New Law of Standing a Plea for Abandonment

Mark V. Tushnet

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Recommended Citation
Mark V. Tushnet, New Law of Standing a Plea for Abandonment, 62 Cornell L. Rev. 663 (1977)
Available at: http://scholarship.law.cornell.edu/clr/vol62/iss4/1
Generalizations about standing, we have been told, are largely worthless. Yet one generalization can be made without fear of challenge: the law of standing lacks a rational conceptual framework. It is little more than a set of disjointed rules dealing with a common subject. "Standing" has no meaning unless the particular doctrines grouped together under that name are identified and then appropriately applied.

Unfortunately, the Supreme Court has given us no guidelines for selecting among the rules of standing other than one indicating that standing has failed as an independent part of constitutional law. Nevertheless, the thrust of recent Supreme Court decisions is clear. Decisions on questions of standing are concealed decisions on the merits of the underlying constitutional claim. The Court finds standing when it wishes to sustain a claim on the merits and denies standing when the claim would be rejected were the merits reached. The law of standing has thus become a surrogate for...
decisions on the merits, providing an especially useful approach for the Court when a decision on the merits might overturn settled precedent. One is hard-pressed, however, to understand why the Court has singled out standing, rather than some other access doctrine, in order to manipulate results. Candor requires that the Court overrule cases with which it no longer agrees, rather than avoid those decisions by contriving an artificial rationale to deny plaintiffs standing. Analytic flaws in standing decisions, then, betoken a deeper problem in the Burger Court: by refusing to confront hard cases honestly, the Court has failed in its task of judicial review.

The Court’s failure to articulate a coherent law of standing has led to a congeries of rules that are neither reconcilable nor rational. For example, in recent cases the Court has required that causation be pleaded with particularity to establish standing. Yet no such particularity has been required in pleading the same causation on the merits of the claim. Other recent opinions state that standing is a purely statutory question, yet treat the issue as if it were purely constitutional. In addition, certain opinions fail to consider the relevance of cases in other areas of law, even though analysis of those cases would materially advance the discussion of standing.

This Article pursues these doctrinal labyrinths where they lead. Each doctrine will be discussed independently. The Article demonstrates the inadequacies of the Court’s articulation and application of each rule, and also shows how the new law of standing leads to conceptual dead ends. For these reasons, the Court should refrain from disposing of cases on standing grounds and, instead, should by careful examination salvage the sensible elements of
each rule and synthesize the results into a more fully articulated and precise conceptual framework.

I

THE PROBLEM OF CONGRESSIONAL POWER OVER STANDING

Without recognizing the significance of what it has done, the Supreme Court has, in the past five years, transformed the law of standing from a constitutional to a statutory question. A brief passage in Justice Harlan's dissent in Flast v. Cohen furnished the foundation for the transformation, but the real impetus came from Justice White's concurring opinion in Trafficante v. Metropolitan Life Insurance Co. Two footnotes in subsequent decisions marked the creeping advance of the change, and the Court has recently acknowledged the shift by treating the statutory basis of standing as too obvious to require defense or explanation. Yet such a far-reaching theoretical shift demands a more clearly articulated justification. Simply stated, the new doctrine rests on the assumption that Congress may confer standing on parties who otherwise would not have it. Once Congress' power to confer standing is conceded, all but the easiest constitutional questions disappear, and standing questions become ordinary problems of statutory interpretation and legislative intent.

A. The Source of Congress' Power

Three sources of congressional power to confer standing have been suggested. The first is formalistic and does not advance our understanding; the second, although sensible, conflicts in some ways with recent expressions of the Court on related issues; the third opens the way to a better analysis of standing problems.

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10 For example, in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), the Court explicitly treated the standing problem as one of constitutional dimensions.
15 "Otherwise would not have it" is a deceptive phrase. Most plaintiffs proceed under jurisdictional grants, and the courts must then decide whether Congress, in creating jurisdiction, also intended to confer standing on those particular plaintiffs. See text accompanying note 51 infra.
1. Standing for Intended Beneficiaries of Statutory Rights

In Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO), Justice Powell reasoned that a congressional grant of standing created an incidental right to sue to enforce underlying substantive rights. Thus, infringement of the underlying substantive right gives rise to the right to sue. This formulation capitalizes on the notion that judicial review is justified as a necessary incident to the adjudication of "private rights." Unfortunately, in many standing cases, the "right" Congress created has been solely a right to sue, wholly divorced from any underlying substantive right, which makes the argument run in a circle of very small diameter.

Three examples illustrate the problem. Under the Freedom of Information Act any person whose request for information has been rejected is permitted to sue in federal court to compel the government to turn over the information. At first glance, this looks like the "private right/federal remedy" case par excellence, but it is not. No common-law analogue to the private right conferred by the Act exists. There is no right to acquire information independent of the judicial remedy created to enforce that right. The right to sue and the underlying right to acquire information are merged in the remedy. We therefore cannot analyze the former in terms of article II and the latter in terms of some substantive congressional power; both must be considered solely as an exercise of Congress' substantive powers.

A second example is the Clean Air Act, which provides that "any person may commence a civil action on his own behalf ... against the Administrator [of the Environmental Protection Agency] where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." The legislative history shows

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16 426 U.S. 26, 41 n.22 (1976).
17 The phrase derives from Monaghan, Constitutional Adjudication: The Who and When, 82 YALE L.J. 1363, 1365-68 (1973). This Article extends Professor Monaghan's argument, although in a direction that he probably would not travel.
21 U.S. CONST. art. III, § 2, cl. 1, states in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States ...."
22 See text accompanying notes 40-47 infra.
that this provision was designed to permit plaintiffs to challenge administrative inaction without having to demonstrate any injury in fact.\textsuperscript{25} Thus, the right to sue arises not from any injury to the plaintiff, but from the plaintiff’s "right" to enforce national pollution policy. When the Court was confronted with a citizen suit under the Clean Air Act, it did not mention the standing issue,\textsuperscript{26} even though it reached out to decide the important standing question in \textit{EKWRO} on the same day.\textsuperscript{27}

The Federal Elections Campaign Act Amendments of 1974\textsuperscript{28} authorize any qualified voter to bring suit to test the Act’s constitutionality.\textsuperscript{29} The only right conferred is the right to sue to have elections regulated in a constitutional manner. A plaintiff who sues under the Act need allege only the general injury from unconstitutional governmental action.

These three statutes, the constitutionality of which the Court has not purported to question, confer standing solely to assure that government officials obey the law. Justice Powell’s theory that Congress can enforce a substantive right by creating an \textit{incidental} right to sue fails to explain the use of Congress’ power to create a substantive right that consists solely of the right to sue.

2. \textit{Standing as Waiver of Separation of Powers Objections}

Justice Harlan’s dissent in \textit{Flast v. Cohen}\textsuperscript{30} rested on the premise that liberalized rules of standing threatened “the allocation of authority among the three branches of the Federal Government.”\textsuperscript{31} Harlan argued, however, that the danger from judicial in-

\textsuperscript{25} See Friends of the Earth v. Carey, 535 F.2d 185 (2d Cir. 1976); Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 723-30 (D.C. Cir. 1974) (legislative history reprinted and discussed). The Federal Water Pollution Control Act has a citizen suit provision (33 U.S.C. § 1365(a)(2) (Supp. V 1975)), which, although modeled on the Clean Air Act, differs in that it defines “citizen” as a person who has “an interest which is or may be adversely affected” (id. § 1365(g)). The conditional verb indicates, however, that no substantial limitation is imposed. In \textit{Natural Resources Defense Council}, the Court of Appeals for the District of Columbia Circuit interpreted the Federal Water Pollution Control Act citizen suit provision as if it reproduced that of the Clean Air Act. 510 F.2d at 699.


\textsuperscript{27} 426 U.S. 26 (1976).


\textsuperscript{29} The pertinent part of 2 U.S.C. § 437h(a) (Supp. V 1975) provides that “any individual eligible to vote in any election for the office of President of the United States may institute such actions . . . as may be appropriate to construe the constitutionality of any provision of this Act.” The Supreme Court, in \textit{Buckley v. Valeo}, 424 U.S. 1, 11-12 (1976), noted this provision, but did not comment on its constitutionality.

\textsuperscript{30} 392 U.S. 83 (1968).

\textsuperscript{31} Id. at 130.
trusion into legislative or executive matters decreased when Congress passed, and the President signed, the law authorizing the intrusion.\footnote{Id. at 132.}

Harlan's argument derives force from the theory of Congress' plenary power enunciated in \textit{Gibbons v. Ogden}.\footnote{22 U.S. (9 Wheat.) 1 (1824). The \textit{Gibbons} Court noted: "This power [to regulate interstate commerce], like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." \textit{Id.} at 196. \textit{See generally C. Black, Perspectives On Constitutional Law} 19-38 (1963).} Plenary power by definition contains no internal limitations. For example, once it is decided that some subject is reasonably related to interstate commerce, Congress may regulate under the commerce clause; courts need not determine whether the subject regulated "directly" affects interstate commerce or whether the subject is in some "stream of commerce" with definable terminal points. Congress' power, however, is not unlimited. Apart from specific limitations such as the first amendment, there are what Professor Wechsler called the "political safeguards" against legislative action that would seriously reallocate power in the government.\footnote{4 H. Wechsler, Principles, Politics, and Fundamental Law 49-82 (1961).} Congress is unlikely to grant courts powers that might infringe upon congressional prerogatives, unless it believes the grant is necessary to serve an important public policy.

