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Burger Court's Unified Approach to Standing and Its Impact on Congressional Plaintiffs

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NOTES

The Burger Court's Unified Approach to Standing and Its Impact on Congressional Plaintiffs

Since 1969, Chief Justice Warren Burger and five Associate Justices[1] have brought a new sense of political conservatism to the United States Supreme Court.[2] From this conservatism has emerged an "interpretivist" view of the Constitution[3]—one which tends toward judicial restraint and enforces only those norms either stated or clearly implicit in the written document itself.[4] This view insists that "the work of the political branches . . . [shall] be invalidated only in accord with an inference discoverable in the Constitution."[5] Such deference to the political process is strongly evidenced by the Court's use of the standing doctrine to restrict access to the federal courts.

During the Burger Court's tenure, standing evolved from a simple constitutional test to a complex prudential inquiry.[6] This

1 Chief Justice Warren E. Burger assumed office on June 23, 1969; Associate Justice Harry A. Blackmun assumed office on June 9, 1970; Associate Justice Louis F. Powell, Jr. assumed office on Jan. 7, 1972; Associate Justice William H. Rehnquist assumed office on Jan. 7, 1972; Associate Justice John Paul Stevens assumed office on Dec. 19, 1975; and Associate Justice Sandra Day O'Connor assumed office on Sept. 25, 1981.

2 *See, e.g.*, Caine, *Judicial Review—Democracy Versus Constitutionality*, 56 TEMP. L.Q. 297, 327, 328 (1983).

3 One commentator claims that there is no reason to suppose that any necessary correlation exists between the "interpretivist" view of the Constitution and political conservatism. J. ELY, DEMOCRACY AND DISTRUST 1 (1980). However, political conservatism generally suggests the cautious, deliberate approach to decisionmaking characteristic of "interpretivist" philosophy. Addressing this conservative approach, Professor Cox has observed:

> The Burger Court does not respond to humanitarian, libertarian, and egalitarian values with all the enthusiasm of its predecessor. It is more worried by complexities, cross-currents, and needs of accommodation that refuse to yield to optimistic generalizations. A court more concerned with the preservation of old substantive values than the articulation of a new spirit is likely to find few occasions for rendering activist decisions . . . .

A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 101-02 (1976).

4 *Id. See also* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 704 (1975).

5 J. ELY, *supra* note 3, at 2.

6 In 1962, Justice Brennan observed that standing existed whenever an individual suffered some personal injury. Baker v. Carr, 369 U.S. 186, 208 (1962) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)). In his view, the Constitution required nothing more. Barlow v. Collins, 397 U.S. 159, 172-73 (1969) (Brennan, J., concurring). Recently, however, in summarizing the standing doctrine's judicial history, Justice Rehnquist noted:

> The term "standing" subsumes a blend of constitutional requirements and prudential considerations, and it has not always been clear in the opinions of this

development has caused considerable analytical confusion in determining who may sue in federal court.[7] This confusion is especially apparent when congressmen, suing as congressmen, attempt judicially to redress allegedly illegal or unconstitutional conduct by the executive or legislative branch.[8]

This note explores how the Burger Court's philosophy of judicial restraint has reshaped the standing inquiry and affected judicial handling of cases brought by congressional plaintiffs. Part I traces the standing doctrine's evolution from a simple test under the Warren Court to a complex inquiry under the Burger Court. Part II examines the development of particular standing rules for congressmen. Part III then suggests that the District of Columbia Circuit misread both the Supreme Court's decision in *Goldwater v. Carter*[9] and several of its own cases, prompting a radical change in congressional standing analysis. Part III argues that this new approach, termed "equitable discretion," is incompatible with the Burger Court's philosophy of judicial restraint. Finally, part IV concludes that the Burger Court's deference to the political process and its restrictive view of standing threaten to make congressional standing a nullity.

I. The Standing Doctrine

Article III of the United States Constitution restricts federal jurisdiction to legitimate "cases" or "controversies."[10] From this constitutional requirement has emerged the doctrine of justiciability: a set of prerequisites to federal court jurisdiction.[11] The

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Court whether particular features of the "standing" requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution.

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982) (footnotes omitted).

7 *Compare* Sierra Club v. Morton, 405 U.S. 727 (1972) *and* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1972) *with* Warth v. Seldin, 422 U.S. 490 (1975) *and* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

8 *See, e.g.*, McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981); Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982); Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632 (1977); Comment, *Standing Versus Justiciability: Recent Developments in Participatory Suits Brought by Congressional Plaintiffs*, 1982 B.Y.U. L. REV. 371.

9 444 U.S. 996 (1979) (mem.).

10 U.S. CONST. art III, § 2, provides in part:

The judicial Power [of the United States] shall extend to all Cases in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made . . . under their Authority . . . [and] to Controversies to which the United States shall be a Party . . . .

11 The justiciability requirements limit the power of the federal judiciary "to questions presented in an adversary context and in a form historically viewed as capable of resolution

justiciability doctrine prescribes four basic elements. First, a litigant must be a proper party to invoke judicial authority—that is, he must have "standing."[12] Second, the claim must be a fully developed, or a "ripe," controversy.[13] Third, the controversy must be active at every stage of disposition to avoid dismissal as "moot."[14] And fourth, the claim may not be heard if it involves a "political question."[15]

A. *The Warren Court's Liberalization of Standing*

During the Warren Court years, the standing requirement was designed simply to ensure that plaintiffs pursued their claims vigorously.[16] Under *Baker v. Carr*,[17] the standing inquiry focused solely on the "status" of the party bringing suit; the claimant was not required to show that he actually was entitled to substantive relief.[18] *Carr* required a plaintiff merely to have a legitimate interest in the issue litigated such that some "concrete adverseness" existed to fulfill the "case" or "controversy" requirement.[19]

Historically, these legitimate interests existed where plaintiffs sought to protect personal rights established at law.[20] In *Flast v. Cohen*,[21] however, the Warren Court permitted a plaintiff, suing in a

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through the judicial process." But further, they refine the role of "the judiciary in a tripartite allocation of powers." Flast v. Cohen, 392 U.S. 83, 95 (1968).

12 *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982) ("As an incident to the elaboration of this bedrock requirement [exercise of the federal judicial power] this Court has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit.").

13 *See* Poe v. Ullman, 367 U.S. 497, 503 (1961) ("[W]ithin the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity.").

14 *See* DeFunis v. Odegard, 416 U.S. 312, 316 (1974) (" '[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' The inability of the federal judiciary 'to review moot cases . . . depends upon the existence of a case or controversy.' ") (citations omitted).

15 *See* Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

16 *Baker*, 369 U.S. at 204.

17 369 U.S. 186 (1962).

18 *Id.* at 208 ("It would not be necessary to decide whether appellants' allegations of impairment of their votes . . . will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. They are asserting 'a plain, direct and adequate interest . . . [to a personal right].' ").

19 *Id.* at 204 ("Have the appellants 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? This is the gist of the question of standing.").

20 *See, e.g.*, Tennessee Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1938) ("The principle [of standing] is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.") (footnote omitted).

21 392 U.S. 83 (1968).

"public action,"[22] to challenge the legality of congressional expenditures. In granting the plaintiff "taxpayer standing," the Court found a legitimate interest in the controversy where there existed only "a logical nexus between the status asserted and the claim sought to be adjudicated."[23] *Flast* departed from prior case law, which had denied standing to plaintiffs suing as taxpayers,[24] and signaled the relaxation of standing as a hurdle to suing in federal court.

When the Court later decided *Association of Data Processing Organizations, Inc. v. Camp*,[25] it further diminished the "standing" barriers to federal jurisdiction. In *Data Processing*, the Court formally determined that standing extended well beyond legally defined rights.[26] Indeed, standing existed if "the interest sought to be protected . . . [was] arguably within the zone of interests [addressed] by the statute or constitutional guarantee in question."[27] Thus, in addition to protecting personal and economic values, plaintiffs could sue where aesthetic, conservational, or recreational interests were involved.[28]

The decisions in *Flast* and *Data Processing* had a twofold effect. First, they increased access to federal courts by permitting plaintiffs to lodge actions of an increasingly "public" character.[29] Second, they liberally expanded the scope of judicial review by reducing the "injury in fact" standard to an almost negligible threshold requirement.[30]

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22 Justice Harlan used this condemnatory phrase while dissenting in *Flast*. *See id.* at 120, (citing L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 483 (1965)).

23 *Flast*, 392 U.S. at 102.

24 *Compare Flast with* Frothingham v. Mellon, 262 U.S. 447 (1923) (denying taxpayer standing). *But see* Wilson v. Shaw, 240 U.S. 24, 31 (1907); Millard v. Roberts, 202 U.S. 429, 438 (1906); Bradfield v. Roberts, 175 U.S. 291, 295 (1899) (accepting jurisdiction in taxpayer suits without passing directly on the standing question).

25 397 U.S. 150 (1970).

26 *Id.* at 153, 154 (The "legal interest" test goes to the merits, while standing addresses the status of the challenging party.).

