in fact, have caused "unnecessary destruction of timber and extraction of raw materials . . . ." Id. at 676; see note 33 supra and accompanying text.


117. Id. at 2210.
ble way from the courts' intervention [footnote omitted]."  

Demonstrations of both the harm and the anticipated benefit are necessary before a court can be confident that there is a real need for judicial review and that relief can be framed with the requisite specificity.  

The Court next addressed the issue of whether the Rochester taxpayers had standing to sue. The taxpayers claimed that as a result of Penfield's exclusionary ordinance, low- and moderate-income groups who would otherwise reside in Penfield were living in Rochester. It was asserted that Rochester taxpayers therefore had to pay higher taxes to finance more public services and low- and moderate-income housing as a result of Penfield's exclusionary policies. The Court declined to recognize such a claim because: (1) the pleadings were too conjectural; (2) the line of causation between the defendants' actions and the injury was not apparent; and (3) the taxpayers could not assert any personal right under a statute or the Constitution to be free from the "incidental adverse effect" of a neighboring municipality's zoning law.  

In the final section of his opinion, Justice Powell addressed the petitioner associations' standing to sue. An association can have standing to sue either in its own right or as the representative of its members. The association, however, must allege concrete injury, either to itself or to a member or members.

Metro-Act of Rochester claimed representational standing on behalf of low- and moderate-income minority members, taxpaying Rochester members, and members who were already residents of Penfield. Claims to standing for the former two groups were precluded by the holdings as to the individual petitioners. The third group, comprising nine percent of Metro-Act's members, claimed to have suffered injury as a result of the exclusionary zoning practices of the Penfield Boards. They were "deprived of the benefits of living in a racially and ethnically integrated com-

121. Id.
123. See notes 110-21 supra and accompanying text.
munity."\textsuperscript{124} Petitioners argued that a similar complaint had been found to constitute injury-in-fact in \textit{Trafficante v. Metropolitan Life Insurance Co.}\textsuperscript{125} The Court held that \textit{Trafficante} was not controlling because "Metro-Act does not assert on behalf of its members any right of action under the 1968 Civil Rights Act, nor can the complaint fairly be read to make out any such claim [footnote omitted]."\textsuperscript{126} Petitioners' complaint alleged that the exclusionary zoning ordinance had the purpose and effect of "[excluding] persons of low and moderate income . . . .\textsuperscript{127} The Court evidently reasoned that such a complaint, if proven, would evidence only a financially discriminatory zoning ordinance. The sections of the 1968 Civil Rights Act in issue were addressed, not to financial discrimination, but to discrimination on the basis of race, color, or national origin. The exclusion of racial or ethnic minorities as an incidental effect of financial discrimination was not sufficient to bring the petitioners within the ambit of the statute. The Court emphasized that the petitioners' complaint did not allege a purposeful racial or ethnic discrimination.\textsuperscript{128}

The Rochester Home Builders Association sought money damages in addition to injunctive and declaratory relief. It claimed that some of its members had lost "substantial business opportunities and profits" as a result of the Penfield zoning practices.\textsuperscript{129} Addressing the claim for monetary relief, the Court noted that Home Builders neither claimed any financial damage to itself, nor an assignment of the damages claims of its members. This was a fatal defect.\textsuperscript{130}

\begin{itemize}
  \item \textsuperscript{124} Warth v. Seldin, 95 S. Ct. 2197, 2212 (1975).
  \item \textsuperscript{125} 409 U.S. 205 (1972). In \textit{Trafficante}, the petitioners were tenants of Parkmerced, an apartment complex in San Francisco. They instituted a suit in the district court pursuant to 42 U.S.C. § 3610(d)(1972), and claimed a violation of their rights under the Civil Rights Act of 1968, 42 U.S.C. § 3604 (1971). See note 34 supra.
  \item The petitioners claimed three specific injuries:
    \begin{itemize}
      \item (1) they had lost the social benefits of living in an integrated community;
      \item (2) they had missed business and professional advantages which would have accrued had they lived with members of minority groups; [and]
      \item (3) they had suffered embarrassment and economic damages in social, business, and professional activities from being "stigmatized" as residents of a "white ghetto."
    \end{itemize}