Justice Harlan's argument provides a useful analytical framework for examining standing questions, and is consistent with the "settled" constitutional principles of plenary congressional power. Unfortunately, the Supreme Court has recently questioned the plenary power theory. \textit{National League of Cities v. Usery} involved the application of the Fair Labor Standards Act\footnote{426 U.S. 833 (1976).} to state and local governments. The Court found that principles of federalism restricted the exercise of congressional power under the commerce clause. The Court explicitly rejected Justice Brennan's dissenting argument,\footnote{29 U.S.C. §§ 201-219 (1970 & Supp. V 1975).} based on \textit{Gibbons}, that federalism values were protected by state representation in Congress.\footnote{426 U.S. at 876-78.} In rejecting the \textit{Gibbons} analysis, the majority drew support from cases that are directly relevant to the argument here. The Court cited two cases in which congressional restrictions on the President's appointment power had been held unconstitutional, even though the President had

\footnote{Id. at 841 n.12.}
arguably acceded to the restriction by signing the bills. Citing these cases, the Court concluded that participating in the enactment of statutes does not waive constitutional objections based upon separation of powers and, by analogy, upon federalism.

Justice Harlan's argument can be refined in light of National League of Cities. Statutes like the Fair Labor Standards Act have two components: a substantive rule of law, about which there may be constitutional doubt, and an authorization to the federal courts to adjudicate the constitutional question. Congress and the President may agree to submit any controversy concerning their respective powers to the courts by conferring standing. For example, by signing a bill, a President does not waive any constitutional objection to a legislative enactment if the bill also confers standing to challenge the enactment; rather, the Executive merely indicates a willingness to submit a controversy to the courts. Thus, an express statutory grant of standing does not result in a "waiver" of substantive rights held by Congress, the Executive, or the states.

This refinement of Harlan's analysis is a bit contrived, and unlike his original argument, is not rooted in a well developed tradition of constitutional law. The central insights of the argument can be preserved, however, upon consideration of the final ground for congressional power to confer standing.

3. Standing and the Necessary and Proper Clause

In his concurrence to Trafficante v. Metropolitan Life Insurance Co., Justice White claimed that Congress could extend standing when the Court would deny it. In support of his claim Justice White cited Katzenbach v. Morgan, in which the Court held that Congress, in exercising its power to enforce the fourteenth amendment, could prohibit the use of literacy tests for voting, even though the Court was not prepared to hold that the use of such tests would violate the equal protection clause absent congressional action. According to one interpretation, the case upheld the power of Congress to make a factual determination that the use of literacy tests by the states promoted violations of fourteenth amendment rights. Thus, it is argued, although literacy tests did not themselves violate the Constitution, and although Congress did not have the power to declare that they did, the enforcement clause of the four-

40 409 U.S. 205, 212 (1972).
teenth amendment allowed Congress to conclude that elimination of literacy tests was necessary to protect rights clearly guaranteed by the amendment.42

This straightforward application of the necessary and proper clause43 can be extended to the standing context: Congress, in exercising some enumerated power, may take substantive action and also grant liberal standing as a necessary and proper means of guaranteeing the effectiveness of that action.44 For example, Congress passed the Clean Air Act pursuant to the commerce power, and chose to extend standing to all citizens45 as a necessary and proper means of securing the benefits conferred by the Act.46 Justice White's theory reduces all standing questions to matters of statutory interpretation.47 A court need only examine the statute conferring the substantive right and/or the right to sue to determine if Congress intended a particular plaintiff to have standing. In addition, Justice White's theory would allow application of the liberal canons of statutory interpretation appropriate to review of congressional action taken under the necessary and proper clause. Under Justice Harlan's waiver theory, stricter canons of interpretation would apply.

B. Problems of Statutory Interpretation

Plaintiffs bring suits under three types of statutes: those that explicitly grant standing to a wide class of plaintiffs, general

42 See Burt, Miranda and Title II: A Morganatic Marriage, 1969 Sup. Ct. Rev. 81, 101-03, 110. My interpretation of Katzenbach v. Morgan is a very weak reading of the case; Professor Burt outlines stronger ones. He argues, for instance, that the Court may have relied on Congress' fact-finding capacity to justify its deference to Congress, or it may have recognized Congress' independent power to declare state action violative of the fourteenth amendment.

43 U.S. Const. art. I, § 8, cl. 18.

44 Under this interpretation of congressional power, in order to claim standing a person need not be in the zone of interests protected by the statute or constitutional provision upon which he or she relies. Congress decides whether to limit the power to initiate review to persons in a particular statute's zone of interests in light of its evaluation of how to best serve the underlying policy of the statute. Cf. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) (standing found where petitioners were arguably within zone of interests protected by statute).


46 Congress' power to confer standing as a means of giving effect to legislation resting on an enumerated power avoids problems that arise from broader readings of Katzenbach v. Morgan and from Congress' power to control the jurisdiction of the federal courts. See generally Monaghan, supra note 17, at 1376-77.

47 Some courts are unaware of the statutory problem, while others are sensitive to it. Compare Evans v. Lynn, 537 F.2d 571, 589-98 (2d Cir. 1975) (en banc) with id. at 598-99 (concurring opinion, Mansfield, J.) and White v. Arlen Realty Dev. Corp., 540 F.2d 645 (4th Cir. 1975).
jurisdictional statutes, and statutes that grant standing to "injured" parties without defining what constitutes an injury. The citizens' suit provisions of the Clean Air Act and the Freedom of Information Act illustrate the first type. These statutes present few problems; to find standing, a court need only determine that the statutory grant of standing was a necessary and proper means for carrying out a constitutional legislative end—a standard easily met by potential plaintiffs.

Claims of standing under general jurisdictional grants such as 28 U.S.C. § 1331, the general federal question provision, and 28 U.S.C. § 1361, the mandamus provision, present more complicated questions. Here, a two-part analysis is necessary. First, because Congress did not focus on questions of separation of powers when it adopted these provisions, there has been no considered congressional determination that potential intrusions on separation of powers are justified by the need for judicial decision of particular constitutional claims. Thus, the general jurisdictional grants should not be construed to confer standing . However, general grants can be invoked only upon a claim that statutory or constitutional rights have been violated. Thus, courts must take a second analytical step and determine whether standing ought to be inferred from the right invoked.

The Supreme Court has already provided a framework for this second step. In Bivens v. Six Unknown Named Agents, the Court held that a person proceeding under federal question jurisdiction could recover money damages in federal courts from federal agents who had violated his or her fourth amendment rights. The Court noted that a remedy was necessary to protect citizens from violations of their fourth amendment rights. The Court

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54 403 U.S. 388 (1971).

55 In Bivens, the plaintiff claimed that an amount in excess of $10,000 was in controversy. Congress has since amended the federal question provision to eliminate the amount-in-controversy requirement in actions against the United States or its agents acting in their official capacity. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721 (amending 28 U.S.C. § 1331(a) (1970)).

56 403 U.S. at 397. See generally Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1533, 1549-52 (1972) (standard ought to be "whether there are other remedies available to those in the plaintiff's position that would as fully effectuate the purposes of the constitutional guarantee as the remedy sought").
relied on cases in which litigants had claimed that private rights of action ought to be inferred from a statutory scheme. It should be emphasized that this is not an article III problem, but rather a "simple" problem of interpreting particular constitutional provisions. For example, if taxpayer suits are an appropriate mechanism for enforcing rights protected by the establishment clause of the first amendment, then standing is conferred by that clause; article III is irrelevant to this stage of the analysis.

The law relating to private rights of action also helps in analyzing the final group of statutes—those that grant an "injured party" standing, yet fail to specify what constitutes an actionable injury. Trafficante v. Metropolitan Life Insurance Co. involved such a statute. The 1968 Civil Rights Act provides that "[a]ny person who claims to have been injured by a discriminatory housing practice" may sue in federal court to enforce the rights protected by the Act. The plaintiffs in Trafficante were tenants of a housing project that allegedly discriminated against nonwhite applicants for apartments. Plaintiffs claimed that they were denied the social benefits and professional advantages of living in an integrated community. The Court held that, given the widespread discriminatory practices and the inadequacy of the government's enforcement efforts, private actions were an appropriate device for enforcing the statutory right.

