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The Justiciability Decisions of the Burger Court

C. Douglas Floyd*

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A recurrent theme of modern “conservative” political theory has been the asserted illegitimacy of “government by the judiciary” in a representative democracy. As the Supreme Court appointees of the Republican presidents of the 1970’s and 1980’s have gradually replaced the members of the “Warren Court,” a somewhat more restrictive doctrine governing access to the federal courts might therefore have been expected to emerge.

Indeed, this has occurred. A distinguishing characteristic of the Burger Court has been an emphasis on problems of justiciability (and related questions of implied private rights of action)\(^1\)

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* Professor of Law, Brigham Young University. B.S. Massachusetts Institute of Technology, 1964; L.L.B. Stanford, 1967. The author gratefully acknowledges the thoughtful comments of Professor Robert E. Riggs.

which serve to limit the parties entitled to invoke the power of the federal courts. In the sixteen years since the appointment of Chief Justice Burger, the Court has issued over seventy opinions dealing with questions of standing, ripeness, and mootness. The overall tendency of these decisions has been to restrict access to the federal judicial forum. This development, which strikes at the core of the historic role of the federal courts as guarantors of federal constitutional and statutory rights, has been the subject of extensive scholarly commentary. Nonetheless, it is valuable to review the Supreme Court's decisions on justiciability at this juncture, after more than a decade of development, during which the characteristic points both of the Court's new justiciability doctrine and of its critics have become relatively well defined.

I. Central Characteristics of the Burger Court's Justiciability Decisions

A. Overriding Concern with the Separation of Powers and Federalism

Almost from the beginning, the Burger Court's justiciability decisions have emphasized separation of powers and federalism concerns in applying the standing, ripeness, and mootness components of the doctrine of justiciability. They thus differ significantly in emphasis from such leading Warren Court decisions as Flast v. Cohen. In Flast, the Court had recognized that the justiciability doctrine embodied two "complementary" but different limitations: the first, to "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"; the second, to "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.”4 As to “standing,” the Court concluded that the question whether a particular person is a proper party to maintain an action did not, of itself, raise separation of powers problems. Such problems arise only from the substantive issues the individual brings before the court. It followed that in construing article III limits, the only standing concern was whether the dispute would be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

In contrast, the Burger Court’s justiciability decisions, taken as a whole, have elevated separation of powers and closely related federalism5 considerations to a primary, perhaps predominant, role in interpreting and applying all aspects of the justiciability doctrine, including the question of standing. In Laird v. Tatum,6 the Court, in holding that persons subjected to allegedly illegal Army surveillance had no standing to sue based on an alleged “chilling effect” on their first amendment rights, concluded that to permit an action based on such a “generalized grievance” would be inconsistent with the separation of powers postulate implicit in article III.

Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the “power of the purse”; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.7

Similarly, in Schlesinger v. Reservists Committee to Stop the War,8 the Court rejected citizen standing to maintain an action claiming that the armed forces membership of members of Congress violated the incompatibility clause,9 resting heavily on separation of powers concerns. The Court reasoned that the standing requirement of concrete injury not only “adds the essential dimension of specificity” to permit informed judicial resolution,10 but also ensures that constitutional adjudication, “the most important and delicate” of a court’s responsibilities, “does not take place unnecessarily.”11 To

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4 392 U.S. at 95.
5 For a discussion of the relationship between federalism and separation of powers concerns, see note 26 infra.
6 408 U.S. 1 (1972).
7 Id. at 15.
9 U.S. Const. art. 1, § 8, cl. 2.
10 418 U.S. at 221.
11 Id. In the Court’s view, the existence of concrete injury not only insures that there is a need for judicial review to protect the complaining party’s interest, but also insures the framing of relief limited to the precise facts of the case. Id. at 221-23.
permit one without concrete injury to obtain judicial resolution of constitutional issues in the abstract would “distort the role of the Judiciary in its relationship to the Executive and the Legislature.”

Justice Rehnquist reiterated this theme in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, in which the Court confined *Flast's* authorization of taxpayer suits challenging public expenditures on establishment clause grounds to the narrowest possible compass. The Court emphasized that the power of judicial review “is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.” Standing requirements ensure that legal questions will not be resolved in the “rarified atmosphere of a debating society.” The Court also recognized, however, that the exercise of the judicial power affects relationships between the coequal branches of the national government. Thus, the judicial branch should neither “shrink from a confrontation with the other two coequal branches of the Federal Government, nor . . . hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.”

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12 *Id.* at 222. In a companion case, *United States v. Richardson*, 418 U.S. 166 (1974), in which the Court rejected taxpayer standing to challenge CIA accounting methods under the accounts clause of the Constitution, the Court was unimpressed by the argument that if taxpayers could not maintain such actions, no one could: “In a very real sense, 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. *Id.* at 179. Justice Powell, a central figure in the Burger Court's evolving justiciability doctrine, elaborated on this theme in his concurring opinion. In his view, “[r]elaxation of standing requirements is directly related to the expansion of judicial power.” *Id.* at 188. He considered such expansion to be inimical to a democratic form of government, see *id.* at 188-91, and advocated the prudent exercise of judicial review lest the representative branches attempt to curb the power, *id.* at 191.

Justice Powell was also concerned with the ability of the judiciary to perform its traditional role if it were forced to resolve all public interest suits brought by taxpayers. He felt that its limited resources were better used to protect individual and minority rights against oppressive or discriminatory government action. This traditional role allowed the judiciary to retain public esteem and “permitted the peaceful coexistence of the counter majoritarian implications of judicial review and the democratic principle” of the federal government. *Id.* at 192.


14 *Valley Forge* involved the standing of an organization dedicated to the separation of church and state to challenge HEW's conveyance of surplus government property to a church-affiliated college. The Court held that the organization had no standing: Its members lacked taxpayer standing because the complaint did not challenge an exercise of the taxing and spending power as in *Flast v. Cohen*, 392 U.S. 83 (1968), *id.* at 476-82, and they lacked standing as citizens because they raised only a “generalized grievance,” *id.* at 482-87. See notes 44-63 *infra* and accompanying text.

15 *Id.* at 471 (quoting *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1892)).

16 *Id.* at 472.

17 *Id.* at 474. Article III is not a “troublesome [prudential] hurdle to be overcome if
The Court's consistent emphasis on separation of powers concerns reached its zenith in Allen v. Wright, holding that parents of black public school children had no standing to challenge the adequacy of IRS procedures for denying tax exempt status to private schools which discriminated on the basis of race. The Court found that the parents had not shown the requisite "causal connection" between the IRS's policy and the racial composition of the public schools. Justice O'Connor expansively stated that "the law of Article III standing is built on a single basic idea—the idea of separation of powers." In the majority's view, standing inquiries "must be answered by reference to the Art. III notion that federal courts may exercise power 'only in the last resort, as a necessity,' . . . and only when adjudication is consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process." The Court sought to avoid "suits challenging, not specifically identifiable government violations of law, but the particular programs agencies establish to carry out their legal obligations," which "are rarely if ever appropriate for federal-court adjudication." There is reason to criticize some of Justice O'Connor's language, if taken literally. For example, the assertion that article III standing doctrine reflects the "single basic idea" of separation of powers ignores the fact that the standing inquiry also focuses on ensuring that a case is presented in a form traditionally viewed as suitable for judicial resolution. On the other hand, Justice O'Connor accurately concluded that the prior standing decisions of the Burger Court establish that separation of powers and federalism concerns are strongly implicated in the determination of who may invoke the power of judicial review, as well as in determining the

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19 See notes 59-61 infra and accompanying text.  
20 Id. at 3324.  
21 Id. at 3325 (citations omitted).  
22 Id. at 3329.  
23 See, e.g., Flast v. Cohen, 392 U.S. 84, 94-101 (1968). Indeed, the majority view in Flast was that this was the sole focus of standing doctrine.
SURELY, as the Court has repeatedly stated, the role of the judiciary in relation to the other branches and state governments is much greater if it is empowered to review executive and administrative action at the request of interested bystanders than if its power of review may be invoked only by a smaller group who are immediately threatened with injury to a claimed legal interest of their own. Moreover, to the extent that interpreting the injury, causation, redressability, ripeness, and mootness components of justiciability analysis involves uncertain questions of degree—as it does—a process of judicial line-drawing is inevitable. Justice O'Connor correctly concludes that in drawing the line between proper and improper exercises of the power of judicial review, a Court should not ignore the underlying separation of powers concept that the role of the judiciary is to resolve concrete and specific claims of violation of legal right, rather than to review executive and administrative policies and programs in the abstract. Nor, under our system of reserved state powers and delegated national powers, is there persuasive reason to conclude that the role of the federal judiciary in relation to the representative branches of state government should be greater than with respect to those of the national government.

24 Justice Stevens assumes that ripeness, reviewability, and political question considerations maintain an appropriately limited role for the judiciary. See note 20 supra. If Justice Stevens includes within his concept of "reviewability" the idea that an issue may be reviewable only at the request of a particular person or group, but not the request of others, his position would arguably serve separation of powers concerns. But if, as appears more likely, his position is that separation of powers concerns are fully satisfied by the power to determine that an issue is subject to limited or no review in general, the conclusion is more questionable. Justice Stevens' view is frequently advanced in the commentary. See, e.g., 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24:21 (2d ed. 1983).

25 See parts VII, VIII infra.

26 In Valley Forge, 454 U.S. 464 (1982), the Court suggested that its concept of limited "judicial" power reflects federalism as well as separation of powers concerns. Id. at 476. This idea has born fruit in a number of the Court's opinions. In O'Shea v. Littleton, 414 U.S. 488 (1974), the Court held that citizens of Cairo, Illinois, did not present a justiciable controversy to enjoin allegedly unconstitutional bail, jury fee, and sentencing practices, even on the assumption that they had been subjected to the challenged practices in the past. Moreover, the Court found that an injunction would intrude into the normal workings of the state criminal process without any showing of the inadequacy of the remedies available within the state system, id. at 499-504, but the "need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is 'both great and immediate'" id. at 500 (quoting Younger v. Harris, 401 U.S. 37, 46 (1971)).

Similarly, in Rizzo v. Goode, 423 U.S. 362 (1976), the Court expressed "serious doubts" whether citizens of Philadelphia presented a justiciable claim for injunctive relief against an allegedly unconstitutional pattern of police misconduct against minority citizens simply because they had been able to demonstrate a number of specific past instances of misconduct. Id. at 371-73. The Court also concluded that beyond the question of justiciability, respondents' invocation of the federal courts' equity power to supervise a local police department was "novel" and unacceptable. Id. at 377-80. In the context of our
In sum, a dominant theme of the Burger Court's justiciability decisions has been that separation of powers and federalism concerns are strongly implicated not just in determining whether the character of an issue insulates it from judicial review under the political question doctrine,27 in the broader doctrine of "reviewability" developed under the Administrative Procedure Act,28 and in determining whether an issue is sufficiently ripe for judicial intervention.29 They also lie at the heart of determining who may invoke the processes of a federal court to obtain review of a particular issue. In the Court's view, to permit invocation of the judicial process by one who has no legitimate claim to call upon the resources of the court—be it a public interest plaintiff who has suffered no personal injury, a plaintiff who has suffered no immediate injury to the federal system, "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." Id. at 389.

In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Court followed O'Shea and Rizzo in holding that a citizen subjected to an allegedly unconstitutional chokehold by the police presented a justiciable claim for damages, but not for prospective injunctive relief. The Court noted that article III requirements "shade into" those governing the availability of equitable relief. Id. at 103. Even assuming that the pending damages claim accorded Lyons standing to seek prospective injunctive relief, issuance of an injunction absent a showing of any "real or immediate threat that the plaintiff will be wronged again" would disturb the "proper balance between state and federal authority." Id. at 111, 112.

O'Shea, Rizzo, and Lyons couched their discussion of federalism heavily in terms of equitable restraint governing the federal courts, rather than limits on the nature of a justiciable controversy imposed by article III. But the Court's opinions make clear that it sees no sharp line dividing these inquiries. For example, in Allen v. Wright, 104 S. Ct. 3315 (1984), the Court relied on the results in O'Shea, Rizzo, and Lyons, in reaching the conclusion that the separation of powers concerns implicit in article III supported the denial of standing to parents of black public school children. Id. at 3330. It seems apparent that the limited concept of justiciable "case" which the Court has derived from separation of powers considerations when federal official action is challenged has in fact been viewed as fully applicable to challenges to state official action as well.

This development is, on the whole, unobjectionable. There is no principled or historical basis for concluding that the original Constitution, augmented by a Bill of Rights directed literally only to the national government, intended to confer a broader power of judicial review with respect to the actions of state officers than those of federal officers. Moreover, the history of the Civil War Amendments and the Reconstruction civil rights legislation provides no support for the conclusion that in subjecting the actions of state officers in violation of federal law to broadened federal judicial review and control, there was an intent as well to alter the understood meaning of a justiciable case. See generally 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-1888 (1971); Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323 (1952). "Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character." Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).


29 See part VI infra.
an arguable claim of legal right, or a plaintiff who cannot trace its injury to the challenged conduct— is to expand the role of the federal courts beyond the limited cases of "necessity" envisioned by the Framers. The thesis developed here is that, on the whole, the Burger Court's heightened focus on the "identification" component of standing and justiciability doctrine is a healthy one. It is more consistent with the limited role appropriate for the unrepresentative branch in a representative democracy than the concept that an interested bystander, or a person suffering injury but who has no arguable claim of impairment of any personal legal right, may subject allegedly unlawful programs or policies to judicial review. At the same time, the Court's doctrine preserves full access for those whose rights are truly at stake, and provides an ample role for the legislative branch in expansively defining substantive rights and conferring private rights of action in the public interest.

B. Increasing Definition and Particularization

A second distinguishing characteristic of the Burger Court's justiciability decisions has been a consistent effort to clarify and particularize the somewhat amorphous concepts that had emerged in prior law. This effort has manifested itself primarily in the Court's decisions on standing, although it is also evident to a lesser extent in its treatment of ripeness and mootness concerns.

Warth v. Seldin may represent the high water mark of this tendency. Justice Powell's opinion for the Court sharply differentiated the "constitutional" from the "prudential" aspects of standing, the first of which focuses solely on whether the plaintiff has alleged injury in fact which was caused by the defendant's conduct and which is likely to be redressed by judicial relief. In addition to this "minimum constitutional mandate," standing doctrine involves prudential considerations which are "closely related to Article III concerns but [are] essentially matters of judicial self-governance." These include the prohibition against the assertion of "generalized grievances," the doctrine that a plaintiff normally must assert his "own legal rights and interests," and the requirement that the "constitutional or statutory provision on which the claim rests

30 See notes 41-63 infra.
31 As developed below, the Court has viewed the question of the nature of the right asserted by an injured plaintiff as central to the process of identification of the proper plaintiff to present a justiciable controversy, consistent with the limited constitutional role of the federal judiciary, although it has characterized such considerations as "prudential" rather than constitutional. See text accompanying notes 64-92 infra.
32 See parts VI, VII infra.
33 422 U.S. 490 (1975).
34 Id. at 499-500, 503-05.
35 Id. at 500.
properly can be understood as granting persons in the plaintiff's position a right to judicial relief." 36 Because such concerns are prudential, they may be outweighed in some circumstances by "countervailing considerations." 37 Moreover, Congress may grant an express right of action to persons who would otherwise be barred by prudential standing rules. 38 Since Warth, the Court has frequently reiterated this highly defined approach to the standing doctrine. 39

Against this background, this article examines the Court's justiciability decisions in more detail. In doing so, it departs somewhat from the Court's careful compartmentalization of justiciability doctrine into "constitutional" and "prudential" concerns. This division is artificial, and in some cases misleading. Some of the principles which the Court has characterized as prudential are better understood on constitutional grounds. At the very least, the line between justiciability requirements imposed as a matter of constitutional interpretation and those imposed by the Court as a matter of "judicial self governance" is hazy. It may be more useful to focus simultaneously on both constitutional and prudential restrictions as they bear on the primary areas of focus of the Court's justiciability decisions—jury to the plaintiff, the immediacy or remoteness of that injury, and the assertion of "third party rights." In each of these areas, two subsidiary inquiries may usefully be considered. First, should the Court's decisions be viewed as discriminatory de

36 Id. at 499-500.
37 Id. at 500-01.
38 Id. at 501. In Warth, the Court also somewhat inconsistently observed, first, that the minimum constitutional requirement of injury in fact could exist "solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'" and, second, that the power of Congress to grant standing to persons otherwise barred by prudential standing rules was "subject to Article III's minimum requirement of distinct and palpable injury in fact." Id. at 501, 502.
quately explained the results that have been reached? Or has the Court subscribed to an analytical structure which produces inadequately explained results and the appearance of tendentious hostility to assertions of certain disfavored rights?

II. Injury

A. Distinct and Palpable "Injury in Fact" as the Constitutional Minimum

The Court has repeatedly stated in its recent opinions that the core article III standing requirement is that a plaintiff allege and prove that he has suffered "distinct and palpable" "injury in fact" as a result of the defendant's challenged actions. Some critics of this approach have argued that to the extent that the "injury in fact" requirement is intended to ensure concrete adverseness and a case suitable for judicial resolution, it misses the mark. Given the long-accepted view that even a trifling injury gives the plaintiff standing to sue in appropriate cases, the injury in fact doctrine must only roughly relate to the ultimate objective of assuring adequate presentation of the case before the Court. So long as the matter is not advisory, collusive, or moot and does not present a political question, a "public" plaintiff who has suffered no personal injury in fact but who has a burning ideological interest in the resolution of the question presented—demonstrated by his maintenance of the action—may be in as good or even a better position to present the issue as one directly injured. A prominent characteristic of the Burger Court's standing decisions, however, is the rejection of the ideological plaintiff, at least absent express congressional authorization for them to commence actions as private attorneys general. In United States v. Richardson, the Court concluded that a federal taxpayer had no standing to obtain a declaration that the Central Intelligence Act violated the article I requirement for a regular account of the receipts and expenditures of public moneys. Richardson did not involve a challenge to an exercise of the taxing and spending power, as did Flast; there was thus no "logical nexus" between plaintiff's complaint and his status as a taxpayer. The case was instead controlled by Froth-

45 U.S. Const. art. I, § 9, cl. 7.
ingham v. Mellon, in which the Court had denied taxpayer standing to challenge an expenditure of public funds allegedly in violation of the tenth amendment. The Court in Richardson concluded that while the barrier to taxpayers' suits erected by Frothingham had been "slightly lowered" by Flast, the principle that a taxpayer could not use a federal court as "a forum in which to air his generalized grievances about the conduct of government" remained unimpaired. Chief Justice Burger's opinion for the Court strongly implied that its holding was grounded in article III itself rather than in any prudential limitation.

The Court then appeared to change course in its treatment of the "generalized grievance" limitation in Warth v. Seldin, decided one year after Schlesinger and Richardson. Justice Powell, writing for the majority, characterized the generalized grievance rule as a matter of "judicial self governance" which was intended to prevent the judiciary from unnecessarily impinging on areas which could be

46 262 U.S. 447 (1923).
47 418 U.S. at 174 (quoting Flast v. Cohn, 392 U.S. 83, 114 (1968)). In Richardson, the plaintiff's claim was that without detailed information on CIA expenditures, he could not intelligently exercise his franchise. 418 U.S. at 177. The Court found that his claim was merely a generalized grievance. Id. at 176-77. The majority was untroubled by the idea that if the plaintiff could not obtain judicial review, then arguably no one could. This bolstered the conclusion that the matter was "committed to the surveillance of Congress and ultimately to the political process." Id. at 179.
48 Id. at 179 ("Lack of standing within the narrow confines of Article III jurisdiction does not impair the [citizen's] right to assert his views in the political forum or at the polls."). In his concurring opinion, Justice Powell agreed that broad recognition of citizen or taxpayer standing would undermine the legitimacy of judicial review in a representative democracy. Id. at 188-91; see note 15 supra. Unlike the majority, Justice Powell made it clear that he considered the "generalized grievances" limitation to be a prudential one that might be overridden by Congress. Id. at 196 & n.18.

The same theme is evident in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974), in which Chief Justice Burger again wrote for the majority. In rejecting a claim of citizens' standing, the Court characterized the plaintiffs' alleged interest in assuring the faithful performance of legislative duties by reservist members of Congress as "an abstract injury" for the claimed violation would "adversely affect only the generalized interest of all citizens in constitutional governance." Id. at 217. The Court drew support from its decision in Ex parte Levitt, 302 U.S. 633 (1937), which had precluded a challenge to Justice Black's appointment to the Supreme Court as a violation of the ineligibility clause. U.S. Const. art. I, § 6, cl. 2. See 418 U.S. at 219-20. More concrete injury was essential if the case was to be presented with sufficient specificity to provide the Court with a "complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." Id. at 220-21. No matter how intense or effective, "mere interest in a problem" was not sufficient to create standing. Id. at 266 (quoting Sierra Club v. Morton, 405 U.S. 727, 739 (1972)). As in Richardson, the Court's opinion was focused on the requirement of article III rather than on any prudential aspect of standing requirement.
49 422 U.S. 490 (1975) (5-4 decision).
50 In Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), plaintiffs who challenged the legality of members of Congress holding reserve commissions in the armed forces were denied standing as either citizens or taxpayers. Their interests were common to the public at large and they failed to satisfy the nexus requirement of Flast.
more competently addressed by other governmental institutions.\textsuperscript{51} The Court's decision in \textit{Warth} did not turn on this point. Nonetheless, the idea that the "generalized grievance" limitation is wholly a prudential one appeared frequently in the Court's subsequent standing decisions.\textsuperscript{52}

In \textit{Valley Forge},\textsuperscript{53} however, the Court again invoked article III underpinnings for the doctrine.\textsuperscript{54} Plaintiffs contended that they had standing as citizens to raise their establishment clause challenge to a transfer of surplus property of the United States to a church affiliated college. In upholding standing, the court of appeals had distinguished \textit{Schlesinger} and \textit{Richardson} on the ground that, unlike the constitutional provisions involved there, the establishment clause arguably created a "personal constitutional right" to a government that did not establish religion, the violation of which conferred standing.\textsuperscript{55} The Supreme Court emphatically rejected this contention, \textit{not in prudential, but in constitutional terms}. The Court found that there was no "principled basis" on which the rights asserted in \textit{Schlesinger} and \textit{Richardson} could be distinguished from that in \textit{Valley Forge}.\textsuperscript{56} The only injury identified by plaintiffs was "the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury \textit{sufficient to confer standing under Art. III}, even though the disagreement is phrased in constitutional terms."\textsuperscript{57} The business of the federal courts is not to correct constitutional errors, but to resolve cases and controversies, and the Court was "unwilling to countenance such a departure from the limits on judicial power con-

\begin{itemize}
\item \textsuperscript{51} 422 U.S. at 499-500.
\item \textsuperscript{53} 454 U.S. 464 (1982); see notes 13-17 supra. The Court rejected the plaintiffs' claim of taxpayer standing because they did not challenge an exercise of the taxing and spending power as required by \textit{Flast}, but of Congress' power under the property clause, U.S. Const. art IV, § 3, cl. 2.
\item \textsuperscript{54} The Court repeated the view that article III, at an irreducible minimum, requires the complaining party to show injury in fact as a result of the defendant's conduct, and that beyond this, as a prudential matter, the "Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." \textit{Id.} at 475 (quoting \textit{Worth} v. \textit{Seldin}, 422 U.S. 490, 499-500 (1975)).
\item \textsuperscript{55} Americans United For Separation of Church and State, Inc. v. United States, 619 F.2d 252, 265 (3d Cir. 1980), \textit{rev'd sub nom.} \textit{Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.}, 454 U.S. 464 (1982).
\item \textsuperscript{56} 454 U.S. at 484; see notes 62-63 \textit{infra} and accompanying text.
\item \textsuperscript{57} 454 U.S. at 485 (emphasis added). The intensity of plaintiffs' interest in the problem was irrelevant because the "concrete adverseness" contemplated by the standing doctrine is "the anticipated consequence of proceedings commenced by one who has been injured in fact." \textit{Id.} at 486.
\end{itemize}
In *Allen v. Wright*, the Court similarly refused to recognize alleged "stigmatic" injury of black parents of public school children as sufficient to confer standing to challenge the adequacy of IRS procedures to deny tax exempt status to racially discriminating private schools. The plaintiffs' children had not applied for admission to these schools. Although noneconomic injury can be fully cognizable, standing based on racial discrimination extends only to those personally discriminated against. The Court stated: "Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' . . . *Constitutional limits on the role of the federal courts preclude such a transformation.*"

The Court's treatment of the issue of the "generalized grievance" raises a number of questions. The characterization of this aspect of modern standing doctrine as prudential undoubtedly reflects the Court's concern that it not foreclose Congress from conferring broad public interest standing on taxpayers or interested citizens in appropriate cases if it wishes to do so. Yet, the Court's discussion of the generalized grievance limitation in *Schlesinger* and *Richardson* has a distinctly constitutional tone. This could perhaps be dismissed as the product of lack of adequate consideration for a potential congressional role, rectified by the Court's more careful articulation in *Warth*, if not for the constitutional emphasis of *Valley Forge* and *Allen v. Wright*. Perhaps the Court meant to suggest some limitation on Congress' power to confer public interest standing. Does the nature of the "generalized grievance" limitation depend upon the type of generalized claim asserted? Is the limit on taxpayer standing wholly prudential, whereas the limit on the assertion of the generalized interest of citizens in constitutional governance constitutionally compelled?