27 *Id.* at 153.

28 *Id.* at 154.

29 *See* Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 10-11 (1982). Under the Court's old test of standing the inquiry focused on whether the plaintiff asserted injury to a legally protected interest. *Data Processing* replaced this somewhat circular rule with the "injury in fact" test. This was considered a major breakthrough in the area of "public" litigation. *See* J. VINING, LEGAL IDENTITY: THE COMING OF AGE IN PUBLIC LAW 26-27, 39-40 (1978).

30 *See* Nichol, *Rethinking Standing*, 72 CAL. L. REV. 68, 74-75 (1984). One commentator predicted this expansion of judicial power almost a decade earlier:

> [J]udicial power expands as the requirements of standing are relaxed . . . . [I]f the so-called public action . . . were allowed with respect to constitutional challenges to legislation, then the halls of Congress . . . would become . . . only Act I of any contest to enact legislation . . . . Act II would, with the usual brief interlude, follow in the courts . . . .

Brown, *Quis Custodiet Ipsos Custodes?—The School Prayer Cases*, 1963 SUP. CT. REV. 1, 1-16.

This liberalization became most evident in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.[31] In *SCRAP*, the Court allowed plaintiff law students to sue to enjoin the Interstate Commerce Commission from increasing railway freight charges. The plaintiffs claimed future aesthetic and recreational injury because increased rates allegedly would require manufacturers to cease using recycled products and start using natural raw materials, in order to remain competitive economically.[32] The Court characterized the students' claim as something more than a "mere interest in the problem," and thus found standing.[33]

Notably, the attenuated line of causation in *SCRAP* was not important to the liberal majority's standing analysis. So long as the injuries alleged did not flow through imagined circumstances, questions of causation were left for proof at trial.[34] In dissent, Justice White argued otherwise. Joined by Chief Justice Burger and Justice Rehnquist, Justice White found the alleged injuries "too remote, speculative, and insubstantial" to confer standing.[35] They were, in his opinion, merely "generalized grievances" and thus presented insufficient bases for a justiciable case or controversy.[36]

B. *The Burger Court's Reformulation of Standing*

The majority and dissenting opinions in *SCRAP* evidence a basic tension between diametric goals of article III standing. Argua-

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31 412 U.S. 669 (1972).

32 To establish standing, SCRAP claimed that each of its members suffered economic, recreational, and aesthetic harm directly as a result of the adverse environmental impact of the railroad's 2.5% freight surcharge.

> Specifically, SCRAP alleged that each of its members was caused to pay more for finished products, that each of its members "[u]ses the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes," and that these uses have been adversely affected by the increased freight rates, that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air has suffered increased pollution caused by the modified rate structure, and that each member has been forced to pay increased taxes because of the sums which must be expended to dispose of otherwise reusuable waste materials.

Id. at 678.

33 The Court rejected the government's attempt to limit standing to "significant harm." The presence of a "direct stake" in the litigation, even though involving only slight harm, was enough in *SCRAP* to allow standing. *Id.* at 689 n.14. Indeed, as Professor Davis suggested, even a mere "trifle is enough for standing to fight out a question of principle." *Id.* (quoting Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)). *See also* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 468 (1970). It is difficult to determine, however, what real differences exist among "direct stake," "trifle," and "mere interest."

34 *See SCRAP*, 412 U.S. at 699-700.

35 *Id.* at 723 (White, J., dissenting).

36 *Id.*

bly, standing allows plaintiffs who simply have a "legitimate interest" in the claim to sue in federal court.[37] At the same time, standing carefully regulates the scope of federal judicial authority within the Constitution's tripartite scheme of separated powers and therefore requires guarded application.[38] The problem, as Justice Harlan observed candidly in *Flast*, is one of prudence: the courts must "determine in what circumstances, consonant with the character and proper functioning of the federal courts, such suits should be permitted."[39]

These conflicting purposes of standing have raised several analytical problems. As a result, the Burger Court has unified the doctrine both to narrowly define the "injury in fact" concept and to accommodate fundamental separation of powers concerns. Specifically, the Court has focused on two analytical problems with the traditional standing doctrine.

First, traditional standing analysis purports to be an inquiry independent of the merits.[40] Yet, in assessing a plaintiff's "personal stake" courts must conduct substantive inquiries. In *Flast*, for instance, the claimed "nexus" could only be evaluated by addressing the causation present in the action.[41] Similarly, if a plaintiff hopes to invoke federal judicial power to redress an injury, he logically must show that the wrong alleged will be remedied by the relief sought.

Thus, since 1974, the Burger Court has established several guidelines to determine when standing exists under article III. At an "irreducible minimum" the Court now requires a federal plaintiff to show some personal injury, actual or threatened, from the defendant's putatively illegal conduct.[42] Additionally, the plaintiff must show that the injury "fairly can be traced to the challenged

37 *See, e.g.*, Barlow v. Collins, 397 U.S. 159, 168-69 (1970) (Brennan, J., concurring); Baker v. Carr, 369 U.S. 186, 204 (1962). *See also* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1034-35 (1968).

38 *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

39 *Id.* at 120 (Harlan, J., dissenting).

40 *Flast*, 392 U.S. at 101 ("[I]n deciding the question of standing, it is not relevant that the substantive issues in the litigation might be nonjusticiable.").

41 The very concept of a nexus test requires courts to address the substantive issues of a case. *Id.* at 101-02. In finding a "nexus" in *Flast*, the Court relied on two elements. First, the taxpayer had to show a connection between his status as a taxpayer and the challenged activity. *Id.* at 102. Second, the taxpayer had to show that Congress' exercise of its taxing power violated *specific constitutional restrictions* on that power. *Id.* at 102-03. This two part test proved rather unwieldy, however, prompting the Court subsequently to acknowledge that "[t]he concept of standing to sue . . . 'is surrounded by the same complexities and vagaries that inhere in [the concept of] justiciability' in general." Jenkins v. McKeithen, 395 U.S. 411, 423 (1969) (quoting Flast v. Cohen, 392 U.S. 83, 98 (1968)).

42 *Valley Forge*, 454 U.S. at 477 (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)).

action" and "is likely to be redressed by a favorable decision."[43]

Second, traditional standing analysis fails to account for separation of powers concepts inherent in the Constitution.[44] But in *Valley Forge Christian College v. Americans United for a Separation of Church and State, Inc.*,[45] the Burger Court integrated the constitutional language of article III with the prudential considerations accompanying a healthy deference to the political branches.[46]

In *Valley Forge*, the Court subsumed into the standing doctrine the separation of powers principle previously reserved for political questions.[47] The Court finally suggested analytically what it had

43 454 U.S. at 472 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

44 Baker v. Carr, 369 U.S. 186, 210 (1962) (stating that separation of powers considerations are treated by the political question doctrine). *See also* McGowan, *supra* note 8, at 244; Nichol, *supra* note 30, at 102. *But cf.* Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 598-601 (1976) (claiming that "[o]ne needs no special doctrine to describe the ordinary respect of the courts for the political domain").

45 454 U.S. 464 (1982).

46 *Id.* at 472-74. The "constitutional" purposes of article III standing are several. First, it limits "the federal judicial power . . . 'to a role consistent with a system of separated powers . . . .'" *Id.* at 473 (quoting Flast v. Cohen, 387 U.S. 83, 97 (1960)). Second, the requirement of "actual injury" ensures that legal issues will be resolved in a concrete factual setting. *Id.* The Court classifies as prudential elements of standing the following rules only: the denial of third-party standing; the refusal to address abstract questions; and the requirement that complaints fall within "the zone of interests to be protected" by statutory causes of action.

Professor Brilmayer has elaborated on the "actual injury" requirement. *See* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979). First, she argues that it encourages judicial restraint and protects institutional decisionmaking. Because of the stare decisis doctrine, to allow a court to settle any matter it wished would give precedential effect to "the preferences of earlier courts, who are able to tie the hands of subsequent ones." *Id.* at 304. In Professor Brilmayer's opinion, a mechanism is needed "to allocate decisionmaking responsibility among successive courts, by specifying the point at which an issue may be addressed." *Id.*

Second, Professor Brilmayer identifies in the due process concept a standing element based on "fairness." *Id.* at 306. She argues that if an ideological challenger—a challenger without the traditional "personal stake" in the controversy—were permitted to litigate a constitutional claim in which he had only an "abstract interest," courts would decide matters which might have strong precedential effects on subsequent traditional litigants. Moreover, there is real concern that "ideological plaintiffs" will frame legal issues more broadly than necessary in order to obtain the results they desire, rather than the results they require, to redress an actual injury. *Id.* at 307-08. The standing requirement, therefore, ensures that individuals most affected by the challenged activity will have a role in that challenge.

