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Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform

Robert Allen Sedler*

I. INTRODUCTION

The Supreme Court's liberalization of standing requirements, which occurred primarily from 1968 to 1973, reflected the general liberalization of its view of justiciability and its efforts to permit litigants to vindicate federal constitutional and statutory rights in federal forums.¹ In fact, standing had become so attenuated a requirement by 1971 that a federal appeals court noted that "[t]he Supreme Court's recent decisions have made the standing obstacle to judicial review a shadow of its former self, and have for all practical purposes deprived it of meaningful vitality."² In the last few years, however, the Burger Court, as part of an ongoing process of restricting access to the federal courts,³ has redefined standing in a way that significantly impedes challenges to governmental action in the federal courts. In addition, the Court has elevated its redefined standing doctrine from an essentially self-imposed limitation on judicial review to the level of a constitutional requirement under article III's case or controversy provision.⁴

This article will first discuss the liberalization of standing that occurred from 1968 to 1973. Attention will then be given to the decisions between 1974 and 1976 in which the Court—step by step and seemingly imperceptibly—changed the constitutional test of standing, promulgated in 1968 in terms of "personal stake," to a test of "injury in fact." Additionally, the Court has imposed such a high "threshold" showing of injury on plaintiffs seeking to vindicate federal rights that it has arguably precluded certain kinds of challenges from ever being made in the federal courts. The final portion of the article, after analyzing the power of Congress to remove the

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1. See generally Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 481-88 (1972).

2. *National Automatic Laundry & Cleaning Council v. Schultz*, 443 F.2d 689, 693 (D.C.Cir. 1971).

3. See generally SOCIETY OF AMERICAN LAW TEACHERS, *SUPREME COURT DENIAL OF CITIZEN ACCESS TO THE FEDERAL COURTS TO CHALLENGE UNCONSTITUTIONAL OR OTHER UNLAWFUL ACTIONS: THE RECORD OF THE BURGER COURT* (1976).

4. U.S. CONST. art. III, § 2.

standing barriers which the Court has placed in the path of federal litigants, will present specific proposals for legislative action to achieve this end.

II. THE STANDING REQUIREMENT

A. *Liberalization of the Standing Requirement*

Initially, it is useful to distinguish between a "private action" and a "public action."⁵ The former is a suit brought to protect the interests, usually economic, of a particular individual or enterprise; an example would be an action challenging an administrative ruling that benefits a competitor.⁶ The plaintiff in such an action does not differ from the plaintiff in an ordinary civil suit, notwithstanding the fact that the plaintiff is challenging governmental action or seeking to review an administrative ruling. The "public action," on the other hand, is one brought by the "non-Hohfeldian" or "ideological" plaintiff.⁷ In practice, it is a group effort, and the suit will be backed by group resources, such as those of the ACLU, the NAACP, or other "public interest" organizations in order to protect group interests and to advance group values that are infringed upon by the governmental action. While particular individuals may suffer identifiable injury from the challenged action—and in practice the lawyer will make every effort to find "injured" plaintiffs in order to minimize standing problems⁸—the identity of the particular plaintiff previously was not determinative. Recently, by applying the same principles of standing to both types of actions, however, the Court has severely restricted the use of the "public action."

One of the consequences of liberalizing standing requirements, as reflected in cases such as *Hardin v. Kentucky Utilities Co.*,⁹ decided

5. The distinction was first developed by Professor Jaffe. See Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961); *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

6. See Sedler, *supra* note 1, at 489-91.

7. See generally Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

8. The "standard plan" in suits challenging abortion laws, for example, has been to include as plaintiffs a physician, a pregnant woman who had sought but was unable to obtain an abortion, a married woman who wished to avoid pregnancy, and other concerned professionals. The Supreme Court held that in such suits, only the physician and the pregnant woman had standing. See *Roe v. Wade*, 410 U.S. 113, 123-29 (1973) (physician could not obtain injunction against pending state prosecutions; woman had standing although pregnancy terminated before Supreme Court heard case); *Doe v. Bolton*, 410 U.S. 179, 187-89 (1973) (physician, not subject to pending state prosecution, had standing, as did formerly pregnant woman).

9. 390 U.S. 1 (1968) (private utility companies challenged TVA expansion of sales; competitive interest alone can confer standing to challenge government action where statute relied upon was designed to protect private utilities from governmental competition).

in 1968, and *Association of Data Processing Service Organizations, Inc. v. Camp*¹⁰ and *Barlow v. Collins*,¹¹ companion cases decided in 1970, was to remove barriers other than the establishment of "injury in fact" as the primary requisite for standing. Although *Data Processing* and *Barlow* promulgated an additional test, requiring that the interest of the plaintiff arguably be within the "zone of interests" sought to be protected or regulated by the statute or constitutional guarantee in question, subsequent cases have not relied on this additional litmus to deny standing.¹² In *Sierra Club v. Morton*,¹³ for example, the Court held that a plaintiff could establish standing by illustrating only "injury in fact," even where an organizational plaintiff was seeking to sue in a representative capacity. The Court further emphasized that this injury could be slight and that it could involve intangible interests, such as those that were "aesthetic, conservational, and recreational."¹⁴ While standing was denied in *Sierra Club* because the organizational plaintiff failed to allege that its members were using the recreational area it was seeking to protect,¹⁵ such failure was easily overcome by an amendment to the pleadings, and the plaintiffs subsequently withstood a motion to dismiss.¹⁶ There is no doubt that the "injury in fact" test, at least as it was interpreted at that time, significantly lowered standing barriers. Justice Powell, who has been in the forefront of the Court's present efforts to reintroduce a more restrictive standing barrier, stated that "[r]eduction of the threshold requirement to actual injury redressable by the court represented a substantial broadening of access to the federal courts over that previously thought to be the constitutional minimum"¹⁷

10. 397 U.S. 150 (1970) (plaintiffs challenged government ruling allowing national banks to provide data processing services; plaintiffs had standing because they would be injured in fact by ruling and their interests were arguably within zone of those protected by Administrative Procedure Act).