Trafficante can be profitably compared with Cort v. Ash, another "private right of action" case, in which shareholders sought a federal remedy in order to recover illegal campaign contributions made by their corporation. In Cort the Supreme Court stated:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First . . . does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to

57 403 U.S. at 396-97.
60 42 U.S.C. § 3610(a), (d) (1970). Suit may not be brought, however, if the complainant fails to exhaust the administrative procedures established by the Act, or if judicial remedies "substantially equivalent" to those provided by the Act are available under state or local law. See id. § 3610(a)-(d).
61 409 U.S. at 210-11.
state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?\(^6\)

In *Trafficante*, the Court found indications in the legislative history that "the whole community" was the victim of discriminatory housing practices and had rights under the statute.\(^6\) It noted that practical limitations on public enforcement supported an inference that Congress intended to permit suit by private parties.\(^6\) The Court allowed the plaintiffs to sue and concluded that the suit would not interfere with any purposes of the legislative scheme.\(^6\) Nothing is gained by labeling *Trafficante* a standing case; the precedents on which the Court relied emanated from a different area of the law. *Trafficante* simply decided that the plaintiffs had stated a claim upon which relief could be granted.\(^6\)

The Court has never clearly recognized the relationship between standing cases and "private right of action" cases.\(^6\) Problems arise when a private right of action is clearly available for a certain class of persons, but it is unclear whether the particular plaintiff is a member of that class. Although the precise issue addressed by cases such as *Cort v. Ash* is not of central concern here, those cases furnish a useful analytic framework.

The primary concern here is with actions brought under the Civil Rights Act of 1871, now 42 U.S.C. § 1983.\(^6\) The leading case is *O'Shea v. Littleton*,\(^7\) where the plaintiffs launched a full-scale attack on the administration of criminal justice in Cairo, Illinois. The plaintiffs were residents of Cairo who had been criminal defendants or suspects. They claimed that city magistrates habitually set bond and imposed sentences in an unconstitutionally discriminatory manner. In an opinion that commingled considerations of standing, mootness, and want of equity, the Court concluded that the plaintiffs' complaint failed to allege an article III case or controversy.\(^7\)

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6 Id. at 78 (citations omitted).
64 409 U.S. at 211.
65 Id. at 210-11.
66 Id. at 211.
67 See text accompanying notes 113-38 infra.
68 See *Warth v. Seldin*, 422 U.S. 490, 509-10 (1975). In *Warth* the Court noted the tenuous relationship between the alleged discriminatory actions of the respondents and the injury the taxpayer-petitioners claimed that they had sustained, and concluded that no statutory or constitutional provision could be construed to grant standing.
71 Id. at 493.
The Court's opinion in O'Shea provides a textbook example of the inappropriate use of standing as a ban to action where other doctrines would have provided adequate bases for dismissal. It was inappropriate to rely, even in part, on standing grounds because the action was based on section 1983, which creates a right of action for parties "injured" by unconstitutional actions of state officials. The Court should have focused on the requisites of an actionable "injury" under section 1983 and should have relied on "private right of action" cases. Examining the case in light of the four factors singled out in Cort, one finds that section 1983 was designed to protect against racially discriminatory action and was intended to displace more limited state law. This follows from Monroe v. Pape and Mitchum v. Foster. In Mitchum the Court canvassed the history of the statute and found a legislative intent to provide "a uniquely federal remedy" against actions by state officers, including actions by judges in their official capacities.

The Court in O'Shea adverted to the "private right of action" criteria only indirectly. It emphasized the plaintiffs' failure to demonstrate that Illinois' appellate courts would have denied them relief if they had proved their allegations, and noted the availability of an alternative remedy for the alleged violations, such as federal criminal prosecutions of the defendants for violating the plaintiffs' civil rights. These points were made in a discussion of the propriety of granting injunctive relief. However, consideration of the appropriateness of such relief was linked by the O'Shea Court to the question of whether a federal right or remedy existed at all, a result clearly inconsistent with Bivens v. Six Unknown Named Agents, where the Court rejected the argument that federal remedies should be inferred only when state remedies are inadequate.

The O'Shea Court's hasty resort to the Constitution to bar the suit when traditional, nonconstitutional doctrines would have

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74 Id. at 239.
75 Id. at 240-42. The Mitchum Court noted: "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against State action ... whether that action be executive, legislative, or judicial.'" 407 U.S. at 240, quoting Ex parte Virginia, 100 U.S. 339, 346 (1880) (emphasis in original).
77 Id. at 503.
78 403 U.S. 388, 397 (1971).
served as well—and indeed were relied on in the course of the constitutional discussion—strikingly illustrates the Court's muddled analysis of standing cases.\(^7\)

In *Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO)*\(^8\) the Supreme Court again rushed to the Constitution when nonconstitutional doctrines would have served as well.\(^9\) The plaintiffs, members of the EKWRO, sought declaratory and injunctive relief from an Internal Revenue Service Revenue Ruling.\(^8\) They claimed that the Ruling violated the Internal Revenue Code by granting favorable treatment to hospitals that provided only limited service to indigents. A suit by one person, challenging another's tax liability, is extraordinary,\(^8\) and the case could have been disposed of on this ground alone. Under the *Cort* standards,\(^8\) to imply a remedy here would have been inconsistent with the underlying purposes of the scheme of tax administration. Justice Stewart alone suggested this analysis, but related it to the standing question, and not to the question of whether the plaintiffs had stated a cause of action: "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."\(^8\) Justice Stewart's reference to standing is particularly unfortunate given the Court's present

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\(^7\) The injunction sought would have called for ongoing federal supervision of the day-to-day operations of the Cairo, Illinois, criminal justice system. Thus, principles of comity and federalism provided a sufficient basis for barring the suit. *Younger v. Harris*, 401 U.S. 37, 43-45 (1971). The Court in *O'Shea* relied on such considerations in its discussion of both constitutional and nonconstitutional principles. 414 U.S. at 498-502. See also *Rizzo v. Goode*, 423 U.S. 362 (1975). Injunctive relief is an extraordinary remedy available only when other remedies are inadequate. *See Evans v. Lynn*, 537 F.2d 471, 595-98 (2d Cir. 1975) (en banc); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 617-22 (1976) (equitable remedy inappropriate). *See also* *Monaghan*, *supra* note 17, at 1393. Sensible application of this traditional equitable principle in *O'Shea* would have yielded the same result without reaching unnecessary constitutional issues.

\(^8\) 426 U.S. 26 (1976).

\(^9\) *See* *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (concurring opinion, Brandeis, J.).


\(^8\) 422 U.S. at 78.

\(^8\) 426 U.S. at 46 (concurring opinion).
confusion over the relationship between the constitutional and the statutory aspects of standing.

EKWRO arose under the Administrative Procedure Act,\(^\text{86}\) which grants judicial review to persons "aggrieved by agency action."\(^\text{87}\) As interpreted in *Association of Data Processing Service Organizations, Inc. v. Camp*,\(^\text{88}\) the Act requires that plaintiffs show that they were injured in fact by agency action and that their interest arguably lies within the zone of interests protected by the statute under which the agency acted. The constitutional requirement of "injury in fact" declared in *Data Processing* and *EKWRO* has little connection with the policies underlying standing rules. Indeed, if citizens are injured in fact by violations of the Clean Air Act or the Federal Elections Campaign Act, it is hard to see what special content the "injury in fact" requirement adds to the "zone of injury" test. The better view of *Data Processing* would regard both requirements as statutory, resting on a determination that Congress generally intends to grant standing to those persons best able to enforce the statute. Fortunately, the Court has never disqualified a plaintiff for failure to satisfy the "injury in fact" requirement;\(^\text{89}\) in fact, the Court has not given the concept much content at all. The requirement, however, has the potential to create future mischief.

The Court disposed of the *EKWRO* plaintiffs on constitutional-standing *cum* pleading grounds. But before examining the Court's recent attempts to inject civil procedure into standing cases,\(^\text{90}\) the constitutional limitations on Congress' power to confer standing should be considered, since at least two Justices believe that the Court, by requiring plaintiffs to allege "palpable injury," has limited that congressional power.\(^\text{91}\) This Article has demonstrated that Congress has the power to confer standing where citizen suits are appropriate ways to enforce substantive rights.\(^\text{92}\) Nonetheless, there may be limitations on Congress' power.

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\(^{87}\) Id. § 702.


\(^{89}\) See D. Currie, *supra* note 58, at 57-58.

\(^{90}\) See notes 113-38 and accompanying text infra.

\(^{91}\) The dissenters in *EKWRO* were responding to the phrase "distinct and palpable injury," as used by the Court in Warth v. Seldin, 422 U.S. 490, 501 (1975). 426 U.S. at 64-66 (concurring and dissenting opinion, Brennan & Marshall, JJ.). *EKWRO* exemplifies the thoughtless use of a catchphrase which is inappropriate in the context of such statutes as the Federal Election Campaign Act, 2 U.S.C. §§ 431-456 (Supp. V 1975). See note 29 and accompanying text *supra*.

\(^{92}\) See text accompanying notes 16-29, 41-47 *supra*. 
C. Limitations on the Power to Confer Standing

In *Trafficante*, Justice White argued that Congress could not confer jurisdiction on the federal courts to issue advisory opinions, and Justice Harlan's dissent in *Flast v. Cohen* advised that "[t]he difficult case" of *Muskrat v. United States* imposed constitutional limits on Congress' power. However, those limits are exceedingly broad, and in the modern context will rarely be transgressed.