47 Within what he termed the constitutional definition of standing, Justice Rehnquist observed in *Valley Forge* that:

> Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury. Thus this Court has "refrain[ed] from passing upon the constitutionality of an act [of the representative branches] unless obligated to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it."

stated prudentially for years—that each citizen's right to require that the government be administered according to the law is not a right to seek judicial redress.[48] Rather, as Chief Justice Burger observed in *United States v. Richardson*,[49] "the absence of any particular individual or class to litigate [certain constitutional] . . . claims . . . [suggests] that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."[50]

II. Standing Analysis Applied to Congressmen Prior to 1980

The Burger Court markedly has curtailed the Warren Court's liberal standing rules. First, it has limited "taxpayer standing" to the *Flast* scenario.[51] Second, by condemning "citizen standing" as an abstract and undifferentiated challenge, the Court virtually has eliminated "public actions."[52] Nevertheless, congressmen increas-

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The importance of this precondition should not be underestimated as a means of "defin[ing] the role assigned to the judiciary in a tripartite allocation of power." 454 U.S. at 474 (citations omitted).

48 *Id.* at 473. *See also* United States v. Richardson, 418 U.S. 166, 173 (1974); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973); 412 U.S. at 723 (White, J., dissenting); Flast v. Cohen, 392 U.S. 83, 100 (1968); Fairchild v. Hughes, 258 U.S. 126, 129 (1922).

49 418 U.S. 166 (1974).

50 *Id.* at 179. In the Burger Court's view, the technical rules of standing attempt to limit the federal judicial power under article III "consistent with a system of separated powers." *Valley Forge*, 412 U.S. at 472. Moreover, the "actual injury" requirement fixes a controversy in the concrete factual setting "conducive to a realistic appreciation of the consequences of judicial action." *Id.* This context helps prevent courts from deciding cases which will disrupt future proceedings through the influence of stare decisis. Additionally, it ensures that those parties who have "actual injury" will not find that the claims they hope to raise have been addressed previously in litigation by less dedicated claimants. *Id.* at 472-73. *Cf.* Brilmayer, *supra* note 46, at 308 ("[W]e do not want the concerned litigant to litigate abstract principles of constitutional law when the precedent established will govern someone else's . . . rights.").

But see Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1722 (1980) ("[T]he so-called premature decision is not likely to 'inappropriately bind' anyone; rather, it is just the beginning of an evolutionary process in which the principle [involved] will be reevaluated, refined, and ultimately either vindicated or narrowed into oblivion . . . ."); Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964) ("[T]here is an obligation to decide in some cases; there is a limit beyond which avoidance devices cannot be pressed and constitutional dicta cannot be urged without enervating principle to an impermissible degree.").

51 In Schlesinger v. Reservists Committee, 418 U.S. 208, 228 (1974), the Court limited *Flast's* "nexus" approach in two ways. First, the Court suggested that the "nexus" rule applied only to taxpayers. Second, it suggested that taxpayers could sue Congesss only pursuant to the taxing and spending clause. *Cf. Valley Forge*, 454 U.S. at 479-82.

52 *See* Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863, 871 (1977) ("*Schlesinger* and *Richardson* have substituted 'injury in fact' for 'personal stake' and 'nexus' for purposes of the case or controversy requirement and have established the proposition that except in very defined circumstances, citizens and taxpayers as such do not suffer 'injury in fact' from the government's alleged violation of the Constitution.").

ingly sue in federal courts to protect the special rights embodied in their legislative office and to uphold the constitutional workings of government.[53]

The problem surrounding these cases is that when congressmen sue in their legislative capacities they frequently seek resolution of matters which are either best left to the political process or incapable of judicial resolution.[54] Moreover, the only right which congressmen have distinguishing them from ordinary citizens is their congressional vote.[55] Thus, unless they suffer some injury to their voting powers they fail to allege "injury in fact" under article III.[56] The question of standing ultimately reduces to whether, and when, congressmen may involve the federal judiciary in protecting their voting rights against executive or congressional branch usurpation.

During the early 1970's, when the Warren Court's influence was still felt, lower federal courts frequently granted congressmen standing to sue the executive and legislative branches.[57] Congressional plaintiffs merely needed to show that, by virtue of their legislative office, they had some "interest" in the challenge.[58] Such suits often were dismissed prudentially as nonjusticiable political questions.[59] But as the standing doctrine changed under the Burger

53 *See, e.g.*, Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985); Crockett v. Regan, 720 F.2d 1355 (D.C. Cir. 1983); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 104 S. Ct. 91 (1983); Riegle v. Federal Open Market Comm., 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), *judgment vacated*, 444 U.S. 996 (1979) (mem.); Reuss v. Balles, 584 F.2d 461 (D.C. Cir. 1978); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975).

54 *See* notes 60-87 *infra* and accompanying text.

55 *See, e.g.*, Harrington v. Schlesinger, 528 F.2d 455, 459 (4th Cir. 1975) (holding that a legislator may sue to prevent the dilution of his voting power in the legislature, but that once a bill has become law the congresional interest is indistinguishable from that of any other citizen); Kennedy v. Sampson, 511 F.2d 430, 435 (D.C. Cir. 1974) (holding that a nullification of a senator's vote by the President's illegal pocket veto gave a federal legislator standing to sue); Coleman v. Miller, 307 U.S. 433, 438 (1939) (holding that the injury to the effectiveness of individual votes gave state legislators standing to sue).

56 *See* note 65 *infra*.

57 *See* note 59 *infra*.

58 For example, in Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973), the Court of Appeals for the District of Columbia Circuit granted standing where the congressional plaintiffs' interest in the case would "bear upon" their duties to consider impeachment proceedings, ratify the executive's actions, or to take other legislative measures.

59 In Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir.), *cert. denied*, 416 U.S. 936 (1974), a congresswoman sued to enjoin the bombing of Cambodia, claiming that congressional termination of funds divested the executive branch of power to continue fighting in Indochina. The court of appeals dismissed the claim as a nonjusticiable political question. In the opinion's final paragraph, the court made a three-sentence announcement that the plaintiff probably did not have standing on what later would become the rationale for Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

In Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973), 13 congressmen sought a declara-

Court, the barriers to federal court jurisdiction over cases filed by congressmen grew more formidable.

A. *The Courts of Appeals' Decisions: (1974-1979)*

In 1974, the Court of Appeals for the District of Columbia Circuit determined in *Kennedy v. Sampson*[60] that the President's improper use of a pocket veto illegally prevented a bill from becoming law. Regarding congressional standing, the court of appeals determined that, as a member of the voting majority, Senator Kennedy personally had suffered injury in fact to the effectiveness of his vote for the bill.[61] Thus, according to the court, the Senator had standing to challenge the President's action and to seek a declaratory order for the bill to be published as a validly enacted law.[62]

The *Kennedy* decision rested upon three principles. First, congressmen have a derivative rather than direct interest in protecting their votes.[63] Second, this derivative interest is nonetheless "personal" for "standing" purposes.[64] And third, some "legislative disenfranchisement" must occur before injury in fact exists.[65] Thus, once Congress (or one of its houses) suffers institutional harm, individual congressmen acquire standing derivatively because they are "among the injured."[66]

The Court of Appeals for the Fourth Circuit endorsed this rationale when it applied *Kennedy* to deny standing to congressmen challenging the President's allegedly improper enforcement of federal law. In *Harrington v. Schlesinger*,[67] the court held that once a bill became law, congressmen had no greater interest in upholding their interpretation of that law than did other citizens.[68] In such cases, congressmen could not claim dilution of their voting power

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tion that continued American involvement in Indochina was an unconstitutional use of executive power. The court dismissed the case as a political question, holding that the President had authority to wind-up the current fighting and that the judiciary was incompetent to evaluate whether, in light of foreign and military policies, his actions were proper.

60 511 F.2d 430 (D.C. Cir. 1974).

61 *See id.* at 435.

62 Chief Judge Carl McGowan of the District of Columbia Circuit has observed that in *Kennedy* the court of appeals failed to recognize any constitutional or prudential concerns "inherent in any effort by a single congressman to transform legislation into law by judicial fiat." McGowan, *supra* note 8, at 245.

63 *Kennedy*, 511 F.2d at 436.

64 *Id.*

65 *Id. See also* Harrington v. Bush, 553 F.2d 190, 199 n.41 (D.C. Cir. 1977), in which the court of appeals held that for a congressman to employ the derivative injury concept, "he must show 1) there has been injury-in-fact done to the Congress, and 2) that he, as an individual legislator, has been injured-in-fact because of the harm done to the institution."

66 511 F.2d at 435 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

67 528 F.2d 455 (4th Cir. 1975).