\textit{Trafficante} v. Metropolitan Life Ins. Co., 409 U.S. 205, 208 (1972). The Court held that the definition of "person aggrieved" under section 3610 was sufficiently broad to give the petitioners standing. \textit{Id.} at 208-12.
  \item \textsuperscript{126} Warth v. Seldin, 95 S. Ct. 2197, 2212 (1975).
  \item \textsuperscript{127} \textit{Id.}
  \item \textsuperscript{128} \textit{Id.} at 2212-13 & n.22. \textit{But cf.} United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).
  \item \textsuperscript{129} Warth v. Seldin, 95 S. Ct. 2197, 2213 (1975).
  \item \textsuperscript{130} \textit{Id.} at 2214.
\end{itemize}
[T]he damages claims are not common to the entire membership, nor shared by all in equal degree. . . . [W]hatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus, to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf.

While it could be assumed that the benefits of prospective relief would inure to the members who were actually injured, that claim failed as well because Home Builders had not averred that any of its members had applied for a building permit or variance for a "current" project. The issue was not ripe for decision.

Finally, the Court considered the claim of the Housing Council of the Monroe County Area. The Housing Council alleged that 17 of its member groups were involved in developing the Penfield area. Only the Penfield Better Homes Corporation, however, had made a concrete attempt to build in the Penfield area. In 1969, the Zoning Board had rejected its application for a zoning variance. The Court emphasized that the complaint did not allege that this project was still viable in 1972. "It is . . . possible that in 1969, or within a reasonable time thereafter, Better Homes itself and possibly Housing Council as its representative would have had standing . . . ." "[H]owever vigorous it may once have been," by the time the complaint was filed, it was no longer, in the Court's estimate, "a live, concrete dispute."

III. A CRITIQUE

The effect of Richardson, Schlesinger and Warth will be to significantly restrict access to the federal court system. The

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131. Id.
132. Id.
134. Richardson, for example, held that the plaintiff had asserted merely a "generalized grievance [whose] impact on him is plainly undifferentiated and 'common to all members of the public.'" United States v. Richardson, 418 U.S. 166, 176-77 (1974), quoting Ex Parte Levitt, 302 U.S. 633, 634 (1937), and Laird v. Tatum, 408 U.S. 1, 13 (1972). The impact of the allegedly illegal spending on the plaintiff in Flast v. Cohen, 392 U.S. 83 (1968), can be characterized by almost identical language. The injury to the plaintiff in Baker v. Carr, 369 U.S. 186 (1962), was also shared by members of the public generally. Justice Powell recognized the obvious parallels and would limit taxpayer standing "to an outer boundary drawn by the results in Flast and Baker v. Carr." United States
Court's analyses of the standing issues foreshadow an era of a more limited judicial role in the resolution of complex social issues.\textsuperscript{135}

A. \textit{Flast, Richardson, and Constitutional Rights}

The difficulties in the use of the nexus test were anticipated by Justices Douglas\textsuperscript{136} and Harlan\textsuperscript{137} in their opinions in \textit{Flast}. Several of the weaknesses of the \textit{Flast} test were evident upon examination of its use in the \textit{Richardson} decision. The Court in \textit{Flast} discussed the nexus requirement in the limited context of a suit brought by a taxpayer to challenge the constitutionality of a federal taxing and spending program.\textsuperscript{138} The plaintiff in \textit{Richardson}, however, was not directly challenging a federal spending program.\textsuperscript{139} His claim was that an executive agency failed to publish information as required by the Constitution. As Justice Brennan stated in dissent,\textsuperscript{140}

\begin{quote}
[the plaintiff] alleged that the [constitutional] violations caused him injury not only in respect of his right as a citizen to know how Congress was spending the public fisc, but also in respect of his right as a voter to receive information to aid his decision how and for whom to vote.
\end{quote}