11. 397 U.S. 159 (1970) (tenant farmers eligible for agricultural subsidies had standing to challenge government regulation adversely affecting their economic relationship with their landlords; Court recognized injury in fact and implicit congressional intent that government protect interests of tenant farmers, bringing plaintiffs within zone of interests protected).

12. Even when the "zone of interests" approach was in effect, it did not present any additional standing problems in practice. See Sedler, *supra* note 1, at 486-87, 489-94.

13. 405 U.S. 727 (1972).

14. *Id.* at 738, quoting *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 154 (1970).

15. See 405 U.S. at 735, 740-41.

16. See *Sierra Club v. Morton*, 348 F. Supp. 219 (N.D. Cal. 1972) (motion to dismiss denied but standing not in dispute). See also 405 U.S. at 735-36 n.8.

17. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 39 (1976). Although Justice Powell was referring specifically to standing under § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), the test for standing to review administrative action and for standing to review other governmental actions does not

The primary beneficiary of this liberalization of standing was the plaintiff in the "private action," who could establish standing by alleging that it was the subject of present or threatened economic injury as a result of the governmental action.¹⁸ The plaintiff in the "public action," however, was guaranteed standing only when there was no difficulty in showing that particular members of the group whose interests were involved had or were likely to suffer identifiable injury from the challenged action.¹⁹

During this period, *Flast v. Cohen*²⁰ gave impetus to the "public action." Although, strictly speaking, *Flast* held only that a federal taxpayer could bring a suit alleging that an appropriation violated the first amendment's establishment clause, of far greater significance was the Court's enunciation of the "nexus" principle of standing²¹ which required a logical nexus between the status asserted by the plaintiff and the claim sought to be adjudicated.²² In *Flast*, the Court found that the plaintiff was "a proper and appropriate party to invoke a federal court's jurisdiction"²³ because a nexus existed between its *status* as a federal taxpayer and its *claim* that the expenditure of federal funds to finance instruction in parochial schools violated the establishment clause. As long as federal funds were being spent in violation of the establishment clause, the Court considered it unnecessary to show that the plaintiff either suffered any "tangible injury" from the expenditure or suffered any "injury" different from that suffered by all federal taxpayers.²⁴

Carried to its logical conclusion, the "nexus" principle would authorize suit by any member of a group to challenge governmental action detrimental to the interests of the group, without the necessity of showing that the particular plaintiff suffered identifiable or differentiated injury resulting from that action. Blacks, for example, would be able to challenge a pattern of racial discrimination directed against blacks as a group, or at least affecting blacks in the area where the plaintiffs lived.²⁵ Similarly, persons objecting to governmental involvement in religious activity would be able to challenge such involvement on establishment clause grounds, even if no expenditure

generally differ. See Sedler, *supra* note 1, at 489. Justice Powell continued to point out that "as this Court emphasized in *Sierra Club*, . . . broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 426 U.S. at 39.

18. See Sedler, *supra* note 1, at 489-94.

19. See, e.g., the abortion cases, *supra* note 8.

20. 392 U.S. 83 (1968).

21. See Sedler, *supra* note 1, at 483-84, 487.

22. See 392 U.S. at 102.

23. *Id.* at 103.

24. *Id.* at 102-03.

25. See Sedler, *supra* note 1, at 499-500, and cases cited therein.

of funds were made.²⁶ By focusing on the nexus between the status asserted and the claim presented, the Court seemed to indicate that "injury in fact" would not be required in the "public action," even though it was the essential basis for standing in the "private action." Justice Harlan implied that this was the thrust of *Flast* when he argued in dissent that "public action" ("non-Hohfeldian") standing should not be allowed in the absence of congressional authorization.²⁷

In *Flast*, the Court also undertook to define the extent to which standing represented a constitutional requirement pursuant to the case or controversy provision of article III. Here the Court was very precise: article III required (1) a plaintiff having a *personal stake* in the outcome of the controversy, and (2) a dispute involving the legal relations of parties having adverse legal interests.²⁸ As the Court stated, "in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."²⁹ There was no discussion whatsoever of "injury in fact," presumably because the Warren Court considered it a very different concept from that of "personal stake." Thus, the Court implied that although a taxpayer might not suffer "injury in fact" from the expenditure of federal funds for an unconstitutional purpose, there was a sufficient nexus between a person's status as a federal taxpayer and the claim that the expenditure violated the establishment clause to give that person a "personal stake" that "impart[s] the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer consistent with the constitutional limitations of Article III."³⁰

The Court's interpretation of the article III standing requirements in *Flast* was consistent with existing doctrine. The Court previously had interpreted the case or controversy provision primarily with reference to the adverseness of the parties,³¹ the prohibition against feigned and collusive suits,³² the stricture against rendering advisory opinions,³³ and the requirement of a present personal stake in the litigation as reflected in the mootness doctrine.³⁴ *Flast* established

26. See *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973); *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970). See also Sedler, *supra* note 1, at 502.