Objections to advisory opinions fall into several groups. Pure advisory opinions may be issued without adversary presentation, as when President Jefferson asked the Supreme Court to outline the law of neutrality. In addition, advisory opinions may be sought before the facts of a case have been fully developed, they may prematurely foreclose action that might later be permitted, and they may permit the legislature to avoid considering the constitutionality of its actions. Finally, advisory opinions cannot be "cases" under article III because no enforceable judgment results.

The force of most of these objections was seriously diminished when the Declaratory Judgment Act was upheld against constitutional attack. In *Aetna Life Insurance Co. v. Haworth* the Court held that article III case or controversy requirements are satisfied if a court must decide the claims of truly adversary parties and the controversy involves a fully developed factual setting. Justice Brennan has defined this requirement as one of "concrete adverseness." No recent standing case has involved a challenge to actions not yet taken. Nevertheless, doctrines of ripeness could be used to dispose of premature challenges.

Because the Supreme Court's reasoning in *Muskrat v. United States* is obscure, it is difficult to define the limitations that case

93 409 U.S. 205, 212 (1972).
94 392 U.S. 83 (1968).
95 219 U.S. 346 (1911).
96 392 U.S. at 132 n.21.
97 See 3 H. Johnston, Correspondence and Public Papers of John Jay 487-89 (1891).
100 300 U.S. 227 (1937).
102 The ripeness doctrine was described in *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967): "[T]he test of ripeness . . . depends not only on how adequately a court can deal with the legal issue presented, but also on the degree and nature of the [challenged] regulation's present effect on those seeking relief."
103 219 U.S. 346 (1911).
imposed on Congress’ power to confer standing. In Muskrat, Congress had authorized four Indians to seek a declaration, on their own behalf and on behalf of other Cherokees, determining the constitutionality of a law affecting Cherokee property. If the law affecting Cherokee property had been held unconstitutional, the United States would have paid the plaintiffs’ attorneys’ fees out of a trust fund established to aid the Cherokees. The Court held that article III barred the federal courts from adjudicating the suit. Two points may be made about Muskrat. First, the light retrospectively cast by Haworth shows that the declaratory judgment aspect of the case is irrelevant. Second, in a parallel proceeding brought under the general jurisdictional statutes, one of the parties singled out by Congress to bring suit secured a determination of the law’s constitutionality. Thus, at least one of the designated plaintiffs had interests sufficiently adverse to those of the United States to satisfy article III. Muskrat apparently holds only that Congress cannot decide the adverseness of parties prospectively; such determinations must be left to the courts.

The proposition that the Constitution requires no more than a retrospective judicial evaluation that a case has been presented with sufficient concreteness by truly adverse parties finds support in Sosna v. Iowa. Sosna sought injunctive and declaratory relief to prevent Iowa from enforcing a one-year residency requirement for divorce. The suit was certified as a class action on behalf of bona fide Iowa residents who desired divorces but could not obtain them because of the requirement. After judgment in the district court, but before disposition in the Supreme Court, Sosna had satisfied the Iowa residency requirement but had obtained a divorce outside of the state. Nonetheless, the Court held that it could reach the merits of Sosna’s claim because “the interests of [the] class have been competently urged at each level of the proceeding . . . .”

106 Similarly, by requiring the court to award the plaintiffs' attorneys' fees, Congress eliminated judicial discretion, which has been preserved even under statutes that make awards of attorneys' fees generally available. See, e.g., Bradley v. School Bd., 416 U.S. 696 (1974). That the United States would have paid the fees of both parties, as the Indians' trustee and as defendant in the suit, would seem irrelevant in light of its fiduciary duties to the Indians.
Sosna's complaint presented a concrete example of the operation of the challenged residency requirement, thus eliminating any possibility of deciding the case on incompletely developed facts. Retrospective evaluation\textsuperscript{110} of the adverseness of the proceeding eliminated any fears of collusion or of lack of diligence in litigating the claim.

D. Summary

Sosna by its terms is a mootness case, but it can as easily be characterized as a standing case. Arguably, Sosna lacked standing to present the claims of those who, unlike her, were actually disadvantaged by the residency requirement.\textsuperscript{111} By providing for class actions in the Federal Rules of Civil Procedure, Congress conferred standing on Sosna, who, absent congressional action, would not have been allowed to litigate the underlying substantive issues. The Sosna Court held that a retrospective determination that a case has been litigated in a concrete setting allows a court to reach the merits of a controversy. Article III seems to require no more.

\textsuperscript{110} The term retrospective here means evaluated as of the time that the individual claim becomes moot. This may occur quite early in the litigation. See generally Bledsoe, Mootness and Standing in Class Actions, 1 Fla. St. U.L. Rev. 430 (1973); Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L.J. 573.

\textsuperscript{111} Thus, it is not surprising that in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), the Court drew freely from mootness and standing precedents in analyzing a class action problem similar to that in Sosna.

Analytically, the Sosna problem may be considered similar to one in which a third party, formerly affected by the statute involved, seeks to assert the rights of persons not before the court but who are presently affected by the statute. The Court has treated such problems as involving considerations of prudence but not constitutional requirements. See, e.g., Singleton v. Wulff, 96 S. Ct. 2868 (1976). See also Monaghan, supra note 17, at 1384 ("Mootness is . . . the doctrine of standing set in a time frame.").
Thus, standing in its pure article III form imposes only a very minor limitation on the availability of a federal forum, given the realities of constitutional litigation. If *Sosna* states the article III limitations on standing, then only occasional pro se suits presenting facially outrageous claims would be constitutionally barred from the courts. This result would render superfluous much of the Supreme Court’s careful construction of a constitutional basis for standing. A full-scale analysis of the relation between the constitutional rule of standing and congressional power to confer standing is needed. The Court has not taken the time to develop such an analysis.

II

**THE PROBLEM OF PLEADING IN STANDING CASES**

In two recent “standing” cases the Supreme Court imposed stringent pleading requirements on the complaining plaintiff. *Warth v. Seldin* was an attack on exclusionary zoning in a suburb of Rochester, New York. The Court held that none of the named plaintiffs had adequately alleged that the assertedly unconstitutional ordinance had caused their exclusion from residence in the community—i.e., no plaintiff had any property interest in a low-income housing project that had been barred from the suburb because of the ordinance. The Court bolstered its conclusion by noting that no such housing projects were awaiting approval by the suburb at the time the case was decided. It also observed that although the zoning ordinances may have increased the cost of housing, the plaintiffs’ inability to find housing in the suburb might have resulted from the ordinary operation of the housing market and not from the defendants’ allegedly unconstitutional actions.

Similar concerns with causation pervaded *EKWRO*, where indigent plaintiffs who had been denied services at certain tax-exempt hospitals challenged a Revenue Ruling which made it easier for hospitals to reduce their services to indigents while maintaining their status as charitable organizations. The Court held that the plaintiffs had inadequately alleged the causal link be-

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113 422 U.S. 490 (1975).
114 Id. at 506.
between the Revenue Ruling and the denial of services, since the hospitals could have decided to limit services to indigents "without regard to the tax implications."\textsuperscript{116}

A. Causation as a Substantive Issue

In both \textit{Warth} and \textit{EKWRO}, the Court was concerned about the effectiveness of any remedy that might have been granted, since the plaintiffs' injuries, if any, were a product of the marketplace and not of the defendants' conduct.\textsuperscript{117} However, the Court's constitutionalization of causation is puzzling. If the Court merely wants a plaintiff to allege clearly the causal link between a defendant's conduct and an ostensible injury, it need not resort to constitutional doctrine. For example, suppose that Smith files a complaint against the Union Pacific Railroad alleging (a) that he had broken his arm in New York, and (b) that on the same day the defendant had negligently run through a grade crossing in California. Smith seeks damages from the railroad. Plainly, this complaint is properly subject to a motion to dismiss for failure to state a claim on which relief can be granted, since the applicable substantive law predicates relief on proof of a causal link between injury and negligence.\textsuperscript{118}

Thus, a causal connection between wrongful act and injury may be part of the plaintiff's burden of proof if he is to obtain relief on the merits.\textsuperscript{119} One could say that Smith lacked standing to raise questions about the Union Pacific's operations in California, but that would needlessly inject constitutional overtones into an otherwise straightforward analysis of the elements of a tort claim. The requirement that a plaintiff establish a causal connection involves a substantive policy choice; it is not inconceivable that a court concerned with railroad safety might some day conclude that Smith's hypothetical claim showed a sufficient causal connection to survive a motion to dismiss, but a court reaching that decision would clearly be changing the substantive law of torts. Smith's claim is barred not because of any inherent limitation on the power of the courts, but because of a substantive policy choice about the degree of causal connection needed to establish a right to recover in tort.

\textsuperscript{116} \textit{Id.} at 43.


\textsuperscript{118} See \textit{Albert, supra} note 3, at 438-42.

\textsuperscript{119} See D. \textit{Currie, supra} note 58, at 56. \textit{See also} \textit{Albert, supra} note 3.
The connection between causation and the merits can be seen in EKWRO. The following scenarios illustrate the range of effects that the Revenue Ruling might have had on hospitals that qualified for the disputed tax exemption:

(1) Trustee A: “The cost of providing services to indigents has skyrocketed, and we haven’t been able to attract new interns and residents. Why don’t we eliminate our service to indigents?”