68 *Id.* at 459 ("Once a bill has become law . . . [a congressional plaintiff's] interest is indistinguishable from that of any other citizen.").

because they already had successfully exercised that right. Thus, their claim merely presented a nonjusticiable generalized grievance.[69]

Two years later, the District of Columbia Circuit refined its *Kennedy* rationale. Responding to the Burger Court's contraction of legal standing, the court of appeals in *Harrington v. Bush*[70] invalidated all pre-*Kennedy* analyses which granted congressional standing where executive action somehow affected a legislator's "official interests."[71] According to the *Bush* court, standing required a plaintiff to "have such a strong connection to the controversy that its outcome will demonstrably cause him to win or lose in some measure."[72] Only *Kennedy's* strict derivative injury theory satisfied this criterion. Thus, the congressional plaintiff in *Bush* lacked standing where he claimed that certain illegal actions of the Central Intelligence Agency ("CIA") were not reported to Congress, as required by the public accounting clause, and thereby deprived him of information relevant to intelligently exercising his voting right.[73]

Distinguishing *Kennedy* from *Bush*, the court observed that Senator Kennedy's injury involved the nullification of a specific vote for a specific bill, within the constitutionally mandated legislative process.[74] To that extent, the injury in *Kennedy* was measured objectively.[75] The injury in *Bush*, on the other hand, constituted a subjective claim.[76] Regarding future votes, the threat of CIA illegalities could not be "traced" sufficiently to any concrete "disenfranchisement."[77] Regarding past votes, the alleged illegalities did not divest the plaintiff of his legislative authority.[78] Thus, because the "legislative process" remained intact, Congress suffered no harm. Absent such direct institutional harm, no derivative injury flowed to the congressional plaintiff.[79]

The District of Columbia Circuit added a post-script to its

69 *Id.* at 458-59 (" 'In some fashion, every provision of the Constitution was meant to serve the interest of all. Such a generalized interest, however, is too abstract to constitute a "case or controversy" for federal resolution.' ") (citation omitted).

70 553 F.2d 190 (D.C. Cir. 1977).

71 *Id.* at 199. *See, e.g.*, note 58 *supra*.

72 *Id.* at 206 (emphasis omitted).

73 *Id.* at 208-09.

74 *Id.* at 212 ("[T]he court in *Kennedy* . . . refer[red] to a specific vote on a specific piece of legislation; it is *not* a reference to the general legislative process and all of its facets.") (emphasis in original).

75 *Id.* ("This objective standard is to be found in reference to 'official influence'; the nature of this influence is determined by the Constitution, . . . and not by an individual legislator's conception.").

76 *Id.* ("[T]he appellant . . . asserts subjective injury to his overall effectiveness which flows from his lack of information concerning the CIA.").

77 *Id.*

78 *Id.* at 213.

79 *See id.* at 199 n.41, 213. *See* note 65 *supra*.

opinion in *Bush*, concluding that the overarching separation of powers issues present throughout the case also required dismissal for lack of standing.[80] Under its reading of the Supreme Court's opinions in *United States v. Richardson*[81] and *Schlesinger v. Reservists Committee to Stop the War*,[82] the court of appeals determined that standing was an appropriate analytical vehicle by which to address separation of powers problems.[83] Because the plaintiff in *Bush* sought to vindicate his personal political values and obtain results which his colleagues refused him, the court denied standing. According to the court, to hold otherwise would allow judicial usurpation of the legislative process.[84]

In summary, the rule of congressional standing in 1977 required that some interference with Congress' constitutional authority be alleged. In the majority of cases, this authority involved Congress' legislative power.[85] Unless the "legislative will" were thwarted by some executive action, no injury in fact flowed to congressmen exercising their derivative voting rights. Moreover, challenges to both executive and legislative wisdom were insufficient for congressmen to acquire standing. Since the former challenge presents an enforcement issue and the latter reflects congressional

80 Part of the plaintiff's claim in *Bush* was that Congress allocated public monies to the CIA through a general appropriations bill. As a result, it did not require a specific CIA accounting for monies spent. Congress merely required a general accounting under article I. The court's discussion of separation of powers concerns in *Bush* is additional to and separate from its prior standing analysis on "traditional" injury in fact grounds. In relevant part, the court observed:

> As a conclusion to our analysis of appellant's Congressional standing claims . . . it is worthwhile to consider the implications of a grant of standing on the [subjective] grounds which appellant has set forth . . . . To accept these grounds for standing would in effect allow *any* Congressional suit to challenge Executive action, and an individual legislator would have a roving commission to obtain judicial relief under most circumstances. This would lead inevitably to the intrusion of the courts into the proper affairs of the coequal branches of government. . . .
>
> . . . Although we do not rest our denial of standing on these separation of powers grounds, their existence does point to the need for a *very clear* showing of concrete, personal injury in this type of case so that federal courts will not be thrust into the role of "continuing monitors of the wisdom and the soundness of Executive action . . . ."

Id. at 214-15 (emphasis in original) (footnote omitted); *cf.* United States v. Richardson, 418 U.S. 166, 179 (1974) (Some subjects are committed to the surveillance of the political process. "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy . . . to oversee the conduct of the National Government by means of lawsuits in the federal courts.").

81 418 U.S. 166 (1974).

82 418 U.S. 208 (1974).

83 553 F.2d at 214-15.

84 *See id.* at 215. *See also* note 30 *supra*.

85 Congress also possesses nonlegislative powers such as impeachment authority, approval of certain executive appointees, and treaty ratification. U.S. CONST. art. I., § 1, cls. 6 & 7; art. II, § 2, cl. 2.

judgment, neither challenge evidences the "legislative disenfranchisement" necessary under *Kennedy* and *Bush*.

B. *The* Goldwater *Decision: (1979)*

The District of Columbia Circuit's analysis of congressional standing in *Bush* is consistent with the Burger Court's current view under *Valley Forge* insofar as it accommodates both traditional standing policies and separation of powers concerns. Under *Bush*, injury in fact is carefully limited to cases of derivative harm[86] and, correspondingly, standing is absent where intrabranch controversies exist.[87]

Decisions throughout 1977 and 1978 continued to require that congressional plaintiffs demonstrate some legislative disenfranchisement consistent with *Kennedy*.[88] In 1979, however, the District of Columbia Circuit faced a special problem in *Goldwater v. Carter*.[89] There, congressional plaintiffs challenged the President's unilateral termination of a foreign treaty without seeking Senate approval.[90] The difficulty in *Goldwater* was that the plaintiffs had a live, objective claim of injury to their constitutional powers only if they had a constitutional right to review treaty terminations—an issue to be determined on the merits.[91]

Finding some "legislative disenfranchisement" in *Goldwater* became a prerequisite to deciding the merits. However, neither a majority, nor even one-third plus one of the Senate expressly asserted that it would vote against the treaty's termination.[92] Thus, as Judge Wright observed, there was no clear evidence that the executive had thwarted the legislative will. Absent such impairment—"the paradigm of injury emerging from *Kennedy*"[93]—no individual congressman could claim legal standing.

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86 *See* note 65 *supra*.

87 *See* 553 F.2d at 214-15.

88 *See, e.g.*, Metcalf v. National Petroleum Council, 553 F.2d 176, 185 (D.C. Cir. 1977) (relying on Harrington v. Bush, 553 F.2d 190 (1977) which followed the *Kennedy* rationale); Harrington v. Schlesinger, 528 F.2d 455, 459 (4th Cir. 1975).

89 617 F.2d 697 (D.C. Cir. 1979) (en banc).

90 In 1978, President Carter announced that as of Jan. 1, 1979, the United States would recognize the People's Republic of China (Mainland China) as the sole Chinese government. This recognition simultaneously would terminate the Mutual Defense Treaty with the Republic of China (Taiwan) a year later. This unilateral action, although made within the Treaty's provisions, was taken without Senate approval. *See* Goldwater v. Carter, 617 F.2d 697, 700-01 (1979).

91 *Id.* at 702-03.

92 *See* McGowan, *supra* note 8, at 246 & n.21, 265. By a vote of 59-35 the Senate amended language in a resolution to require the President to submit "any mutual defense treaty between the United States and another nation" to the Senate for approval. 125 CONG. REC. 13,672, 13,697 (1979). However, no final vote ever was taken on the resolution itself. *See* Goldwater v. Carter, 481 F. Supp. 949, 954 (D.D.C. 1979).

93 *Goldwater*, 617 F.2d at 711 (Wright, J., concurring).

The court's solution to the standing problem focused on the unavailability of political recourse for the plaintiffs. Independent Senate action was futile unless the President first had a constitutional obligation to obtain Senate approval of treaty terminations.[94] Thus, since no political recourse existed prior to a federal court's decision regarding this constitutional obligation, the plaintiffs were forced to seek judicial resolution of their complaint.[95] In the court's view, the President's unilateral act deprived the plaintiffs of the *opportunity* to cast a binding vote. This deprivation constituted a "disenfranchisement" sufficient for derivative standing[96] and allowed the court to reach the merits.

In a memorandum order, however, the Supreme Court vacated the *Goldwater* decision without mentioning congressional standing.[97] Instead, the Court relied on the justiciability doctrines of ripeness and the political question to avoid hearing the case. Writing independently, Justice Powell argued that the controversy in *Goldwater* was not ripe for judicial disposition. In his opinion, the judiciary had a prudential obligation to avoid issues affecting the allocation of political power between the executive and legislative branches. Only after the political branches reached a "constitutional impasse" should the judiciary intervene.[98] According to Justice Powell, since the Congress had not confronted the President over the treaty termination, no controversy had "ripened" suffi-

94 *See id.* at 702, 703.