27. See 392 U.S. at 130-33.

28. See *id.* at 101.

29. *Id.*

30. *Id.*

31. See, e.g., the classic case of *Muskrat v. United States*, 219 U.S. 346 (1911).

32. See generally 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3530 (1975).

33. See generally *id.* at § 3529.

34. See generally *id.* at § 3533.

that a case or controversy for article III purposes was presented whenever the plaintiff had a "personal stake" in the outcome of the litigation. Additionally, it held that this personal stake was to be determined by looking to the nexus between the status asserted by the plaintiff and the claim the plaintiff sought to have adjudicated.

In *Trafficante v. Metropolitan Life Insurance Co.*,³⁵ decided in 1972, the Court expressly recognized that the violation of substantive federal rights created by Congress may result in "individual injury or injury in fact" to those whom the statute was intended to benefit. Specifically, the Court determined that Congress, by virtue of the Civil Rights Act of 1968,³⁶ had created a substantive right on the part of white persons to have interracial associations in a housing situation. Thus, the Court held that white residents of an apartment complex from which blacks had been excluded had standing, pursuant to the statute, to file a claim of racial discrimination against the landlord.³⁷

These decisions embodied the law of standing as applied in 1973. When the *Flast* test was satisfied, plaintiffs had standing unless some other factor—such as that the claim was not presently ripe for determination³⁸—militated against allowing it in a particular case. In the "private action," and sometimes in the "public action" as well, the "personal stake" test would be satisfied by a showing of "injury in fact," even if it were slight and involved intangible interests.³⁹

The liberality of the "injury in fact" test as it then existed, and its applicability in the context of the "public action," was demonstrated by the Court's 1973 decision in *United States v. SCRAP*,⁴⁰ which held that users of a metropolitan recreational area had standing to challenge an Interstate Commerce Commission order that permitted railroads to impose a surcharge on freight rates.⁴¹ The plaintiffs based their claim of injury in fact on the allegation that the surcharge would discourage the use of recyclable goods, which in turn would lead to the greater use of virgin materials and diminish the plaintiffs' enjoyment of camping, hiking, sightseeing, and fishing in the area.⁴² The Court specifically rejected the argument that in order to show "injury in fact" the plaintiffs had to be "significantly affected" by

35. 409 U.S. 205 (1972).

36. 42 U.S.C. § 3610(a) (1970).

37. Filing a concurring opinion, Justices White, Blackmun and Powell emphasized the importance of congressional fact-finding and noted that they would not have found standing in the absence of the statute. See 409 U.S. at 212.

38. See generally WRIGHT, MILLER & COOPER, *supra* note 32, at § 3532.

39. When the Court equated "injury in fact" with "personal stake" in *Data Processing*, it did so in the context of finding standing in the "private action." Additionally, the Court distinguished between a "private action" such as *Data Processing* and "public action" such as *Flast*. See 397 U.S. at 151-52.

40. 412 U.S. 669 (1973).

41. See *id.* at 689-90.

42. See *id.* at 678.

the challenged governmental action.⁴³ Additionally, for purposes of the case or controversy requirement, it was not necessary to allege "injury in fact" if the requisite "personal stake" was otherwise present under the nexus test of *Flast*.⁴⁴

B. *The Burger Court's Retreat from Liberalization*

In four decisions, *Schlesinger v. Reservists Committee to Stop the War*,⁴⁵ *United States v. Richardson*⁴⁶ (companion cases decided in 1974), *Warth v. Seldin*⁴⁷ (1975), and *Simon v. Eastern Ky. Welfare Rights Organization*⁴⁸ (1976), the Court has effectively revived standing as a formidable obstacle to judicial review. With only Justices Brennan and Marshall of the present Court seriously disagreeing in all four cases,⁴⁹ the Court has (1) replaced the "personal stake" and nexus test with one of "injury in fact," and (2) limited "injury in fact" to situations in which particular plaintiffs can show that they have suffered or will suffer a specific present injury from the challenged action,⁵⁰ and that this injury is likely to be redressed if the court invalidates that action.⁵¹ By so altering standing requirements, the Court has elimi-

43. The Court cited Professor Davis' article, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968), for the proposition that "an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." 412 U.S. at 689 n.14.

44. In *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), the Court held that the mother of an illegitimate child did not have standing to challenge on equal protection grounds the constitutionality of a Texas statute making it a crime for the parent of only a legitimate child to fail to provide support. The Court noted that "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative," *id.* at 618, which seems to foreshadow the "likely to be redressed by the invalidation of the challenged action" test of *Simon*, see text accompanying notes 73-74 *infra*. It also based its decision on the impropriety of allowing one person to challenge the nonprosecution of another. See 410 U.S. at 619.

45. 418 U.S. 208 (1974).

46. 418 U.S. 166 (1974).

47. 422 U.S. 490 (1975).

48. 426 U.S. 26 (1976).

49. Justice Stewart dissented in *Richardson*, and Justice White dissented in *Warth*. Justice Douglas, who dissented in *Richardson*, *Schlesinger*, and *Warth*, had left the Court when *Simon* was decided, and Justice Stevens did not participate in *Simon*. Justices Brennan and Marshall concurred and dissented in *Simon*.