Trustee B: “But won’t we lose our tax exemption?”

Accountant: “I have looked at the figures, and I estimate that we would save more by eliminating those services than we would lose in contributions if we were not tax-exempt.”

(A vote is taken and Trustee A’s proposal is adopted.)

Counsel: “Incidentally, I have just learned that, under a recent Revenue Ruling, the new policy won’t endanger our tax-exempt status.”

(2) Trustees A and B as before.

Counsel: “There is a new Revenue Ruling that will permit us to retain our tax-exempt status even if this new policy is adopted.”

(A vote is taken and Trustee A’s proposal is adopted.)

(3) Trustees A and B as before.

Accountant: “I have looked at the figures, and my guess is that we will lose slightly more than we gain if the new policy is adopted and we lose our tax exemption.”

Counsel: “But there is a new Revenue Ruling that will permit us to retain our tax-exempt status even if the new policy is adopted.”

Accountant: “In that case, we will be better off if we adopt the new policy.”

(A vote is taken and Trustee A’s proposal is adopted.)

(4) Counsel: “Before the meeting starts, I would like to point out that there is a new Revenue Ruling that will let us eliminate many of our services to indigents and still retain our tax exemption.”

Trustee A: “Good. We have never made money on that operation anyway.”

(A vote is taken and Trustee A’s proposal is adopted.)
For convenience, these scenarios can be labeled as follows: (1) "no causation"—a situation analogous to the Smith hypothetical, (2) "contributory causation," (3) "causation at the margin," and (4) "primary causation." In EKWRO the pleadings alleged contributory causation, and the suit should have been dismissed at the pleading stage only if substantive law required some closer connection between the allegedly illegal Revenue Ruling and the injury to the plaintiffs.

Although this Article is not concerned with substantive tax law, the contours of the tax question should be quickly sketched. To determine if the EKWRO pleadings stated a cause of action, one would first determine the nature of the tax incentive. If Congress wished to grant hospitals a clear-cut tax incentive for providing services to indigents, then the Internal Revenue Service would violate the law if it sought to change the congressional policy by administrative action, whether or not the hospitals continued to provide the services. Thus the injury complained of would not be the denial of services, but reduction of the incentive that Congress intended to provide. Alternatively, Congress may have wanted to induce hospitals to provide services that market pressures might otherwise have led them to deny. In that case, a "contributory causation" pleading would be inadequate because Congress did not intend to insulate indigents from all market pressures; a hospital's decision to terminate its services to indigents while retaining its tax exemption would be improper only if the tax exemption was the primary factor in the decision to terminate services. The Revenue Ruling would frustrate the congressional policy of encouraging services to indigents only in the clear "but for" case. Thus, a pleading would have to allege "primary causation" or "causation at the margin" in order to state a claim on the merits.

In EKWRO, the plaintiffs clearly alleged that the Revenue Ruling "encouraged" hospitals to deny services to indigents. Nevertheless, the Court held that "it does not follow . . . that the denial of

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120 The "no causation" case will not be discussed in this section. There analysis proceeds after determining whether Congress conferred standing in a particular case. See text accompanying notes 10-112 supra.
121 426 U.S. at 33.
122 This was the allegation in EKWRO. Id. at 33.
123 The claimed injury was "to [the plaintiffs'] beneficial interest . . . , to their 'opportunity and ability' to receive medical services." Id. at 56 (dissenting opinion, Brennan, J.).
124 The EKWRO Court's analysis of Warth v. Seldin, 422 U.S. 490 (1975), indicates that there too it implicitly determined that a claim of primary causation was required in order to state a claim. See id. at 504-05.
access to hospital services in fact results from [the] Ruling," and considered it “plausible that the hospitals... would elect to [forego] favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.” Without acknowledging that it was ruling on the merits, the Court plainly held that the plaintiffs had failed to make out a case of “primary” or “marginal” causation. That may indeed have been the correct result on the merits, but instead of directly confronting the statutory tax issue, the Court concealed its decision by raising constitutional standing questions.

B. Pleading Causation

Even if the Court correctly interpreted the tax laws as requiring more than contributory causation, it failed to face the problem of identifying, at the pleading stage, which scenario the hospital had followed. Had the Court held that the plaintiffs needed to show only contributory causation to make out a cognizable claim, then it could have assumed that, like all economic entities, the hospital had based its decision in part on the availability of the challenged tax incentive. Under this assumption, the pleadings would have adequately alleged contributory causation.

A requirement that the pleadings allege primary or marginal causation would create serious difficulties for plaintiffs in the position of the EKWRO complainants. The EKWRO plaintiffs probably had no way of knowing what happened at the meeting of the trustees; that kind of information could only have been obtained through discovery. Of course, they could have alleged primary causation, and left their attorney to worry at night about Rule 11. But they also would have faced a second problem if they had had to establish primary or marginal causation on the face of the pleadings: the particular hospital at which they were denied services might have done so because of market considerations and not because of the Ruling. Had they named the wrong hospital, the lawsuit would have been unnecessarily terminated because there

125 426 U.S. at 42.
126 Id. at 43.
127 Id. at 40-44. The Court admitted there might be “speculative” grounds for such a decision, but held that “respondents’ allegation that certain hospitals receive substantial charitable contributions, without more, does not establish the further proposition that these hospitals are dependent upon such contributions.” Id. at 43-44 (emphasis added).
128 Fed. R. Civ. P. 11. The rule states in part: “The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.”
must have been a hospital somewhere in the country where the balance regarding services to the indigents had been tipped by the Revenue Ruling, as in the third scenario. The market, however, would have concealed the identity of that hospital. Congress, although regarding causation at the margin as a necessary element of the claim, might have wished to allow persons who could not adequately allege causation at the pleading stage—those who could allege only that the Ruling "encouraged" hospitals to abandon services—to assert the statutory claim. Thus, once the Court had vaulted the hurdle of causation by implicitly choosing the stricter standard, it still should have considered the proper scope of the statutorily conferred standing to litigate the substantive claim. The source of this cavalier treatment of questions of substantive statutory law lies in the Court's erroneous effort to constitutionalize the law of standing.

Because the plaintiffs in *EKWRO* had structured their claim in terms of contributory causation and because the Court implicitly held that primary causation must be proved in order to state a cognizable claim, it was not necessary for the Court in *EKWRO* to decide the degree of specificity required in pleading causation. However, because the Court did not acknowledge this implied holding, its decision in *EKWRO*, and earlier in *Warth*, required a degree of specificity in pleadings that is at odds with the general pleading rules of the Federal Rules of Civil Procedure. In *EKWRO*, for example, the Court criticized the plaintiffs' "unadorned speculation" about the various links in the chain of causation between the Revenue Ruling and the denial of services. Presumably, allegations in a signed complaint would have satisfied the Court, although statements in briefs would not. But the Court failed to explain why the complaint had to be dismissed for failure to prove causation prior to discovery, especially when summary judgment would have offered an early opportunity for trial court dismissal of a meritless claim. That procedure would have given the plaintiffs an opportunity to use discovery to bolster their claims of causation from the evidence in the hands of the hospitals affected by the Revenue Ruling. If the plaintiffs had failed to

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130 Cf. United States v. SCRAP, 412 U.S. 669, 689 n.15 (1973). There, the Court observed that plaintiffs must allege that they have been or will be perceptibly harmed by the challenged action, not that they could imagine circumstances in which they might be affected by such actions. But the Court added that summary judgment, after discovery, was available to sort out meritorious from frivolous claims.

131 In the discovery process, the plaintiffs would have been forced to use depositions,
show primary causation after discovery, summary judgment could have been entered against them on the merits.

The Court's opinions in *Warth* and *EKWRO* do not give a principled justification for the special pleading requirements. The new pleading rules serve to trap unfortunate plaintiffs and may alert defendants to new methods of prevailing on the merits. The Court can now manipulate specificity rules to disguise decisions on the merits while appearing to dispose of cases on preliminary pleading grounds. When drafting a pleading, a plaintiff's attorney must try to determine whether the Court's views on the merits of the case are so strong that special pleading rules will be raised to bar the claim. Attorneys are likely to guess incorrectly in a fair number of cases, and therefore the special pleading rules are not only unprincipled in terms of the development of the law of standing, but are also arbitrary and unjust.

It is possible to justify the Court's special pleading rules by reconstructing the requirement. If we accept the Court's holdings that primary causation must be pleaded in certain cases, we can rationalize the pleading rules as an attempt to rule out the possibility that the ordinary operations of the market economy caused the injury. This view limits the scope of the *Warth-EKWRO* pleading rules to cases in which the underlying complaint asserts that the challenged governmental action had its primary effect on the poor. Increased specificity regarding the link between governmental action and injury is one means, but certainly not the best means, to guarantee that governmental action alone caused an injury.

However, problems remain. Under normal primary causation rules, a defendant prevails on the merits by proving that something other than the allegedly illegal action contributed to the injury.

which are relatively expensive. Because the hospitals were not parties to the litigation, the plaintiffs would not have been able to use the less expensive interrogatories. Fed. R. Civ. P. 33; Fed. R. Civ. P. 26. See Wirtz v. I.C. Harris & Co., 36 F.R.D. 116 (E.D. Mich. 1964).