95 This case differs from the situaion where a congressman challenges the actions of his legislative colleagues. Judicial intervention there intrudes into the domain of intrabranch political administration. But the redress in *Goldwater*, like that in *Kennedy*, seeks to protect the Congress from unconstitutional encroachment by the executive branch. Thus, the unavailability of legislative redress in *Goldwater* demonstrates that no threat exists of judicial intervention into the work of the political branches.

96 *See* 617 F.2d at 702, 703.

97 444 U.S. 996 (1979) (mem.).

98 Paramount in Justice Powell's opinion was the importance of judicial restraint in political matters:

> Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress *until the political branches reach a constitutional impasse.* Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.

Id. at 997 (Powell, J., concurring) (emphasis added).

Justice Powell's view appears consonant with that of Alexander Bickel. *Cf.* United States v. Richardson, 418 U.S. 166, 188 & n.8 (1974) (Powell, J., concurring) (citing with approval, A. BICKEL, THE LEAST DANGEROUS BRANCH 122 (1962)). Merely because the judiciary has the power to decide such questions, its constitutional obligation to decide rests upon the context of each case.

ciently to warrant judicial intervention.[99]

Justice Rehnquist, on the other hand, writing for Chief Justice Burger and Justices Stewart and Stevens, determined that *Goldwater* presented a nonjusticiable political question. First, there was no textual guidance within the Constitution for resolving the treaty question. Second, the issue involved foreign matters beyond the competence of the courts.[100] Thus, according to Justice Rehnquist, the issue itself, rather than the form of its coming to the Court, was beyond the scope of judicial review.[101]

III. Standing Analysis Applied to Congressmen Since 1980

The Supreme Court's failure in *Goldwater* to dispose of the case in terms of standing raised significant questions about the standing doctrine's viability as a mechanism for judicial self-restraint.[102] Moreover, because the Court addressed *Goldwater's* political overtones through traditional justiciability doctrines, courts and commentators inferred that there was no relationship between standing and the separation of powers.[103] This interpretation undermined the District of Columbia Circuit's analysis in *Harrington v. Bush*[104]

99 If courts lack the information necessary to make a decision, they must wait until such information becomes available. This waiting frequently will be until a political decision is made by a coordinate branch of government. The philosophy surrounding such abstention rests on the idea that "courts should not sap the quality of the political process by exercising initial as opposed to reviewing judgment." Bickel, *The Supreme Court 1960 Term—Foreward: The Passive Virtues*, 75 HARV. L. REV. 40, 74 (1961).

100 *Goldwater*, 444 U.S. at 1002-04 (Rehnquist, J., concurring). Justice Powell expressed much concern over Justice Rehnquist's analysis in *Goldwater*. Justice Powell determined that the goals of the political question doctrine under Baker v. Carr were threefold: to abstain where the controversy was "textually committed" to a coordinate branch; to abstain where a decision would be beyond judicial competence; and to abstain on prudential grounds. *Id.* at 998 (Powell, J., concurring).

In *Goldwater*, however, the absence of textual *guidance* differed substantially from the presence of a textual *commitment*. Although the treaty termination question was difficult to resolve, it was not *a priori* nonjusticiable. Judicially discoverable and manageable standards were present within the normal bounds of constitutional interpretation; the fact that the issue touched upon matters of foreign relations was inconsequential. Finally, since *Carr's* third ground rested upon the fear that "multifarious pronouncements by various departments on one question" would erode interbranch respect, Justice Powell found abstention appropriate on ripeness grounds. The political departments would then be free to resolve their disputes without judicial interference, but the Court would not forego its *powers* of review if a "constitutional impasse" arose. *Id.* at 998-1000 (Powell, J., concurring). Only then would the "spectre of the Federal Government [be] brought to a halt because of the mutual intransigence of the President and the Congress[,] . . . requir[ing] th[e] Court to provide a resolution . . . ." *Id.* at 1001 (Powell, J., concurring).

101 *Cf. id.* at 999-1000 (Powell, J., concurring) (under the political question doctrine, the issue itself becomes nonjusticiable despite textually explicit guidance for courts to resolve the dispute).

102 *See, e.g.*, McGowan, *supra* note 8, at 256. *See also* Riegle v. Federal Open Market Comm., 656 F.2d 873, 880 (D.C. Cir. 1981).

103 *See, e.g.*, McGowan, *supra* note 8, at 256. *See also* 656 F.2d at 880.

104 553 F.2d 190 (D.C. Cir. 1977).

and prompted a reassessment of the congressional standing doctrine.

A. *The Equitable Discretion Doctrine*

Because of the confusion surrounding *Goldwater*, the District of Columbia Circuit adopted a new theory of judicial restraint the following year. The theory, entitled "equitable discretion," was developed earlier by former Chief Judge Carl McGowan.[105] In Judge McGowan's view, a principled judicial analysis must be consistent regardless of a plaintiff's political character.[106] Thus, constitutional standing under article III should be the same for both private and congressional plaintiffs.[107]

Judge McGowan argued, however, that in trying to address separation of powers concerns, the circuit's standing doctrine failed to achieve this neutrality.[108] He read both *Bush* and *Goldwater* as requiring congressional plaintiffs to pursue collegial remedies before seeking judicial review.[109] This reading established a basic contradiction: that private and congressional plaintiffs were indistinguishable for standing purposes, but that congressional plaintiffs acquired standing only when they suffered injury which their colleagues could not redress.

Judge McGowan's thesis was that if any plaintiff passed the traditional standing "tests" and presented a justiciable dispute, then the political branches presumably had committed the dispute to the judiciary.[110] For Judge McGowan, the crucial problem lay in the separation of powers considerations attending cases involving congressional plaintiffs.[111]

In determining whether a dispute was justiciable, Judge McGowan initially turned to the traditional formulations—in particular, the political question doctrine. His analysis, however, suggested that the political question doctrine was not really a test for justiciability. Unlike ripeness, mootness, and standing, which focus on the *manner* in which a viable question comes to a court, application of the political question doctrine results in finding the actual *issue* nonjusticiable. Thus, because characterizing a question

105 McGowan, *supra* note 8, at 241.

106 *Id.* at 254-55.

107 *Id.* at 254.

108 *Id.* at 254-55.

109 *Id.* at 254. Judge McGowan's reading of *Bush* and *Goldwater* suggested that before acquiring standing "the [congressional] plaintiff suffer an injury that his colleagues cannot redress." *Id.* This view, however, is totally unsupported either in the text or the footnotes of his article. *See* notes 126-129 *infra* and accompanying text.

110 *Id.* at 255. *See also* K. RIPPLE, CONSTITUTIONAL LITIGATION 114 (1984) (the traditional formula adopted in *Riegle* may be described as "injury in fact + causation").

111 *See* McGowan, *supra* note 8, at 242, 255, 259.

as "political" forecloses judicial review, the political question doctrine is always a determination of the merits.[112]

Judge McGowan, however, argued that many cases involving congressional plaintiffs presented justiciable issues.[113] To deal with the attendant separation of powers problems, without creating new difficulties through the rigidity of the political question analysis, Judge McGowan suggested that courts accept jurisdiction over cases involving congressional plaintiffs but dismiss them for prudential reasons.[114]

This approach gained currency when it was adopted in its entirety by the District of Columbia Circuit in *Riegle v. Federal Open Market Committee*.[115] In *Riegle*, the court of appeals read the Supreme Court's *Goldwater* decision as a tacit rejection of technical "congressional standing" for a more flexible approach to justiciability.[116] In its view, however, the ripeness and political question doctrines employed by the Court failed to ensure the flexibility necessary to resolve the prudential issues arising in congressional plaintiff cases.[117] To ensure the proper exercise of judicial authority "inherent in the constitutional scheme for dividing federal power,"[118] the court of appeals invoked its equitable authority to

112 *See id.* at 257; *cf.* Goldwater v. Carter, 444 U.S. at 999-1000 (Powell, J., concurring).

113 McGowan, *supra* note 8, at 258-59. In Judge McGowan's opinion, the question of treaty termination could have been addressed judicially. He felt, however, that because the subject matter in *Goldwater* involved political processes, the Court abstained from hearing the case. Judge McGowan interpreted this action as part of a broader legal theory of equitable discretion. *Id.* at 263. He analogized the political question doctrine to federal abstention under Younger v. Harris, 401 U.S. 37 (1971), which rested on the "absence of the factors necessary under equitable principles to justify federal intervention." 401 U.S. at 54. Thus, rather than declare a dispute nonjusticiable, Judge McGowan suggested that courts accept jurisdiction over cases involving separation of powers conflicts but dismiss them for want of equity. McGowan, *supra* note 8, at 263.

114 McGowan, *supra* note 8, at 263. Judge McGowan's analysis partly followed that of Professor Henkin. *See* Henkin, *supra* note 44, at 618-25 & nn.61-62. Professor Henkin has concluded that the "political question" doctrine "is an unnecessary, deceptive packaging of several established doctrines." While the doctrine has a proper role in American jurisprudence, Professor Henkin suggests that it really consists of the following propositions:

> 1) The courts are bound to accept decisions by the political branches within their constitutional authority.
>
> 2) The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.
>
> 3) Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties.
>
> 4) The courts may refuse some (or all) remedies for want of equity.
>
> 5) In principle, finally, there may be constitutional provisions which can properly be interpreted as wholly or in part "self-monitoring" and not the subject of judicial review.