50. See *Warth v. Seldin*, 422 U.S. at 498-518.

51. See *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. at 44-46.

[I]ndirectness of injury, while not necessarily fatal to standing, "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." . . . Respondents have failed to carry this burden. Speculative inferences are necessary to connect their injury to the challenged actions of petitioners. Moreover, the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire. [Citations and footnotes omitted.]

nated citizen's suits⁵² and has effectively ruled out taxpayer's suits except in the precise situation of *Flast*,⁵³ in which an expenditure of federal funds is challenged on establishment clause grounds.⁵⁴ Thus, by elevating the "injury in fact" test to constitutional dimensions, the Court has significantly restricted access to the federal courts and has strongly encouraged the lower federal courts to reimpose the standing bar to the assertion of federally protected rights.⁵⁵

Schlesinger and *Richardson* were clearly "public actions." Neither involved a claim of "injury in fact," since the plaintiffs were not alleging an injury distinct from that suffered by all other citizens and taxpayers. In *Schlesinger*, the plaintiffs claimed that membership by congressmen in the armed forces reserves violated the incompatibility clause of article I.⁵⁶ The lower court held that the plaintiffs' status as citizens gave them standing to assert the claim.⁵⁷ In *Richardson*, the lower court, expressly relying on *Flast*, determined that a taxpayer had standing to challenge a statute⁵⁸ that allowed the CIA to refuse to account for its expenditures as contravening the taxing and spending clause of the Constitution.⁵⁹ The Supreme Court, however, held that standing was lacking in both cases. In *Schlesinger*, it reiterated the "personal stake" test for case or controversy that it promulgated in *Flast* but, without any further analysis or discussion, stated that "personal stake" meant "injury in fact,"⁶⁰ and that "injury in fact," in turn, meant "concrete" rather than "abstract" injury.⁶¹ Characterizing the

SCRAP, see notes 37-39 and accompanying text *supra*, would seem to be effectively overruled or limited to its precise facts. See 426 U.S. at 45 n.25.

52. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-27 (1973).

53. See text surrounding notes 20-34 *supra*.

54. See *United States v. Richardson*, 418 U.S. 166 (1974). The nexus principle of standing developed in *Flast* is now limited to taxpayer's suits, which in turn are limited to challenges to expenditures of funds as violative of a particular constitutional limitation on the spending power.

55. The lower courts apparently have received the message. See, e.g., *Evans v. Lynn*, 537 F.2d 571 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 797 (1977).

56. Article I, § 6, cl. 2, provides:

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments increased during such time; and no person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

57. 323 F. Supp. 833, 839-41 (D.D.C. 1971), *aff'd mem.*, 495 F.2d 1075 *sub nom.* *Reservists Comm. to Stop the War v. Laird* (D.C. Cir. 1972), *rev'd*, 418 U.S. 208 (1974).

58. Central Intelligence Agency Act of 1949, 50 U.S.C. §§ 403a-j (1970).

59. Article I, § 9, cl. 7, states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." See *Richardson v. United States*, 465 F.2d 844, 851-54 (3d Cir. 1972).

60. See 418 U.S. at 218. As to the Court's citation of *Data Processing* in support of this statement, see note 39 *supra*.

61. See 418 U.S. at 220-23.

plaintiffs' injury as merely a "generalized interest of all citizens in constitutional government," the Court held that this type of "abstract injury" could not constitute "injury in fact" for case or controversy purposes.⁶² Similarly, in *Richardson*, the Court found that the taxpayer was asserting a "generalized grievance common to all members of the public" and limited *Flast* to the situation in which the taxpayer established that the expenditure of certain funds violated a particular constitutional limitation on the spending power.⁶³ In both cases, the Court noted that it was unwilling to adjudicate claims of this kind, involving a collision between the courts and the other branches of the federal government, absent a showing of "concrete injury."⁶⁴ Additionally, the Court asserted that the fact that no one would be able to litigate a particular question, rather than militating in favor of allowing these plaintiffs standing, "gives support to the argument that the matter is committed to the surveillance of Congress, and ultimately to the political process."⁶⁵ Thus, *Schlesinger* and *Richardson* have substituted "injury in fact" for "personal stake" and "nexus" for purposes of the case or controversy requirement and have established the proposition that except in very narrowly defined circumstances, citizens and taxpayers as such do not suffer "injury in fact" from the government's alleged violation of the Constitution.

Having constitutionalized "injury in fact" as part of article III's case or controversy requirement, the Court proceeded in *Warth* and *Simon* to redefine "injury in fact" and to demand a showing that the plaintiffs had suffered or would suffer a specific and present injury from the challenged action and that this injury would probably—not merely possibly—be redressed by invalidating the challenged governmental action. Like *Schlesinger* and *Richardson*, both *Warth* and *Simon* were "public actions." *Warth* was a suit brought on behalf of low-income and minority persons challenging a suburb's zoning practices on the ground that they were allegedly designed to exclude such persons. The Court held, *inter alia*, that low-income persons living in the area did not have standing to challenge the suburb's exclusionary zoning practices since they could not show that their inability to obtain housing in that suburb resulted in any "concretely demonstrable way" from the questioned zoning practices.⁶⁶ In addition, the Court denied standing

62. See *id.*

63. See 418 U.S. at 174-78. See particularly Justice Powell's concurrence, *id.* at 180-97. By so restricting *Flast*, the Court effectively precluded the use of *Flast's* nexus principle of standing in any other context. See notes 51-54 and accompanying text *supra*.