The majority was correct in concluding that the plaintiff had not satisfied the nexus test as developed in its application to taxpayer status. This was not, however, the relevant inquiry, which is

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\textsuperscript{137} \textit{Id.} at 118-33 (Harlan, J., dissenting).
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\textsuperscript{138} \textit{Id.} at 101-02. \textit{See also Scott, supra note 1, at 660.}
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\textsuperscript{139} In his complaint, respondent had stated that he was "a member of the electorate, and a loyal citizen of the United States." \textit{United States v. Richardson}, 418 U.S. 166, 167 n.1 (1974). The petition for certiorari, however, phrased the issue as one of taxpayer standing. \textit{Id.}
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\textsuperscript{140} \textit{United States v. Richardson}, 418 U.S. 166, 236 (1974) (Brennan, J., dissenting).
\end{flushleft}
whether the plaintiff had the "[sufficient] personal stake and interest that impart the necessary concrete adverseness to [conform to] the constitutional limitations of Article III."" The Court had acknowledged that the plaintiff was not challenging taxing and spending; its use of the test developed in Flast was inappropriate.

The final section of the Richardson opinion was addressed to the court of appeals' position that the nexus between a taxpayer and an allegedly unconstitutional act "need not always be the appropriation and the spending of his money for an invalid purpose." The court of appeals noted that the statement and accounts clause was designed to secure the availability of fiscal information to the public-at-large. Because the alleged injury resulted from nonobservance of this clause, plaintiff's allegations were sufficient to give him standing "consistent with article III." The Supreme Court rejected this position and concluded that the plaintiff was merely asserting "a generalized grievance." The plaintiff had, however, distinguished himself from the public-at-large; he had written to request the documents published in compliance with the statements and accounts clause and therefore had done everything possible to have the clause executed with respect to himself. It was asserted that he had personalized the lawsuit. The Court quickly dismissed this argument while acknowledging that it was likely that no one would be able to litigate the issue. In the majority's view, this created no problem because "Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest." The petitioner's alternative to judicial enforcement of


143. Id. at 853-54. The court believed that the statement and accounts clause was "for the benefit and education of the public," id. at 851, and that a duty was owed "specifically to the appellant." Id. at 850.


145. Id. at 236 (Brennan, J., dissenting).

146. Id. at 178 n.11. There is a serious question about the degree of discretion Congress has in executing its reporting and accounting duty. While the framers acknowledged the possible need for secrecy in some matters, the debates on the clause were characterized by George Mason's statement that "[t]he people . . . had a right to know the expenditures of their money . . . ." 3 J. Elliott, Debates on the Federal Constitution 459 (2d ed. 1836). Accordingly, "[t]he beneficiary—as is abundantly clear from the constitutional history—is the public." United States v. Richardson, 418 U.S. 166, 201 (Douglas, J., dissenting).
the constitutional provision was to elect representatives who would enforce more liberal disclosure provisions under the clause. This means that since the citizen-litigant cannot have an adjudication of his claim on the merits, Congress is able and tacitly encouraged to ignore the clause.

Does the Court's opinion in *Richardson* render the statements and accounts clause a nullity? The clause does not create a judicially cognizable right.\(^\text{147}\) The Court is apparently willing to let Congress define its meaning. From an historical point of view, this runs counter to the proposition put forward by Alexander Hamilton in *The Federalist*:\(^\text{148}\)

\[\text{[T]he courts were designed to be an intermediate body between the people and the legislature, in order . . . to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two . . . the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.}\]