Even assuming that the "generalized grievance" rule is a prudential one, the question remains of when, if ever, it is appropriate for the Court to depart from it without explicit congressional sanction. The Court has not directly addressed this question, but in *Sierra Club v. Morton*, Justice Stewart, writing for the Court, observed that "the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." This

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58 *Id.* at 490 (emphasis added); *see also* *Allen v. Wright*, 104 S. Ct. 3315, 3326-27 (1984).
60 *Id.* at 3327; *see also* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67 (1972).
61 104 S. Ct. at 3327 (emphasis added; citation omitted).
is surely true. If the IRS assessed a one cent surcharge on all United States taxpayers without congressional authorization, then none would question that each had standing to challenge the illegal tax, despite the fact that the grievance is a "generalized" one. That the injury is an economic one is not the critical point of distinction from Schlesinger, Richardson, Valley Forge, and Wright, for the Court has made clear that noneconomic injuries are sufficient to satisfy the "injury in fact" component of its article III standing doctrine. 63 On what ground, then, can the cases rejecting a generalized concern with constitutional governance be distinguished from the tax case involving a trifle?

Before venturing to answer these questions, it is useful to examine another major aspect of the Court's treatment of the "injury" component of the standing doctrine—the nature of the injury sufficient to establish standing to sue. The Burger Court's treatment of this subject begins with Justice Stewart's opinion in Sierra Club. While rejecting the standing of the organizational plaintiff on the ground that the complaint did not allege that any of its members had personally suffered injury as the result of the defendants' actions, the Court emphasized that "injury in fact" sufficient to satisfy the standing requirements of section 10 of the Administrative Procedure Act 64 (and, implicitly, the requirements of article III), was not limited to economic injury. "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society." 65

The Court continued its apparently expansive approach to the nature of the "personal" injury that will establish standing to sue in Trafficante v. Metropolitan Life Insurance Co., 66 in which it held that the "person aggrieved" language of section 810(d) of the fair housing

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63 See text accompanying notes 91-92 infra.
64 "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." 5 U.S.C. § 702 (1982).
65 Sierra Club v. Morton, 405 U.S. 727, 735 (1972). The Court also observed that:

[T]he trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and toward discarding the notion that an injury that is widely shared is ipso facto not an injury sufficient to provide the basis for judicial review.

Id. at 738. The Court held that Sierra Club nonetheless lacked standing because it had not alleged that any of its members would personally suffer aesthetic or environmental injury. Because the Court's holding appeared to turn on an easily cured pleading deficiency, it is difficult to argue that Sierra Club evidences any ingrained hostility to assertions of environmental interests. This conclusion is born out by the Court's subsequent decision in the SCRAP case. 412 U.S. 669 (1973). While one could argue that Sierra Club and SCRAP were "early" Burger Court decisions and that the tone of later decisions is to the contrary, that assertion is not supportable.
provisions of the Civil Rights Act of 1968 was intended to define standing as broadly as article III permits. Under this standard, both a white and a black tenant of an apartment complex that had allegedly discriminated against nonwhite rental applicants had standing based on their allegations that they had been denied the social benefits of living in an integrated community. The Court focused on the legislative history of the housing provisions, which tended to show that proponents of the legislation believed that those who were not the direct objects of discrimination had an interest in ensuring fair housing. In their concurring opinion, Justices White, Blackmun, and Powell—three "centerists" whose views are particularly important in detecting the likely trend of decisions on the Court—relied heavily on the broad language of the private right of action provision, and suggested that they would have found article III injury in fact to be lacking absent the statutory authorization to sue.

In United States v. Students Challenging Regulatory Agency Procedures (SCRAP), the Court not only held that damage to environmental interests was sufficient to support standing in actions seeking judicial review under section 10 of the Administrative Procedure Act, but, in apparent contradiction to later decisions requiring a strong demonstration of causation, based standing upon a lengthy and speculative chain of contingencies. In S C R A P , unlike Sierra Club, the plaintiffs had specifically alleged that they used the forests, streams, mountains and other resources allegedly adversely affected by the challenged freight rate increase. The Court recognized that the environmental injury alleged in S C R A P , if it could be established, was shared by "all persons who utilize the scenic resources of the country, and indeed all who breathe its air." Nonetheless, standing would not be denied, for "[t]o 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."
In *Warth v. Seldin*, the Court addressed the injury question only in passing. It observed that "the actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"\(^{72}\) The Court thus apparently endorsed the suggestion of Justice White's concurring opinion in *Trafficante* that congressional action may, in some way, create constitutional "injury in fact" which would not otherwise exist.

Following *Warth*, the Court continued to recognize impairment to a wide variety of noneconomic and intangible interests as sufficient to constitute article III injury in fact. In *Duke Power Co. v. Carolina Environmental Study Group*,\(^{73}\) plaintiffs challenged the provisions of the Price-Anderson Act limiting liability in the event of a nuclear accident. The Court held that the "thermal pollution" of bodies of water used by the plaintiffs for recreational purposes and the "non-natural radiation into appellees' environment" that allegedly would be caused by the construction and operation of nuclear power plants constituted sufficient injury to accord them standing.\(^{74}\) The Court concluded that there was no need to rely on the uncertain prospect of injury resulting from a future nuclear accident.

In *Gladstone Realtors v. Village of Bellwood*,\(^{75}\) the Court once again considered a "statutory" standing issue under the fair housing provisions of the Civil Rights Act of 1968. It concluded that section 812 of the Act was intended to extend standing to the fullest scope permitted by article III of the Constitution. The Court sustained the standing of the Village of Bellwood to challenge the alleged racially discriminatory "steering" practices of the defendant realtors on the ground that its tax base might be diminished by in-

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\(^{72}\) 422 U.S. 490, 500 (1975). The Court relied on *Sierra Club* and on dictum in Linda R.S. v. Richard D., 410 U.S. 614 (1973), in which the Court observed in a footnote: "It is, of course, true that 'Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions,' . . . But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Id.* at 617 n.3 (citations omitted).

\(^{73}\) 438 U.S. 59 (1978). In *Duke Power*, standing was apparently not based on the broad authorization of judicial review of the Administrative Procedure Act.

\(^{74}\) *Id.* at 73-74. The Court relied upon its prior decisions in *SCRAP* and *Sierra Club*.

Other Justices were less sanguine about the Court's injury analysis. Justice Stewart would have remanded the action with directions to dismiss the complaint, even assuming that but for the Price-Anderson Act's limitation of liability provisions the nuclear plants in question would not have been constructed. "Surely there must be some direct relationship between the plaintiff's federal claim and the injury relied on for standing." *Id.* at 95 (Stewart, J., concurring in the judgement) (original emphasis). Justice Stevens expressed the same concern. In a footnote he pointed out that many statutes facilitate the financing of public projects, but "[o]ne would not assume . . . that mere neighbors have standing to litigate the legality of a utility's financing." *Id.* at 103 n.6 (Stevens, J., concurring in the judgment).

\(^{75}\) 441 U.S. 91 (1979).
creased segregation of the community attributable to such steering. As to four individual respondents who were residents of the “target area” of the steering practices, standing was sustained on the *Trafficante* theory that denial of the benefits of living in an integrated community constituted sufficient injury.

Justice Powell’s majority opinion noted that although Congress could pass legislation removing the prudential limitations on standing, it could not abrogate the article III minima: A plaintiff must always have suffered “‘a distinct and palpable injury to himself.’” Contrary to prior intimations, then, the Court suggested that there might be some undefined limit of Congress’ power to create legal interests the impairment of which will create injury sufficient to support standing to sue.

The Court’s apparently expansive approach to the injury component of the standing doctrine collided with its hostility to the assertion of “generalized grievances” in *Allen v. Wright* and *Valley Forge*. In *Wright*, the Court recognized the seriousness of stigmatic injury to those directly discriminated against, but declined to recognize standing in all members of the stigmatized racial group. In *Valley Forge*, a narrowly divided Court rejected a claim of citizen standing based on the contention that the establishment clause created a “personal constitutional right” in each citizen. Plaintiffs’ complaint failed to identify any “personal injury suffered by the plaintiffs as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees,” and that was held not to be an injury sufficient to confer standing under article III.

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76 Id. at 110-12.
77 Id. at 112-15. The Court rejected the argument that while such an injury might suffice within a single apartment complex as in *Trafficante*, it should not be recognized within the larger area of an entire neighborhood, for it found no categorical distinction between the two injuries. Id. at 114. The Court did recognize, however, that a neighborhood might be so large or lacking in “shared social intercourse” that injury of the kind alleged would not exist. Id.
78 Id. at 100 (citations omitted).
79 See notes 59-61 supra and accompanying text.
80 The majority stated that “the assertion of a right of a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Article III without draining those requirements of meaning.” 454 U.S. at 483. The norm of governmental conduct established by the establishment clause could not be differentiated from that created by other provisions of the Constitution. “We know of no principled basis on which to create a hierarchy of constitutional values or a complementary ‘sliding scale’ of standing which might permit respondents to invoke the judicial power of the United States.” Id. at 484.
81 Id. at 485-86 (original emphasis). The majority professed adherence to its earlier holdings that noneconomic injury might constitute injury in fact, but concluded that plaintiffs had not “alleged an injury of any kind, economic or otherwise, sufficient to confer standing.” Id. at 486 (original emphasis). The challenged property transfer had occurred in Pennsylvania. The plaintiffs resided in Virginia, Maryland, and Washington, D.C. and
Justice Brennan's dissent for himself and Justices Marshall and Blackmun rested primarily on the ground that whether article III "injury in fact" exists frequently turns on the nature and source of the claim asserted. The question is whether the plaintiff has a "legal right under the constitutional or statutory provision upon which he relies."82 The dissenters contended that the Court "makes a fundamental mistake when it determines that a plaintiff has failed to satisfy the two-pronged 'injury-in-fact' test . . . without first determining whether the Constitution or a statute defines injury, and creates a cause of action for redress of that injury, in precisely the circumstance presented to the Court."83 They concluded that when the federal government moves funds from the citizens to the ministry, "each . . . federal taxpayer suffers precisely the injury that the Establishment Clause guards against."84 Flast "did not depart from the principle that no judgment about standing should be made without a fundamental understanding of the rights at issue."85

The court returned to more comfortable ground in its unanimous opinion in Haven Realty Corp. v. Coleman.86 The primary issue was whether black and white "testers" had standing to challenge racial steering under section 812 of the Fair Housing Act, which the Court had interpreted in Gladstone to extend as far as article III of the Constitution would permit.87 The Court upheld the standing of a black tester on the ground that section 804(d) of the Housing Act

learned of the transfer in a news release. The Court stated that plaintiffs had no "special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." Id. at 487. In a footnote, the Court rejected a claim of standing under the broad standing provisions of the APA because "neither the [APA] nor any other congressional enactment, can lower the threshold requirements of standing under Art. III." Id. at 487 n.24.

82 Id. at 492-93 (emphasis added).
83 Id. at 492 (Brennan, J., dissenting); see also id. at 509. Justice Brennan distinguished Frothingham's rejection of taxpayer standing primarily on the ground that taxpayers in general have no substantive right to complain of unlawful expenditures of their tax dollars: they lack the "required legal interest because the Due Process Clause . . . does not protect taxpayers against increases in tax liability." Id. at 499 (emphasis added). The majority's means of distinguishing Flast, that Valley Forge involved executive rather than congressional action and the disposition of surplus property rather than direct expenditure of public monies, was wholly mechanical and artificial. Justice Stevens' dissenting opinion agreed that the majority's distinction of Flast tended to "trivialize the standing doctrine" and argued that Flast quite clearly rested on the special character of the establishment clause. Id. at 513-15 (Stevens, J., dissenting).

84 Id. at 509 (Brennan, J., dissenting). Justice Brennan stated that the history of the establishment clause demonstrated that it was explicitly designed to preclude state taxation for the support of religious institutions, id. at 500-04, and that the taxpayer was the direct and intended beneficiary of the prohibition on financial aid to religion, id. at 504.
85 Id. at 508-09 (Brennan, J., dissenting).
87 See notes 75-78 supra and accompanying text. In Gladstone, the issue of tester standing had been abandoned in the Supreme Court and the question was reserved.
precluded false representations to "any person" on account of race that housing was not available when in fact it was. The black tester had suffered the precise injury that the statute was to guard against and so had standing.\textsuperscript{88} On the other hand, the white tester, who had received correct housing information, had no standing because he had not suffered the injury contemplated by the statute.\textsuperscript{89} The Court also sustained the standing of HOME, an organization dedicated to obtaining equal opportunity in housing in the Richmond area, on the ground that defendants' alleged racial steering practices impaired its counseling and referral services.\textsuperscript{90}

In its unanimous 1984 decision in \textit{Heckler v. Matthews},\textsuperscript{91} the Court again considered the injury component of standing doctrine. A male retiree alleged that a provision of the Social Security Act applying an offset for other pension payments to nondependent men, but not to certain excepted nondependent women, constituted a denial of equal protection of the laws. If the challenge was successful, the plaintiff would achieve no financial gain: a severability provision provided that if the exception to the offset provision were held invalid, the offset would not be eliminated, but would be extended to the women previously excluded. The Court nonetheless upheld the plaintiff's standing. Justice Brennan's opinion for the Court relied upon the very "legal interest" analysis that he had advanced unsuccessfully in his \textit{Valley Forge} dissent. He reasoned that apart from any financial gain, the denial of equal treatment "can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group."\textsuperscript{92}

As in the case of the Court's "generalized grievance" doctrine, review of the Court's treatment of the "injury in fact" required to establish standing raises a number of questions. The Court has indicated a willingness to recognize nontraditional interests—including the subjective and intangible interests of environmental and civil rights plaintiffs. But this liberal view has, with the exception of \textit{Duke Power}, manifested itself almost entirely in cases involving inter-

\textsuperscript{88} \textit{Id.} at 373-74.
\textsuperscript{89} \textit{Id.} at 374-75.
\textsuperscript{90} \textit{Id.} at 378-79. The Court expressed doubt that the individual plaintiffs had suffered the "injury in fact" of being denied the benefits of living in a racially integrated community. Although such injury had been recognized in \textit{Trafficante} and \textit{Gladstone}, plaintiffs in this case alleged only that they were residents of the area where defendants' had engaged in steering. Such allegations, unlike those relating to an apartment complex or relatively compact neighborhood, were insufficient to show that the alleged steering had affected the plaintiffs' own interracial associations. The case was remanded to allow the plaintiffs to plead their injury with more particularity. \textit{Id.} at 375-78.
\textsuperscript{92} 104 S. Ct. at 1995.
pretation of broad statutory standing provisions such as section 702 of the Administrative Procedure Act, or the private right of action provisions of the Fair Housing Act. The Court's explanation for this is that standing is found in such cases because article III injury may be based on the violation of an interest created by a statute, as well as more traditional forms of economic injury.

This explanation has superficial appeal, which diminishes on closer examination. If the Court were concerned solely with "injury in fact" as the constitutional minimum, then why should congressional recognition of an injury be necessary to accord article III significance? If denial of the benefits of interracial association or misrepresentation to a tester are "injuries in fact" when recognized by Congress, why are they not "injuries in fact" without congressional recognition? If injury to the intangible interest in the quality of the environment is constitutionally cognizable under the broad judicial review provisions of the Administrative Procedure Act, why is it not equally cognizable apart from the Act? Duke Power may be read as holding that such environmental interests are generally cognizable without a special statutory basis; however, it is not clear how such interests are to be distinguished from the interests in Trafficante, Gladstone, and Havens Realty, in which the Court quite clearly rested standing wholly on the existence of special statutory standing provisions.

The Court's treatment of the congressional role has produced other ambiguities. It has held that Congress can create legal interests the impairment of which satisfies the injury in fact requirement of article III. At times it has suggested that this power is unlimited, while at other times it has suggested that this power is subject to a bedrock constitutional requirement of injury in fact which exists prior to and apart from congressional recognition. Which view applies is of critical significance in light of the broad citizen standing provisions found in much current legislation, not all of which can be seen as merely recognizing some pre-existing injury, and some of which appear to encroach on the Court's general proscription against basing standing on "generalized grievances."

Another question arises from the interrelationship of the Court's view that statutory provisions may create legal interests the

93 See text accompanying notes 61-63 supra.
violation of which create standing, and its frequently reiterated "prudential" rule that "generalized grievances" are not judicially cognizable. If Congress can override this "prudential" rule, why may not the Constitution itself do so? This is the point argued by Justice Brennan in his *Valley Forge* dissent.

These difficulties strongly suggest that something is amiss in the Court's elaborate articulation of the standing doctrine in *Warth*. "Injury in fact" is a poor vehicle for assuring concrete adverseness and a case suitable for judicial resolution. The circumstances in which intangible interests will support standing are poorly differentiated from those in which they will not. The kinds of "generalized grievances" which will provide access to the judicial forum are not clearly distinguished from those which will not. And the role of Congress, while obviously important, appears to rest on superficial premises and is of uncertain scope.

The problem, however, may be merely one of emphasis. As previously noted, the Court has deemphasized the requirement that a plaintiff, in order to present a justiciable controversy, must allege a violation of his own legally protected interests. Beginning in *Warth*, the Court has repeatedly characterized as "prudential" the requirement that a plaintiff's claim be within the "zone of interests" protected by the statute or have some "nexus" with the challenged conduct, and its refusal to entertain assertions of "generalized grievances" and third party rights. But on the Court's own premises, these matters are of more fundamental concern. The driving force of most of the Burger Court's significant justiciability decisions is not a concern with assuring the presentation of issues in a form suitable for judicial resolution, but a preoccupation with questions of separation of powers and federalism—in short, a focus on the proper role of the federal judiciary in our system of separated federal powers and reserved state powers. Thus, the justiciability decisions of the Court are designed primarily to limit the group of plaintiffs potentially capable of presenting issues with sufficient concrete adverseness to those whose invocation of the power of judicial review is most consistent with the constitutional premises regarding the proper role of the federal judiciary.

The "generalized grievance" doctrine would then represent a constitutionally grounded view that opening the federal courts to an interested citizen who asserts no peculiarly individual rights would be inconsistent with the judicial role envisioned by the Framers. Widespread grievances such as the "trifle" exacted by a universal illegal tax, or the environmental injury alleged in *SCRAP*, may still be justiciable; the individual is viewed as asserting the impairment of a legal interest which is, in some sense, peculiar to himself, and not merely an abstract concern with government in
accordance with the law. The constitutional standing inquiry, in short, turns on whether the plaintiff's claim is arguably within the "zone of interests" protected by the statutory or constitutional guarantee asserted.

Just as the Court's focus on "injury in fact" as the touchstone of constitutional standing is unsuited to identifying those litigants who have a sufficient stake to assure adequate presentation of a controversy, it is also unsuited to identifying litigants whose invocation of the judicial process is consistent with a properly limited judicial role. From a separation of powers and federalism standpoint, there is as little reason to grant access to the judicial process to a person who has suffered incidental injury as a result of governmental conduct which injures no arguably protected right of his own, as to the concerned citizen or public interest organization. Both might have a strong interest in obtaining a favorable resolution of the question. If the role of the judiciary is viewed as the vindication of individual rights where it is necessary to do so, however, neither has any logical claim to a right to invoke the judicial power. One who claims no legal entitlement of his own, but who has suffered from some adverse collateral consequence against which the law provides him no protection, is no more entitled to access to the federal courts than one who has suffered no injury at all.\textsuperscript{95}

This perspective makes the role of Congress more comprehen-

\textsuperscript{95} The Fourth Circuit relied on these premises in \textit{Leaf Tobacco Exporters Ass'n v. Block}, 749 F.2d 1106 (4th Cir. 1984). The court held that leaf tobacco exporters had no standing to challenge a decision of the Secretary of Agriculture to permit a tobacco growers' cooperative to sell directly to foreign purchasers. Since it concluded that the statutory scheme had been enacted to protect the interests of tobacco growers, not exporters, the exporters were not within the zone of interests protected by the statute. \textit{Id.} at 1112-16. In its view, the zone test "rests on the need to secure the benefits of a statutory program for the groups that Congress intended to benefit," \textit{id.} at 1111, and "prevent[s] groups outside of the [protected] class from usurping the legislative enactment," \textit{id.} at 1115. Thus, the zone test "furthers the general recognition of standing doctrine that the decision to enforce legal rights usually belongs to the possessor of those rights," \textit{id.} at 1111, and "permits government officials to act in furtherance of congressional purposes without the prospect of protracted court challenges from those whose interests Congress clearly did not protect," \textit{id.} at 1116.

The court emphasized its view that the zone test was "prudential" and not "constitutional"; however, the primary thrust of this observation was to preserve the power of Congress to modify the test. \textit{Id.} at 1112. The zone test is better understood to rest on constitutional premises.