64. See *Richardson*, 418 U.S. at 179-80; *Schlesinger*, 418 U.S. at 221-23.

65. *Richardson*, 418 U.S. at 179.

66. Compare *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). There, a black resident who alleged that he would qualify for admission to a particular housing project, which a housing development corporation

to builders who wished to construct low-income housing in the suburb, since they were unable to show that any particular project was aborted because of the municipality's restrictive zoning practices.⁶⁷ The dissenting Justices lamented what appeared to them to be the majority's intentional avoidance of the substantive issue:

[T]he Court turns the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation. In effect, the Court tells the low-income minority and building company plaintiffs they will not be permitted to prove what they have alleged—that they could and would build and live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit.⁶⁸

*Simon v. Eastern Kentucky Welfare Rights Organization*⁶⁹ was an action against Treasury Department officials on behalf of low-income persons, challenging an Internal Revenue Service ruling that made it easier for nonprofit hospitals to avoid providing services for low-income persons while retaining their federal tax exemption. Although there was no question that the plaintiffs had suffered injury, since they were being denied services by hospitals enjoying the charitable exemption, the Court dismissed the complaint, considering such a denial insufficient to establish "injury in fact" for constitutional purposes.⁷⁰ Pointing out that no hospital was a defendant,⁷¹ the Court noted the injury must be one that "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."⁷² The granting of the exemption by the Secretary of the Treasury did not constitute "injury in fact" because the plaintiffs were unable to show that the denial of treatment was likely to be redressed by a favorable decision.⁷³ According to the

planned to build in the suburb where he worked, had standing to challenge the suburb's allegedly racially discriminatory zoning practices.

67. See 422 U.S. 490, 514-17. There were two other classes of plaintiffs: city taxpayers, who claimed that as a result of the suburb's exclusionary policies they had to pay higher taxes to support low-income housing in the city, and suburban residents who claimed that they were being denied the benefits of living in a racially and ethnically integrated community. The Court held that each of these plaintiffs lacked standing because the challenged actions of the suburb were not unconstitutional as to them and they were not entitled to assert the third-party rights of excluded city residents. See 422 U.S. at 508-14.

See also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), in which a housing development corporation that had applied for a zoning variance had standing to challenge the denial of the variance as racially discriminatory.

68. 422 U.S. at 523.

69. 426 U.S. 26 (1976).

70. See *id.* at 41-43.

71. *Id.* at 41.

72. *Id.* at 41-42.

73. See *id.* at 43-44, 45-46.

Court, it was "speculative" both whether the denial of services to low-income persons was "encouraged" by the challenged ruling and whether the invalidation of that ruling would result in the availability of the desired services; the Court found it "just as plausible" that the hospitals would prefer to give up the exemption rather than provide the additional services.⁷⁴

The real significance of *Warth* and *Simon* lies in their dramatic alteration of the standing requirement; a few years before these decisions, the plaintiffs' standing would not seriously have been questioned. Low-income and minority persons living in a city located in a metropolitan area, and builders desiring to construct housing for such persons in the suburban part of that area, would have been assumed to have standing to challenge the constitutionality of zoning practices allegedly excluding the low-income and minority persons from those suburbs. Similarly, low-income persons would have been assumed to have standing to challenge an IRS ruling that made it easier for local nonprofit hospitals to cut back on the services they provided to the poor of the area while retaining their federal tax exemptions. Certainly these persons and the group of which they were a part had a "personal stake" in the outcome of the controversy. Certainly there was a "logical nexus" between their status as low-income persons and their claims that actions of the government, allegedly in violation of the Constitution or laws of the United States, interfered with the ability of low-income persons to obtain housing in a suburb or to obtain medical care at a nonprofit hospital.

The standing bars that the Court imposed in *Warth* and *Simon* are artificial ones; they deny access to the courts to interested groups of persons whose interests are adversely affected by the actions they are challenging. Even if the results in *Schlesinger* and *Richardson* can somehow be justified on the ground that "generalized grievances" should not enable citizens to invoke the federal judicial power, a view that is strongly disputed by this author, certainly the plaintiffs in *Warth* and *Simon* were not asserting "generalized grievances common to all members of the public." In both cases, plaintiffs presented the particular grievances of a class of persons living in a designated area that were directed against the specified actions of certain government officials. To say that the plaintiffs in these cases have not alleged "injury in fact" is to retreat sharply from the substantial broadening of access to the federal courts that was purportedly represented by the "[r]eduction of the threshold requirement to actual injury redressable by the court."⁷⁵ Instead of broadening access to the federal forum, the "injury in fact" requirement, as reinterpreted by the Burger Court majority, operates

74. See *id.* at 42-44.

75. *Id.* at 39. See note 17 and accompanying text *supra*.

to close the federal courts to large classes of persons seeking vindication of federally guaranteed rights.