Plaintiff lacked standing for two reasons: his claim failed to satisfy the nexus test and he was asserting a generalized grievance. While reasserting that standing focuses on the party, and not directly on the issues involved, the Court suggested that the "subject matter [of the suit was] committed to the surveillance of Congress . . . ."\(^\text{149}\) According to the Court, the statement and

\[\text{147. As Professor Corbin wrote: "In the whole field of law there is no right without a remedy. The reason that this statement is true is that the only useful test as to the existence of a right is that some legal remedy is provided." 5 A. CORBIN, CONTRACTS § 990 (2d ed. 1964).}\]

\[\text{148. *The Federalist* No. 78, at 101 (E. Bourne ed. 1937) (A. Hamilton). Perhaps the Court's answer to this would be that they have interpreted the Constitution and have construed the subject matter of the suit to be committed to the surveillance of Congress.}\]

\[\text{149. United States v. Richardson, 418 U.S. 166, 179 (1974). This section of the opinion suggests that the Court may have viewed the issue as a political question. The inquiry most often made to determine whether a case raises a political question has been stated to be whether "[there is] found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . ." Baker v. Carr, 369 U.S. 186, 217 (1962). See, e.g., United States v. Nixon, 418 U.S. 683, 693 (1974); Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Roudebush v. Hartke, 405 U.S. 1, 30 (1972) (Douglas, J., dissenting); Powell v. McCormick, 395 U.S. 486, 521 (1969). If the statement and accounts clause is a general directive to Congress, then it may not be enforced by the judicial branch. This was apparently not the intention of the founding fathers. See note 146 supra.}\]
accounts clause was not intended to create a cause of action for an aggrieved citizen. The Court clearly rejected Professor Jaffe's view that such clauses of the Constitution are in part "intended for the protection of that class of citizens which is disadvantaged by the failure to observe the constitutional requirement." 150

B. Asserting Rights Common to Many—Are They Always Generalized Grievances?

In Schlesinger, the Court held that the plaintiffs' asserted injury was undifferentiated from that suffered by all citizens and therefore inherently abstract. 151 The Court stated that the claimed nonobservance of the constitutional proscription contained in the incompatibility clause "would adversely affect only the generalized interest of all citizens." 152 The Court stated no reliable criteria for differentiating the individualized injury from the generalized, the concrete one from the abstract. 153

Without established criteria, the courts are left to determine on a case-by-case basis whether a plaintiff's interest is generalized or specific. The position taken in Richardson and Schlesinger—that if a plaintiff shares his interest with taxpayers or citizens generally, he will not have standing—is a clear departure from the principles established in United States v. SCRAP. 154 In SCRAP, the Government argued that the plaintiffs

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152. Id.
153. One method of ascertaining whether a taxpayer's particular interest is concrete is the nexus test. Flast v. Cohen, 392 U.S. 83, 102-03 (1968). Inherent in the nexus test is the premise that a taxpayer's interest will vary according to the constitutional provision upon which he is basing his claim. Id. at 124 (Harlan, J., dissenting). The nexus test, however, is of little assistance in determining whether a litigant is asserting a concrete claim or an abstract one. See generally Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 604-08 (1968); Scott, supra note 1, at 660-62 (1973).
were aggrieved, if at all, in the same manner in which all citizens were aggrieved by the purportedly illegal action. The Court rejected this theory:

[The focus of the standing analysis is] that the party seeking review be himself among the injured, for it is this requirement that gives a litigant a direct stake in the controversy. . . .

. . . Rather than a limited group of persons who used a picturesque valley in California, all persons who utilize the scenic resources of the country, and indeed who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. . . . 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.

It now appears that the Court has accepted precisely that conclusion. The petitioner in *Richardson* claimed that the document published by the executive branch in compliance with the statement and accounts clause was incomplete and therefore fraudulent. Similarly, the litigant in *Schlesinger* claimed that Congressmen who held reserve positions were subject to undue influence by the executive branch. Since the duty to comply with these clauses was owed to the public generally, the Court found no particularized injury. Followed to its logical conclusion, nobody could challenge noncompliance with the clauses—the very type of result rejected in *SCRAP*.