Although expressed somewhat differently, the analysis suggested here is not in conflict with Professor Brilmayer's focus on questions of "self-determination" as important determinants of justiciability doctrine. See Brilmayer, \textit{The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement}, 93 HARV. L. REV. 297, 511-14 (1979). Although she declines to ground such considerations wholly on separation of powers arguments, \textit{id.} at 303, her views are broadly consistent with a theory focused on appropriately limiting the role of the judiciary in a representative democracy. Where those whose rights are at stake do not wish to assert them, it is institutionally inappropriate as well as philosophically questionable to allow interested by-standers to do so.
sible. The significance of congressional authorization is not simply in creating injury, but in conferring an arguable claim of legal right on those who seek to invoke the judicial process. Thus, the injury in *Trafficante* is cognizable only with congressional sanction, not because the denial of the benefits of living in an integrated community was not an "injury" prior to congressional recognition, but because it was unrelated to any arguable claim of legal entitlement until that time.

Under this approach, there is no underlying, pre-existing "core" of article III "injury in fact" which limits congressional ability to grant standing to public interest plaintiffs. Congress' ability to create legal interests—including an interest in every citizen in compliance with a particular constitutional provision or statutory scheme—is limited only by the scope of its enumerated powers under the Constitution, and not by some judicial conception that the class of plaintiffs is too large, or that the interest created is too abstract. This is not to assert that Congress can override the separation of powers concerns inherent in the Constitution, or the appropriate limits on the judicial power inherent in article III. But so long as the controversy presented is real and immediate, the judgment sought is not advisory, and the suit does not infringe on the constitutional prerogatives of the executive. Article III contains no principled basis for limiting Congress' power to create private rights of action—and thus claims of legal entitlement—in broad groups of private attorneys general or the citizenry at large beyond those limiting Congress' power to enact substantive legislation generally.96

The result in *Valley Forge* would thus turn, not on a "prudential" rule that generalized grievances should not be entertained by the federal courts, but on the rejection on substantive grounds of the claim espoused by Justice Brennan that the establishment clause creates a personal legal right in every citizen to assure the constitutional use of his public subsidies. One may quarrel with this result, but at least it would rest on a principled interpretation of the Constitution, rather than the unsatisfactory generalized grievance doctrine.

Moreover, the result in *Valley Forge*, which rejected both taxpayer and citizen standing to challenge a transfer of surplus property of the United States, may be unimportant in relation to *Flast's* continuing authorization of suit by federal taxpayers to challenge

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96 See 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24:5 (2d ed. 1983) ("On the question whether Congress may determine who has standing, the relevant provision could be Article I, which confers upon Congress the power to create legal rights. *If Congress may confer rights upon a class of persons, Congress may also confer rights to be plaintiffs."") (emphasis added).
public expenditures on establishment clause grounds. The artifici-
alility of the Court’s distinction of transfers of surplus property from
expenditures of tax dollars in Valley Forge suggests that Flast has be-
come a doctrinal outrider. While the Court has undermined Flast’s
doctrinal foundations, however, it has, by preserving its result, in
effect accepted Justice Brennan’s contention that the establishment
clause creates a personal constitutional right in each federal tax-
payer to avoid coerced financial support of religion in the most im-
portant category of cases.97

Similarly, standing in Heckler v. Matthews was based solely on a
denial of equal treatment without the prospect of any tangible fi-
nancial gain, since the Constitution creates a legal interest in equal-
ity of treatment under the law.98 In contrast, in Roe v. Wade, the
intangible discomfort caused by a married couple’s apprehension
that an abortion might not be available in the event the wife should
become pregnant contrary to medical advice was insufficient to con-
fer standing.99 The result is explicable, not because that alleged
impediment to the couple’s marital happiness was not an “injury,”
but because it was an injury against which the law provides no argu-
able claim to legal protection. The only legally protected interest
arguably asserted by the couple was the invalidity of the challenged
restrictions on abortion. Whether the couple would be subjected to
this illegality depended upon the future contingencies of contra-
ceptive failure, pregnancy, and a desire for an abortion; therefore,
there was no actual case or controversy.100

This approach faces a number of obstacles. It is difficult to rec-
concile such decisions as Duke Power and Laird v. Tatum with a stand-
ing doctrine which focuses on the nature of the interests
asserted.101 Further, such a focus appears to hark back to the now
discredited view that a party must establish the existence of a “legal

97 The result in Valley Forge can be rationalized with this view on the ground that dispo-
sition of previously purchased surplus property does not increase the burden of any current
taxpayer. See 454 U.S. at 480 n.17.
100 Id. at 128.
101 On Duke Power, see text accompanying notes 180-84 infra. In Laird v. Tatum, 408
U.S. 1 (1982), the plaintiffs claimed that the Army’s allegedly unconstitutional domestic
surveillance program had chilled first amendment rights. The plaintiffs appeared to be
within the zone of interests protected by the constitutional provision relied upon, and the
alleged injury was direct and immediate. Nonetheless, the Court concluded that such alle-
gations of subjective “chill” were insufficient to support standing. It distinguished other
cases in which first amendment violations had been found on the basis of alleged chilling
effects, id. at 11, though recognizing that in an appropriate case, allegations of chilling
effect could state a judicially cognizable injury, id. at 12, 13. Perhaps the result in Laird is
best explained in terms of the Court’s doubts that the plaintiffs’ rights had in fact been
chilled in any way and its perception that they were therefore attempting to litigate the
rights of third parties. See id. at 13 & n.7.
right” in order to establish standing. Finally, this view has been subjected to substantial scholarly criticism.

While the test implicates the merits and thus may sometimes present more difficulty than an unrefined “injury in fact” approach to standing, the “zone” test does not require that the Court resolve the merits of the claim. Rather, it must only be able to say that the plaintiff possesses some arguable claim of personal legal right. Such inquiries are commonplace in the law governing the jurisdiction of federal courts. The objection that merits consideration should be resolved on motion to dismiss for failure to state a claim is wide of the mark. The matter could be resolved in that way, but so long as the plaintiff is clearly relying solely on the legally protected interests of others, a dismissal for lack of “standing” appropriately symbolizes the inappropriateness of his attempt to invoke the power of the court.

The doctrines of reviewability and political question do not adequately serve the purpose of the zone test: they are focused on whether an issue is subject to judicial review at all. The legal interest question, however, addresses the question of who may appropriately assert an otherwise justiciable and reviewable claim in court. This question lies at the core of concern of the standing doctrine. The current Supreme Court has clearly and, in my view, appropriately, rejected the view that so long as a claim is justiciable and reviewable in a suit by one arguably possessing a claim of legal entitlement, it is equally justiciable and reviewable at the instance of

103 See 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24:17 (2d ed. 1983). Professor Kenneth Davis argues that the “zone of interests” test is artificial and unworkable, is inconsistent with the legislative history of the Administrative Procedure Act, is applied by the Court only rarely and inconsistently, and has not in fact played a significant role in the Court’s standing decisions. He also argues that the test would preclude the courts from affording common law protection to new rights. This argument ignores, however, the fact that the test requires only that the plaintiff’s injury be “arguably” within the scope of a viable legal interest of the plaintiff—in short, that the claimed new right not be “frivolous.”

Professor Davis’ interpretation of the APA has not proved persuasive, and his characterization of the zone test as “artificial” is largely pejorative. Professor Davis’ most serious objection to incorporating consideration of the nature of plaintiff’s claim into standing analysis is that it is inconsistent with what the Court has actually done. However, a broad review of the Court’s decisions does not support his position. Not only has the Burger Court repeatedly stated that the nature of the plaintiff’s claim is an important—albeit “prudential”—aspect of standing doctrine, but as illustrated by its “injury” decisions, it has acted in ways which are best explained on that ground.
one who clearly has no personal claim to the protection of the law. In the Court's view, that approach would sanction unwarranted intrusions into the legislative and executive spheres of federal and state governments.\(^{105}\) So long as those who do possess an arguable claim of legal entitlement are permitted to invoke the judicial process, the role of the judiciary as a guarantor of individual rights stands unimpaired.

B. Zone of Interests

Incorporating consideration of the nature of plaintiff's claim into standing analysis would be subject to serious objection if it were inconsistent with what the Court has actually done. A review of the Court's decisions dealing with the role of legally protected interests and the assertion of third party rights is therefore essential.

The "zone of interests" formulation derives from the Court's 1970 decisions in *Association of Data Processing Service Organization, Inc. v. Camp*,\(^{106}\) and *Barlow v. Collins*.\(^{107}\) In *Data Processing*, the question before the Court was whether the sellers of data processing services had standing to challenge the Comptroller of Currency's authorization to national banks to offer competing services. In *Barlow*, the question was whether tenant farmers had standing to challenge a regulation of the Secretary of Agriculture permitting the assignment of crop support payments as security for the payment of their rent. In each case, the court of appeals had denied standing on the ground that plaintiffs asserted no "legal right" or "legally protected interest" of their own. The significance of the Supreme Court's opinions was in the rejection of the "legal interest" test for standing on the ground that it unduly implicated the merits. "The question of standing is different. It 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."\(^{108}\) The Court's opinion referred to both prudential and article III aspects of standing, but did not clearly identify the "zone of interests" test as only of "prudential" concern. The opinions also focused heavily on the language of the Administrative Procedure Act, which in section 702 provides for judicial review in favor of any person "aggrieved by agency action within the meaning of a relevant statute," but appeared to regard

105 See text accompanying notes 86-90 supra.
this language merely as illustrative of the general "zone of interests" principle applicable to standing questions generally.\textsuperscript{109}

Since \textit{Data Processing} and \textit{Barlow}, the Court has continued to treat the "zone of interests" requirement as an essential, albeit "prudential," part of the standing inquiry. In the Court's elaborate rearticulation of its standing decisions in \textit{Warth v. Seldin}, it observed that:

\[\text{T}\]he source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases 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{110}

This view has been consistently repeated in decisions since \textit{Warth}.\textsuperscript{111} For reasons previously stated, the "zone of interests" is a principled constitutional basis on which to limit the class of plaintiffs entitled to invoke judicial review.\textsuperscript{112}

\textsuperscript{109} \textit{Id.; Barlow}, 397 U.S. at 165. In \textit{Data Processing}, the Court also relied heavily on its prior decision in \textit{Hardin v. Kentucky Utilities Co.}, 390 U.S. 1 (1968), which held that a competitor had standing to challenge TVA activities allegedly in violation of the TVA Act because it was "within the class of persons that the statutory provision was designed to protect." \textit{Data Processing}, 397 U.S. at 155.

Justices Brennan and White concurred in the result in both cases, but dissented from the Court's treatment of the standing question. They claimed that the only constitutional requirement for standing was injury in fact and that the additional zone of interests requirement imposed by the majority was wholly nonconstitutional. In addition, the dissenters contended that by imposing this additional requirement, "the Court comes close to perpetuating the discredited "legally protected interests theory." 397 U.S. at 168 (Brennan, J., concurring in the result and dissenting). They believed that the question of statutory coverage should be considered when determining reviewability of the challenged agency action, not standing. \textit{Id.} at 169. They recognized, however, that the question of "reviewability" was separate from the merits, and that Congress may have precluded judicial review not only generally, but also with respect to a specific class of plaintiffs. \textit{Id.} at 169 n.2, 173-74. But if the presumption was in favor of "reviewability" of agency action by any person aggrieved, there must be a "persuasive reason" to conclude that Congress intended to deny it. \textit{Id.} The suggested distinction between standing and reviewability has not proved influential in the Court's standing decisions.

\textsuperscript{110} 422 U.S. 490, 501 (1975).


\textsuperscript{112} In their influential treatise, Professors Wright, Miller, and Cooper do not unequivocally reject the "zone" test, but suggest that "its reach remains obscure to lower courts." 13 C. WRIGHT, A. MILLER & E. COOPER, \textit{FEDERAL PRACTICE AND PROCEDURE} § 3531.7 (1984). They suggest further that "[i]f the test is to become a predictable part of standing doctrine, it will be necessary to define its purpose and its limits." \textit{Id.} While their conclusion that the test is difficult to apply is justified, the test's purposes seem apparent. The treatise itself recognizes that the test not only helps to ensure effective and concrete presentation, but also limits "the occasions for judicial action to circumstances of the greatest need." \textit{Id.} at 513.
An approach to standing which focuses on the nature of the claim asserted by the plaintiff, rather than on "injury in fact," is obviously not a panacea. In some settings, those appropriately viewed as within the protective intent of the legal entitlement asserted will be obvious. In others, the question may be of considerable difficulty. For example, determining the standing of persons injured by congressional enactments allegedly in excess of the enumerated powers, or by administrative action allegedly in excess of delegated authority, will continue to present perplexing problems. Nonetheless, such problems are not insuperable. Thus, the historic tendency of the Supreme Court to limit the class of injured persons entitled to challenge official action allegedly in excess of lawful authority to those subject to direct regulatory requirements or alleging injury to an interest analogous to those traditionally protected by the common law would no doubt continue under the approach suggested here.113 In the absence of a more specific indication of broader protective intent, interpretation of a general limitation on governmental authority to permit standing in those suffering previously unactionable forms of injury would constitute an unwarranted extension of the judicial role. Similarly, difficulties in determining the appropriate depth of judicial analysis for ascertaining when a plaintiff is "arguably" within the protective intent of the legal entitlement asserted should not prove unmanageable,114 bearing in mind that adjudication of the lawsuit on the merits is not an appropriate part of standing analysis.

Another difficulty for the thesis suggested here arises from the Court's treatment of the zone of interests test as wholly "prudential." To the extent that this characterization is simply directed to preserving a broad congressional role to designate private attorneys general authorized to sue in the public interest, it is entirely consistent with the view that article III itself contemplates invocation of the judicial process only by those whose own rights have been invaded, and not by interested bystanders or the public at large. In fact, the Court's statutory standing cases tend to underscore the importance of the zone of interests requirement. On the whole, they display a strong tendency to require that the "injury in fact" sufficient to establish standing be closely related to the statutory intent, even when the statutory language would sustain the rec-


114 For an excellent analysis of this question, see Judge Wilkey's opinion in Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 137-45 (D.C. Cir. 1977).
ognition of a private right of action in favor of any person in fact
injured by the defendant’s conduct.115 The only plausible expla-
nation for the Court’s adoption of this approach is a recognition that
the “zone of interests” test is basic and fundamental, rather than
merely a judicial rule of prudence and self restraint.

The leading decision contrary to this position is Duke Power116
where Chief Justice Burger’s opinion for the Court limited the Flast
“nexus” test to taxpayer suits. The majority rejected the argument
that plaintiffs had no standing because their claim on the merits
bore no relation to their injuries. The “zone of interests” limita-
tion was wholly “prudential.” The Court declined to apply the test
in Duke Power on the theory that “[w]here a party champions his
own rights, and where the injury alleged is a concrete and particu-
larized one which will be prevented or redressed by the relief re-

115 In cases under the APA and the Fair Housing Act, the Court has occasionally sug-
ggested that broad statutory private right-of-action provisions may create standing which
would not otherwise exist. But the Court has generally construed such provisions to extend
standing only to persons arguably sought to be protected by the statute in question at least
absent an unmistakable declaration of congressional intent to confer standing on any citi-
zen. The “zone of interests” test arose in cases under the APA, notwithstanding the ambi-
guity of the language of that statute. The Court has shown no signs of departing from that
construction in spite of protests that “injury in fact” is the only statutory and constitutional
requirement. See, e.g. 4 K. Davis, ADMINISTRATIVE LAW TREATISE § 24:17 (2d ed. 1983).

The Housing Act cases reach the same result. The injury of persons accorded standing
in such decisions as Trafficante and Gladstone, the denial of the benefits of living in an inte-
grated community, was not simply an incidental injury to a bystander having no relation-
ship to the statutory purpose. Although the private right-of-action provisions of the Act
speak broadly of any “person aggrieved” by actions in violation of the Act, the injuries
recognized by the Court were closely connected to the statutory purposes. Similarly, in
Havens Realty, 455 U.S. 363 (1982), the Court held that black testers who had suffered the
type of misrepresentation injury prohibited by the statute had standing, but a white tester
equally offended by defendant’s practices but who had not been directly injured himself
lacked standing. The injury to the organizational plaintiff in Havens Realty—impairment of
its housing counseling and referral services—was likewise closely related to the statutory
purpose.

That is not to say that the Court’s decisions are wholly consistent. In Gladstone, the
Village of Bellwood was held to have standing on the apparent ground that defendant’s
alleged steering practices were creating a segregated community, and this might impair the
city’s tax base. 441 U.S. at 110-12. But the Court also recognized that “other harms flowing
from the realities of a racially segregated community are not unlikely,” such as the
inability to provide a desegregated education. Id. at 111.

Such leading “public interest” standing cases as Office of Communication of United
Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) and Scenic Hudson Preservation
Conference v. Federal Power Comm’n, 354 F.2d 608 (2d Cir. 1965) are consistent with the
analysis suggested here because of their focus on the protective intent of the statutory pro-
visions relied upon. Federal Communications Comm’n v. Sanders Radio Station, 309 U.S.
470 (1940) might be viewed as inconsistent, as it allowed a competing radio station to appeal
the grant of a broadcast license even though it was not within the protective intent of the
agency’s organic statute. However, the Court’s decision rested squarely on its conclusion
that the competitor was included in the “person aggrieved” language of the appeals statute.
Id. at 476-77.

quested, the basic practical and prudential concerns underlying the
standing doctrine are generally satisfied when the constitutional
requisites are met." But the very objection to standing in *Duke Power*
was that the plaintiffs were not asserting their own rights, but
those of some as-yet unidentified class of victims of a nuclear acci-
dent which had not yet occurred and might never occur. The
Court’s rationale for departure from the zone of interests or
"nexus" limitation was thus wholly unsatisfactory. Justices Stewart
and Stevens dissented on precisely this ground.118

While *Duke Power* demonstrates that the Court has not always
adhered to a nexus or interest requirement as central to the pur-
poses of article III, it stands as a warning of the consequences of
not doing so.119 Perhaps the result in *Duke Power* could have been
avoided if *Warth* had not so clearly cast the zone of interests and
third party standing doctrines in wholly prudential terms relating to
effective advocacy, but instead had recognized their underlying sep-
aration of powers and federalism foundation, derived from the
Constitution itself.

Characterizing a standing limitation as prudential means that
the Court is free to depart from it when it believes it is appropriate
to do so. To the extent that such departures are frequent and not
explicable on grounds consistent with the constitutional foundation
for the limitation suggested here, my thesis should be rejected. It
is, therefore, imperative to examine closely the occasions on which
the Court has recognized the standing of persons whose own "legal
rights" have not arguably been invaded.

III. Assertion of "Third Party Rights"

A. Third Party Standing Generally

The view that a party is entitled to invoke the process of a fed-
eral court only if arguably within the zone of interests sought to be
protected by the right asserted logically implies that interested
third party bystanders are not entitled to assert the rights of others.
Since *Warth v. Seldin*, the Burger Court’s decisions have emphasized
this point.120 Like the Court’s "zone of interests" test, the Court
has viewed this restriction on standing as "prudential" and thus
subject to exceptions in appropriate cases.121

This view is not an innovation, but draws support from a

117 Id. at 80-81.
118 See note 74 supra.
119 For a strong criticism of the decisions on somewhat differing grounds, see Varat,
120 See, e.g., Craig v. Boren, 429 U.S. 190, 192-95 (1976); Singleton v. Wulff, 428 U.S.
number of the Court's prior decisions over a substantial period of time. The leading examples are well known.122 Although a number

122 In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court permitted private school corporations to assert that a state statute requiring parents and guardians to send children under age 16 to public school unconstitutionally interfered with the liberty of the parents and guardians to direct the upbringing of their children. The interest of the schools in preventing unlawful interference with their patrons and destruction of their business was viewed as "clear and immediate." Id. at 536. In Tileston v. Ullman, 318 U.S. 44 (1943), in contrast, the Court held that a physician had no standing to attack a Connecticut statute prohibiting him from giving professional advice concerning contraceptives to his patients. Id. at 46. The physician had challenged the statute only as a denial of the due process rights of the patients.

In Barrows v. Jackson, 346 U.S. 249 (1953), however, the Court sustained the right of a white seller of land to defend a suit for damages against him, predicated on his violation of a racially restrictive covenant, by raising the fourteenth amendment rights of his black purchaser. The Court recognized that ordinarily a person had no standing to litigate the rights of a third party because of the case or controversy requirement and the Court's complementary rule of self-restraint. Id. at 255. The Court allowed third party standing in Barrows, however, because it would be difficult or impossible for the parties whose rights were asserted to present their claims before the court. Id. at 257. Additionally, the Court found that the seller was the only effective litigant because of the close relationship among the coercion exerted on the seller, her possible pecuniary loss, and the purpose of the restrictive covenant. Id. at 259. Chief Justice Vinson strongly objected to the majority's characterization of the rule against third party standing as one of self restraint. Id. at 266 (Vinson, C.J., dissenting).

In NAACP v. Alabama, 357 U.S. 449 (1958), the Court sustained the right of the NAACP to assert its members' first and fourteenth amendment associational rights in opposition to a discovery order in a suit against the NAACP requiring the disclosure of membership records. The Court upheld the Association's standing to assert the rights of its members, because the Association acted as the members' representative, the Association and its members were identical in a practical sense, and the Association's membership might have been adversely affected by the discovery order. Id. at 458-60.

In United States v. Raines, 362 U.S. 17 (1960), the Court refused to permit state officials to defend an action by the Attorney General in that the statute under which the Attorney General proceeded might be unconstitutional if applied to the actions of private persons. Justice Brennan, for the Court, observed that the exercise of judicial review is limited by two rules: never decide a question of constitutional law before it must be decided, and never establish a rule of constitutional law broader than required by the precise facts of the case. Id. at 21. Further, one to whom application of a statute is constitutional cannot attack the statute on the ground that it might be unconstitutional as applied to other persons or other situations. Id. This rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." Id. at 22. Justice Brennan distinguished Raines and cases such as Barrows and NAACP. Id. at 22-23.

In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court again considered whether persons prosecuted for giving medical advice regarding contraception to married persons had standing to raise the "rights of the married people with whom they have a professional relationship." Id. at 481. The defendants were the Executive Director and the Medical Director of the Planned Parenthood League of Connecticut. The Court concluded that "certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime." Id. The Court distinguished Tileston on the ground that plaintiffs in that case had sought a declaratory judgment for which the requirements of standing should be strict. Id.

Finally, in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), the Court allowed a white assignor of membership rights in a discriminatory private club to raise the rights of his black assignee in seeking injunctive relief against his expulsion from the club. The
of themes were visible in the leading pre-1970 third party standing cases, no coherent theory had emerged. In some, but not all of these cases, the Court characterized the rule against permitting one party to assert the "rights" of another as prudential. The reasons which the Court gave for departing from the rule seemed to vary from case to case. In some cases, the Court emphasized its concern that the right in question might be impaired if third party standing were not recognized. In others, the nature of the relationship between the party asserting the right and the person whose right was asserted was clearly important. In others, the Court focused on the possible inability of the absent party to assert his or her own rights. Yet in others, the posture of the party asserting the right as a plaintiff or defendant apparently influenced the result.