Given the Burger Court's present policy regarding access to the federal judiciary, the only immediate hope for broadened access lies in legislative reform. The availability of this solution depends upon whether Congress, if it so desires, can significantly lower or even completely remove the standing bar as imposed by the Burger Court. The extent to which Congress can counteract recent judicial attitudes toward standing is related in part to the Court's constitutionalization of standing within article III's case or controversy provision, and, more specifically, to its incorporation of the "injury in fact" test within that provision. If Congress enacts legislation dispensing with the "injury in fact" requirement or redefining that requirement in a markedly different manner, the Court may be forced to reconsider its own interpretation if it is called upon to determine the constitutionality of such legislation. Such action would be highly desirable because it would permit the Court to realize that it may have committed serious constitutional error, which presumably it would then correct.

When the Court in *Schlesinger* equated "personal stake," the test of case or controversy promulgated in *Flast*, with "injury in fact," it did so without analysis or discussion.⁷⁶ Whether this was due to inadvertence or design is of little consequence. What is important is that the Court still has never explained why "injury in fact" has been raised to constitutional dimensions. In the past, the Court has taken the position that the case or controversy requirement must be interpreted in an historical context.⁷⁷ Referring to this provision, the Court has stated that one touchstone of justiciability is "whether the action sought to be maintained is of a sort recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems."⁷⁸ Unless the Court has

76. The Court discussed this same equation in *Data Processing*; see note 39 *supra*. While the "personal stake" concept of standing had been discussed earlier in *Baker v. Carr*, 369 U.S. 186, 204-08 (1962), it was substantially clarified in *Flast*. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218 (1974).

77. See Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 817 (1969).

78. *Glidden Co. v. Zdanok*, 370 U.S. 530, 533 (1962), quoting *United Steelworkers v. United States*, 361 U.S. 39, 44, 60 (Frankfurter, J., concurring). Justice Frankfurter similarly stated:

In endowing this Court with "judicial Power" the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. The Constitution further explicitly indicated the limited area within which judicial action was to move—however far-reaching the consequences of action within that area—by extending "judicial Power" only to "Cases" and "Controversies." Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its mani-

repudiated this historical interpretation of the provision, it is incorrect in holding that the provision requires "injury in fact." Scholarly commentary has demonstrated convincingly that the "injury in fact" standard cannot be reconciled with such an interpretation of article III.⁷⁹ Moreover, as Professors Berger and Jaffe have argued, an historical interpretation of article III would not require even a showing of a "personal stake" in the outcome of the controversy, since the English practice allowed "strangers" to obtain the prerogative writs of prohibition, mandamus, and certiorari to challenge illegal official action.⁸⁰ "Public suits instituted by strangers to curb action in excess of jurisdiction," according to Professor Berger, "were well established in English law at the time Article III was drafted."⁸¹ Given this fact, although the Court in *Flast* properly interpreted English practice when it stated that article III required an "adversary proceeding," it was incorrect in holding that an "adversary proceeding" required the plaintiff to have a "personal stake" in the controversy, if a stranger's challenge to official action was a proceeding "historically viewed as capable of judicial resolution."⁸²

In any event, "personal stake," as defined in *Flast*, is something very different from "injury in fact," particularly as the latter concept has been redefined by the Burger Court. The essence of the case or controversy provision is adverseness. This concept relates to what have been considered the traditional components of a case or controversy: the existence of parties, the prohibition against feigned and collusive suits, and the stricture against rendering advisory opinions.⁸³ Because there is no logical or functional relationship between "injury in fact" and adverseness, most commentators have taken the position that "injury in fact" is completely irrelevant in the context of determining whether a case or controversy exists for constitutional purposes.⁸⁴

festations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies."

Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring). Professor Berger, however, has pointed out that "the English practice on which Justice Frankfurter relied did not in fact demand injury to a personal interest as a prerequisite to attacks on jurisdictional excess . . . [since] we find that attacks by strangers on action in excess of jurisdiction were a traditional concern of the courts in Westminster." Berger, *supra* note 77, at 817-19.

79. See generally Berger, *supra* note 77, at 817-19; Jaffe, *supra* note 7, at 1034-37.

80. See Berger, *supra* note 77, at 818-27; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 462-67 (1965).

81. Berger, *supra* note 77, at 840.

82. *Id.* at 827.

83. See text accompanying notes 31-33 *supra*. As to adverseness in relation to article III, see also *United States v. Nixon*, 418 U.S. 683, 696-97 (1974).

84. See Jaffe, *supra* note 7, at 1037-38; Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 672-74 (1973); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1391-92 (1973). The con-

"Personal stake," however, is useful in demonstrating the existence of adverseness. The relation of personal stake to adverseness was defined appropriately by the nexus test of *Flast*: the nexus between the status of the plaintiff and the claim that is presented determines whether the plaintiff has such a "personal stake" in the outcome of the controversy as to furnish the requisite adverseness. Precisely because of their status, for example, the plaintiffs in *Warth* and *Simon* were adverse to the municipal officials who allegedly sought to exclude low-income persons from the suburbs, and to the IRS officials who issued the ruling enabling nonprofit hospitals to retain their tax exemptions while cutting back on services to low-income persons. Similarly, in *Schlesinger* and *Richardson*, the status of the plaintiffs as citizens⁸⁵ interested in the government's compliance with particular constitutional provisions supplied the requisite adverseness for their contention that these provisions were being violated. In any reasonable sense of the term, the plaintiffs in these cases had a "personal stake" in the outcome of the litigation. If that had been the test to determine standing for case or controversy purposes, there would not have been a constitutional bar to standing in any of them.