These recent decisions raise serious questions about accountability which are illustrated by the following hypothetical case. Assume that Congress were to pass a law creating a nondisclosure provision analogous to that in the CIA Act but applicable to the Federal Trade Commission, or the Civil Aeronautics Board, or for that matter, virtually any executive agency. The Freedom of Information Act would offer no recourse, because that law “does not apply to matters . . . (3) specifically exempted from disclosure by statute.” After *Richardson*, would anyone have standing to challenge a largely blank document published in compliance with the statement and accounts clause? According to the Court, any one citizen’s or taxpayer’s interest would be “held in common by

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155. *Id.* at 687-88 (emphasis added).
all members of the public, because of the necessarily abstract nature of the injury all citizens share. Supra note 157. A logical nexus to taxpayer or citizen status could not be established.

The mere fact that the injury asserted by a citizen or taxpayer is shared by many other members of the public should not necessitate characterization of his claim as a generalized grievance. If injury is asserted and the complaint thereby framed in an adversary context, the suit should not be dismissed for lack of standing. Supra note 158. That a plaintiff has a poor chance of success on the merits is irrelevant to the standing issue. The key should be whether the litigant has asserted an injury to himself—not whether others similarly situated suffered the same injury.

Because the taxpayer and citizen plaintiffs in Richardson and Schlesinger had asserted only "generalized grievances" which caused only "injury in the abstract," they did not satisfy minimum article III requirements for standing. Supra note 159. The Court was then faced with distinguishing these litigants from the plaintiff in Baker v. Carr. Supra note 160. Chief Justice Burger wrote that "[t]he injury asserted in Baker was . . . a concrete injury to fundamental voting rights, as distinguished from the abstract injury in nonobservance of the Constitution asserted by respondents as citizens." Supra note 161. This might be interpreted to mean that a citizen's common, undifferentiated claims under the Bill of Rights will be heard by the courts, while injury arising from violations of other constitutional clauses will not be heard. If this is what Chief Justice Burger meant, it would be impossible to distinguish the majority's view (a litigant who asserts injury based on the violation of a fundamental right will have standing, while a plaintiff who claims injury based on the violation of a right found outside the Bill of Rights will not) from that advanced by Justice Powell. Supra note 162. Both would be stating that article III minimum standards are not sufficient to screen the number of cases which the courts will hear and that some additional criteria are needed to limit standing.

C. Examination of Causation as a Standing Issue

As noted above, Supra note 163 the standing issue purportedly focuses on

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158. See text accompanying note 155 supra.
162. See note 134 supra.
163. See text at notes 6 & 44 supra.
the party who alleges an injury and upon whether he has such a personal stake in the outcome of the litigation to warrant the invocation of federal jurisdiction. In Warth, the Court resolved this issue for several plaintiff groups.

The Court stated that it must assume the plaintiffs' allegations to be true—that is, that the zoning ordinance had both the purpose and effect of excluding persons of low and moderate income, many of whom were members of minority groups. The low-income plaintiffs had in fact tried to purchase housing in Penfield. The Court imposed an extremely heavy burden of proving concrete injury by requiring that these plaintiffs allege "facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield . . . ." The Court held that the low- and moderate-income plaintiffs had not shown in fact a relationship between their inability to reside in Penfield and the allegedly illegal zoning law or practices. These petitioners had, however, claimed that because of allegedly illegal actions, they had suffered harm. This was precisely what past cases had required.