Id. at 622-23.

115 656 F.2d 873 (D.C. Cir), *cert. denied*, 454 U.S. 1082 (1981).

116 *See id.* at 880.

117 *See id.* at 881.

118 *Id.*

deny relief.

In *Riegle*, the plaintiff alleged that the Federal Open Market Committee ("FOMC") statutorily contained officers of the United States who were not confirmed by the Senate.[119] Senator Riegle claimed that this legislative scheme deprived him of his right to approve FOMC members. Applying what it termed "traditional" standing analysis,[120] the District of Columbia Circuit determined that the plaintiff had standing because he had alleged a personal stake "in the outcome of the controversy [sufficient] . . . to justify the exercise of the court's remedial powers."[121] Senator Riegle's quarrel, however, was with his colleagues because of their refusal to amend the objectional law. Therefore, the court dismissed the case as one beyond the scope of proper judicial review.[122]

By adopting Judge McGowan's reading of *Bush* and *Goldwater*, the *Riegle* court developed the following rules. Under prudential principles, congressional plaintiffs have no judicial remedy either where their challenges could be redressed by their colleagues or where private plaintiffs likely would bring similar actions, regardless of standing and justiciability.[123] Where such legislative redress is unavailable, or private action is unlikely, however, federal courts will hear congressional suits if "traditional" standing rules are satisfied.[124]

B. *Criticisms of the Equitable Discretion Doctrine*

The equitable discretion doctrine fails either to accommodate prior cases involving congressional plaintiffs or the Supreme

119 The Federal Reserve System is the nation's central bank. The FOMC is the part of the System designed to formulate national monetary policy. The FOMC consists of seven federal officers appointed by the President with the Senate's approval, and five members elected by the boards of directors of the member banks. These five members are not approved by the Senate. An issue in *Riegle* was whether these five private members, because of their function on the FOMC, held official offices of the United States in violation of the article I appointments clause. *Riegle*, 656 F.2d at 874-76.

120 *Id.* at 878 (The court applied what it termed "the traditional standing tests for non-congressional plaintiffs" to evaluate the claims of injury to congressmen.). *See also* K. RIPPLE, *supra* note 110, at 114.

121 *Id.* at 878-79 (quoting Warth v. Seldin, 422 U.S. 490, 498-99 (1975)). The court also found that Sen. Riegle had asserted a protectable interest under the appointments clause, traced his injury to the defendant's action, and requested relief sufficient to remove the harm of which he complained. *Id.* at 878-79. This analysis seemingly comports with the Supreme Court's minimal standing "tests" in *Valley Forge*. *See* text accompanying notes 42-43 *supra*. The *Riegle* court, however, found injury to a legislator's official "interests," despite the absence of "derivative injury" under *Kennedy* and *Bush*. This finding suggests that *Riegle* erroneously rejects the derivative injury theory and thus expands standing, despite the Burger Court's general trend towards judicial restraint. *See* notes 126-129 *infra* and accompanying text.

122 *See id.* at 882.

123 *Id.*

124 *Id.*

Court's *Goldwater* decision. Nor is the doctrine compatible with the Burger Court's general philosophy of judicial restraint. First, the doctrine is premised on Judge McGowan's misreading of *Bush* and *Goldwater*. Second, the doctrine greatly expands the concept of personal "injury in fact" to congressional plaintiffs. And third, *Riegle's* application of equitable discretion fails to account for the results in the Supreme Court's *Goldwater* decision. This criticism is further supported by demonstrating that the Court's *Goldwater* decision is completely consistent with the *Kennedy-Bush* theory of derivative injury.

1. The equitable discretion doctrine is erroneously premised.

Judge McGowan read the court of appeals' decisions in *Bush* and *Goldwater* as requiring congressmen to show both injury in fact and the unavailability of legislative redress before they could acquire individual standing.[125] This reading, however, is mistaken and misapprehends the underpinnings of derivative standing. In neither case did the court establish a two step congressional standing inquiry as Judge McGowan suggests.[126] Rather, the absence of legislative redress was either a corroborative element in finding actual derivative injury (*Bush*) or merely evidence to show that judicial relief would not infringe the political system (*Goldwater*).[127]

125 *See* text accompanying notes 63-65, 77-78 *supra*. Nowhere in the text of his article, however, does Judge McGowan cite to case language clearly supporting his argument.

126 Judge Skelly Wright's review of congressional standing in the District of Columbia Circuit as of 1977 shows clearly that derivative injury alone was sufficient to give congressmen standing.

> The question of standing where a legislator claims injury to his lawmaking role is not new to this court. . . . [W]e have developed a strict approach to evaluating the unique type of injury that arises when a legislator challenges Executive action. . . .
>
> . . . Under the paradigm of injury emerging from *Kennedy*, . . . [t]he injury derives from the injury to the legislature, and becomes personal to the indivdual congressman-plaintiff. . . .
>
> The Supreme Court's pronouncements on standing compel this view. As we have noted, where a legislator alleges Executive impairment of the effectiveness of his vote his injury can only be derivative. He cannot suffer injury in fact unless Congress suffers injury in fact. Congress suffers no injury unless the Executive has thwarted its will . . . .

Goldwater, 617 F.2d at 710-12 (Wright, J., concurring) (citations and footnotes omitted); *cf.* Moore v. U.S. House of Representatives, 733 F.2d 946, 952 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985) ("From *Kennedy v. Sampson* to *Harrington v. Bush* . . . we have held that unconstitutional deprivations of a legislator's constitutional duties or rights, such as the nullification of a legislator's vote . . . , may give rise to standing . . . .").

127 The derivative injury theory logically compels the conclusion in *Bush* that congressional plaintiffs do not have standing where they could seek legislative redress. *See Goldwater*, 617 F.2d at 712 & n.7 (Wright, J., concurring). According to the theory, the availability of legislative redress suggests that no institutional, and thus no derivative, injury exists. *See, e.g.*, *Bush*, 553 F.2d at 215. Absent some derivative injury, no congressional standing exists. The absence of legislative redress, therefore, merely corroborates the existence of deriva-

2. The equitable discretion doctrine expands injury in fact.

Neither *Bush* nor *Goldwater* departed from the accepted injury in fact test, as narrowly drawn by the Burger Court. They merely held that congressmen, by virtue of the legislative office, could suffer *only* derivative injury in fact.[128] This analysis is consistent with the Supreme Court's restriction of injury in fact. *Riegle*, however, departed from the derivative injury approach under the euphemism of "traditional" standing.[129] By finding injury to a congressman's right to approve FOMC members, and ignoring congressional intent to limit that right, *Riegle* expanded the scope of injury in fact for congressmen. *Riegle*, therefore, is inconsistent with the Burger Court's contraction of standing.

3. The equitable discretion doctrine fails to account for the *Goldwater* results.

The *Riegle* court, through the equitable discretion doctrine, attempted to account for the Supreme Court's *Goldwater* decision. The *Riegle* court suggested that the senators in *Goldwater* had available to them appropriate legislative relief[130] and thus prudentially should have been denied judicial review. Although *Riegle's* result comports with that of the Supreme Court's *Goldwater* decision, its argument mischaracterizes the legislative redress available in *Goldwater*. The Senate in *Goldwater* had little power to change the President's termination decision; in fact, all it could do was pass a nonbinding resolution expressing its official opinion.[131] Since this action would *not* redress the plaintiff senators' alleged injury, the equitable discretion doctrine actually suggests that the senators should have been heard.[132] This result is contrary to the Supreme

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tive injury. It neither departs from the traditional standing inquiry nor prescribes a second test for congressional standing.

The question of legislative redress in *Goldwater*, on the other hand, was totally unrelated to the issue of derivative injury. There, the absence of such redress was not a prerequisite to standing. Rather, it merely evidenced the fact that since political relief was unavailable, judicial review would not intrude on the political process. *See* 617 F.2d at 703. Thereafter, the court found standing solely on the grounds of some legislative disenfranchisement consistent with the derivative injury theory. *See* note 95 *supra*.

128 *See* note 126 *supra*.

129 *See* note 121 *supra*.

130 *Riegle*, 656 F.2d at 880 ("[C]ollegial remedies existed because Senate resolutions . . . were pending at the time.").

131 *Goldwater*, 617 F.2d at 703 ("The crucial fact is that . . . there is no conceivable senatorial action that could likely prevent termination. . . . A congressional resolution *or statute* . . . could *not* block termination . . . . [T]he *only* way the Senate can effectively vote on a treaty termination, with the burden on termination proponents to secure a two-thirds majority, is for the President to submit the proposed treaty termination to the Senate . . . .") (emphasis added). *See also* notes 91-96 *supra* and accompanying text.