133 422 U.S. at 508 & n.18; 426 U.S. at 44-46.

134 Had the Court accepted the contention that on the merits only contributory causation must be alleged, the plaintiffs' pleadings probably would have been sufficient. Given the economic assumptions of the tax laws, it is likely that tax considerations played some part in the hospitals' decision to limit services to indigents, and the plaintiffs were in no better position than the defendants to gather information on the hospitals' decisionmaking processes.

135 That is, if the illegal action joins something else to cause the deprivation, the illegal action is a contributory cause; if the caused deprivation is independent of the allegedly illegal action, a "no causation" case results. See also Scott, *supra* note 3, at 651-54.
Stated in this manner, a claim that the market, rather than the government, caused an injury looks like an affirmative defense. But why should the burden of pleading that the market did not cause an injury be shifted to the plaintiff?136

Professor Cleary's classic analysis137 identifies three standards relevant to allocating the burden of pleading: probability, fairness, and policy. This analysis is based on the notion that in a market society governmental actions alone will rarely prevent consumers from paying the going price to private suppliers for a service. Thus, probability considerations argue in favor of placing the burden of pleading the absence of market causes on the plaintiff in cases where primary causation is required as a matter of substantive law. This shift in the burden of pleading will eliminate a large number of cases from initial consideration by the courts.

Fairness criteria rest on the relative access of the parties to crucial information. Prior to discovery, the plaintiffs are unlikely to have access to materials relating to the internal deliberations of private suppliers. However, where the defendants are government officials, as in Warth and EKWRO, perhaps neither party will have easy access to the necessary information. In addition, given the infrequency of primary causation situations, those that do occur are likely to be matters of public knowledge. For example, one might expect investigative reporters to look into changes in hospital policies adopted soon after the issuance of a favorable Revenue Ruling.

Finally, policy must be considered. The strict requirement of primary causation is a response to the skepticism we feel about identifying single causes for complex events.138 The allocation of the burden of pleading in EKWRO ultimately rested on the Court's judgment that plaintiffs should not be granted relief where governmental action has merely compounded the burdens of indigency. Whatever the validity of that judgment, disguising the policy choice by invoking the standing doctrine does not promote the rational development of constitutional law. Here, as elsewhere, the

136 At this point, the burden of pleading, not the burden of persuasion, is being considered. It is entirely possible that the defendants would have the burden of pleading that something other than their action caused the harm to the plaintiffs, while the plaintiffs would bear the burden of persuasion on the same point.


law of standing hinders rather than helps our understanding of the genuine constitutional problems involved.

III

THE PROBLEM OF MISPLACED GENERALIZATION—

*Flast v. Cohen* AND ITS PROGENY

*Warth* and *EKWRO* involved identifiable injuries to particular parties. They exemplify the role of constitutional law as incidental to the determination of private rights. It is possible, although ultimately unsatisfactory, to ground Congress’ power to confer standing in the “private rights” theory. *Flast v. Cohen,* which allowed a taxpayer to challenge the expenditure of federal funds, is inconsistent with that theory. It has, however, been the source of a branch of the law of standing.

*Flast* established a relatively coherent framework for analyzing constitutional questions of standing to sue. Unfortunately, Chief Justice Warren’s opinion for the Court, after clearly setting out the proper framework, introduced unnecessary embellishments that have weakened the opinion’s force and have confused the Court.

In *Flast,* the Chief Justice drew a distinction within the general doctrine of justiciability—between those policies served by the law of standing and those policies served by the law of political questions. Justiciability encompasses two complementary but somewhat different limitations. In part [it] limit[s] the business of the federal courts to questions presented [(I)] in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part [it] define[s] the role assigned to the judiciary in a tripartite allocation of power [(2)] to assure that the federal courts will not intrude into areas committed to the other branches of government.

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139 See Monaghan, *supra* note 17, at 1365-68.
140 See text accompanying notes 16-29 *supra*.
141 392 U.S. 83 (1968).
142 Chief Justice Warren’s opinion for the Court suggested that a taxpayer had a private interest because success would reduce his or her tax burden. *Id.* at 103 n.23. Justice Harlan’s dissent correctly responded that where expenditures are drawn from general revenues, invalidation of a spending program would not result in a decrease in taxes. *Id.* at 118-19. *See also* Jaffe, *supra* note 18, at 1034.
143 392 U.S. at 94-101. The opinion also attempted to distinguish between prudential and constitutional considerations affecting the Court’s disposition of questions of standing. *Id.* at 101-06. For a discussion of the revival of that distinction, see text accompanying notes 191-98 *infra*.
144 392 U.S. at 95.
According to *Flast*, the constitutional doctrine of standing guarantees adverseness; the doctrine of political questions assures the proper judicial respect for the coordinate branches of government.\(^{145}\) This distinction represents Chief Justice Warren’s major accomplishment in the opinion.

A. Concrete Adverseness and its Surrogates

The distinction drawn by the Chief Justice should have simplified the process of determining whether a plaintiff has standing; inquiry should focus on the “concrete adverseness” of the plaintiff’s case. Unfortunately, the *Flast* Court’s formulation of the test for standing added the more complicated requirement that there be a “logical nexus between the status asserted and the claim sought to be adjudicated”\(^{146}\) and that, in a taxpayer suit, the plaintiff “show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power.”\(^{147}\) The point of the first part of this requirement is clear. When a nexus between status and claim exists, we can be relatively “confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor.”\(^{148}\) The nexus serves as a substitute for the direct personal injury called for by the “private rights” model of constitutional adjudication.

This analysis, however, leaves open two related questions. First, it is not clear that the required nexus will guarantee concrete adverseness. Thus, the Court’s attempt to substitute a more particularized test for concrete adverseness might permit a lawsuit where the policies underlying the case or controversy requirement would suggest that the suit should not be entertained. Second, the *Flast* Court never explained the necessity for an indirect test for concrete adverseness.\(^{149}\)

The *Flast* Court, by establishing a rule to limit standing,\(^{150}\) may

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\(^{146}\) 392 U.S. at 102.

\(^{147}\) Id. at 102-03.

\(^{148}\) Id. at 106.

\(^{149}\) This problem was mentioned by Justice Harlan in dissent. Id. at 121, 124. Moreover, the Court has more recently been satisfied with direct retrospective examination of that question. See text accompanying notes 107-10 *supra*.

\(^{150}\) See 57 ILL. BAR J. 236, 245 (1968).
have erroneously tried to generalize from the taxpayer cases to other, as yet unimagined, cases of ideological plaintiffs. The Court's failure to justify its generalized rule sowed the seeds for subsequent decisions repudiating the fundamentally correct analysis of Flast. Flast itself thus illustrates the dangers of deciding cases not concretely before the Court.

1. The Implicit Limitations in Flast

Chief Justice Warren twice hinted in Flast that the absence of other plausible plaintiffs to challenge the government action at issue justified granting standing to taxpayers. He noted that free-exercise claims were distinguishable from establishment-clause claims, since the former necessarily involved a specially burdened class of people, and "the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers within the affected class." In formulating the nexus requirement, the Chief Justice stated that taxpayers could not challenge expenditures incidental to "the administration of an essentially regulatory statute." In such a case, persons directly affected by the regulation could ordinarily be expected to challenge its constitutionality. If necessary, they could also assert claims affecting the general public interest in addition to claims based upon the direct burdens imposed on them by the regulation.

If these hints are taken seriously, taxpayers had standing in Flast because no one else was likely to present the claim for adjudi-

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151 An ideological plaintiff's sole interest in litigating is to vindicate his or her belief about what is constitutional and what is not, without concern for pocket-book or other forms of concrete injury.


153 392 U.S. at 104 n.25. Justice Harlan, in dissent, responded to this "better plaintiff" analysis by noting that Board of Educ. v. Allen, 392 U.S. 236 (1968), showed that there were better plaintiffs than taxpayers to raise challenges to federal expenditures for church-related schools, 392 U.S. at 125 n.12. In Allen, members of a school board, who were concerned about a conflict between their oaths of office and the requirement of state law that they disburse books to church-related schools, were allowed to raise the constitutional challenge. However, the situation in Allen was unusual. Not all school boards are reluctant to spend money, and most expenditure programs would not involve the participation of officials who might realistically be expected to object. Thus, a finding that no better plaintiffs exist rests on a realistic estimate of the likelihood that other plaintiffs will come forward, not on abstract speculation about who might be more directly injured.

154 Id. at 102.

cation. A preference for "better" plaintiffs is justified by the self-evident truth that the more directly a person is affected by a governmental regulation, the harder he or she will fight to remove the restrictions it imposes; i.e., adverseness is likely to be great. In addition, better plaintiffs allow the court to gauge the actual operation of the statute in question and ensure a fuller factual setting for deciding constitutional questions.

Conversely, the Court has repeatedly bestowed standing by default in the absence of better plaintiffs. Moot cases, for example, are ordinarily nonjusticiable, but the Court has often decided the merits of otherwise moot cases that are "capable of repetition, yet evad[e] review." These cases involve applications of a statute in concrete situations; therefore, only adverseness need be established.