In their pleadings, petitioners arguably demonstrated that there was a direct relationship between their injury and the claim they sought to have adjudicated. Because of this showing, the majority's reliance on Linda R. S. v. Richard D. was inappropriate. The basis of the decision in Linda R. S. was that the plaintiff "had made no showing that her failure to secure support payments resulted from the [allegedly unconstitutional law]." The low- and moderate-income plaintiffs in Warth filed numerous affidavits which showed the relationship between their inability to reside in Penfield and the challenged laws and practices. Thus, in Warth, the Court extended the rationale of Linda R. S., in which the plaintiff had made no showing of a causal relationship, to a case where the litigants submitted numerous and extensive affidavits at the pleading stage to demonstrate the direct relationship required. This result is inconsistent with the concept that the "purpose of pleadings is to facilitate a proper

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165. Id. at 2207 n.14.
166. Id. at 2208.
167. Id. at 2205, 2208.
169. Id. at 618.
In short, the dismissal for lack of standing creates the anomaly pointed out in Justice Brennan's dissent: plaintiffs "will not be permitted to prove what they have alleged—that they could and would build and live in [Penfield] if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching . . . the very barriers which are the subject of the suit." In *Linda R. S.*, the Court concluded that the plaintiff had failed to make any showing that she would be aided by an adjudication by the Court. The low- and moderate-income plaintiffs did allege that they could and would live in Penfield, absent the restrictive zoning laws. To demand a greater showing is to come close to the extreme of requiring a plaintiff to prove his entire case at the pleading stage. The "but for" analysis—demonstration on the pleadings that but for the defendant's allegedly illegal actions, plaintiff would not have been injured—is in sharp contrast to the Court's previous treatment of the issue. In *United States v. SCRAP*, the Court reasoned:

Here, the Court was asked to follow . . . [an] attenuated line of causation to the eventual injury of which the appellees complained—a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area. . . . [W]e deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected.

The line of causation which the Court followed in *SCRAP* was far more attenuated than that alleged in the pleadings in *Warth*. The Court reasoned that it should hear the case in *SCRAP* because "[w]e cannot say on these pleadings that the appellees could not prove their allegations which, if proved, would entitle them to seek review."  

How could the petitioners demonstrate at the pleading stage that the allegedly illegal ordinance was the cause of their inability

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173. *Id.* at 689-90.
to purchase housing in Penfield? It was a clear departure from precedent to require this showing on a motion to dismiss for want of standing. In *Jenkins v. McKeithen*, the Court outlined the procedure for evaluating such a motion:

[T]he material allegations of the complaint are taken as admitted. . . . The complaint is to be liberally construed in favor of plaintiff. . . . The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim to entitle him relief."

The decision of the Court concerning other parties in the suit paralleled the pleading requirements applied to the low- and moderate-income plaintiffs. Petitioner Home Builders, for example, alleged that the zoning ordinance had caused past projects to fail, and made future projects futile. The Court concluded that since there was no current project which had been precluded by the ordinance, the claim was unripe. Justice Brennan criticized the Court's position accurately when he stated that the majority "ignores the thrust of the complaints" that the respondents are engaged in a "purposeful, conscious scheme to exclude such housing." The "heart of the complaint" was that "respondents will not approve any project which will provide residences for low- and moderate-income people." Justice Brennan's dissent concluded that to require the existence of a current project would be an unreasonable prerequisite to standing in this case. Past injury to the building associations coupled with a future intent to build should have been sufficient to invoke the court's jurisdiction. These factors, in the setting of a challenge to exclusionary zoning practices, would satisfy the conditions the standing requirement was designed to assure.

The overall significance of the principles of analysis applied in *Warth* will be determined by future standing cases. The timing of the inquiry into causation—on the motion to dismiss for lack of standing—is a departure from past case law. As Justice Brennan pointed out, it provides the Court with a convenient conduit for dismissing complex cases on standing grounds, cases the

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177. *Id.* at 2221 (Brennan, J., dissenting).
178. *Id.* (emphasis in original).
179. *Id.*
180. *See text accompanying note 10 supra.*
Court may prefer for other reasons to leave unresolved.\textsuperscript{181} For the judiciary to dismiss a case such as \textit{Warth} for lack of standing leaves unresolved complex and difficult legal issues which were posed in an adversary context by petitioners who were alleging concrete injury. Future courts might bear in mind Professor Jaffe’s succinct comments on the judicial process:\textsuperscript{182}

Where the citizen is demanding his legally prescribed due in the form of money, property, or the specific performance of an act . . . it is a fundamental tenet of our legal system that there should be a tribunal which will provide a disinterested determination of his claim. Neither the executive nor the legislature is as dependable as the judiciary in making such determinations . . . .