132 The *Goldwater* plaintiffs had no real opportunity for legislative redress. *See* note 131 *supra* and accompanying text. Moreover, since the injury in *Goldwater* was to a legislative

Court's disposition in the case and the equitable discretion doctrine fails by negative implication.

4. The Supreme Court's *Goldwater* decision is consistent with the derivative injury theory.

The Supreme Court's opinion in *Goldwater*, however, may be interpreted consistently with *Kennedy* and *Bush*. Fifty-nine senators voted for resolution language requiring the President to seek two-thirds approval of any treaty terminations.[133] But the resolution never reached the Senate floor for a final vote. Had the resolution been enacted, the block of senators whose ratification "opportunity" would be affected by the President's action would have suffered derivative injury.[134] Thus, if the Supreme Court in *Goldwater* assumed that these senators either had or subsequently could have obtained standing by suffering a derivative injury to their combined legislative will, then analyzing the case through justiciability doctrines other than standing was essential to avoid hearing the merits.[135]

Under these circumstances, Justice Powell's opinion is explained easily. He felt the Court should not assume jurisdiction until such a vote forced a ripe "constitutional impasse."[136] On the other hand, if the Court never wanted to address the merits, then

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voting "opportunity," *see* text accompanying notes 94-96 *supra*, it is unlikely that private actions could arise. Finally, applying *Riegle*'s expanded scope of injury in fact for congressmen, the *Goldwater* plaintiffs appear to have "traditional" standing. Given these factors, *Riegle*'s equitable discretion doctrine actually suggests that the *Goldwater* plaintiffs should have been heard. *See* text accompanying notes 123-24 *supra*. Thus, *Riegle*'s approach clearly fails to explain the Supreme Court's decision in *Goldwater*.

133 125 CONG. REC. 13,672, 13,697 (1979). *See also* note 92 *supra*.

134 The concept of a lost voting "opportunity" may be explained through a more general theory of derivative injury. The right of congressmen to vote may be seen as deriving from some constitutional "voting block" within Congress. Normally, this "block" would be a one or two house majority. But in *Goldwater*, the appropriate "block" was composed of 34 senators.

In *Goldwater*, the right in question was whether two-thirds of the Senate had to approve treaty terminations. For the *Goldwater* plaintiffs, this right translated to whether one-third plus one of the Senate could bar the President's unilateral action. Thus, the constitutional voting "block" was a minority of senators. And the impossibility of this minority to obtain collegial action (even if available, *see* note 131 *supra*), constituted the requisite "disenfranchisement." *See* notes 94-96 *supra* and accompanying text.

135 As the court of appeals observed in *Goldwater*, the plaintiff senators claimed "the right to block termination with only one-third plus one of their colleagues." 617 F.2d at 703. Thus, since the court found that this minority had standing to protect its "opportunity" to vote, one logically may infer that the court's protections extend to some constitutional "voting block" within Congress. *See id. See also* text accompanying notes 94-96 *supra*.

136 *Goldwater*, 444 U.S. at 997 (Powell, J., concurring). At this point, the "block" of 34 senators would certainly have voted for the resolution. Once they demonstrated their voting preferences, the refusal by the President to submit the Mutual Defense Treaty to the Senate for review disenfranchised this "block" of its voting "opportunity." *See Goldwater*, 617 F.2d at 713.

Justice Rehnquist's approach applies.[137] His application of the political question doctrine ensures that the merits themselves, rather than the case as presented, were nonjusticiable.[138] In either event, the Court did not upset the prevailing theory of congressional standing based upon derivative injury.

This alternative reading of *Goldwater* currently is supported by the Supreme Court's opinion in *Valley Forge Christian College v. Americans United for a Separation of Church and State, Inc.*[139] The Court has subsumed into the constitutional definition of standing the separation of powers concerns formerly thought reserved to the political question doctrine.[140] And to the extent that congressmen have standing, *Valley Forge* suggests a very restrictive rule. Thus, the only rule consistent with the Burger Court's jurisprudence appears to be that of derivative injury employed in the *Kennedy*, *Bush*, and *Goldwater* decisions. Under this doctrine "once it is determined that [there] is a suit by congressmen, against congressmen, pertaining to their legislative powers, that . . . end[s] . . . the matter."[141]

C. *Current Status and Future Impact of the Equitable Discretion Doctrine*

In light of *Valley Forge*, the Supreme Court's approach to standing has assumed a markedly "interpretivist" character.[142] Deference to the political branches has assumed more than a prudential status. *Valley Forge* now requires courts constitutionally to address separation of powers considerations in their standing analyses.[143] Despite the clear implications that *Riegle* is incompatible with the Burger Court's philosophy in *Valley Forge*, however, the current rule in the District of Columbia Circuit still is "equitable discretion."[144]

The court of appeals continues to grant standing to congress-

137 *See* Bickel, *supra* note 99, at 76. Since the issue in *Goldwater* involved the right of a congressional minority to bar the President's unilateral treaty termination, the underlying question was whether 34 senators could block the political judgment of 66 senators. Had the Court addressed *Goldwater*'s merits, it would have decided intrabranch rights. Although this note agrees with Justice Powell's rationale in *Goldwater*, it recognizes the intrabranch (as well as interbranch) problems which the case raised.

138 *See* note 113 *supra*. *See also* Henkin, *supra* note 8, at 599.

139 454 U.S. 464 (1982).

140 *See* Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). *See also* notes 45-50 *supra* and accompanying text.

141 Moore v. U.S. House of Representatives, 733 F.2d 946, 963 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 105 S. Ct. 779 (1985).

142 *See* text accompanying notes 1-5 *supra*.

143 Valley Forge Christian College v. Americans United for a Separation of Church and State, Inc., 454 U.S. 464, 471-74 (1982). *See* note 46 *supra*.

144 *See, e.g.*, Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 104 S. Ct. 91 (1983); Riegle v. Federal Open Market Comm., 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

men with intrabranch quarrels, but denies them redress on prudential grounds.[145] The reason for this approach, aside from misapprehending derivative injury, appears to be the court's fear that to deny standing will make redress of Congress' article I violations impossible.[146]

Such sympathy, however, is not a license for federal courts to assume jurisdiction. Since 1974, the Burger Court has stated clearly that the absence of a party with standing to sue "is no reason to find standing."[147] Rather, as Chief Justice Burger cautions, "the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."[148]

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145 In *Vander Jagt*, the court found standing for 14 Republican House members to sue the Speaker of the House. Plaintiffs alleged that a disproportionate allocation of political representation on key House committees had diluted their political power. Although the court found the case justiciable, it refused to address the merits under the doctrine of equitable discretion. Similarly, in *Moore*, the court found standing for 18 House members to sue the House itself. Plaintiffs claimed that certain Senate action nullified their right to originate, by debate and vote, all revenue bills. Again, through its equitable discretion, the court of appeals found standing but denied review of the merits on prudential grounds.

The claims in *Vander Jagt* and *Moore* centered on intrabranch disputes. Judges Bork and Scalia, in each case respectively, argued strongly against finding jurisdiction over the internal affairs of the political branches. Because of the strong separation of powers problems attending such matters, both judges held that *Valley Forge* counseled against granting standing in these cases. Nevertheless, the District of Columbia Circuit found standing based upon its precedent in *Riegle*.

146 *See, e.g.*, *Moore*, 733 F.2d at 953 ("Because *any* claim under the Origination Clause, including one brought by a private taxpayer, will necessarily pertain to the exercise of legislative power, under [a contrary] . . . analysis, no one will ever have standing to sue for such an alleged constitutional violation.") (emphasis in original).

147 *Valley Forge*, 454 U.S. at 489 (quoting Schlesinger v. Reservists Comm., 418 U.S. 208, 227 (1974)).

148 United States v. Richardson, 418 U.S. 166, 179 (1974). Professor Doernberg argues, however, that the theoretical foundations of American government require courts to protect "collective rights." *See* Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 95-117 (1985). His premise is that the Lockean concept of *consensual* civil government requires the political branches to account generally to the public at large. *Id.* at 57-64. But if the government's "accountability must be to the group, not to any individual member of it," *id.* at 64, then Chief Justice Burger's view in *Richardson* comports with Locke's theory.

According to Locke, constitutions are the "social compacts" between the governed and the government. *See id.* at 62-63; *id.* at 64-65 (quoting E. DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 31-32 (1950)). Further, Locke suggests that the collective social right permits total dissolution of government where the people's trust is breached. Doernberg, *supra*, at 64 & n.69. Such total dissolution, however, would dissolve the judicial branch, as well as the political branches. Thus, the judiciary clearly is not an extra-governmental entity designed to protect the "collective" interest.

To avoid this analytical result, Professor Doernberg suggests that "[t]he American political system has . . . modified Locke's model by developing two methods of governmental accountability other than revolution: the elective process and judicial review." *Id.* at 67. But Professor Doernberg's analysis improperly characterizes the separation of powers dynamic and segregates the blended powers concept inherent in the Constitution.