If the Court intends to abandon its historical interpretation of the case or controversy provision, it should do so expressly. If it wishes to adhere to that interpretation, on the other hand, it is inaccurate to raise "injury in fact" to constitutional dimensions. Such an interpretation must then be viewed as an aberration which should be corrected.

III. A BROAD ROLE FOR CONGRESS

On the assumption, however, that the Court will continue to insist that "injury in fact" is a constitutional requirement, it is submitted that Congress still has the power to remove all the standing barriers that the Court has imposed. The Court has expressly noted that Congress can broaden access to the federal courts beyond the limits which the Court itself has permitted.⁸⁶ First, the Court has recognized certain *nonconstitutional* (or "prudential" or "self-imposed") requirements of standing.⁸⁷ These requirements include the "zone of

trary view is expressed in Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 485-88 (1974).

85. Taxpayer status is subsumed within that of citizenship.

86. See, e.g., *Warth*, 422 U.S. at 509.

87. By making "injury in fact" a constitutional requirement, the Court has sharply distinguished it from these nonconstitutional requirements. See text accompanying note 55 *supra*; see generally text surrounding notes 76-85 *supra*.

The Court has not expressly considered whether the "political question" doctrine is a part of article III's case or controversy requirement or whether it represents a discretionary limitation on judicial review. See, e.g., *United States v. Nixon*, 418 U.S. 683, 693 (1973); *Powell v. McCormack*, 395 U.S. 486, 521 (1968); *Baker v. Carr*, 369 U.S. 186, 216-17 (1961). Professor Wright has argued that "[t]he non-justiciability of a political question is founded primarily on the doctrine of separation of powers and

interests" test,⁸⁸ limitations on the assertion of rights of third parties,⁸⁹ and ripeness.⁹⁰ Second, the Court has stated that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."⁹¹ The creation of a statutory right was the basis of the plaintiff's standing in *Trafficante*.⁹² The Court has not taken a clear position on the extent to which congressional power to create such substantive rights may be limited by the constitutionalization of "injury in fact." In *Simon*, on the one hand, the Court stated that the requirements of article III still exist in situations in which Congress creates statutory rights and that a "plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of . . . litigants."⁹³ In *Warth*, on the other hand, the Court asserted that so long as this "distinct and palpable" injury requirement is satisfied, persons to whom Congress has granted either an expressed or a clearly implied right of action "may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim."⁹⁴ Thus it remains unclear to what extent article III will be interpreted as limiting the power of Congress to remove the standing bars that the Court has recently imposed.

There are two basic approaches that Congress can take in eliminating all these standing bars or, indeed, the requirement of standing itself. One approach would be to operate within the standing framework to remove these limitations. The other would be to eliminate the standing requirement in the "public action" by authorizing citizen's suits on behalf of the United States to vindicate the public interest

the policy of judicial self-restraint." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 52 (3d ed. 1976). See also Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 566-97 (1966). Compare this view with the position that matters "textually committed to a coordinate branch" involve questions going to the merits rather than to justiciability and that the other aspects of the political question doctrine are discretionary limits on judicial review. See Jackson, *The Political Question Doctrine: Where Does It Stand After Powell v. McCormack, O'Brien v. Brown and Gilligan v. Morgan?*, 44 U. COLO. L. REV. 477 (1973). At this juncture, at least, there is no reason for Congress to assume that the political question doctrine is constitutionally mandated.

88. See, e.g., *Simon*, 426 U.S. at 39 n.19.

89. See, e.g., *Warth*, 422 U.S. at 509.

90. See, e.g., *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972); *Poe v. Ullman*, 367 U.S. 497, 502-03 (1961).

91. *Warth v. Seldin*, 422 U.S. at 514.

92. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). See notes 35-37 and accompanying text *supra*.

93. 426 U.S. at 41 n.22.

94. 422 U.S. at 501.

in the enforcement of the laws and the Constitution of the United States.

A. *Operating Within the Standing Framework*

Under the first approach, Congress could (1) remove all nonconstitutional limits on standing, (2) create a federal substantive right to ensure that the actions of Congress, the President, executive officials, and administrative agencies comply with the Constitution and laws of the United States, and (3) authorize representational standing in actions against state and local governments in order to protect group interests such as those at stake in *Warth*.⁹⁵

1. Removing Nonconstitutional Standing Requirements

The Court has repeatedly emphasized that Congress, pursuant to its article III power to regulate the jurisdiction of the federal courts, can remove all the nonconstitutional aspects of standing that the Court, in the "prudential exercise of its jurisdiction," has imposed.⁹⁶ Congress could accomplish this goal by enacting the following statute:

The federal courts shall exercise jurisdiction and grant appropriate relief in all cases arising under the Constitution or laws of the United States wherein a case or controversy is presented between the plaintiff and the defendant. In such cases the federal courts shall have no discretion to decline to exercise jurisdiction or to grant appropriate relief, and shall invalidate any statute or governmental action insofar as such statute or action is found to violate the federally protected rights of any person.

Such a provision would eliminate, for example, the "zone of interests" test, limitations on asserting the rights of third parties,⁹⁷ and the requirement of ripeness.⁹⁸

2. Substantive Right of Governmental Compliance

Congress could also create a federal substantive right on behalf of all citizens and residents of the United States to ensure that all fed-

95. *Warth v. Seldin*, 422 U.S. 490 (1975). See notes 66-68 and accompanying text *supra*.