On the whole, the Burger Court's decisions on third party standing are typical of its justiciability decisions generally. They do not depart radically from prior doctrine. Instead, the Court has attempted to articulate the principal elements of its approach with more precision, and on occasion to provide a somewhat more highly developed rationale for its approach.

In Eisenstadt v. Baird\textsuperscript{123} the "seven-man" Court of the early Nixon years\textsuperscript{124} considered the conviction of Baird, who was neither a physician nor a licensed pharmacist, for distributing contraceptive foam. Under Massachusetts law, the distribution of contraceptive materials to unmarried persons was forbidden. In addition, only licensed physicians and registered pharmacists could distribute contraceptives to married persons, and then only with a prescription. The record contained no evidence regarding the marital status of the recipient. Justice Brennan, writing for four members of the Court, rejected the argument that Baird had no standing to challenge the statute as violative of the fourteenth amendment rights of single persons, advanced on the theory that Baird was not an authorized distributor. He reasoned that there could be "no question" of Baird's standing under article III of the Constitution because he was a criminal defendant.\textsuperscript{125} Justice Brennan concluded that the rules of third party standing should be relaxed in Eisenstadt, even assuming that the restriction on distributors was a valid health measure. The decision rested largely on the perceived "impact of the litigation on the third-party interests."\textsuperscript{126} Enforcement of the

\textsuperscript{123} 405 U.S. 438 (1972).
\textsuperscript{124} Justices Powell and Rehnquist had been appointed but did not participate.
\textsuperscript{125} 405 U.S. at 443.
\textsuperscript{126} Id. at 445.
The absence of a doctor-patient or aiding and abetting relationship was not critical to the Court in *Eisenstadt*. It was sufficient that the relationship between Baird and his potential distributees was "that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so. The very point of Baird's giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives."  

*Eisenstadt* appears to be out of step with the overall tone of the Burger Court's justiciability decisions. The Court has repeatedly rejected the concept that an "advocacy" relationship may give rise to standing for the purpose of asserting legal rights. It is true that the Court stated that the relationship was not critical, and that the primary determinant of standing was the alleged inability of unmarried persons to assert their own rights. But it seems unlikely that an appropriate declaratory judgment action could not have been maintained by a single person denied contraceptives, or by a licensed distributor suing to remedy the injury to his business. Moreover, the Court's facile assumption that Baird had suffered article III injury as a result of the challenged statute, even assuming that the restriction on distributors was valid as a health measure, is illogical. There was no evidence of the status of Baird's distributee, and if the restriction on distributors was valid without regard to the marital status of the distributee, there was no principled basis on which Baird's injury could be traced to the alleged illegality complained of. Even if the restriction on distribution to unmarried persons was invalid, Baird's conduct could be validly prohibited.

It is tempting to dismiss *Eisenstadt* as an aberrational decision of the early seven-man Court, with little or no continuing precedential force. But there may be more to it than this. The Court's assumption that Baird possessed article III standing without regard to the nature of the rights he was asserting or the relationship of his claim of illegality to the validity of his conviction may have been the result, in part, of its characterization of the third party standing rule as entirely "prudential." The Court's "prudential" approach to third party standing may also have contributed to its suggestion that an "advocacy" relationship might be sufficient to permit one

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127 *Id.* at 446. Justices White and Blackmun concurred in the result on the ground that the restriction on distributors had not been adequately supported as a health measure. *Id.* at 463-64. Chief Justice Burger dissented on the ground that the only question before the Court was the validity of the restriction on distributors, and that restriction should be sustained as a valid health measure. *Id.* at 465-72.

128 *Id.* at 445.
party to assert the rights of another. These possibilities will be discussed further below.

After Eisenstadt, the Court's third party standing decisions followed a more predictable course. In Doe v. Bolton, the Court sustained the standing of physicians to challenge allegedly unconstitutional state restrictions on abortion on the ground that the statutes operated directly against them and the doctors should not have to await criminal prosecution in order to determine their validity. In Warth v. Seldin, the Court underscored its conviction that the third party standing and zone of interest rules are "prudential," and recognized that "controversying considerations" might in some cases outweigh this bar. The Court then proceeded to apply the "prudential" third party standing rule to bar suit by Rochester taxpayers who alleged that their tax burden had been increased by the need to provide additional housing for low income people allegedly excluded from residence in a neighboring community by its restrictive zoning practices, but who had not asserted any personal constitutional or statutory rights. The Court distinguished such cases as Doe v. Bolton because: the challenged zoning restrictions were not being enforced against the plaintiffs and did not "adversely affect a relationship existing between them and the persons whose rights assertedly are violated," and the taxpayer plaintiffs had not shown that their prosecution of the suit was necessary to protect the asserted rights.

In Planned Parenthood v. Danforth, the Court upheld the standing of physicians who performed and supervised abortions to challenge the parental and spousal consent provisions of Missouri's abortion statute on the ground that the provisions violated the rights of both physicians and their patients. Because the statute operated directly against the plaintiffs, they had asserted "a sufficiently direct threat of personal detriment" and should not be required to await a criminal prosecution.

129 410 U.S. 179, 188 (1973). The Court expressly refused to determine whether similar claims by nurses, clergymen, social workers, and nonprofit corporations advocating abortion were justiciable, but it noted that they were "another step removed and as to them, the Georgia statutes operate less directly." Id. at 189. Such persons were, however, liable to be prosecuted as accessories or conspirators. Id.

130 422 U.S. 490, 499-501 (1975). In a footnote, the Court observed that similar standing issues arose when a litigant asserted the rights of third persons defensively as a bar to a judgment against him, and that in such cases "there is no Art. III standing problem; but the prudential question is governed by considerations closely related to the question whether a person in the litigant's position would have a right of action on the claim." Id. at 500 n.12.

131 Id. at 508.

132 Id. at 510.

133 428 U.S. 52 (1976).

134 Id. at 62.
In *Singleton v. Wulff*, however, the Court had more difficulty upholding the standing of physicians to challenge a state statute excluding abortions not “medically indicated” from Medicaid payments. Justice Blackmun, writing for four members of the Court, found standing on the ground that the exclusion from Medicaid benefits constituted sufficient “injury in fact” for article III purposes. As to whether the doctors could assert the rights of their patients, the Court stated that the federal courts should “hesitate” before recognizing third party standing, because they “should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the suit succeeds.”

Moreover, “third parties themselves usually will be the best proponents of their own rights.” However, when the relationship between the litigant and the person whose rights are asserted is such that “the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right’s enjoyment will be unaffected by the outcome of the suit.”

Even if there is a close relationship, a party should normally be required to assert his own rights. However, “[i]f there is some genuine obstacle to such assertion . . ., the party who is in court becomes by default the right’s best available proponent.”

These principles required recognition of standing in *Singleton* because a woman could not safely secure an abortion without the aid of a physician, and “[t]he woman’s exercise of her right to an abortion . . . is therefore necessarily at stake here.” In addition, the physician was uniquely qualified to litigate the claim. Both the woman’s desire to protect her privacy and the possibility of mootness presented “obstacles” to the woman’s assertion of her own rights that, while not insurmountable, were sufficient to sustain the doctor’s standing.

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136 Justice Blackmun could not obtain a majority. Justice Stevens concurred only on the ground that the physicians had asserted that their own constitutional rights were violated. That being true, he believed that they also had standing to assert the rights of their patients. *Id.* at 121-22.
137 *Id.* at 113-14.
138 *Id.*
139 *Id.*
140 *Id.* at 116. Moreover, “third parties themselves usually will be the best proponents of their own rights,” and as courts depend on effective advocacy, they “should prefer to construe legal rights only when the most effective advocates of those rights are before them.” *Id.* at 114.
141 *Id.* at 117.
142 *Id.* at 117-18. Responding to Justice Powell’s assertion in dissent that *Doe v. Bolton* and similar decisions recognizing physician standing turned on the “direct interdiction” of
Justice Powell, joined by the Chief Justice and Justices Stewart and Rehnquist, dissented in part. He agreed that the plaintiffs possessed article III standing because of their alleged monetary injury, yet stated that there was an additional inquiry, a matter of judicial self-governance, of "whether it is prudent to proceed to decision on particular issues even at the instance of a party whose Article III standing is clear." Reviewing the Court's prior decisions, Justice Powell concluded that third party standing had been sustained only where statutes "directly interdicted" a physician-patient relationship by criminalizing it or where it was effectively impossible for the party whose rights were in question to assert them himself. In Singleton, there was no "direct interdiction" and the mere assertion of "obstacles" to the third party's direct assertion of rights was insufficient.

The Court's view that an actual or potential criminal defendant normally has standing to assert the rights of third parties intimately involved in the prohibited transaction proved controlling in its subsequent decisions in Craig v. Boren, and Carey v. Population Services International. In Craig, the Court sustained the standing of a licensed beer distributor to challenge Oklahoma's prohibition on the distribution of beer to males under the age of twenty-one and to females under the age of eighteen on the ground that it denied equal protection to males. The Court again concluded that article III standing requirements were met by the potential "injury in fact" resulting from enforcement of the statute against the distributor. As to nonconstitutional limitations on third party standing, dismissal of the action would unnecessarily foster repetitive litigation and would serve no purpose, as the issues had been effectively presented. Since Eisenstadt and similar decisions established that a vendor was entitled to assert the rights of purchasers who would be adversely affected if the statute were enforced and since the statute in question directly regulated the vendor, he was the "obvious the physician patient relationship by the criminalization of certain procedures, Justice Blackmun pointed out that many of the Court's prior third party standing decisions, such as Pierce, see note 122 supra, upheld standing absent any such "direct interdiction," while others such as McGowan v. Maryland, 366 U.S. 420 (1961), had denied standing to a criminal defendant to assert the rights of third persons. Id. at 118 n.7.

143 Id. at 123-24 (Powell, J., concurring in part and dissenting in part).
144 Id. at 125-26.
145 Id. at 129.
146 Id. at 126.
147 429 U.S. 190 (1976).
149 429 U.S. at 194. The claim of a male plaintiff had become moot when he reached age 21 during the pendency of the appeal. Id. at 193.
150 Id. at 193-94.
claimant." Similarly, in Carey, the Court relied on Eisenstadt and Craig in concluding that an unlicensed distributor of contraceptives had standing to challenge a New York statute limiting the distribution of contraceptives, as a violation of the rights of both the distributor and its purchasers.

As with the Court's injury decisions generally, the Burger Court's doctrinal approach to third party standing leaves a number of points of difficulty unresolved. At the most basic level, for example, the Court has based its conclusion that the rule against third party standing is "prudential" on evaluation of cases in which the "rights" of another were asserted by a criminal defendant. In that context, the Court has insisted that the defendant clearly has suffered article III "injury in fact" from the mere maintenance of the action against him.

This contention, however, is subject to question. Assume, for example, a case such as United States v. Raines, in which the allegedly invalid portion of a statute is severable from the remaining provisions which apply to the conduct of the defendant. Whether the issue is raised by a civil or criminal defendant, a determination of unconstitutionality would have no effect on the validity of a judgment. Thus, the injury of which the defendant complains—the imposition of criminal punishment—is causally unrelated to the legal challenge he has raised. In what sense can such a defendant be said to have article III standing? Under the principles consistently espoused by the Burger Court, article III standing should be denied on the ground that the defendant's alleged injury cannot be traced to the alleged violation.

On what basis, then, are cases in which civil and criminal defendants do have standing to raise the "rights" of others to be distinguished from those in which they do not? Is the question wholly one of the inseverability of the statute's application to the defendant from its application to third parties? And if this is the basis for recognizing third party standing, in what sense can the defendant be said to be raising the rights of others rather than those of himself?

The differences in the significance accorded to the various factors bearing on third party standing in Singleton v. Wulff are equally

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151 Id. at 196-97. Only Chief Justice Burger dissented on the standing issue. Id. at 215.
152 431 U.S. at 683-84.
155 See part V infra. This is not to say that such a defendant does not have standing to litigate the issue of severability itself. But once that issue is resolved adversely to the defendant, there is no basis on which to accord the defendant standing to challenge his own conviction on the basis of the claim that the severable portions of the statute may be invalid as applied to others.
puzzling. Justice Blackmun, writing for four members of the Court, attached great importance to the relationship between the parties as bearing not only on the effectiveness of advocacy of the right asserted, but on whether it was necessary and appropriate for the Court to entertain the challenge at all.\textsuperscript{156} On the other hand, he concluded that a substantial obstacle to the assertion of rights by their possessors would be sufficient to permit a third party to assert them.\textsuperscript{157} In contrast, Justice Powell for four other members of the Court downplayed the significance of the relationship between the parties, which he viewed as bearing only on the question of adequate presentation of the rights asserted. Rather, the critical factors were whether it was "impossible" for the party whose rights were asserted to vindicate them directly, or whether a state enforcement program "directly interfered" with the enjoyment of the right in question.\textsuperscript{158} 

Uncertainty in treatment of the factors bearing on third party standing continues unabated after more than fifty years of judicial consideration. Perhaps the Court's lack of unanimity is symptomatic of a defect in the doctrinal underpinnings of its approach. The Court has stated that the prudential standing rule is "closely related" to article III concerns. If so, there is a need to define this relationship and to determine when it is appropriate to depart from the general rule.

To the extent that the Court has attempted to explain its rule of "self-restraint," it has done so in language containing decidedly constitutional overtones. In \textit{Warth v. Seldin}, for example, the Court emphasized that absent such a rule, the courts would be called on to resolve "abstract questions of wide public significance . . . even though judicial intervention may be unnecessary to protect individual rights."\textsuperscript{159} Similarly, in \textit{Singleton v. Wulff},\textsuperscript{160} Justice Blackmun explained the rule against third party standing primarily on the ground that courts should not adjudicate rights unnecessarily, or where their holders do not wish to assert them, or where the litigation is irrelevant to their enjoyment.\textsuperscript{161} These "prudential" concerns do not differ significantly from those implicit in a construction of article III. As the Burger Court has held, the article III inquiry looks not simply to whether an issue is sharply presented in a form capable of judicial resolution, but equally to whether the resolution of such a right is "necessary," since the Court has a con-

\begin{itemize}
\item \textsuperscript{156} 428 U.S. at 113-18 (plurality opinion).
\item \textsuperscript{157} Id. at 116.
\item \textsuperscript{158} Id. at 126-29 & n.5 (Powell, J., dissenting).
\item \textsuperscript{159} 422 U.S. 490, 500 (1975).
\item \textsuperscript{160} 428 U.S. 52 (1976).
\item \textsuperscript{161} Id. at 113-16.
\end{itemize}
A view of standing which assumes that, under article III of the Constitution, rights should normally be asserted only by those arguably within the "zone of interests" which the constitutional or statutory guarantee asserted seeks to protect would do much to rationalize the Court's third party standing decisions. Consider, for example, the Court's relatively persistent, if not wholly consistent, emphasis on the relationship of the party asserting the right in question to the party whose "rights" are asserted. Where such a relationship is absent—as in the case of the taxpayers denied standing to assert the rights of persons allegedly adversely affected by discriminatory zoning ordinances in Warth—the Court has denied standing. But the Court has almost uniformly recognized standing where a doctor-patient or seller-buyer relationship is present and where the person asserting the right is in the position of an actual or potential civil or criminal defendant. In such cases, the relationship itself manifests the intention of the possessor of the right to assert it, and the relationship of the parties is such that permitting enforcement would have the inescapable effect of impairing the ability of the "holder" of the right to enjoy it. To say that relaxation of the general prohibition against third party standing in such circumstances is "prudential" is artificial. To put the matter another way, would the Court have denied standing to the white seller asserting the rights of his black purchaser in Barrows v. Jackson, or to the doctors made criminal defendants in Griswold v. Connecticut and Doe v. Bolton if Congress had passed a statute purporting to deny them standing to assert the constitutional rights of their patients? Given the Court's conclusion that recognition of third party standing was essential to permit effective vindication of the constitutional right, the answer is at least doubtful. In such cases, to use the words of Warth v. Seldin itself, the Court had "found, in effect, that the constitutional . . . provision in question implies a right of action in the plaintiff."162 Surely Congress does not have unlimited power to restrict the assertion of such a constitutionally based right.

The same general line of analysis would help to explain the apparently different treatment accorded third party standing questions where plaintiffs rather than defendants seek to assert the "rights" of others. Where the plaintiff is not the object of actual or immediately threatened enforcement, it is, as Justice Blackmun pointed out in Singleton v. Wulff, far less clear that the right is truly threatened, or that the "holder" of the right wishes to assert it. Both the relationship of the parties and the existence of apparent

162 422 U.S. at 501.
obstacles to asserting the right by its direct beneficiary serve to ensure that litigation is not unnecessarily foisted on the Court by an interested bystander. On the other hand, to insist that assertion of the right by its direct beneficiary be shown to be “impossible,” as suggested by Justice Powell in Singleton, goes well beyond prior authority without any principled basis of support in article III. Such a draconian additional “prudential” standing requirement should therefore be rejected.

Just as increased recognition of the article III basis of zone of interests considerations in standing doctrine would have avoided aberrant decisions such as the Duke Power case, so in the area of third party standing, it would decrease the likelihood of results such as Eisenstadt. It is true that the relationship between the parties in Eisenstadt evidenced the intention of the woman given contraceptives to assert her right to obtain them, and that resolution of the claim of right was not unnecessary because Baird was a criminal defendant. But it seems equally true that if the limitation on distribution was a valid health measure, neither Baird nor his distributee had standing to challenge the restriction on distribution to single persons unless that provision could be shown to be inseverable from the statute as a whole. In Eisenstadt, therefore, standing should have been denied unless Justice Brennan had been willing to invalidate explicitly the restriction on authorized distributors of contraceptives. The characterization of third party standing doctrine as “prudential” no doubt contributed to the Court’s willingness to recognize standing in Eisenstadt despite serious article III difficulties. Conversely, increased focus on the separation of powers aspects of article III as the basis for the general rule against third party standing would protect the Court from charges that it has “manipulated” standing rules to exclude disfavored claims on an unprincipled basis.

If followed by the Court, the suggested analysis could have altered the result in its most recent decision on third-party standing, Phillips Petroleum Co. v. Shutts. In Shutts, the Court permitted a class action defendant to assert that it would be a violation of due process for a state court to exercise jurisdiction over members of a plaintiff class who did not have “minimum contacts” with the forum state. The Court recognized that defendant arguably lacked standing to assert the rights of class members under the approach of Singleton v. Wulff, but sustained standing on the ground that defendant was vindicating its “own interests” in assuring that any judgment entered would bind the class members as well as itself. Under the view advanced here, however, the Court should have permitted the

defendant to raise the minimum contacts question only if it pos-
possessed, not simply an "interest," but arguable claim of legal entitle-
ment to a judgment binding the members of the class under the
due process clause or some other constitutional provision, statute,
or rule of court.

B. First Amendment Overbreadth

Those who resist a "zone of interests" approach to standing
find comfort in the Burger Court decisions which continue to apply
the first amendment "overbreadth" doctrine. This doctrine per-
mits persons whose first amendment rights are not violated to chal-
lenge application of a statute to them on the ground that it would
violate the first amendment rights of others. These decisions on
their face support the view that "injury in fact" is the only constitu-
tional aspect of standing doctrine. Moreover, because they permit
parties whose own rights are not at stake to assert the "rights" of
unrelated third parties without any evidence that the rights of these
persons are truly threatened or that they wish to assert them, such
decisions suggest that the separation of powers and related federal-
ism underpinnings for standing doctrine advanced here are of little
concern.

If the Burger Court had enthusiastically embraced the over-
breadth doctrine and applied it expansively in non-first amendment
areas, this position would be unassailable. That, however, has not
been the case. The Court has substantially curbed the doctrine
even in the first amendment area, essentially on separation of pow-
ers grounds, and has shown no inclination to expand its coverage.
Careful examination of the Court's decisions supports the conclu-
sion that the overbreadth doctrine is the exception which proves
the rule.

In its early application of the overbreadth analysis in Coates v.
City of Cincinnati, the Court applied conventional Warren Court
document in reversing a conviction under an ordinance precluding
sidewalk assembly in a manner "annoying" to passers-by without
regard to the details of the defendant's conduct. The opinion
hardly stands as a ringing endorsement of overbreadth analysis.
The majority emphasized that the ordinance "is vague, not in the
sense that it requires a person to conform his conduct to an impre-
cise but comprehensible normative standard, but rather in the
sense that no standard of conduct is specified at all." Thus, the
rights of Coates himself were arguably at stake. Moreover, four
members of the Court dissented on the ground that in order to

165 Id. at 614.
assess a vagueness challenge, it was necessary to know the conduct with which the defendant was charged.\textsuperscript{166}

In \textit{Gooding v. Wilson},\textsuperscript{167} the Court confronted a "pure speech" case involving offensive words addressed to a police officer.\textsuperscript{168} The language in question apparently fell within the category of "fighting words" which, under \textit{Chaplinsky v. New Hampshire},\textsuperscript{169} could be constitutionally prohibited. Nonetheless, the Court invalidated the conviction on overbreadth grounds. Regardless of whether appellant's conduct could be validly prohibited, the statute must be invalidated on its face unless it was "not susceptible" of invalid application to others, because of the possibility of inhibiting protected expression.\textsuperscript{170} Because the statute was not, in the majority's view, narrowly drawn to reach only "fighting words," appellant's conviction was invalid. Focusing on federalism concerns, Chief Justice Burger's dissent anticipated future developments. He argued that procedures for facial invalidation of state criminal statutes were "'fundamentally at odds with the function of the federal courts in our constitutional plan.'"\textsuperscript{171} At the very least, "substantial" overbreadth should be demonstrated before facial invalidation was appropriate.\textsuperscript{172}

In \textit{Broadrick v. Oklahoma},\textsuperscript{173} the Court narrowly confined overbreadth scrutiny, holding that Oklahoma's "little Hatch Act" regulating political activity by public employees should not be subjected to overbreadth scrutiny: the fact that the statute might be applied to protected expression such as the wearing of political buttons was irrelevant.\textsuperscript{174} Appellants had been charged with clearly unprotected activity.\textsuperscript{175} The majority's rationale was based on the same fundamental concerns of properly restricted judicial power that underlie its standing doctrine generally. The Court expressed the "conviction that under our constitutional system courts are not rov-

\textsuperscript{166} Id. at 617 (opinion of Black, J.); id. at 618 (White, J., dissenting).

\textsuperscript{167} 405 U.S. 518 (1972).

\textsuperscript{168} The defendant allegedly addressed the officer with "White son of a bitch, I'll kill you" and "[y]ou son of a bitch, I'll choke you to death." \textit{Id.} at 519 n.1. The Georgia statute involved prohibited the use "to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace." \textit{Id.} at 519.

\textsuperscript{169} 315 U.S. 568 (1942). Justices Powell and Rehnquist did not participate in \textit{Gooding.}

\textsuperscript{170} Id. at 521.