The differences between the approaches in *Valley Forge* and *Riegle* are subtle, but important. Under the Burger Court's philosophy of judicial restraint, *Valley Forge* finds certain cases nonjusticiable by denying standing. This approach precludes courts from ever assuming power to hear cases best left to the political process.[149] The *Riegle* approach, however, permits courts to acquire jurisdiction but abstain voluntarily from reviewing the merits. Under *Riegle*, the scope of judicial power is expanded, and the sole barrier to review rests on judicial discretion. As Judge Bork noted recently, the modern standing doctrine "raises a jurisdictional bar to judicial power, while remedial discretion . . . raises no bar and grants the judiciary unfettered discretion to hear a case or not, depending on the attractiveness of the idea."[150]

The doctrine of equitable discretion thus expands the scope of judicial review contrary to the trends indicated by the Burger Court. And despite the court of appeals' exculpating statements, the doctrine "suggests the sort of rudderless adjudication that courts strive to avoid."[151] Instead of providing a principled rule of adjudication, equitable discretion empowers federal courts to decide (or not decide as individual jurists see fit) cases involving intrabranch quarrels.[152] Ironically, this power fosters the "free-

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Moreover, it threatens to raise the antimajoritarian power of judicial review above the democratic process of elective redress. *See* A. BICKEL, *supra* note 98, at 16-17.

When the public, the collective body, has a stake in the outcome of a controversy, the appropriate recourse, within the political system is through the elective process. As Justice Rehnquist has observed:

> Representative government is predicated upon the idea that one who feels deeply upon a question as a matter of conscience will seek out others of like view or will attempt to persuade others who do not initially share that view. When adherents to the belief become sufficiently numerous, he will have the necessary armaments required in a democratic society to press his views upon the elected representatives of the people, and to have them embodied into positive law.
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> . . . .
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> . . . It is always time consuming, frequently difficult, and not infrequently impossible to run successfully the legislative gauntlet and have enacted some facet of one's own deeply felt value judgments. It is even more difficult for either a single individual or indeed for a large group of individuals to succeed in having such a value judgment embodied in the Constitution. All of these burdens and difficulties are entirely consistent with the notion of a democratic society. It should not be easy for any one individual or group of individuals to impose by law their value judgments upon fellow citizens who may disagree with those judgments. Indeed, it should not be easier just because the individual in question is a judge. We all have a propensity to want to do it, but there are very good reasons for making it difficult to do.

Rehnquist, *Observation: The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 705-06 (1976).

149 *See* note 47 *supra*.

150 *Vander Jagt*, 699 F.2d at 1184 (Bork, J., concurring) ("equitable" and "remedial" discretion in this context are interchangeable terms).

151 *Id.* at 1175.

152 Professor Bickel criticized this enlargement of judicial discretion over twenty years

wheeling interventionism" which Judge McGowan hoped to remedy.[153]

D. *The Viability of the Derivative Injury Theory*

Although the derivative injury concept is consistent with the Burger Court's general contraction of injury in fact, its viability seems to hinge on that of *Kennedy v. Sampson*.[154] In Judge Bork's opinion, the judiciary's authority to entertain cases brought by congressional plaintiffs is limited to *Kennedy's* derivative injury theory.[155] According to Judge Scalia, however, *Kennedy* arose during the transition from the active Warren Court to the more restrained Burger Court.[156] Thus, in light of *Valley Forge's* integration of separation of powers concepts into article III standing, Judge Scalia argues that "*Kennedy* is no longer good law."[157]

Judge Scalia stresses that congressional plaintiffs wield the power of their office not as private citizens, but as public servants.[158] Any protectable interest, therefore, belongs to the public, not individual congressmen.[159] Thus, until the political process forces a result which harms private individuals, courts constitution-

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ago. A. BICKEL, *supra* note 98, at 122. Commenting on a colleague's liberal views regarding judicial review, Professor Bickel argued that narrow standing rules restrict the expanded discretion like that present in *Riegle*. *See id.* (addressing Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1960); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961)). According to Professor Bickel, "[i]f a case is offered by a conventional plaintiff who has standing in the pure sense . . . the question whether or not the Court must hear it is answered by the federal law of remedies . . . . There is no judicial discretion to decline adjudication, no such attenuation of the duty." A. BICKEL, *supra* note 98, at 122.

153 McGowan, *supra* note 8, at 252.

> The duty to decide justiciable cases, according to Professor [Herbert] Wechsler, is embedded in the doctrine of judicial review itself, as enunciated by Chief Justice Marshall in *Marbury v. Madison*. . . . In an analogous vein, Professor Gerald Gunther laments those who would transform a narrow ability to decline adjudicating certain cases into a "virtually unlimited choice in deciding whether to decide." Reliance on unprincipled grounds to avoid adjudication, Professor Gunther warns, can "frequently inflict damage upon legitimate areas of principle." He notes a final irony: unprincipled refusals to adjudicate justiciable cases where "there is an obligation to decide" are really "a virulent variety of free-wheeling interventionisn."

Id. (footnotes omitted).

154 511 F.2d 430 (D.C. Cir. 1970). The derivative injury theory first arose in *Kennedy* and later was refined in *Bush*. *See* notes 70-73 *supra* and accompanying text. The actual presence of congressional standing based on this theory, however, existed only in *Kennedy*.

155 *See Vander Jagt*, 699 F.2d at 1182 (Bork, J., concurring).

156 *See Moore*, 733 F.2d at 961 (Scalia, J., concurring).

157 *Id.* (footnote omitted).

158 *Id.* at 959. Congressmen have a private right to the office itself, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and the emoluments of the office. Powell v. McCormack, 395 U.S. 486 (1969).

159 733 F.2d at 959 & n.1 (Judge Scalia's view is a "conceptualism" which "reflects and facilitates application of . . . the doctrine of separation of powers.").

ally have no jurisdiction over such institutional quarrels.[160] Stated differently, Judge Scalia suggests that constitutional protections were "conferred for the benefit not of the governors but of the governed."[161] And since private plaintiffs cannot enforce congressional authority, no standing exists for anyone either to bring intra- or inter-branch claims.[162]

IV. Conclusion

The current rule in the District of Columbia Circuit, using equitable discretion to decide cases involving congressional plaintiffs, is premised on an erroneous reading of the *Bush* and *Goldwater* decisions regarding derivative injury. Moreover, equitable discretion is philosphically incompatible with the *Valley Forge* doctrine. This result does not mean, however, that the derivative injury theory is a suitable replacement for equitable discretion. While the derivative injury theory allows congressmen restricted access to federal courts under traditional theories of injury in fact, it does *not* avoid the separation of powers problems present in such cases. Thus, under the Burger Court's unified approach to standing, the derivative injury doctrine also may be inadequate to address cases involving congressional plaintiffs. If so, then *Kennedy* is no longer good law. And without *Kennedy*, congressional standing is reduced to a nullity.[163]

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160 *Id.* at 959. Judge Scalia concludes:

> The only test of congressional standing that is both consistent with our constitutional traditions and susceptible of principled application (*i.e.*, an application undistorted by the *ad-hoc* ery of "remedial discretion") must take as its point of departure the principle that we sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless and until those internal workings, or the resolution of those inter-branch disputes through the system of checks and balances . . . brings forth a result that harms private rights, it is no part of our constitutional province, which is "solely, to decide on the rights of individuals."

Id. (emphasis in original) (citations omitted); *cf.* Nichol, *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C.L. REV. 798, 819-27 (1983) (both Justices Powell and Rehnquist support a "private rights" theory of legal standing). As an example of where executive or legislative action harms private plaintiffs, Judge Scalia cites INS v. Chadha, 103 S. Ct. 2764 (1983). But the peculiar facts of that case, and the suggestion that *Chadha* constituted an appropriate use of judicial power, forces one to question the quality of Judge Scalia's illustration. *See, e.g.*, Note, *INS v. Chadha: The Future Demise of Legislative Delegation and the Need for a Constitutional Amendment*, 11 J. LEGIS. 317, 333-36 (1984).

161 *Moore*, 733 F.2d at 960 (Scalia, J., concurring) (footnote omitted).

162 *Cf.* United States v. Richardson, 418 U.S. 166, 179 (1974) ("[T]he absence of any particular individual . . . to litigate [certain constitutional] claims gives support to the argument that the subject matter is committed to the . . . political process."). *See* text accompanying note 148 *supra*.

163 The Supreme Court's recent denial of certiorari in *Moore*, 105 S. Ct. 779 (1985), may suggest a different conclusion, however. The question presented for review was whether a federal court may "refuse to decide a justiciable constitutional question patently within its

jurisdiction solely on the grounds that, in its discretion, it chooses not to do so?" 53 U.S.L.W. 3372 (U.S. Nov. 13, 1984). By denying certiorari, the Court may signal a tacit approval of the equitable discretion doctrine.

Yet, commentators run the risk of inferring too much from a denial of certiorari. Had the Court granted certiorari in *Moore*, it would have faced difficult questions about congressional standing and justiciability, as well as about the legitimacy of discretionary dismissals. Declining review in *Moore* merely may exemplify the Court's prudential decision not to decide. *See* A. BICKEL, *supra* note 98, at 127-33, 200-07.