In contrast, cases raising questions of first amendment overbreadth involve litigants with strong incentives to pursue the challenge but whose cases do little to illustrate the evil effects of unconstitutionally overbroad statutes. A defendant may challenge a statute as overbroad—prohibiting activity protected by the first amendment—even though his or her activity was plainly not constitutionally protected. The justification for the exception lies in the deterrent effect of an overbroad statute. Such a statute prohibits constitutionally protected activity. Conscientious citizens, knowing that the protected activity has been prohibited, will refrain from engaging in it. Thus, cases will seldom arise in which the state acts to penalize a person whose activity is indeed protected; the only prosecutions will involve those perfectly willing to break even a clearly constitutional law. However, in vagueness cases law-abiding citizens may misjudge the scope of a statute,
engage in protected activity, and find themselves prosecuted.\textsuperscript{160} Thus, those who engage in constitutionally unprotected activity should be able to raise overbreadth claims, since plaintiffs engaging in protected activity are unlikely to feel the force of the law's operation, and state deterrence of constitutionally protected activity ought to be challenged. But those same individuals should not be permitted to raise vagueness claims, because of the probable availability of better plaintiffs. In fact, this is the state of the law.\textsuperscript{161}

The "no better plaintiff" concept stands as an implicit limitation of \textit{Flast}. Two concluding observations are in order. First, if \textit{Flast} suggests that standing should be granted to taxpayers or citizens when no other plaintiffs are available, the opinion does not assume that all constitutional questions are justiciable. The Court does not sanction the result feared by Professor Brown—that enactment of a statute would be a mere prelude to challenge of the statute in the courts.\textsuperscript{162} \textit{Flast} clearly preserved other doctrines of justiciability, notably the political question limitation.\textsuperscript{163} Relaxed standing need not, as Professor Brown feared, turn the Supreme Court into a Council of Revision.\textsuperscript{164}

Second, Chief Justice Burger's opinion for the Court in \textit{United States v. Richardson}\textsuperscript{165} argued that the absence of a plaintiff other than a citizen or taxpayer to challenge the failure of the Central Intelligence Agency (CIA) to make its budget public, indicated that the issue involved a political question.\textsuperscript{166} But the Chief Justice's argument departs from traditional political question analysis. The absence of better plaintiffs may suggest that there is a "textually de-
monstrable constitutional commitment” of the issue to Congress, the current test for determining whether a question is political in the constitutional sense. But the absence of a better plaintiff does not conclusively determine whether a question is political, as the Solicitor General recognized in Richardson when he conceded that even if standing were found, the suit might be barred by the political question doctrine. Perhaps the political question doctrine ought to be revitalized, but it confuses analysis to use dissatisfaction with the state of the law in one area to justify irrational decisions in another.

2. The Repudiation of Flast

Because Flast substituted an arbitrary nexus requirement for an inquiry into concrete adverseness, the Court could easily limit the implications of its holding. For example, when the plaintiff in Richardson attacked the nondisclosure of the CIA budget rather than a particular expenditure made by the agency, the Court simply held that the plaintiff had failed to satisfy the Flast nexus between his status as a taxpayer and the expenditure challenged. In a formal sense this was correct, but it is inconceivable that the result would have been different had the plaintiff alleged that CIA funds had been used to support right-wing Christian fundamentalist publications in violation of the establishment clause, and that disclosure of the CIA budget was necessary to prove that claim at trial.

The Richardson Court rejected the plaintiff's claim to standing as a citizen. The plaintiff had argued that he could not fulfill his obligation as a citizen to vote in an informed manner without

168 See also The Supreme Court, 1974 Term, 89 Harv. L. Rev. 47, 194-95 (1975) (difficulty of administering remedy for exclusionary zoning may be one ground justifying judicial reluctance to determine such cases on merits). The difficulty of administering relief supports, instead, the withholding of relief for want of equity.
169 418 U.S. at 206-07 (dissenting opinion, Stewart, J.).
170 Id. at 175. See also Public Citizen, Inc. v. Simon, 539 F.2d 211, 216-19 (D.C. Cir. 1976).
171 Justice Powell noted the formalistic nature of the Court's analysis. 418 U.S. at 184 (concurring opinion).
172 At several points in the opinion, the Court clearly indicated its views on the merits of the claim presented. Id. at 175 n.7 (reference to other agencies operating under statutes that conceal budgets). See also id. at 175 n.8 (Congress, although recognizing public's need for information on government operation, has maintained restraints on disclosure of confidential information); id. at 178 n.11 (reference to history of U.S. Const. art. 1, § 9, cl. 7, as proving that framers did not intend to abolish secrecy absolutely).
knowing what expenditures Congress had approved for CIA activities. The Court held that citizen standing was unavailable because the plaintiff's grievances were "shared with 'all members of the public.'"\textsuperscript{173} This simply restates the problem; a party claiming standing as a citizen presents a claim shared by all members of the public. According to \textit{Flast}, courts must inquire into the logical nexus between citizenship and the claim; the Court in \textit{Richardson} simply refused to make the inquiry.\textsuperscript{174}

In a companion case to \textit{Richardson}, the Court directly addressed the question of the concreteness necessary to permit informed adjudication. \textit{Schlesinger v. Reservists Committee to Stop the War}\textsuperscript{175} was a suit by persons, claiming standing as citizens, challenging the enrollment of members of Congress in the Reserves. Plaintiffs claimed that this practice violated the constitutional prohibition of dual office holding.\textsuperscript{176} The Court held that the claimed injury, denial of the exercise of independent judgment by the dual office holders, was insufficiently concrete to permit informed adjudication. Unfortunately, the Court followed a standard that disregarded the inherently relative nature of concreteness. If the factual setting of a plaintiff's claim provides the best possible illumination of the operation of the challenged practice, then the Court ought to be able to consider the merits of the case. Of course, finding standing does not mean that the Court must decide the case in favor of the plaintiffs, or even that it must decide the merits at all. An amorphous injury may be evidence that the issue is not a proper one for judicial resolution, but that is a separate inquiry.

The Court's decisions in \textit{Richardson} and \textit{Reservists} rested on two unarticulated assumptions. First, the Court assumed that judicial inquiry into the constitutionality of a practice may offend coordinate branches of government. Although this assumption might be defensible if fully articulated, on its face it is odd. It is difficult to see why Congress and the President should be offended by being required to defend a lawsuit, particularly when the political question doctrine provides an adequate defense for their actions. The

\textsuperscript{173} Id. at 178, quoting \textit{Ex parte Levitt}, 302 U.S. 633, 634 (1937).

\textsuperscript{174} The Court also demonstrated some confusion in explaining why \textit{Frothingham v. Mellon}, 262 U.S. 447 (1923), survived \textit{Flast}. It suggested that \textit{Frothingham} survived because there the plaintiff had failed to satisfy the requirement of distinguishing herself from the general populace. 418 U.S. at 172. But in \textit{Flast} the Court explicitly stated that \textit{Frothingham} survived only because the plaintiff did not allege a violation of a specific limitation on the spending power. 392 U.S. at 105.

\textsuperscript{175} 418 U.S. 208 (1974).

\textsuperscript{176} U.S. CONST. art. I, § 6, cl. 2: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."
second assumption is simpler: the Court was convinced that the practices challenged in \textit{Richardson} and \textit{Reservists} were constitutional, and it made no sense to let those lawsuits go to trial when they were doomed to failure.\footnote{177} But it made little sense to twist the law of standing to terminate the lawsuits. The Court's duty is to articulate principles of continuing applicability; hostility to the merits of particular lawsuits is not such a principle.

B. "Exceeds Specific Limitations"

The second part of the \textit{Flast} test is pure fiat: no member of the Court has explained why a taxpayer has standing only to challenge expenditures that exceed specific limitations on the spending power.\footnote{178} Perhaps the only explanation lies in a felt necessity to preserve the result in \textit{Frothingham v. Mellon}.\footnote{179} There the Court denied standing to a taxpayer who claimed that a federal expenditure violated the due process clause and invaded a sphere reserved to the states by the tenth amendment.\footnote{180}

Another possible source of the second \textit{Flast} requirement is more interesting. The concurring opinions of Justices Stewart and Fortas in \textit{Flast} suggested rather strongly that \textit{Flast} should be understood as an establishment-clause case.\footnote{181} They argued, in effect, that because of its particular history, the establishment clause conferred standing on taxpayers, just as in \textit{Bivens v. Six Unknown Named Agents},\footnote{182} the fourth amendment conferred standing on persons whose homes had been searched.\footnote{183} The second \textit{Flast} requirement, then, is no more than a misguided attempt to articulate a general standard for determining which constitutional provi-
sions confer standing on taxpayers. The attempt is misguided because under this analysis standing can be found only after interpretation of each particular constitutional provision. A constitutional provision on its face may not limit the spending power, but if examined in light of its history, the same provision might have been designed to limit impliedly Congress' power to spend. By attempting to generalize about the types of provisions that would confer standing, the Court in *Flast* weakened the force of its analysis.