\textsuperscript{171} Id. at 531 (Burger, C.J., dissenting) (quoting Younger v. Harris, 401 U.S. 37, 52-53 (1971)). As the Court had observed in \textit{Younger}, the power of judicial review, "broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them." 401 U.S. at 52.

\textsuperscript{172} 405 U.S. at 530.

\textsuperscript{173} 413 U.S. 601 (1973). Justice White authored the majority opinion for himself, the Chief Justice, and Justices Powell, Rehnquist, and Blackmun.

\textsuperscript{174} \textit{Id.} at 608-10.

\textsuperscript{175} \textit{Id.} at 619-20.
ing commissions assigned to pass judgment on the validity of the Nation’s laws;” thus, “constitutional rights are personal and may not be asserted vicariously.”

Although the first amendment overbreadth doctrine was a limited exception, the Court’s overbreadth cases had been limited to cases involving spoken words or where rights of association were “ensnared” in overbroad statutes, and cases involving regulation of time, place and manner of communication or involving discretionary prior restraints. Further, overbreadth claims, “if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct.”

The Court stated that “particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well judged in relation to the statute’s plainly legitimate sweep.” Under this standard, the Oklahoma statute passed muster.

In Lewis v. City of New Orleans, a six-to-three majority of the Court reverted to the expansive approach of Gooding v. Wilson and invalidated a New Orleans ordinance which made it unlawful for any person “wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.” The Court then articulated a more restrictive approach in Erznoznik v. City of Jacksonville, which involved a facial challenge to an ordinance prohibiting drive-ins from showing films containing nudity when the screen was visible from a public street or place. Justice Powell’s
majority opinion concluded that the ordinance was invalid as applied to the appellant, but went on to address the question whether the ordinance should be invalidated on its face. The Court held that “a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts . . . and its deterrent effect on legitimate expression is both real and substantial.”\textsuperscript{184} Under this standard, the majority concluded that the statute was facially invalid.

In \textit{Young v. American Mini Theatres, Inc.},\textsuperscript{185} in contrast, the Court rejected a vagueness challenge to a zoning ordinance restricting the density of “regulated uses,” including adult theatres, in specified areas. Justice Stevens for a five-member majority held that the ordinance was not vague as applied, and that there was no occasion to consider its vagueness in other applications. The majority concluded that the zoning ordinance was subject to a narrowing construction and would not have a significant deterrent effect on protected activity.\textsuperscript{186} Accordingly, under the \textit{Erznoznik} standard, facial invalidation was inappropriate. In requiring demonstration of a “significant” deterrent effect, the Court did not rely on the fact that “conduct” was regulated, as in \textit{Broadrick}, but on the fact that the speech regulated was, in the majority’s view at least, “on the borderline between pornography and artistic expression.”\textsuperscript{187}

In \textit{Bates v. State Bar of Arizona},\textsuperscript{188} the Court further restricted application of overbreadth analysis by holding that it does not apply to “commercial speech.” Although commercial speech was entitled to first amendment protection, “the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context,” because commercial speech was unlikely to be deterred.\textsuperscript{189}

The Court continued to waver on the overbreadth issue in \textit{Village of Schaumburg v. Citizens for a Better Environment},\textsuperscript{190} in which it invalidated an ordinance prohibiting solicitation of contributions by organizations that did not use at least seventy-five percent of their receipts for charitable purposes. Even though commercial solicitation might concededly be regulated to prevent consumer

\textsuperscript{184} \textit{Id.} at 216 (emphasis added). “[W]hen considering a facial challenge, it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program.” \textit{Id.}

\textsuperscript{185} 427 U.S. 50 (1976).

\textsuperscript{186} \textit{Id.} at 60-61.

\textsuperscript{187} \textit{Id.} at 61. Justice Blackmun dissented, joined by Justices Brennan, Stewart, and Marshall, asserting that the statute was unconstitutionally vague and that its deterrent effect was just as significant as that leading to facial invalidation in \textit{Erznoznik}. \textit{Id.} at 94-96 & 95 n.7.

\textsuperscript{188} 433 U.S. 350 (1977).

\textsuperscript{189} \textit{Id.} at 380.

\textsuperscript{190} 444 U.S. 620 (1980).
fraud, religious and charitable solicitation raised a variety of speech interests protected by the first amendment. As applied to charitable solicitations, the seventy-five percent limitation could not stand. Whether plaintiff was engaged in charitable or commercial solicitation was irrelevant, because, under conventional overbreadth doctrine, the ordinance was invalid if it was not narrowly drawn to exclude protected speech, whether or not the conduct of the party before the court was protected. Although “conduct” was obviously involved, the Court did not mention Broadrick’s “substantial” overbreadth doctrine, nor the availability of a readily apparent narrowing construction, so important in Young.

The Burger Court’s general skepticism regarding overbreadth analysis reemerged in New York v. Ferber. At issue was a New York statute prohibiting knowing promotion of sexual performances by children under sixteen by distributing material depicting them. The Supreme Court applied the “substantial” overbreadth doctrine of Broadrick, stating that its rationale applied fully in a case involving “the harmful employment of children to make sexually explicit materials for distribution.” While a sweeping statute might have the potential for chilling expressive activities by many persons, “the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.” In Ferber, the Court doubted that the arguably impermissible applications of the statute amounted to more than a “tiny fraction” of the materials within its reach.

Putting aside the obvious internal inconsistencies of the Burger Court’s “substantial overbreadth” cases, several things are clear. Wide-ranging application of the doctrine evidenced by such cases as Coates and Gooding has been substantially curtailed. So long as allegedly “marginal” speech, or some form of “conduct” is involved, the Court is likely to require “substantial” overbreadth as a condition of facial invalidation. Although, as Erznoznik suggests, such cases occasionally occur, the usual result of the Court’s new doctrine will be to require the litigant before the Court to demonstrate that the challenged statute or ordinance is unconstitutional “as applied.” As with so much of its justiciability doctrine, the Court has justified this curbing of overbreadth analysis primarily in

191 Id. at 628, 632-33.
192 Id. at 633-35.
193 See text accompanying notes 184-86 supra.
195 Id. at 771.
196 Id. at 772. “This observation appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech.” Id.
197 Id. at 773.
terms relating to the properly limited role of the federal judiciary in a representative democracy.

The Burger Court's restrictive approach to overbreadth analysis is more consistent with prior overbreadth cases than such extreme applications as Gooding v. Wilson. In most of the foundation "overbreadth" decisions prior to 1970, the rights of the party before the Court had been violated, and the invalid sweep of the challenged statute was substantial. Facial invalidation in such circumstances is a far less substantial invasion of state and federal legislative and executive spheres than in cases such as Gooding, in which the invalid sweep of the statute was ephemeral, and the conduct of the party before the Court was almost certainly not protected.

The consistency of the Court's new doctrine leaves much to be desired. Presumably because of its view that "pure speech" cases involve very limited governmental interests, and because it is reluctant to repudiate overbreadth doctrine entirely, the Court has purported to preserve expansive overbreadth analysis in such cases. But the distinction between speech and conduct is at best illusive. All speech to some extent involves conduct. If the speech-conduct distinction makes any sense at all, surely the "conduct" which invokes the "substantial" overbreadth doctrine must be something more than the act of communication itself. Yet in cases such as Broadrick and Ferber, the identification of such additional "conduct" is difficult and strained. Ferber involved the sale of films—a core speech activity—while Broadrick involved political solicitations and button wearing. These were "conduct" cases. In contrast, the charitable solicitations involved in Village of Schaumburg were apparently analyzed under the expansive overbreadth doctrine applicable to "pure speech."

It is equally unclear on what basis courts may be expected to make the essentially empirical determination whether a statute is "substantially" overbroad. Such judgments are made without any concrete demonstration of the range of the statute's application. By their very nature, they require speculative determinations of a kind contrary to the essential role of the judiciary described in the Burger Court's decisions. Moreover, the Court has not made clear whether such unsubstantiated predictions are to be made on a qualitative or quantitative basis, or some combination of the two.

These observations might suggest that if the Court were true to its principles, it would reject overbreadth analysis altogether. The question remains, however, whether its retention of the doctrine in modified form should be viewed as a rejection of a view of justiciability which seeks to limit the judiciary to a role consistent with the separation of powers and federalism postulates of the Constitution. I suggest that it should not. An appropriately limited judicial role should not preclude a court from vindicating individual rights where it is clear that such rights are being violated in a significant number of cases, that holders of the rights are not indifferent, and that they will be unable to assert them under conventional doctrine. If the Court were able to say with confidence—if not with certainty—that these conditions were met, then its essential role as a guarantor of individual rights would require a departure from normal standing principles.

The Burger Court's restriction of overbreadth analysis represents an effort to address these concerns. As a generalization, where conduct is involved and overbreadth is insubstantial, or where a narrowing construction is readily apparent, the Court recognizes not only increased likelihood of unnecessary interference with legitimate law enforcement and other activities of the representative branches of federal and state governments, but also considerably less basis for predicting that important speech and associational interests will be irreparably impaired. But the "conduct" standard is only a conclusory generalization. The important question is not whether speech or conduct is involved, per se, but whether important protected speech is likely to be deterred in a significant number of cases and whether those who are deterred are unlikely to assert their rights in court. Similarly, the Court's focus on the type of speech involved in such cases as Young and Ferber underscores its reluctance to depart from conventional standing principles unless it is convinced that important first amendment values are truly at stake.

No matter what verbal formulation the Court employs, its effort to predict cases in which the rights of those not before the court are truly and irreparably threatened is inherently uncertain. As previously suggested, one conclusion which could be drawn is that the attempt should not be made. The Burger Court has not endorsed this view. However, the uncertainty of such predictions suggests that overbreadth analysis should be employed cautiously, and only when the Court has considerable confidence in its conclu-

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199 This is particularly true in light of the broad availability of modern declaratory judgment procedure permitting those whose rights are threatened to vindicate them without the risk of criminal penalty.
sion. This is the approach that the Court has taken. The fact that an exercise of judgment is required does not mean that the Court's approach to overbreadth analysis is "prudential." In justiciability determinations, as in other areas, constitutional analysis frequently requires difficult judgmental determinations. The Burger Court's wavering but painstaking approach to the overbreadth doctrine confirms the constitutional underpinnings of its justiciability doctrine generally, and of the requirement that a party assert an arguable claim of personal right in particular.

IV. Representational Standing

Representational standing raises essentially the same concerns as those discussed relative to third party standing. The question is when one person is entitled to invoke the judicial process to determine the "rights" of others. The issue arises in the contexts of organizational standing and class action standing. In each of these areas, the considerations already explored help to provide a more unified and principled explanation for the approach which the Burger Court has taken.

A. Organizational Standing

Despite forceful scholarly support for a contrary position, the Burger Court has rejected the concept that an advocacy interest of the type possessed by a public interest organization provides a basis for invoking the process of an article III court. The contrary position is based on the view that the public interest plaintiff may be in as good or better a position than the traditional plaintiff to present a case with sufficient "concrete adverseness" to permit informed judicial resolution. The Court's lack of enthusiasm for this approach is best viewed in terms of separation of powers and federalism, rather than as turning solely on whether ideological plaintiffs are generally capable of presenting a case in a form suitable for judicial resolution.

The Court has not rejected organizational standing altogether. The most comprehensive statement of its approach is that in Hunt v. Washington State Apple Advertising Commission. In sustaining the standing of the Washington Commission to raise a commerce clause challenge to North Carolina's restriction on the display of Washington apple grades, the Court reviewed its prior decisions and concluded:

We have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.203

The limitation that the presence of individual members of the organization be unnecessary to determination of the claim asserted or the relief sought is clearly focused on the article III requirement that a case be presented with concrete adverseness in a form suitable for judicial resolution.204 The other aspects of the Court's organizational standing doctrine focus on separation of powers and federalism concerns designed to preserve an appropriate role for the representative branches of federal and state governments. If an organization is to be accorded standing to assert the rights of its members, then the courts must be able to conclude with reasonable certainty not only that it is able to do so effectively, but also that it is not a volunteer, and that its presence in court very probably reflects the decision of the "holder" of the right to assert it. These considerations are not merely prudential, but go to the heart of the limited role of the judicial branch in our system of government. The organizational standing doctrine elaborated in Hunt reflects the Court's conclusion that where the organization in question takes on the character of a trade association or other voluntary organization whose very reason for being is to implement the wishes of its members, and where the suit before the Court advances interests which are "germane to the organization's purpose," there is sufficient assurance that the organization's members wish to invoke the judicial process.205

203 Id. at 343. Professor Tushnet has suggested that this approach to organizational standing is inconsistent with the Court's general insistence on the presence of a traditional plaintiff, and recognizes in effect the standing of public interest or ideological plaintiffs in these limited circumstances. See generally Tushnet, The Sociology of Article III: A Response to Professor Brilmayer, 93 HARV. L. REV. 1698 (1980). This view overlooks the significance of the limitations imposed by the Court.

204 The Court has little sympathy with the idea that an organizational plaintiff will adequately present questions turning wholly on the individual circumstances of each of its members. In the Court's view the necessity for individualized proof of such damages for each member requires their participation as parties. Warth v. Seldin, 422 U.S. 490, 515-16 (1975). On the other hand, the organization might obtain declaratory and injunctive relief in an appropriate case, because it "can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." Id. at 515. Such relief was nonjusticiable in Warth, however, because the organizational plaintiffs had shown no specific project that was currently being precluded by the defendants' conduct. Id. at 516-17. See the discussion of the remoteness aspect of the justiciability doctrine, infra at notes 304, 307.

205 See 432 U.S. at 343. Although the organization in Hunt was established by statute and was supported by compulsory assessments, the Court concluded that "for all practical
The same analysis largely explains the apparent tension between the Court’s third party standing decisions, which require a plaintiff to show some disability or obstacle to the direct assertion of the right by its holder, and the organizational standing decisions, which do not. Where the standing of the third party plaintiff is based merely upon some business relationship with the person whose “rights” are asserted, such as that of a doctor and patient or buyer and seller, the failure of that person to evoke the judicial process may reflect the fact that the rights are not truly threatened, or are not important to their possessor. A showing of some disability or obstacle to the direct assertion of the rights thus provides some additional assurance that the judicial process has not been invoked unnecessarily. On the other hand, where a voluntary organization asserts rights of its members that are closely related to its organizational purpose, the assumption that the members of the organization wish to obtain judicial relief is justified without any additional showing of disability.

B. Class Actions

The Burger Court has held that the claim of the representative party in a class action must be justiciable not only when the action is filed, but at the time of class certification. Thus, mootness of the named representative’s claim prior to class certification requires dismissal of the action—unless the matter is “capable of repetition yet evading review,” but mootness of the named plaintiff’s claims following class certification will not result in dismissal of the action so long as a live controversy with the class remains, and representation is adequate. This doctrine raises a number of questions: If a named representative with a justiciable claim for relief is unnecessary after class certification, why not before? If a named representative with a live claim is necessary before certification, why not after? And apart from these questions, is not the existence of the entire class action procedure, which by definition permits the court to resolve the rights of those not before the court even though they have not asserted them, inconsistent with the separation of powers view of justiciability suggested here?

As discussed in more detail below, the class action mootness

purposes [it] performs the functions of a traditional trade association representing the Washington apple industry.” Id. at 344. The Court made essentially the same point in NAACP v. Alabama, 357 U.S. 449 (1958), when it observed that “[p]etitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association . . . is but the medium through which its individual members seek to make more effective the expression of their own views.” Id. at 459.


207 Id.

208 See text accompanying notes 332-43 infra.
doctrine simply recognizes the legislative determination embedded in Rule 23 that in cases of shared common grievances falling within the categories of Rule 23, it is appropriate for a court to determine the rights of those who have not asserted them. The Rule 23 requirements of typicality, commonality, and adequate representation ensure that the claims of the class will be presented concretely and effectively—in short, that the matter is suitable for judicial resolution. As to the separation of powers and federalism underpinnings of justiciability doctrine, Rule 23 itself represents a legislative recognition of appropriateness of a broader role for the courts.

In this light, the Court’s insistence that a named representative with a live claim be before the court at all times before class certification, but not after, becomes more comprehensible. Prior to certification, there is no legislative authorization for the Court to entertain and determine the rights of class members who have not asserted them. After certification, the rule itself authorizes the Court to put aside normal separation of powers and federalism concerns and to determine the rights of the absentees without their consent.

V. Causation and “Redressability”

Whether the “injury” component of the justiciability doctrine is viewed primarily as a means of assuring that issues are presented with concrete adverseness, or as a means of ensuring that the power of judicial review be invoked only in cases of actual necessity, it is clear that there must be some basis on which the plaintiff’s injury can be linked to the challenged conduct of the defendant. Recognition of standing on the basis of injuries which are unrelated to the defendant’s conduct would be as gratuitous and illogical as recognition of standing in the absence of any injury at all.

One of the most notable aspects of the Burger Court’s justiciability decisions has been its clear recognition of and adherence to this principle. Because the limitation seems so obvious when stated in general terms (unless one rejects the “injury” component of the standing doctrine altogether), it is surprising that the Court’s particularization of the requirement would generate controversy. Nonetheless, of all of the justiciability decisions of the Burger Court, those dealing with the issues of causation and “redressability” have generated the most strident accusations that

210 The Rule was approved by the Supreme Court itself, but this was pursuant to power validly delegated by the Rules Enabling Act, and subject to the disapproval of Congress.
211 See, e.g., Jaffe, supra note 201; Tushnet, supra note 203.
the Court has manipulated the standing doctrine to serve its unarticulated substantive agenda.\(^\text{212}\)

The concepts of causation and redressability emerged in *Linda R. S. v. Richard D.*\(^\text{213}\) The mother of an illegitimate child challenged a Texas criminal statute imposing support obligations on the parents of legitimate, but not those of illegitimate, children as a denial of equal protection. The complaint alleged that the father of the child had refused to provide support, and that the district attorney had refused to prosecute.\(^\text{214}\) Justice Marshall and four other members of the Court concluded that the plaintiff lacked standing, since she "failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention."\(^\text{215}\) The plaintiff had been injured by the failure of support, but she had not shown direct injury "as the result" of the defendant's failure to prosecute.\(^\text{216}\)

In the *SCRAP* case, decided the same term, however, the Court reached a superficially inconsistent result. It sustained the standing of an unincorporated environmental organization to challenge implementation of a freight rate increase on the ground that it would discourage the use of recyclable materials, thus impairing its members' recreational and aesthetic interests in the use and enjoyment of the Washington, D.C. area.\(^\text{217}\) After concluding that standing could properly be based on aesthetic and environmental injury as well as economic injury, and that *Sierra Club* was distinguishable be-


\(^{213}\) *410* U.S. 614 (1973).

\(^{214}\) *Id.* at 616.

\(^{215}\) *Id.* at 617-18.

\(^{216}\) *Id.* at 618. "[I]f appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." *Id.* Having reached this seemingly dispositive, if questionable, conclusion, the majority then somewhat curiously observed that "the Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. . . . [These cases] demonstrate that in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619 (emphasis added).

Justice White, joined by Justice Douglas, dissented, stating that "I had always thought our civilization has assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct," an assumption apparently shared by the state of Texas which "assumes that criminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children." *Id.* at 621. Justices Blackmun and Brennan would have remanded the case for reconsideration in light of an intervening decision, *Gamez v. Perez*, 409 U.S. 535 (1973), but expressed the view that the standing issue was "a difficult one with constitutional overtones." *Id.* at 622.

\(^{217}\) *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 678 (1973). The challenge was based on the claim that no environmental impact statement had accompanied the Commission's decision, as allegedly required by the NEPA.
cause SCRAP had alleged injury to its members,\textsuperscript{218} the Court turned to the question of causation. It noted that the injury to the environment alleged in \textit{SCRAP} was "far less direct and perceptible" and involved a far more attenuated line of causation than that in \textit{Sierra Club}.\textsuperscript{219} Nonetheless, a unanimous Court sustained standing. Even though pleadings must be something more than "an ingenious academic exercise in the conceivable," the plaintiffs had alleged specific harm that distinguished them from other citizens, and it was impossible to say that their allegations could not be proved.\textsuperscript{220}

Together, these decisions created the appearance of judicial manipulation. A relatively obvious chain of causation was ignored in \textit{Linda R. S. v. Richard D.} in closing the court to a mother seeking support for an illegitimate child, while an admittedly remote and attenuated chain of causation was recognized in \textit{SCRAP} in order to reach and reject an environmental challenge on the merits. This impression was reinforced by the Court's next decision on the causation issue, \textit{Warth v. Seldin}. The low and moderate income plaintiffs in \textit{Warth} alleged that they desired to obtain suitable housing in the town of Penfield, but had been unable to do so because of the town's restrictive zoning ordinances, which had precluded the construction of housing that was within their financial means. Each of the individual plaintiffs alleged that he desired to reside in Penfield, and that he had made unsuccessful efforts to locate housing that he could afford.\textsuperscript{221} Justice Powell, for a five-member majority, concluded that such allegations were insufficient. The Court was willing to assume that defendants' actions had contributed substantially to the cost of housing in Penfield. Nonetheless:

\begin{quote}
[T]here remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.\textsuperscript{222}
\end{quote}

The plaintiffs asserted that their injuries resulted from enforcement of the zoning ordinance against third parties, which allegedly

\begin{itemize}
\item \textsuperscript{218} \textit{Id.} at 686-87.
\item \textsuperscript{219} \textit{Id.} at 688.
\item \textsuperscript{220} \textit{Id.} at 688-90. On the merits, the Court concluded that the district court had no jurisdiction to enter the requested injunction. \textit{Id.} at 689-90.
\item \textsuperscript{221} 422 U.S. 490, at 503-05 & n.14 (1975).
\item \textsuperscript{222} \textit{Id.} at 505.
\end{itemize}
precluded the construction of suitable housing. While the indirect nature of plaintiffs' harm was not in itself fatal to standing, "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."223

Justice Brennan's dissenting opinion foreshadowed the recurrent theme of later academic critics of the Burger Court's causation decisions. He argued that the majority's result "can be explained only by an indefensible hostility to the claim on the merits."224

In effect, the Court tells the Low-income minority and building company plaintiffs they will not be permitted to prove what they have alleged—that they could and would build and live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit.225

The majority's result was inconsistent with decisions such as SCRAP, which had "not required such unachievable specificity."226

The Court's somewhat tendentious application of the causation requirement continued in Simon v. Eastern Kentucky Welfare Rights Organization,227 in which indigents attempted to challenge an IRS ruling that permitted hospitals to obtain tax treatment as charitable organizations despite their refusal to provide nonemergency treatment to those unable to pay. Each of the individual plaintiffs alleged one or more occasions on which they or members of their family had been unable to obtain needed hospital services because of their indigency.228 The Court held that the indigent plaintiffs

223 Id. at 505. Plaintiffs' ability to live in Penfield depended on the efforts of third parties, and the record showed only two previous efforts to build low and moderate income housing. The record did not indicate that either of these projects would have satisfied the plaintiffs' needs at prices they could afford. Id. at 505-06. The plaintiffs' inability to live in Penfield was a "consequence of the economics of the area housing market" rather than of the challenged zoning practices. Id. at 506. The Court found no indication that the petitioners could afford housing in the proposed projects and, therefore, "the facts alleged fail[ed] to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury." Id. at 506-07. In contrast to lower courts recognizing standing where the plaintiffs challenged zoning restrictions as applied to projects they could afford and of which they were intended residents, the Court found that the petitioners here relied on an unsubstantiated and remote possibility that they may have been better off if the respondents had acted differently. Id. at 507.
224 Id. at 520 (Brennan, J., dissenting).
225 Id. at 523. Justice Brennan stated that "this is not the sort of demonstration that can or should be required of petitioners at this preliminary stage." Id. at 526. Further, they could not be expected to know the future plans of developers and the precise details of the Penfield housing market in advance of discovery. Id. at 527-28.
226 Id. at 528 (Brennan, J., dissenting).
228 Id. at 32-33.
lacked standing because they had not established that the revenue ruling was the "cause" of their inability to obtain hospital services, or that invalidation of the ruling would make such services available to them. In the Court's view, it was "speculative" whether the denials of services resulted from the tax ruling or from decisions of the hospitals made without regard to their tax status. *Linda R. S.* and *Warth* were controlling.\(^{229}\)

Causation analysis proved no barrier to standing in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.\(^{230}\) The Court sustained the standing both of a developer and an individual plaintiff to challenge the refusal of the Village of Arlington Heights to rezone a parcel to permit multiple-family construction. There was "little doubt" that the developer had standing, because it had been refused permission to build a specific project that it had contracted to place on a specific site.\(^ {231}\) If injunctive relief were granted, that barrier would be removed. It did not matter that the project still might fail because of an inability to obtain financing or for some other reason: "a court is not required to engage in undue speculation [about such uncertainties] as a predicate to finding that the plaintiff has the requisite stake in the outcome."\(^ {232}\) In addition, one individual plaintiff had alleged that "he seeks and would qualify for the housing MHDC wants to build in Arlington Heights."\(^ {233}\) This was held not to be a "generalized grievance" because it "focuses on a particular project and is not dependent on speculation about the possible actions of third parties not before the court."\(^ {234}\)

In *Bryant v. Yellin*,\(^ {235}\) the Court reverted to expansive treatment

\(^{229}\) The Supreme Court declined to reach the Secretary's contention that IRS policies could not be challenged by third parties whose own tax liabilities were unaffected. *Id.* at 37. However, Justice Stewart, concurring on the standing issue, additionally observed that "I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." *Id.* at 46.