As a result of the Court’s decision in \textit{Warth}, the claims of the plaintiffs in that case will likely remain without such a disinterested determination.

\textbf{IV. Conclusion}

In 1953, Justice Frankfurter called the concept of standing to sue a “complicated specialty of federal jurisdiction.”\textsuperscript{183} The recent Supreme Court cases have done nothing to vitiate the soundness of his conclusion, indeed, they have made the doctrine far more complicated and unpredictable. While it is clear that both constitutional (article III) and policy considerations enter into the standing analysis, the Court has failed to satisfactorily differentiate between the two concepts.\textsuperscript{184} In 1962, Professor Lewis stated the problems he saw with the standing doctrine at that time. His conclusions are apt today:\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{181} \textit{Warth v. Seldin}, 95 S. Ct. 2197, 2216, 2219-20 (1975) (Brennan, J., dissenting).
\item \textsuperscript{183} United States \textit{ex rel. Chapman v. FPC}, 345 U.S. 153, 156 (1953).
\item \textsuperscript{184} For example, the Court in \textit{Schlesinger} held that concrete injury was the “indispensable element of a dispute” which “adds the essential dimension of specificity” that must exist before a federal court will accept jurisdiction. \textit{Schlesinger v. Reservists Comm. to Stop the War}, 418 U.S. 208, 220-21 (1974). A litigant who is asserting a generalized grievance has only suffered abstract injury. According to the \textit{Schlesinger} Court, this is not sufficient to satisfy the prerequisites of article III. \textit{Id.} at 218-19. This construction sharply contrasts with the Court’s position in \textit{Warth}, where Justice Powell stated that litigants who assert generalized grievances are barred by a rule of judicial self-governance, and not necessarily by article III considerations. \textit{Warth v. Seldin}, 95 S. Ct. 2197, 2205 (1975).
\end{itemize}
So long as standing serves, on occasion, as a shorthand expression for all the various elements of justiciability. . . . its convenience alone likely will preclude the Court’s adoption of greater precision in the use of the concept. By the same token, discovering what the Court intends to convey when it relies on the concept will become increasingly difficult.

Justice Brennan echoed this criticism in his opinion in Warth, chiding the majority for “[refusing] to hear a case on the merits because they would prefer not to . . . .” Standing focuses on the individual and whether he has been injured; once a court looks to the merits of a plaintiff’s claim, the standing issue becomes intertwined with other elements of justiciability, such as whether the plaintiff has raised a political question.

In Warth, the Court restricted access to the courts by putting a substantial burden on the plaintiff at the pleading stage. In the context of a suit challenging exclusionary zoning practices, the Court made a significant departure from recent law regarding the purposes of modern pleading.

The Court’s belief that the “countermajoritarian implications of judicial review” should be avoided when a court is presented with issues having social or political significance was in evidence in Richardson, in Schlesinger, and in Warth. When a litigant has asserted a personal injury resulting from an allegedly illegal action, it is not appropriate to deny an adjudication of his claim under the rubric of standing. Standing is only one of the limitations on the judicial power which is derived from article III. It may be convenient for the courts to use the doctrine to resolve all of the difficult considerations involved in deciding whether federal jurisdiction has been properly invoked. Such convenience, however, does not override the need for clear judicial reasoning upon which the lower courts and the public rightfully rely.

Ronald Townsend Carman

188. See notes 110-14 supra and accompanying text.