Justice Stewart's recent foray into the field, in his dissenting opinion in *Richardson*, demonstrates the same eagerness to substitute a test which purportedly turns on concreteness, without direct inquiry into the facts of the case. He too sought to return to the "private rights" model by distinguishing between affirmative duties imposed on federal officials by the Constitution and specific prohibitions against federal action. Justice Stewart argued that when the Constitution imposes a duty, the plaintiff complaining of an official failure to perform the duty has alleged an infringement of a private right to benefit from the performance of the affirmative duty. For example, a plaintiff may claim that Congress has a duty to disclose the CIA budget and that it has not done so. He or she then assumes the same legal position as a person claiming that the Director of the CIA entered into a contract to provide the budget, but refused to perform; the constitutional duty is the analogue to the contract. The analysis of *Flast* comes into play only when a prohibition is involved.

Justice Stewart's distinction makes little sense when closely examined. Difficulties arise as soon as we try to decide which constitutional provisions impose affirmative duties and which contain only prohibitions. For example, Justice Stewart treats the establishment clause as a prohibition, and yet it could easily be characterized as a duty not to use taxpayers' money to support churches. The negative phrasing of this duty is linguistically and logically irrelevant. The clause at issue in *Richardson* provided that "a regular Statement and Account . . . shall be published from time to

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184 418 U.S. at 202-05.
185 Id. at 203.
186 Id. at 203-04.
187 Id. at 205; Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228-29 (1974) (concurring opinion, Stewart, J.). In his discussion in *Richardson* of the importance attached to this distinction and its significance to Justice Stewart, Justice Powell did not recognize the strict bifurcation between duty-analysis and *Flast*-analysis that Justice Stewart proposed. 418 U.S. at 185-86 (concurring opinion).
A duty to publish is equally a duty not to withhold from publication. One is hard-pressed to imagine why the happenstance that the Constitution puts it one way rather than the other should make any legal difference. Logically, too, the duty-prohibition distinction serves none of the underlying policies of the standing doctrine.

C. Prudential Limitations on Standing

Chief Justice Warren and Justice Stewart felt compelled to develop restrictive tests for standing, without explaining the need for restrictions. Justice Powell has at least articulated his reasons for desiring a return to limited standing to sue. Unfortunately, his reasons, which he characterizes as prudential, are not good ones: where they involve political judgments, the judgments are almost certainly wrong; where they purport to elaborate a doctrine of standing, the limitations suggested are universally applicable and therefore lawlessly discretionary.

According to Justice Powell,

repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.

Justice Powell's argument is premised on the flawed assumption that entertaining a suit automatically leads to the invalidation of government action. So long as other doctrines of justiciability remain available, finding standing does not entail a head-on confrontation between Congress and the courts. Of course, if the Court regularly entertained purely political controversies, Justice Powell's evils might result, but the political question doctrine was designed to prevent that from occurring. Justice Powell's focus on the past—on the debates in the Constitutional Convention and on the

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188 U.S. CONST., art. I, § 9, cl. 7.
189 As Justice Powell noted, the clause at issue in Richardson is found in a section that generally consists of clear prohibitions and directly follows a negative duty: that no money be drawn from the Treasury unless lawfully appropriated. 418 U.S. at 187 n.6 (concurring opinion).
190 Id. at 186.
191 Id. at 188.
New Deal—misled him. For nearly thirty years, cases decided after generous application of the standing doctrine have created little public furor except when federalism questions have been involved, as in the reapportionment and abortion controversies. Thus, the general prudential concern that Justice Powell expressed in *Richardson* was misplaced; of the recent standing cases only *Warth v. Seldin* potentially raised federalism concerns, and then only if the merits were decided with insufficient sensitivity to those concerns.

Justice Powell's specific grounds for restrictive standing are also inadequate. First, he argues that "unrestrained standing... would create a remarkably illogical system of judicial supervision," as compared to the rejected Council of Revision. If standing were unrestrained, judicial review of all legislative and executive actions could occur at the whim of taxpayers. Furthermore, the quality of presentation of suits would vary enormously, and such adjudication would proceed abstractly. However, given the massive expansion of statutory standing, a development that Justice Powell does not question, the anomalous cases are those in which standing is unavailable. Direct application of the test of concrete adverseness would eliminate these difficulties.

Justice Powell then noted that if the power to grant standing were "indiscriminately" used, "we may witness efforts by the representative branches drastically to curb its use." At best, this comment demonstrates a remarkable political obtuseness. In the political climate of 1974, Congress probably would not have reacted adversely to a requirement that it disclose the CIA budget. Indeed, one suspects that many legislators would have been relieved had a court required them to do so.

Finally, Justice Powell thinks that citizen suits would impair the effectiveness of the courts by diverting limited resources away from the historic role of alleviating concrete injuries to aggrieved parties. Standing thus acts to ration limited judicial resources.

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192 *Id.* at 189 n.9, 191.
193 "We also note that zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975).
195 *Id.* at 189-91.
196 *Id.* at 191. Actually, the precise reference is to the power to invalidate legislation, "[t]he power recognized in *Marbury v. Madison.*" *Id.* Here again Justice Powell proceeds as if the power of judicial review and the wisdom of its exercise were the same thing.
197 *Id.*
However, Justice Powell erroneously assumes that a decision in favor of standing in *Richardson* and *Reservists* would have swamped the courts with litigation.\(^{199}\) Statutory standing is now so broad that allowing citizen suits would probably not significantly increase the workload of the courts.

These criticisms of Justice Powell's reasons for denying standing in *Richardson* relate to a more general and important criticism. Justice Powell's rationale, if taken seriously, would close the courthouse doors completely. If *Richardson* threatened congressional retaliation or significant diversion of judicial resources, then any case in which standing might be in issue would do the same. Justice Powell never gave any grounds for choosing *Richardson* and *Reservists* as cases in which standing should be denied, while allowing determination of the merits in such cases as *Sosna v. Iowa*.\(^{200}\) If the Supreme Court is to develop a rationale to restrict standing, that rationale must be articulated in general principles responsive to accurately perceived considerations of prudent behavior. Justice Powell's position is based on misperception, and, because his prudential concerns are stated in terms too generally applicable, his position is unacceptable.

### Conclusion

The new law of standing arises from "concern about the proper—and properly limited—role of the courts in a democratic society."\(^{201}\) "Properly" takes on a dual meaning: that it is correct to limit the role of the courts, and that their role must be limited in an acceptable manner. The Court's recent efforts do not comport with the latter meaning. The new law of standing rests on mechanisms of limitation that are insufficiently justified, are arguably inconsistent with doctrines the Court has not purported to question, and have more than an air of arbitrariness about them.

The central function of standing as a limitation on federal courts may be gleaned from the Court's strong intimations in *EKWRO* that, had it reached the merits of the plaintiffs' claims, it would have rejected them.\(^{202}\) A determination that a plaintiff lacks standing serves as a surrogate for disposition on the merits. Similarly, the Court may manipulate standing rules to dispose of cases on the merits, as it did in *Sosna*. The Court, of course, has not

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\(^{199}\) See Davis, *supra* note 163, at 634.

\(^{200}\) 419 U.S. 393 (1975).

\(^{201}\) Warth v. Seldin, 422 U.S. 490, 498 (1975).

\(^{202}\) 426 U.S. at 42-44.
admitted that standing serves this function, yet the rationales the Court has advanced for denying standing would support identical dispositions based on other doctrines.

Plainly, limiting judicial activity through the use of the standing doctrine is no easy task. Justice Powell has suggested that the choice is essentially between polar extremes—standing for everyone, or standing for only some. Although Justice Powell does not doubt the nature of the chosen few who are to be allowed to pursue their cause, the Court’s decisions tend in the direction of resuscitating a relatively pure “private rights” approach to standing. Whatever the merits of that approach, it cannot be revived without wreaking havoc in other areas. For example, the “private rights” approach is inconsistent with developments in the law of mootness such as Sosna, and with the traditional recognition of a congressional power to confer standing.

But if standing is granted to more than the chosen few, must Justice Powell’s other option—standing for everyone—necessarily follow? There is a third option. Standing would be limited only if a candid assessment of the plaintiff’s ability to present the case adequately\(^2\) and a pragmatic evaluation of the factual concreteness that could be expected led to the conclusion that the necessary “concrete adverseness” was absent. In addition, a generous law of standing should be coupled with a reluctance to find standing where plaintiffs more directly affected by the claimed illegality might realistically be expected to come forward.\(^3\) The final component of this approach would be a revitalized political question doctrine, which would allow the Court to confront directly the separation-of-powers concerns that underlie its recent efforts.\(^4\)

The law of standing has done the state some service; but like an old soldier, it is time for the doctrine to fade away.

\(^2\) See note 109 and accompanying text supra.

\(^3\) In Singleton v. Wulff, 96 S. Ct. 2868 (1976), a plurality suggested that the Court should pragmatically determine whether the persons directly affected by a statute were likely to challenge it. If these persons would come forward, then third parties would have no standing to contest the statute, and vice versa. Id. at 2873-75. This is similar to the test suggested here.

\(^4\) But see Henkin, supra note 79.