Justice Brennan concluded that the case was not ripe because it was not clear how, if at all, the challenged ruling applied to the hospitals that had denied services to the plaintiffs. *Id.* at 52-55 (Brennan, J., concurring). In his view, however, the Court's standing analysis was deficient. The plaintiff's alleged claim of injury was not the denial of treatment per se, but the denial of the benefit of the economic inducement to provide indigents treatment which the revenue ruling had removed. *Id.* at 56. He believed that the line of causation in *Simon* was clearly less attenuated than that recognized in *SCRAP* as a sufficient basis for standing. *Id.* at 62-63.


\(^{231}\) *Id.* at 261.

\(^{232}\) *Id.* at 261-62.

\(^{233}\) *Id.* at 265. At trial he testified that if the project were built, he would probably move to it because it was closer to his job. This was sufficient to establish his standing because "if a court grants the relief he seeks, there is at least a 'substantial probability' . . . that the Lincoln Green project will materialize." *Id.* (citations omitted).

\(^{234}\) *Id.* On the merits, the Court held that there was no fourteenth amendment violation.

\(^{235}\) 447 U.S. 352 (1980).
of the causation requirement, reminiscent of the result in SCRAP. The United States sought a declaratory judgment that a statutory provision limiting water deliveries from federal reclamation projects to not more than 160 acres under single ownership applied to all lands in the Imperial Valley. After an adverse judgment, the United States determined not to appeal. A number of Imperial Valley residents then sought to intervene for the purpose of taking an appeal. They based their standing on the contention that they wished to purchase Imperial Valley lands, and that if the 160-acre limitation were applied, a provision of federal law requiring recipients of reclamation waters to sell their excess land at a price not including the value of irrigation rights if they were to continue to receive water would force the sale of Imperial Valley land at prices the plaintiffs could afford. Without careful analysis, the Supreme Court affirmed the decision of the court of appeals concluding that the intervenors had standing. That Court had reasoned that while no owner was forced to sell, it was highly unlikely that existing owners would prefer to withdraw land from production. Thus, respondents had standing under Arlington Heights, even though they could not establish with certainty that they would be able to purchase the excess lands.\footnote{Id. at 367-68. In a footnote, the Court concluded that absence of information about the intervenors' financial resources was irrelevant, because if forced sales occurred, they would be at prices far below the market and resale value of the property. Id. at 367 n.17.}

\textit{Bryant} is consistent with the "zone of interests" approach to standing doctrine suggested here, for the 160-acre limitation was designed to protect and enhance the viability of the small family farm. On the other hand, its "causation" analysis is more problematic. \textit{Bryant} is obviously inconsistent with \textit{Warth}. Unlike the plaintiffs in \textit{Arlington Heights}, the proposed intervenors had not established that if the 160-acre limitation were applied, a specific parcel of land which they wished to purchase would become available at a price they could afford. Thus, their claim of injury as a result of the 160-acre limitation was subject to multiple future contingencies. The Court nonetheless proceeded to reject application of the 160-acre limitation on the merits. \textit{Bryant} thus suggests that the Court may have manipulated the causation requirement with a view to the merits. On the other hand, only the standing of intervenors was at stake. It is not clear whether intervenors are required to meet the same standing requirements as those who initiate an action.\footnote{See 7A C. Wright & A. Miller, Federal Practice and Procedure §§ 1907, 1908 (1972) discussing the interest requirement of Rule 24(a). \textit{But see} New Orleans Public Serv., Inc. v. United Pipe Line Co., 732 F.2d 452 (5th Cir. 1984) (en banc).} Moreover, the Court clearly did not focus on the standing issue, which occupied only two paragraphs of the opinion.
In *Allen v. Wright*, the parents of black children attending public schools attempted to maintain a nationwide class action challenging the adequacy of IRS procedures to ensure the denial of tax exemptions to racially discriminating private schools. The suit alleged that the improper grant of such exemptions harmed their children's ability to obtain a desegregated education by aiding and encouraging the expansion of segregated private schools. A five-member majority of the Court held that the parents lacked standing. They had not alleged direct racial discrimination against their children, but only indirect injury resulting from the existence and growth of discriminating private schools. The Court stated that "the line of causation between [the challenged IRS conduct] and desegregation of respondents' schools is attenuated at best." The separation of powers aspect of standing stood behind the Court's refusal to find causation: "That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations."
If the Burger Court's causation decisions are evaluated solely on the rationale offered by the majority of an often narrowly divided Court, they are subject to criticism. Such cases as *Warth*, *Simon*, and *Allen v. Wright* appear to impose impossible pleading requirements on the plaintiffs, and to require plaintiffs somehow to prove or "establish" the validity of the chain of causation that they have alleged without the benefit of any opportunity for discovery or the presentation of evidence. Moreover, although the decisions are phrased in terms of the inadequacy of plaintiff's "allegations" of causation, there is no indication that the plaintiffs were to be accorded any opportunity to amend, or that there were any more detailed allegations that could have been made that would have satisfied the Court. In short, the plaintiffs were precluded as a matter of law from establishing the chain of causation that they had alleged. The Court offers no persuasive justification for erecting such an impenetrable legal barrier to the assertion of rights.

Apart from the pleading aspect, the cases rely heavily on the idea that it is "speculative" to assume that if the relief requested is granted, the plaintiff will in fact obtain the desired benefit. Yet, as others have pointed out, it has never been necessary to establish with certainty that a desired benefit will be obtained in order to permit a party seeking that benefit to maintain an action to remove an illegal barrier to the opportunity to receive it. The Court itself recognized this in *Arlington Heights* in which it sustained the standing of a developer and prospective tenant to challenge zoning restrictions precluding a project despite the fact that there was no assurance that financing could be obtained or that the project would be constructed absent the restrictions. The same was true in *Regents of the University of California v. Bakke*, where the plaintiff was permitted to challenge the constitutionality of a medical school's use of a racial quota in admissions, even though there was no assurance that the plaintiff would be admitted if the quota were removed. Moreover, it is difficult to answer the position of the dissenting Justices that criminal statutes are assumed to restrain the conduct prohibited, and that tax subsidies are granted for the very purpose of promoting the subsidized conduct.

The conclusion that has generally been drawn from such decisions is that they are explicable only in terms of hostility to certain...
types of claims on the merits.243 There is, however, reason to ques-
tion this conclusion. For example, the Court upheld standing to
challenge zoning requirements in Arlington Heights, despite its prior
rejection of standing in Warth. The difference between the cases
was in the immediacy and concreteness of the impact of the regula-
tion, not in the nature of the rights asserted. Moreover, if the
Court were hostile to certain types of claims on the merits, it is un-
likely that it would cloak its hostility under the guise of standing,
thus generating additional litigation by others who might be in a
better position to advance the disfavored rights. If the Court were
truly hostile to certain assertions of right, one would expect it to
reach out to seize and dispose of such claims on the merits, rather
than to temporize on justiciability grounds—just as it apparently
ignored normal justiciability limitations when it reached out to de-
cide a disfavored claim on the merits in Duke Power.

As previously argued, the Burger Court’s justiciability deci-
sions are frequently explainable on the basis of certain types
of merits considerations, such as whether the plaintiff is arguably
within the zone of interests protected by the constitutional or statu-
tory guarantee asserted. While this view does make standing turn
on the merits to a limited extent, it cannot be criticized on the
ground that it permits the Court to “manipulate” the standing doc-
trine to reject disfavored rights. Rather, this view of standing is
value-neutral.

Such value-neutral merits considerations may have influenced
the results of the causation decisions. Most notably, Linda R. S. and
Allen v. Wright—and less obviously, Simon—all involved challenges
to law enforcement discretion, which is subject to the most nar-
rrowly circumscribed judicial review even by those who are the di-
rect objects of enforcement.244 The Court’s opinion in Linda R. S.
explicitly emphasized this factor:

The Court’s prior decisions consistently hold that a citizen lacks
standing to contest the policies of the prosecuting authority
when he himself is neither prosecuted nor threatened with pros-
ecution. . . . [These cases] demonstrate that, in American juris-
prudence at least, a private citizen lacks a judicially cognizable
interest in the prosecution or nonprosecution of another.245

Simon involved the additional consideration that recognition of
standing would have permitted one taxpayer, in effect, to challenge
the tax liability of another. Although the majority of the Court de-
clined to reach this point in Simon, Justice Stewart’s concurring

243 See generally Nichol, supra note 212.
244 See, e.g., Heckler v. Chaney, 105 S. Ct. 1649, 1656-57 (1985); United States v. Batch-
opinion specifically relied on it.\textsuperscript{246} The same issue was lurking in the background in \textit{Allen v. Wright}, but it was not decided by the Court. In his dissenting opinion, Justice Stevens observed: "the Court could be saying that it will not treat as legally cognizable injuries that stem from administrative decisions concerning how enforcement resources will be allocated. This surely is an important point."\textsuperscript{247} He ultimately concluded that the issue regarding specific constitutional and statutory limitations on the IRS's enforcement discretion was not "so insubstantial that respondents' attempt to raise it should be defeated for lack of subject-matter jurisdiction on the ground that it infringes the Executive's prerogatives," but should be dealt with on the merits.\textsuperscript{248}

If the question whether third parties had a legally cognizable interest in constraining IRS enforcement discretion was not insubstantial, Justice Stevens was correct that it would not justify dismissal of the case for lack of standing to sue. Conversely, the negative implication of his analysis is correct: If the majority of the Court was of the view that third parties clearly have no legally cognizable interest in controlling the service's enforcement discretion, then the action was properly dismissed for lack of standing. The dismissal would be based on the general separation of powers principle that one who possesses no arguable claim of legal entitlement may not invoke the judicial process. As the majority did not address that issue either in \textit{Simon} or \textit{Allen v. Wright}, we do not have the benefit of the Court's views on the question. At the very least, however, the explicit grounding of its holding in \textit{Linda R. S.} on the view that third parties have no legally cognizable interest in controlling prosecutorial discretion suggests that the tax cases may implicitly recognize that third parties have no judicially cognizable interest in challenging the tax liabilities of others, or the IRS's allocation of enforcement resources. One should not assume that because the reasons articulated by the Court do not provide a fully satisfactory explanation for the results reached, it was motivated by hostility to the underlying claims on the merits.

The analysis does little to explain the result in \textit{Warth v. Seldin}. Nonetheless, even in this setting there is reason to question whether the Court was motivated by hostility to certain values. Although the issues of "causation" and "redressability" may not provide adequate justification for what the Court did, the result seems generally consistent with the approach that the Court has taken to another significant element of the justiciability doctrine—

\textsuperscript{247} 104 S. Ct. 3315, 3347 (Stevens, J., dissenting).
\textsuperscript{248} Id. at 3348.
that the threat to the plaintiff's interest be demonstrated to be both "real and immediate," rather than remote and hypothetical. In appraising Warth, it is therefore useful to examine the Burger Court's ripeness decisions.

VI. Ripeness

The Burger Court has emphasized that in order to present a justiciable controversy, the plaintiff's threat of harm must be "real and immediate," not abstract, speculative, or remote. Such decisions have frequently insulated claims of unconstitutional patterns of state and local law enforcement from anticipatory judicial review. This development has once again produced close divisions on the Court, and considerable scholarly criticism. As in other areas, a brief chronological review of what the Court has done is helpful to analysis.

Younger v. Harris concerned the circumstances in which a federal court might enjoin a pending state prosecution. Harris had already been indicted, but three other plaintiffs had not yet been charged. Although those plaintiffs alleged that the prosecution of Harris inhibited their own exercise of first amendment rights, the Court held that the controversy was not justiciable. These plaintiffs did not claim that prosecution was likely, or even a remote possibility. The Court indicated, however, that if the three had made such allegations, a live controversy would exist should the district court find them to be true.

The decision in Younger was not clearly couched in constitutional terms. In O'Shea v. Littleton, however, the Court held non-justiciable a claim by residents of Cairo, Illinois, challenging alleged unconstitutional conduct of a local judge and magistrate in bond setting, sentencing, and jury fee assessment. The complaint failed to allege that the named plaintiffs had been subjected to any of the alleged unconstitutional practices, although, on oral argument, counsel represented that they had been. Justice White, for six members of the Court, held that plaintiffs had not alleged a sufficient threat of injury to themselves to present an article III controversy. Plaintiffs must allege an injury or threat of injury that is both

251 Id. at 42.
253 Id. at 495. The unconstitutional conduct was allegedly in retaliation for economic boycotts challenging racial discrimination in which the plaintiffs had participated. Id. at 491-92.
“real and immediate,” not “conjectural” or “hypothetical.” \(^{254}\) Even if the named plaintiffs had experienced illegal conduct in the past, “past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present, adverse effects.” \(^{255}\) Although past wrongs were evidence bearing on whether there was a real and immediate threat of future injury, there was no allegation that plaintiffs would be improperly arrested or prosecuted in the future. The Court “assume[d] that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners.” \(^{256}\)

In *Steffel v. Thompson*, \(^{257}\) the Court held that a plaintiff who had been threatened with arrest for the distribution of handbills at a shopping center presented a justiciable controversy under the first amendment. Petitioner alleged that he wished to return to the shopping center to distribute handbills, but had not done so because of his fear of arrest. The parties stipulated that if he did so, he would be arrested. \(^{258}\) The controversy was justiciable under article III because, unlike the three plaintiffs in *Younger*, petitioner had “alleged threats of prosecution that cannot be characterized as ‘imaginary or speculative.’” \(^{259}\) Justiciability did not require that the plaintiff actually be arrested or prosecuted. \(^{260}\)

The Court’s unwillingness to find a justiciable controversy where application of a challenged regulatory provision to the plaintiff rests on uncertain or multiple contingencies was strongly illustrated in its next treatment of the ripeness doctrine, in *California Bankers Association v. Shultz*. \(^{261}\) Banks, bank customers, and associa-
tions representing their interests sought to challenge the record-
keeping and reporting requirements imposed by regulations
implementing the Bank Secrecy Act of 1970. The Court held a vari-
ety of the claims nonjusticiable on ripeness grounds. The "claims
of depositors against the compulsion by lawful process of bank
records involving the depositors' own transactions must wait until
such process issues."262

In the *Regional Rail Reorganization Cases*,263 the Court concluded
that a variety of constitutional challenges to the compulsory reor-
ganization of eight major railroads by conveyance of their prop-
ties to Conrail were ripe for consideration. The district court had
determined that the taking claim was not ripe, relying on a number
of contingencies which remained before any conveyance would be
accomplished, including the formulation of a reorganization plan,
failure of either house of Congress to disapprove the plan, and the
issuance of an order of conveyance by a special court.264 The
Supreme Court noted that "issues of ripeness involve, at least in
part, the existence of a live 'Case or Controversy' " under article
III.265 In the Court's view, "implementation of the Rail Act will
now lead inexorably to the final conveyance, although the exact
date of that conveyance cannot be presently determined."266 The
statute conferred no discretion on the special court to refuse to or-
der the conveyance to Conrail. "Where the inevitability of the operation
of a statute against certain individuals is patent, it is irrelevant to the
existence of a justiciable controversy that there will be a time delay
before the disputed provisions will come into effect."267

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262 *Id.* at 51-52.

Similarly, the ACLU's first amendment challenge to recordkeeping and reporting re-
quirements on the ground that they might disclose its members and contributors was not
ripe because "no such disclosure has been sought by the Government . . . ." *Id.* at 56.
Fifth amendment challenges of individual depositors to domestic and foreign reporting re-
quirements were also unripe, for even though the depositors alleged that they would en-
gage in covered transactions, there were no allegations establishing that any of the
information required would tend to incriminate them. *Id.* at 73.

In dissent, Justice Marshall impliedly challenged a number of the majority's ripeness
decisions, on the ground that the banks frequently voluntarily disclosed their records to the
government without the issuance of compulsory process, and the depositors would there-
fore have no meaningful opportunity to raise their claims at a later time. *Id.* at 96-99.


264 *Id.* at 138-40.

265 *Id.* at 138.

266 *Id.* at 140.

267 *Id.* at 143 (emphasis added). Nor were there any prudential factors which would
support delaying the resolution of the constitutional question until a time closer to convey-
ance. In particular, it was unlikely that the courts would have a better factual record on
which to decide the issues at any time of conveyance, and the conveyance once made, would
be practically irreversible. *Id.* at 145-46. The railroads also claimed that they would suffer
an "erosion taking" of their properties by forced unprofitable operation pending the con-
voyance to Conrail. Absent a determination of the availability of a Tucker Act remedy to
Rizzo v. Goode involved yet another challenge to an alleged pattern of discriminatory law enforcement by local authorities. The suits alleged a pervasive pattern of unconstitutional mistreatment of minority citizens by the Philadelphia police department. The principal defendants were the mayor, the managing director, and the police commissioner of the city, who were alleged to have inadequately supervised the police. The evidence established a number of instances in which the constitutional rights of individual members of the plaintiff classes had been violated. Justice Rehnquist, for six Justices, expressed concern that the evidence established no link between past constitutional violations and any policy or practice of the defendants and doubts whether there was an article III case or controversy between the individual defendants and the named plaintiffs. As in O'Shea, the existence of a real and immediate threat of injury turned on speculation as to what would happen to the plaintiffs in the future. Here, however, the question was even more conjectural than in O'Shea, because the question was not what the defendants might do to the plaintiffs in the future, but what "one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures."

The Court's decision in Buckley v. Valeo illustrates the importance of congressional action in justiciability determinations. It

compensate for any unconstitutional erosion of the estate, there was "a distinct possibility" that plaintiffs would suffer a taking without adequate assurance that compensation would ever be provided. Id. at 124. The Court did, however, hold that issues of valuation theory were not ripe for decision, where it appeared that neither the property to be valued nor its actual value could be determined until the time of conveyance. Id. at 146.

269 Id. at 367-70. The district court found a tendency to discourage citizen complaints of police misconduct and to minimize the consequences. It ordered the implementation of a revised procedure for handling complaints.
270 Id. at 371-72.
271 Id. at 372. The majority found it unnecessary to rest on this conclusion alone, however. In their view, § 1983 would not support a cause of action for equitable relief on the basis of the alleged inaction of the defendants. Id. at 374-78. The Court further concluded that principles of equitable restraint and federalism precluded the relief sought, id. at 378-79, and that these principles are even more forceful when federal courts are asked to supervise the conduct of state judicial, legislative, or executive officials, id. at 380.

Justice Blackmun, for himself and Justices Brennan and Marshall, dissented on the ground that the trial court had found a pattern of violations of constitutional rights. He distinguished O'Shea, for in that case, whether the named plaintiffs would be subjected to unconstitutional practices in the future depended on whether they would first be arrested, but the Court had assumed that they would conform their conduct to the requirements of the law. Id. at 383-84. Here, in contrast, the plaintiffs had been injured by past police misconduct and feared future injury regardless of whether they violated the law. Id. The dissenters also thought it clear that equitable relief was available under § 1983 to prevent a supervisor from consciously permitting subordinates to violate the constitutional rights of others. Id. at 386.
thus underscores the fundamental separation of powers basis of the Burger Court's justiciability doctrine. Pursuant to the expedited anticipatory review provisions of the Federal Election Campaign Act of 1971, the Court reached and resolved constitutional challenges to the contribution and expenditure provisions, the reporting and disclosure provisions, and the public financing provisions of the Act without any consideration of ripeness. It was clear that these provisions of the Act would inevitably affect at least some of the plaintiffs in the upcoming election, if they had not already done so. The court of appeals had, however, concluded that an appointments clause challenge to the exercise of certain administrative and enforcement powers by the Federal Election Commission was not ripe, as those powers had not yet been exercised. The Supreme Court reversed. In its view, the Commission had exercised some of its powers, and the "all but certain" exercise of its other powers was imminent. The expedited judicial review provisions of the Act created a legally protected interest in the plaintiffs to obtain an immediate determination of the constitutionality of the provisions of the Act. Thus, under the principle of the Regional Rail cases, the controversy was ripe.

There is a temptation to conclude that normal ripeness principles were sacrificed to expediency in Buckley. While exercise of the Commission's investigatory, rulemaking, and enforcement policies may have been inevitable, there was no demonstration that the Commission's future activities would have an adverse impact on any of the particular plaintiffs before the Court. Thus, the result seems superficially inconsistent with such decisions as O'Shea and Rizzo. There was a significant point of difference, however. In Buckley, the expedited judicial review provisions of the Act created a legally protected interest in the plaintiffs to obtain an immediate determination of the constitutionality of the provisions of the Act. It was this protected legal interest that was immediately at stake. Thus, so long as the controversy was sufficiently concrete to permit judicial determination, therefore, there was no basis on which the Court should have declined to exercise the jurisdiction that Congress had conferred.

273 See id. at 12.
274 Id. at 115 n.157.
275 Id. at 116-17.
276 Congress was understandably most concerned with obtaining a final adjudication of as many issues as possible litigated pursuant to the provisions of § 437h. Thus, in order to decide the basic question whether the act's provision for appointment of the members of the Commission violates the Constitution, we believe we are warranted in considering all of those aspects of the Commission's authority which have been presented by the certified questions.

Id. at 117.
As previously noted, the Court found the controversy in the Duke Power case ripe, even though the possibility of a nuclear disaster bringing the challenged limitation of liability provisions of the Price-Anderson Act into play was remote. The Court reasoned that the environmental injuries alleged to result from the present construction of nuclear power plants—assertedly in reliance on the Price-Anderson limitations—were real and immediate. Although no nuclear accident had occurred, such an occurrence "would not, in our view, significantly advance our ability to deal with the legal issues presented nor aid us in their resolution." However, delayed resolution would preclude the plaintiffs from obtaining any relief from their present injuries, and raise doubts about the scope of private liability for nuclear accidents. The later effect would frustrate the purpose of the Price-Anderson Act.

The Court's approach in Duke Power was fundamentally in error. The only immediate injury was unrelated to any arguable claim of right by the plaintiffs. And their only arguable claim of right—application of the limitation of liability provision—was not ripe. The Court was motivated by its perception of the public interest in prompt resolution of the constitutionality of the limitation of liability provision. But a principled separation of powers view of justiciability would, at the very least, have required congressional recognition of the appropriateness of judicial review in order to proceed, such as that in Buckley. Such recognition could not, of course, overcome article III ripeness limitations to the extent they are directed to ensuring adequate presentation of an issue. But by conferring a protected legal interest on citizens immediately injured by the construction of nuclear plants it would have obviated ripeness arguments that no protected legal interest of the plaintiffs was immediately threatened. The approach in Duke Power should therefore be rejected in favor of that reflected in Buckley v. Valeo.

In Babbit v. United Farm Workers National Union, a unanimous Court entertained an anticipatory attack by a farm union and its members on a variety of Arizona statutory provisions regulating agricultural employment, but held that other contentions were not ripe. Ripeness is a showing that the operation and enforcement of the statute presents a concrete danger of injury to the plaintiff.

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277 See text accompanying notes 73-74 supra.
279 Id. at 82.
280 Id.
282 It is enough to show that "an intention to engage in a course of conduct arguably affected with a constitutional interest" and that "there exists a credible threat of prosecution." Id. at 298.
To meet that burden, the union need not expose itself to criminal prosecution provided the injury sought to be avoided was "certainly impending."\(^{283}\) Under these standards, the challenge to the statutory election procedure on the ground that it created delays which prevented participation by many farmworkers was justiciable. It was not essential that the union actually have invoked the statutory election procedures, because its very claim was that those procedures unconstitutionally frustrated the democratic selection of bargaining representatives.\(^{284}\)

The statute also made it unlawful to discourage ultimate consumers from using agricultural products, or to use dishonest or deceptive publicity. The Court held that an anticipatory attack on this provision was justiciable because the union had engaged and would continue to engage in boycott activity.\(^{285}\) The Court rejected the argument that the matter was not justiciable because the statute had never been enforced. The state had not disavowed its intention to enforce the statute, and so long as the fear of prosecution was not imaginary, the union need not expose itself to prosecution.\(^{286}\)

In contrast, the Court held that plaintiffs' challenge to a provision of the law regulating access to private property was premature. Although UFW would undoubtedly seek such access, to anticipate denial was "conjectural."\(^{287}\) The Court held that these claims could not be resolved until the appellees had an interest in obtaining access to a particular facility and could demonstrate a real possibility that access would be denied.\(^{288}\)

In a series of subsequent decisions, the Court held that claimed unconstitutional takings were not ripe for decision where the plaintiffs had not established that they possessed property subject to the challenged regulation, or the controversy had not developed to the point where the impact of the regulation could be determined.\(^{289}\)

\(^{283}\) Id. at 298.
\(^{284}\) Id. at 299-300. It was enough that UFW "has in the past sought to represent Arizona farmworkers and has asserted in its complaint a desire to organize such workers and to represent them in collective bargaining." Id. at 301.
\(^{285}\) Id. at 301.
\(^{286}\) Id. at 302-03. In the same way, plaintiffs' vagueness challenge to the criminal penalty provisions of the statute was justiciable. Plaintiffs asserted that they had previously engaged and would engage in protected organizing, boycotting, picketing, striking and collective bargaining activities regulated by the statute, and they could not be sure what was prohibited. Id. at 303. It was clear that plaintiffs wished to engage in activities prohibited by the Act, and they should not be expected to pursue such activities at their peril.
\(^{287}\) Id. at 304.
\(^{288}\) Id. Similarly, the question of the validity of compulsory arbitration provisions of the Act was held to be nonjusticiable because, even assuming an unlawful strike or boycott were to occur, "employers may elect to pursue a range of responses other than seeking an injunction and agreeing to arbitrate." Id. at 305. On the merits, the Court held that except as to the election provisions, the district court should have abstained to permit construction of the act by Arizona state courts. Id. at 306-13.
Such decisions were entirely predictable, and have generated little discussion.\textsuperscript{289}

In \textit{Clements v. Fashing},\textsuperscript{290} the Court permitted public officials who wished to run for another office to challenge a provision of the Texas Constitution providing that their candidacy would constitute an automatic resignation from the offices they then held even though they had not actually declared their candidacy. It was enough that plaintiffs had alleged that but for the challenged provision, they would engage in the prohibited acts.\textsuperscript{291}

In its most recent and perhaps most controversial ripeness decision, \textit{City of Los Angeles v. Lyons},\textsuperscript{292} a narrowly divided 5-to-4 Court held that a citizen of Los Angeles who had been arrested for a traffic violation and subjected to a "chokehold" by the Los Angeles police presented a justiciable claim for damages, but not for prospective injunctive relief. Justice White, for himself, the Chief Justice, and Justices Powell, Rehnquist and O'Connor, held that the

\textsuperscript{289} For example, in \textit{Agins v. City of Tiburon}, 447 U.S. 255 (1980), the Court held that a challenge to a municipal zoning ordinance alleged to limit development of plaintiff's five acre parcel to between one and five single family residences could be entertained only to the extent that the mere enactment of the ordinance was alleged to constitute a taking. The contention that limiting plaintiffs to less than five homes was a taking was not ripe because plaintiffs had not submitted a plan for development under the ordinance. \textit{Id.} at 260.

Similarly in \textit{Hodel v. Virginia Surface Mining & Reclamation Ass'n}, 452 U.S. 264 (1981), the Court entertained pre-enforcement challenges to the constitutionality of the Surface Mining Control and Reclamation Act of 1977 by coal producers on the ground that the Act exceeded the scope of Congress' power under the commerce clause and violated the tenth amendment. This result was understandable, as it was clear that the plaintiffs were subject to the Act in their ongoing operations. However, the Court held that challenges to the Act's "steep slope" reclamation provisions were not ripe because the plaintiffs had not identified any property in which they had an interest that had allegedly been taken by the operation of the Act. \textit{Id.} at 294. Moreover, because taking claims by their very nature require an ad hoc factual inquiry in each case, resolution of such claims turned on the identification of specific property claimed to have been taken. \textit{Id.} at 295. In addition, plaintiffs had not availed themselves of the opportunity to obtain a variance or a waiver. \textit{Id.} at 297.

The Court similarly declined to resolve challenges to the civil penalty provisions of the Act where the plaintiffs did not allege that civil penalties had been assessed against them, \textit{id.} at 303-04, but it did reach and resolve a due process challenge to other provisions of the Act where the record showed that some of plaintiffs had been subjected to such orders, \textit{id.} at 298-300. The conclusion that the due process challenge seeking prospective relief was ripe appears to conflict with the result in \textit{City of Los Angeles v. Lyons}, 461 U.S. 95 (1983); \textit{see text accompanying notes 292-96 infra.}

Similarly, in \textit{Dames & Moore v. Regan}, 453 U.S. 654 (1981), the Court held that the availability of a remedy in the Court of Claims for any unconstitutional taking resulting from the President's suspension of Iranian claims as part of the Iranian hostage settlement was justiciable, because there must at the time of taking, be a reasonable and adequate provision for obtaining compensation. \textit{Id.} at 689. However, all parties and the Court agreed that whether the suspension of any particular claim was an unconstitutional taking was not ripe prior to the decision of the Iran-United States Claims Tribunal. \textit{Id.} at 688-89.

\textsuperscript{290} 457 U.S. 957 (1982).

\textsuperscript{291} \textit{Id.} at 962.

\textsuperscript{292} 461 U.S. 95 (1983).
case was not moot because, despite its litigation moratorium, the city might resume the practice at any time. Nonetheless, the majority believed that the federal courts were without article III jurisdiction to entertain the claim for injunctive relief. Decisions such as O'Shea and Rizzo were dispositive. Past exposure to illegal conduct did not in itself show a present case or controversy regarding injunctive relief; rather, Lyons' "standing" to seek an injunction turned on "whether he was likely to suffer future injury from the use of the chokeholds by police officers." The fact that he had been choked five months previously did not establish that he would be stopped and choked again in the future. In order to establish that he would again be choked, Lyons would have to show that he would be stopped for another traffic violation, and that the police always choked any citizen they arrested or that the City authorized them to do so.

Justice Marshall, for himself and Justices Brennan, Blackmun and Stevens, dissented from the majority's "fragmented" standing analysis. If Lyons had standing to seek damages, he also should have standing to seek injunctive relief. There plainly was a case or controversy, and "[n]one of our prior decisions suggests that his requests for particular forms of relief raise any additional issues concerning his standing." Lyons' claim for damages assured that there was a live dispute and concrete adverseness regarding the constitutionality of the City's chokehold policy.

293 Id. at 101.
294 Id. at 102, 105.
295 Id. at 105-06. Lyons' complaint alleged that the city's policy authorized chokeholds absent a threat of deadly force. Id. at 106. The majority explained that the likelihood that Lyons would be injured under such a policy was no more real than the possibility that injury would occur due to his own resistance or police disobedience of their instructions. Id. The case, thus, clearly fell within the parameters of O'Shea and Rizzo since, even assuming the police would stop Lyons again, "it is untenable to assert . . . that strangleholds are applied by the Los Angeles police to every citizen who is stopped or arrested." Id. at 108. Although the police might in certain instances illegally and unconstitutionally apply strangleholds which result in injury or death, this alone could not establish article III standing for Lyons himself. Id.

In addition, the Court held that the "capable of repetition, yet evading review" doctrine did not apply since Lyons' claim for damages remained justiciable and he had failed to "make a reasonable showing that he [would] again be subjected to the alleged illegality." Id. at 109. Even assuming the pending damages claim afforded standing to seek injunctive relief, Lyons had failed to establish the prerequisite "irreparable injury." Id. at 111. Thus, "Lyons [was] no more entitled to an injunction than any other citizen of Los Angeles . . . ." Id. The majority concluded by emphasizing that while a state is free to apply less restrictive standing and remedial requirements, principles of federalism, equity, and comity restrain federal courts from issuing injunctions against state administration of state criminal law. Id. at 112-13.

296 Id. at 114.
297 The dissent argued that Lyon's complaint clearly alleged that the city's policy authorized the use of chokeholds without provocation. Id. at 120-21 (Marshall, J., dissenting). O'Shea and Rizzo were distinguishable because they involved only prospective relief. Id. at
Apart from *Duke Power*, the general thrust of the Burger Court’s ripeness decisions is satisfactory. The requirement that the plaintiff’s asserted injury be both real and immediate is justified as a means of assuring that a question is presented with sufficient concreteness and adversity to permit informed judicial resolution. In *Duke Power* and *Babbit*, the Court suggested that the need for added specificity was “prudential.” However, at some point it clearly embodies a constitutionally required minimum as well. The idea that, beyond this constitutional minimum, a court may postpone anticipatory review as a matter of judicial discretion in order to obtain a “better” record is not objectionable in the abstract. Nonetheless, care should be exercised to ensure that such postponements of review on “prudential” grounds do not result in denial of effective judicial review altogether.

Apart from assuring concrete adverseness, the ripeness doctrine serves separation of powers and federalism concerns. Even if a party might be subject to future injury of a kind arguably within the protection of the statute or constitutional provision relied upon, there is no need to invoke the judicial process until it can be said with some assurance that the asserted injury will occur. Absent such assurance, the plaintiff is indistinguishable from the general run of citizenry—he is, in short, asserting a “generalized grievance” the resolution of which is inconsistent with the limited role of the federal courts envisioned by the Constitution. The concept that asserted injury be both “real” and “immediate” thus rests on the same premises as the Court’s insistence that the plaintiff assert specific and personal injury in fact, and on the additional requirement—whether it be characterized as constitutional or prudential—that such injury have some logical nexus with the statute or constitutional provision relied upon.

The view reflected in *Younger* and subsequent decisions that the existence, standing alone, of an allegedly unconstitutional statute or practice which might in the future be applied to the conduct of the plaintiff, does not create a justiciable controversy, was well es-

123-25. Once Lyons established standing to obtain some relief, federal courts could decide what relief was available after determination of the merits. *Id.* at 130. Regarding equitable relief, *Rizzo v. Goode* was inapposite, *id.* at 134, and all other authority concerned federal injunctions of state criminal proceedings; thus, the principles of equity, comity and federalism underlying the *Younger* doctrine have little force in Lyons’ case. *Id.* at 134-35. Moreover, an injunction was appropriate under traditional equitable principles, since choking was unprovoked and pursuant to city policy, and since there was a future risk of death or serious injury absent an injunction. The dissent concluded by criticizing the majority’s opinion for “imuniz[ing] persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again in the future.” *Id.* at 137.
tablished in prior law. Where the plaintiff was engaged in a business or course of conduct that would almost certainly bring the operation of the allegedly unconstitutional statute or practice into play, as in Steffel v. Thompson, The Regional Rail Reorganization Cases, Buckley, Babbitt, and Clements v. Fashing, the Court has not hesitated to find justiciability unless there was some reason to believe that resolution of the issue would be significantly aided by further factual development. The Court has been equally sensitive to the purpose of the Declaratory Judgment Act. It has repeatedly held that a person need not expose himself to the operation of an allegedly unconstitutional statute in order to challenge its validity. Thus, the Court has recognized the unjustified hardships caused by some of its pre-1970's ripeness decisions, which required the plaintiffs to expose themselves to irreparable injury in order to invoke the power of judicial review.

The Court's decisions in O'Shea, Rizzo, and Lyons, involving allegedly unconstitutional patterns of misconduct by state executive and judicial officers, have been the most controversial. The essence of such decisions was to deny injunctive relief not only to members of the plaintiff class, but even to the very plaintiffs before the Court who had themselves been subjected to the alleged unconstitutional practices in the past. In Lyons, this principle was extended to preclude a claim for future injunctive relief even though the plaintiff presented a justiciable claim for damages.

Such decisions are subject to criticism to the extent that they rest in whole or in part on the view that the Younger v. Harris doctrine of equitable restraint precludes injunctive relief against unconstitutional state executive action as well as judicial proceedings. On the preliminary question of justiciability, however, the cases are consistent with the general view that a controversy is not ripe for decision if it presents multiple contingencies regarding subsequent application of the allegedly unconstitutional statute or practice to the plaintiff. In all of these cases, there was consider-

300 Younger was based on historical principles of comity applicable to state judicial proceedings, which provided an adequate forum in which the federal plaintiff might vindicate his or her rights. 401 U.S. 37, 41-47 (1971). Broad application to state executive and administrative action not only ignores this rationale, but would vitiate the role of federal courts as guarantors of individual rights under the Constitution and Reconstruction civil rights statutes.
able uncertainty whether the plaintiffs would again engage in a
course of conduct that would expose them to the allegedly uncon-
stitutional statute or practice, and, if so, whether the statute or
practice would be applied to them. The cases were thus much dif-
ferent in principle from Steffel, Regional Rail, Buckley, and Babbitt,
where it was obvious that the plaintiffs desired to engage in the reg-
ulated conduct, and that the challenged statute or practice would
be applied to them if they did.302

A view of justiciability doctrine grounded in an appropriately
limited judicial role goes far to explain even the Lyons decision. If
the sole concern of standing and ripeness limitations were to assure
adequate presentation of a controversy, then Lyons' claim should
have been held to be justiciable. There was no reason to think that
the issues on the question of injunctive relief differed significantly
from those that would necessarily be presented with specificity on
the damages claim. But justiciability doctrine serves separation of
powers and related federalism concerns as well. It limits invocation
of the judicial power to instances in which a plaintiff can show that
relief is not only desirable, but necessary to prevent or redress in-
jury that is personal to the plaintiff and is immediately threatened.
On this perspective, the result in Lyons, although subject to ques-
tion,303 is less obviously incorrect.

The Court's apparent conviction that a plaintiff seeking future
relief against an alleged illegal statute, regulation or policy must
differentiate himself from the general run of citizens by demon-
strating with reasonable certainty that he personally will be sub-
jected to the illegality also goes far to explain (if not fully to justify),
the Court's much criticized "causation" decisions: Linda R.S.,
SCRAP, Warth, Simon, Arlington Heights, and Allen v. Wright. In these
cases, plaintiffs sought prospective relief to prevent the future im-
 pact of asserted illegal statutes, regulations or policies. Where
standing was denied, multiple contingencies prevented the Court
from concluding that the challenged practice would have an impact
on the very plaintiff before the Court, as opposed to the class of
which the plaintiff was a member.304 The Court's maligned "causa-

M. Kane, Federal Practice and Procedure § 2757, at 586-95 & n.25 (1983) (criticizing
but recognizing the doctrine).
302 See also United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413
U.S. 548, 551-53 & 551 n.3 (1973); Lake Carriers Ass'n v. MacMullin, 406 U.S. 498, 508-09
(1972).
303 See text accompanying note 308 infra.
304 For example, in Linda R.S., the alleged discriminatory support statute would affect
the plaintiff only if, absent the discrimination, plaintiff's spouse would be prosecuted, and
only if such prosecution would cause support to be forthcoming. In Warth, the challenged
illegal zoning practice would have a future impact on the plaintiff only if a project which the
plaintiff could afford and desired to live in would be constructed absent the zoning regula-
tion" decisions are thus not different in principle from general ripeness doctrine, which denies justiciability to a claim for prospective relief where it cannot be said with some certainty that the impact of the illegality alleged will fall on this plaintiff. From this perspective, the dissenter’s argument that criminal prosecution and IRS tax exemptions may be assumed to have some effect in deterring or inducing the prohibited or exempt conduct would demonstrate only that the challenged illegality would have an impact on members of the plaintiff class, rather than on the plaintiff himself. Under consistent decisions of the Court, such a showing does not create a justiciable controversy.

Most of the decisions in which the Court has found “causation” are consistent with this view. In Arlington Heights, the chain of contingencies was reduced because a specific project which the plaintiff could afford and asserted a desire to live in had been proposed and rejected. It was irrelevant that even if approved the project might not be built for other reasons. It was enough that plaintiff had shown that the challenged illegality almost certainly would be brought to bear on him, as opposed to others in the community. In the Bakke case, the challenged admissions procedure had been applied to the plaintiff. Thus, the controversy was ripe and the plaintiff had standing to sue, even though if the practice were eliminated, he might not be admitted to medical school for other reasons. Even the SCRAP case, frequently cited as sustaining standing based on a speculative chain of contingencies, is consistent with this analysis if a “zone of interests” view of standing is accepted. The direct injury in SCRAP was not the possible future environmental degradation that might result if no Environmental Impact Statement were prepared, but the denial of the plaintiff’s statutorily protected interest in the consideration of potential adverse environmental effects before agency action was taken. The plaintiffs not only would, but already had, felt the effects of the allegedly illegal failure to comply with NEPA.

To rationalize the Court’s decisions is not necessarily to justify them. Some of the Court’s causation and ripeness decisions, which appear to turn on the existence of multiple contingencies between

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305 See text accompanying notes 230-34 supra.
the challenged illegality and its impact on the plaintiff, may not have significantly affected the vindication of individual rights. It was possible that the plaintiff (or at least a member of the plaintiff's class) might return to court when the matter was more developed.307 The Arlington Heights case is illustrative.

In some of the Court's ripeness decisions, however, such as O'Shea, Rizzo, and Lyons, it would clearly be impossible, on the Court's premises, for any plaintiff sufficiently to eliminate the contingencies of enforcement to present a justiciable controversy for prospective relief. Do these decisions represent an abdication of the Court's responsibility to protect individual rights under the Constitution? Or can the result be justified by the conclusion that in most instances, the ability of an injured plaintiff to obtain retrospective compensatory relief sufficiently preserves the role of the judiciary under article III? This was the apparent conclusion of the Court in Lyons. But, in that setting where there was a demonstrable risk of fatal injury for which damages could provide no relief, one must wonder whether the balance between the need for judicial protection of individual rights was not unduly subordinated to separation of powers and derivative federalism concerns. Whether viewed in constitutional or prudential terms, there is no doubt that ripeness doctrine involves difficult questions of judgment and degree: the uncertainty that the plaintiff will suffer future injury and the need for further factual development must be balanced against the potential hardship of denying anticipatory relief.308 Even on the perhaps debatable assumption that retrospective damages relief provides adequate protection against constitutional violations resulting from patterns of official misconduct in cases such as O'Shea and Rizzo, the result in Lyons appears unduly wooden and insensitive to the Court's own constitutional role as a guarantor of individual rights.

307 For example, Warth's exclusion of those generally interested in breaking down the barriers of exclusionary zoning policies merely required a more particularly affected plaintiff to emerge. Despite the potential irony that under the Court's doctrine, the more effective the exclusionary zoning policies were, the less likely that a qualified challenger could be found, complete inability to challenge the zoning practices was unlikely. Similarly, it was not entirely clear in the tax exemption cases that it was impossible for any plaintiff to bring a case in which the concrete impact of the challenged regulations on the plaintiff could be predicted with certainty.

VII. Mootness

As others have recognized, the mootness doctrine is a corollary of the principles embodied in the justiciability concepts of standing and ripeness. Because the Burger Court has taken a rigorous approach to these underlying components of justiciability, largely on the basis of separation of powers and derivative federalism considerations, it is hardly surprising that its approach to mootness issues has sometimes been stringent as well. If explanation for the Court's decisions is sought solely in the ability of the parties adequately to present a controversy suitable for judicial resolution, the result may appear artificial and hostile to the assertion of protected rights. But if the decisions are evaluated in terms of appropriate limitations on the role of the federal judiciary, they, while occasionally subject to criticism, are at least understandable in more value-neutral terms.

If, as I have suggested, separation of powers and federalism concerns provide the driving and unifying force for the Burger Court's justiciability decisions, there would be no reason for the Court to require any particular minimum quantum or intensity of continuing personal interest to conclude that a case is not moot. So long as the identification of a plaintiff whose personal rights are necessarily and immediately at stake is accomplished, the appropriateness of the Court's intervention to protect individual rights is assured, despite the fact that the continuing effects of the challenged conduct may be ephemeral. It is enough that they exist. Thus, the Court has endorsed preexisting doctrine that an attack on a criminal conviction is not moot, even though the sentence has expired, so long as there is a "possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."}


310 Lane v. Williams, 455 U.S. 624, 632 (1982) (quoting Sibron v. New York, 392 U.S. 40, 57 (1968)). It has, however, declined to apply that doctrine where a habeas corpus attack was not focused on the validity of a conviction, as to which there are well established and immediate collateral consequences, but on the validity of a mandatory parole term under which plaintiffs were confined for an alleged parole violation. Id. at 632-33. In Lane, plaintiffs sought relief from a mandatory parole term allegedly imposed on them in violation of their plea bargain and from confinement for parole violations. The Supreme Court held that the cases were moot because the confinement had expired, so long as there is a "possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."
Similarly, in *Super Tire Engineering Co. v. McCorkle*, the Court held that a challenge to the state’s provision of benefits to striking workers was not moot even though the particular strike had been settled. Employees knew that if they went on strike, public funds would be available. Therefore, the challenged action continued to play a role in the collective bargaining process. These effects on the “ongoing collective relationship” were not contingent and were “immediately and directly injurious to the corporate petitioners’ economic positions.” Moreover, because of the short duration of economic strikes, the controversy should be regarded as “capable of repetition, yet evading review” even if the existence of an economic strike were essential to justiciability.

In contrast, where the effects of the challenged action have entirely dissipated, a view of justiciability grounded in separation of powers and federalism considerations would regard a judicial determination of the rights asserted to be as inappropriate as decision of a case in which no immediate threat to those rights had ever materialized. Just as the Court has held that a controversy for past damages does not imply a justiciable controversy for prospective relief, so a case involving no continuing controversy at all presents no legitimate call upon the resources of the Court.

In *DeFunis v. Odegaard*, a narrowly divided Court endorsed this view, holding that DeFunis’ challenge to a law school’s alleged preferential admissions policies for racial minorities was moot. DeFunis had been admitted to the final term of law school, and defendants represented that he would be allowed to complete his academic requirements. If he did so successfully, he would graduate regardless of the public importance of the controversy. The Court held that regardless of the public importance of the controversy, the requirements of

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312 Id. at 124-25.
313 Id. at 125. Four dissenters concluded that justiciability was contingent on the existence of an economic strike, and that not only had the strike giving rise to the controversy ceased long before the Supreme Court review was sought, but the threat of another strike was entirely speculative. Id. at 127-33 (Stewart, J., dissenting).

One could attempt to read the difference in outcome between *Super Tire* and the parole revocation case as reflecting a hidden substantive agenda in favor of business interests and against those of criminal defendants, but this reads too much into the differing outcomes. *Super Tire* was admittedly close to the line, with the Chief Justice, and Justices Stewart, Powell, and Rehnquist dissenting. Nonetheless, the Court’s appraisal of the likelihood of immediate effects on the collective bargaining process in *Super Tire* seems firmly grounded in business reality, whereas the alleged collateral consequences in *Lane* were subject to significant future contingencies.

article III precluded a decision on the merits.\textsuperscript{315} The result in \textit{DeFunis} seems correct. If the limited role of the federal judiciary precludes a case from being commenced in the first instance where the impact of the defendant’s conduct on the plaintiff turns on speculative future contingencies, as the Court has uniformly held, then a case should equally be viewed as moot where the challenged practices can be shown to have no present impact on the plaintiff, and any likelihood of future impact depends on uncertain future contingencies, as in \textit{DeFunis}. It is doubtful that the Court’s mootness decision in \textit{DeFunis} was the product of a hidden substantive agenda. When, in \textit{Bakke}, the issue was properly presented, the Court granted certiorari and responded with a principled substantive disposition.

The “capable of repetition yet evading review” aspect of the mootness doctrine presents an interesting puzzle. If mootness is an aspect of article III, then on what basis may the Court entertain a controversy that has become moot, simply because it is subject to the possibility of repetition? This is particularly true where the recurrence of the injury is subject to substantial contingencies. To the extent that a Court endorses and applies the capable of repetition doctrine, one might conclude that the constitutional underpinnings of its justiciability doctrine are called into question, or—contrary to the argument here—that the only constitutional aspect of justiciability is whether a controversy will be presented in a form suitable for judicial resolution.

The Burger Court has embraced the capable of repetition doctrine in a variety of contexts.\textsuperscript{316} For example, in \textit{Roe v. Wade},\textsuperscript{317} the Court concluded that a woman’s challenge to a state law restricting abortion was not moot even though the woman had delivered by the time the case reached the Supreme Court. The Court recognized that the “usual rule” is that an actual controversy must exist at all stages of appellate review.\textsuperscript{318} However, because the normal human gestation period is so short that pregnancy litigation seldom

\textsuperscript{315} \textit{Id.} at 317. This was not a controversy capable of repetition yet evading review. Nor was it relevant that others might be subjected to the same policy in the future, for “the respondents, through their counsel, the Attorney General of the State, have professionally represented that in no event will the status of \textit{DeFunis} now be affected by any view this Court might express on the merits of the controversy.” \textit{Id.} at 317. The possibilities that \textit{DeFunis} might not graduate because of illness, economic necessity, or academic failure, relied upon by the dissenters, were “speculative contingencies” which would not support justiciability. \textit{Id.} at 320 n.5.


\textsuperscript{317} 410 U.S. 113 (1973).

\textsuperscript{318} \textit{Id.} at 125.
would survive beyond the trial stage, and appellate review would thus be impossible, the case was not moot.319

Despite potentially expansive implications of this and similar “capable of repetition” decisions, they do not undermine the constitutional underpinnings of the Court’s justiciability doctrine. If separation of powers and federalism concerns were viewed as subordinate, one would assume that the Court would be willing to apply the “evading review” doctrine to permit resolution of cases where a controversy, once commenced, was capable of repetition in the citizenry at large, without regard to the situation of the plaintiff before the court. So long as the action was capably presented, it would be suited for judicial resolution despite the fact that the plaintiff might obtain no personal relief. One outstanding characteristic of the Burger Court’s decisions in this area, however, has been its clarification of ambiguities in prior law to require that a controversy be capable of repetition, yet evading review as to the very plaintiff before the Court.320 In this way the Court has maintained the underlying principle that a case is justiciable only when necessary to protect a claimed legal interest of a party before the Court, and not merely because the Court can say that the rights of some person not before the Court may be threatened.321

One might argue that the same line of reasoning would imply that the Court should hold nonjusticiable cases such as Roe, in which the plaintiff’s claim of future injury was subject to multiple contingencies (that she would again become pregnant and again desire an abortion prohibited by law) that would have precluded her from instituting the action in the first instance if she had not been pregnant. In short, if the Court took its concept of a limited judicial role seriously, it arguably should reject the capable of repetition doctrine altogether. The conclusion, however, does not follow. The Burger Court’s recognition of the continuing vitality of the doctrine in cases in which the plaintiff’s own rights are likely again to be threatened is strong evidence that it takes seriously its role as the ultimate guarantor of federal rights in cases of necessity. In such cases, a real plaintiff whose rights have been immediately threatened has attempted to obtain judicial relief. If relief is denied because of the inherently transitory nature of his or her claim, but

319 Id.

Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of non-mootness for it could be capable of repetition, yet evading review.


321 See text accompanying notes 101-04 supra.
the plaintiff is faced with a reasonable, albeit contingent, likelihood of repetition, the Court's own essential role would be nullified unless relief could be obtained.\textsuperscript{322} Just as it has preserved the "capable of repetition" doctrine as essential to adequate performance of the judicial role, so the Court has recognized the continuing vitality of the "voluntary cessation" doctrine, under which a defendant cannot avoid a judicial order by cessation of the challenged conduct.\textsuperscript{323} Absent such a rule, the essential rights-protecting role of the courts would be subject to unilateral subversion by a wrongdoer. Nonetheless, the Burger Court has declined to find a continuing controversy even in cases of voluntary cessation where, in its view, there was no reasonable likelihood that the challenged conduct would be resumed.

For example, in another closely divided opinion, \textit{County of Los Angeles v. Davis},\textsuperscript{324} the majority of the Court held that a challenge to use of an allegedly discriminatory testing procedure was moot where the city had replaced it with a new procedure. The conditions under which the invalidated test had been employed were "unique," and were not likely to recur. The new hiring procedures had resulted in high levels of minority employment, and the Court found no evidence suggesting that the city would resume the allegedly discriminatory practices.\textsuperscript{325} In \textit{Iron Arrow Honor Society v. Heckler},\textsuperscript{326} the Court similarly took the view that the action of a University president in "unequivocally" barring an all-male honor society from campus mooted the society's action against the Secretary of Health and Human Services.\textsuperscript{327} The society sought to prevent the Secretary from construing certain regulations to require its

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\textsuperscript{322} On this ground, the Court's result in \textit{Lyons} is subject to the most serious criticism. The Court rejected application of the capable of repetition principle in that case on the ground that the chokehold policy did not "evade review"—it was subject to review in a damages action. \textit{City of Los Angeles v. Lyons}, 465 U.S. 95, 109 (1983). Because of the possibility of permanent injury or even death as a result of future application of the challenged chokehold policy, this rationale is questionable. The fact that repetition of Lyons' injury was not certain provides no basis for rejecting application of the evading review doctrine, for by its very nature it permits claims to be maintained that would otherwise be foreclosed under normal ripeness principles. In such circumstances, according unconstitutional executive and administrative action immunity from judicial review constitutes too great a subversion of the role of the Court.

\textsuperscript{323} \textit{See United States v. W.T. Grant Co.}, 345 U.S. 629, 632 (1953).

\textsuperscript{324} 440 U.S. 625 (1979).

\textsuperscript{325} \textit{Id.} at 632. The "conservative" wing of the Court on justiciability issues—the Chief Justice and Justices Stewart, Powell, and Rehnquist—took the view that the decision to abandon the test had been prompted by the litigation, and there was no assurance that use of the test would not be resumed. \textit{Id.} at 635, 643.

\textsuperscript{326} 104 S. Ct. 373 (1983).

\textsuperscript{327} Two Justices dissented, one on the ground that the University's future conduct was uncertain, \textit{id.} at 376 (Brennan, J., dissenting), and the other on the ground that the University's "unequivocal" action might have been prompted by the challenged regulations, \textit{id.} at 377 (Stevens, J., dissenting).
\end{footnotesize}
exclusion. While the Court's conclusions about the likelihood of resumption of the challenged practices in these cases could be debated, they evidence no pervasive hostility to the assertion of disfavored rights.

In view of the Court's general inclination to take mootness questions seriously, its approach in the class action setting raises additional questions. Here, the Burger Court has held that it may continue to adjudicate the claims of members of a certified class even though the claims of the named representative have become moot and are not likely to recur, and even though other members of the class have taken no affirmative steps to assert their own rights.

In *Sosna v. Iowa*, the Court held that even though the named plaintiff had satisfied Iowa's challenged durational residency requirement for divorce while the case was pending on appeal, and the controversy was not likely to be repeated as to her, the case was not moot. Justice Rehnquist's opinion for the Court affirmed the traditional view that a "live controversy" must exist when the Supreme Court hears the case. Nevertheless, the Court held that following certification of the class, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." Provided there is a "live controversy" within the class following certification, the action may proceed. But the plaintiff whose claim is moot is not automatically an adequate representative: adequacy of representation is a separate inquiry. Justice White dissented on the grounds that an attorney could not initiate or maintain a class action without a client with a personal stake, that the only continuing interest in the action was that of the class attorney, and that the Court's reliance on class certification to avoid mootness improperly rested on a legal "fiction" to satisfy a constitutional mandate.

*Sosna*'s emphasis on the class as a separate legal entity for article III purposes strongly suggests that perhaps certification was the

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328 419 U.S. 393 (1975).
329 Id. at 399 (footnote omitted).
330 Id. In *Sosna* the Court treated the question of adequate representation very summarily, noting only that there was no clear lack of homogeneity in the class and that the interest of the class had been "competently urged at each level of the proceeding." *Id.*
331 Id. at 412-13 (White, J., dissenting). There was some indication in *Sosna* that the "capable of repetition yet evading review" doctrine might limit the scope of its holding. The Court specifically noted that the case presented an issue which "escapes full appellate review at the behest of any single challenger." *Id.* at 401. Yet in its subsequent decision in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), the Court announced that "nothing in [*Sosna*] . . . holds or even intimates that the fact that the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue 'capable of repetition, yet evading review.'" *Id.* at 754 (footnote omitted).
critical event and that termination of the named plaintiff’s claim when no class had been certified would moot the controversy. Several of the Court’s subsequent decisions supported this suggestion, but others contained contrary indications. These conflicting currents were resolved in United States Parole Commission v. Geraghty. The trial court had denied class certification simultaneously with its ruling on cross motions for summary judgment upholding the validity of the United States Parole Commission’s release guidelines. While the case was pending on appeal, Geraghty’s individual claim was mooted by his release. The Supreme Court, by a narrow five-to-four majority, held that the action was not moot. The majority held that the article III mootness doctrine in the class action setting consists of two aspects: whether the issues presented are “live,” and whether the named class representative has the necessary personal stake in the outcome. In Geraghty, there was a live controversy with at least some members of the class as demonstrated by motions to intervene. As to the personal stake requirement, the Court derived a “relation back” doctrine from the Sosna decision. Mootness of the named plaintiff’s claim did not moot the entire case because a class action involves two separate issues: the individual’s claim, and the class claim. Notwithstanding expiration of his substantive claim, the named plaintiff had a

332 In Board of School Comm’rs v. Jacobs, 420 U.S. 238 (1975), the Court held that actions treated as class actions but never formally certified as such become moot upon the expiration of the named plaintiffs’ claims. The Court emphasized the importance of a formal certification decision to define those bound by the judgment. 420 U.S. at 130; see also Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). Similarly, in East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395 (1977), plaintiffs had made no motion for class certification, and the district court, sua sponte, denied certification simultaneously with its ruling on the merits. The Supreme Court held that no class action could be certified on appeal since, following trial, it was clear that the named plaintiffs were not qualified for the positions they sought and thus were not members of the class they sought to represent. Id. at 403. The Court stated that the result would have been different if the named plaintiffs had been found not to be class members after the class initially had been certified. Id. at 406 n.12. In United Airlines v. McDonald, 432 U.S. 385 (1977), the Court held that class members were entitled to intervene for the purpose of appealing an earlier denial of class certification following entry of a consent judgment satisfying the claims of the named plaintiffs. Id. at 393-94. The Court’s holding was explicitly based on the conclusion that the trial court’s refusal to certify the class was “subject to appellate review after final judgment at the behest of the named plaintiffs.” Id. at 393. In Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), the Court, in holding that a denial of class certification was not subject to interlocutory appeal, stated that a prevailing plaintiff might appeal the denial following the entry of the final judgment. Id. at 468, 469.


334 The majority consisted of Justices Blackmun, Brennan, Marshall, White and Stevens, with Justice Powell, the Chief Justice, and Justices Stewart and Rehnquist dissenting.

335 445 U.S. at 396 (citing Powell v. McCormack, 395 U.S. 484, 486 (1969)).

336 445 U.S. at 396.

337 Id. at 398.

338 Id. at 402.
sufficient personal stake in the procedural claim for class certification to satisfy article III requirements.\textsuperscript{339} Furthermore, the Court made clear that its holding was limited to an appeal of the certification question. Only if denial of class certification were ultimately reversed could the merits be reached.\textsuperscript{340} As in \textit{Sosna}, adequacy of representation by the named plaintiff was a separate issue.\textsuperscript{341} Justice Powell's dissent predictably rested on the grounds that the core article III requirement of a personal stake was not "flexible,"\textsuperscript{342} and there could be no article III personal stake in a procedural decision separate from the outcome of the case.\textsuperscript{343}

The dissenting opinion of Justice Powell, joined by the Chief Justice and Justices Stewart and Rehnquist, reflects the general separation of powers concept that a live case or controversy within the meaning of article III can continue to exist only if there is a real plaintiff with a continuing viable claim before the Court. As this theme pervades the Burger Court's justiciability decisions generally, should the class action decisions be regarded as inconsistent with the Court's overall approach to justiciability questions? I suggest that they are not. The distinguishing characteristic of the class action decisions is that Rule 23 itself legitimates a procedure which authorizes a Court to entertain and dispose of the claims of absent class members who have not asserted their rights, so long as adequate representation is assured and the other requirements of Rule 23 are met. Although the Rule was adopted by the Court, it acted pursuant to validly delegated legislative power, and the Rule was subject to congressional review and rejection under the reporting procedures of the Rules Enabling Act.\textsuperscript{344} Given the underlying premise of Rule 23 that, in limited circumstances, rights may be adjudicated on a mass basis without their individual assertion, the Court has not unduly extended its powers in relation to the other branches by permitting the adjudication of a continuing live controversy between the defendant and absent members of a certified class even though the claim of the class representative has become moot. Thus, in \textit{Sosna} and \textit{Geraghty} the majority was correct in treating the mootness of the representative's claims as practical problems of adequate representation rather than fundamental

\textsuperscript{339} \textit{Id.} at 403-04. The \textit{Geraghty} Court recognized that its holding that a party retains a legally cognizable interest in a procedural issue divorced from the outcome of the case was at odds with traditional mootness doctrine. But it reasoned that "[t]his 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." \textit{Id.} at 403.

\textsuperscript{340} \textit{Id.} at 408.

\textsuperscript{341} \textit{Id.} at 405-06.

\textsuperscript{342} \textit{Id.} at 412 (Powell, J., dissenting).

\textsuperscript{343} \textit{Id.} at 421-23 (Powell, J., dissenting).

questions of article III jurisdiction. The Court's approach to this area while not unanimous, goes far to repudiate the notion that the Burger Court does not take its role as a guarantor of individual rights seriously.

VIII. Conclusion

A view of justiciability which focuses on appropriate limitations on the role of the federal judiciary in a system of separated national powers and reserved state powers normally requires that the rights of the plaintiff be within the zone of interests of the statute or constitutional provisions relied upon, and that the plaintiff's alleged injury be immediately threatened. There is ordinarily no reason to permit one whose rights clearly have not been violated to assert the rights of others. People are the best protectors of their own rights.

In limited circumstances, however, third parties should be able to raise the rights of others. Where there is a relationship, such as physician-patient, which demonstrates the intent of the holder of the right to assert it, and where it is reasonably clear—whether by virtue of a direct proscription or an obstacle to assertion of the right by its holder—that it is immediately threatened, the Court does not invade the province of the other branches by permitting the assertion of a right by third parties. Similarly, the Court has not overstepped its powers in entertaining claims of first amendment overbreadth where it has reason to conclude that a statute has substantial application to protected speech or conduct and those whose rights are at stake are likely to be deterred from asserting them. While such determinations involve difficult questions of judgment, they nonetheless rest on premises consistent with the Court's own role in our system of government.

A zone of interests formulation accords desirable broad scope to the congressional role in creating standing. It also helps to differentiate the kinds of intangible interests and injuries that will support standing from those that will not. It explains why some "generalized grievances" are sufficient to invoke the power of judicial review and some are not. Perhaps most importantly, it provides a principled constitutional basis for making such determinations. Under the Court's current articulation of the "zone," "generalized grievance," and "third party right" standing limitations, there is too much potential both for inexplicable inconsistency and unprincipled abdication in application of justiciability doctrine.

Just as a justiciability doctrine focused on an appropriate judicial role implies a more refined approach to the identification of parties entitled to invoke the power of judicial review, so it implies strong emphasis on ripeness and mootness considerations.
Although a case may be such that it could be adequately presented by the parties, there is ordinarily no "necessity" for judicial review if it is uncertain whether the plaintiff's injury will ever occur, or it has passed with no reasonable prospect of repetition or redress. The fact that a court may see with some assurance that others in the plaintiff's class may be subjected to the same illegality does not create or preserve a justiciable controversy. Justiciability doctrine grounded in separation of powers and federalism concerns would insist that those others assert their own rights.

At the outset, this article questions whether the Burger Court's justiciability decisions are properly viewed as the product of hostility on the merits to certain claims of right. While not all the decisions fit a single mold, this review gives scant support for that conclusion. Among other indications that the Court is not motivated by hidden substantive agenda, but instead by more fundamental and value neutral concerns, are its willingness to accord broad effect to congressional action, both in creating intangible interests sufficient to support standing and, as in *Buckley v. Valeo*, in altering normal ripeness principles. Similarly, the Court has tolerated—admittedly by a narrow majority—a significant departure from normal justiciability principles in the class action context. This result is best explained by the significance of Rule 23 in enlarging the appropriate role of the Court. Hospitality to legislative definition of the Court's role should not be viewed as the product of political expediency. Instead, it results from the Court's recognition of separation of powers concerns as a primary ingredient of justiciability doctrine.

The Burger Court has evidenced its sensitivity to the importance of its own role as guarantor of individual rights in other ways. For example, it has applied ripeness doctrine in a way which amply serves the purposes of the Declaratory Judgment Act by avoiding the need to risk a costly penalty in order to obtain a judicial determination of right. It has preserved overbreadth doctrine—albeit in more limited form—even though stringent application of the concept that judicial review is unnecessary unless a party asserts his or her own rights might have compelled rejection of the doctrine altogether. Similarly, the Court has endorsed the capable of repetition yet evading review doctrine. This result can best be explained as a recognition by the Court that its own rights-protecting role requires a departure from normal ripeness and mootness principles if effective judicial review would otherwise be precluded.

That is not to say that the Court's decisions are entirely above criticism. There have been inconsistencies and anomalies, as illustrated by *Duke Power*. Such results are better attributed to the Court's failure to recognize the constitutional underpinnings of its
“prudential" standing rules than to naked manipulation on substantive grounds.

As many commentators have recognized, the Court’s most questionable performance has been in its application of "causation" and "redressability" considerations. Even if, as suggested here, those decisions are viewed primarily in zone of interests and ripeness terms, they reflect undue rigidity in the Court’s perception of its role. The Court’s “chokehold” decision in *City of Los Angeles v. Lyons* is similarly deficient. If the result of precluding review in a particular case is merely to postpone it until a plaintiff whose own rights are immediately threatened comes to the fore, the Court would stand on firm ground. But if it is to deny effective judicial review altogether even though official conduct violating individual rights is ongoing, the Court has unduly subordinated the role of the federal judiciary to those of the other branches and the states. The same Court that has been willing to accord broad sweep to the Declaratory Judgment Act, and to recognize and apply the judicially created overbreadth and capable of repetition doctrines in appropriate cases, should be equally willing to view the permissible area of judicial review more broadly in cases where failure to do so will almost certainly place violations of individual rights beyond the pale of effective review. Such applications of justiciability doctrine would not impermissibly enlarge the role of the Court. They would merely recognize that the separation of powers and federalism underpinnings of justiciability doctrine require a flexible accommodation of the Court’s own role as well as those of other institutions of government.