96. See, e.g., *Warth*, 422 U.S. at 509.

97. For a discussion of asserting the rights of third parties, see generally Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974). The Supreme Court has not yet retreated from its prior recognition of *jus tertii* standing. See *Singleton v. Wulff*, 428 U.S. 106 (1976); *Craig v. Boren*, 429 U.S. 190 (1976).

98. In addition, the statute could provide that all limitations on judicial review would be abolished in any case in which a case or controversy was presented, setting out "including, but not limited to" examples.

eral executive, legislative, and administrative officials comply with the Constitution and laws of the United States. The creation of this substantive right would be based not upon Congress' power to regulate the Court's jurisdiction, but rather upon its power to create claims "arising under [the] Constitution [and] Laws of the United States."⁹⁹ Proceeding on the assumption that the plaintiff must show "injury in fact" for case or controversy purposes, the creation of such a substantive right would require a legislative determination that American citizens and residents suffer "injury in fact" from the enactment of unconstitutional laws by Congress and from the violation of the Constitution or laws of the United States by the President, executive officials, or administrative agency personnel. Congress might find that such violations cause American citizens to lose confidence in their government, make them less likely to exercise their franchise, and otherwise cause injury to the intangible "right of citizenship."¹⁰⁰ This would be a reasonable determination, especially in the post-Watergate era when continuing violations of law by such agencies as the FBI and the CIA have contributed to a widespread loss of confidence in American governmental institutions. To the extent that the Court's unwillingness to allow citizen standing has rested on a desire to avoid collision between the courts and the other branches of the government, as emphasized in *Schlesinger* and *Richardson*,¹⁰¹ this concern could be obviated by a congressional determination encouraging courts to invalidate unconstitutional or illegal governmental action.¹⁰² A statute creating such a federal right might provide:

All citizens and residents of the United States have a substantive right to compliance with the Constitution and laws of the United States on the part of the Congress, the President, executive officials, and administrative agencies. Any citizen or resident may maintain an action in the courts of the United States against the United States or against the appropriate officer thereof, challenging the constitutionality of any Act of Congress, or challenging any action of the President, any Member of Congress, any executive official, or any administrative agency as violating the Constitution or laws of the United States.

99. U.S. CONST. art. III, § 2. This follows from the "necessary and proper" clause of art. I, § 8, cl. 18, insofar as it gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States." Thus, there can be no doubt that the United States has the power to create a substantive right in favor of its citizens and residents as described in this section. The power of Congress to provide "constitutional remedies" is discussed in the dissenting opinions of Chief Justice Burger and Justice Black in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, Bureau of Narcotics*, 403 U.S. 388, 411, 427 (1971).

100. Professor Jaffe has analyzed the relationship between citizen's suits and a sense of participation in the government. See Jaffe, *supra* note 7, at 1044-47.

101. See text accompanying note 64 *supra*.

102. See Justice Powell's supportive view, text accompanying notes 132-33 *infra*.

The legislative finding of fact would represent a determination that the "generalized interest of all citizens in constitutional governance,"¹⁰³ characterized in *Schlesinger* as constituting "abstract" injury,¹⁰⁴ should provide the constitutionally requisite "concrete injury." Unless the Court is prepared to alter its traditional deference to legislative findings of fact,¹⁰⁵ such "concrete injury" would thus establish "injury in fact" for case or controversy purposes. Furthermore, since violation of the provision would also establish a "distinct and palpable injury" to all citizens, it would not matter that the injury would be "shared by a large class of . . . litigants";¹⁰⁶ the plaintiffs would still be entitled to "invoke the general public interest in support of their claim."¹⁰⁷ Thus, the creation of such a right would overcome the standing bar both to citizen's suits and to the "public action" in situations involving federal officials.

The Court, however, might not as readily countenance the creation of such a right to ensure, on behalf of all citizens, that state and local officials comply with the Constitution and laws of the United States. The Court may consider that the legislative determination of "injury in fact" is somewhat more attenuated in this situation.¹⁰⁸ In addition, Congress itself may be less willing to create such a right against state and local governments than it would be to create one against the federal government.

3. Representational Standing

What Congress clearly can and should do here, however, is to create representational standing. Representational standing is analytically based upon the assertion of third-party rights, which is subject to self-imposed, rather than constitutional, limitations on judicial review.¹⁰⁹ Representational standing meets the needs of persons who admittedly suffer "injury in fact" from the challenged governmental action, but may not be readily identified and/or may not be in a practical position to vindicate their own rights.¹¹⁰ In *Warth*,¹¹¹ for example, the allegedly unconstitutional zoning practices caused "injury in fact" to *some* low-income persons who, if the practices had not been in effect, would have been able to obtain low-income housing. Similarly, in *O'Shea v.*

103. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974).

104. *Id.* at 220.

105. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964).

106. *Warth v. Seldin*, 422 U.S. 490, 501 (1975), quoted in *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41 n.22 (1976).

107. *Warth*, 422 U.S. at 501.

108. See Monaghan, *supra* note 84, at 1378, 1379.

109. See notes 86-87 and accompanying text *supra*.

110. Regarding "latent injury," see Jaffe, *supra* note 7, at 1045-46.

111. *Warth v. Seldin*, 422 U.S. 490 (1975).

Littleton,¹¹² where plaintiffs alleged racial discrimination against blacks in the criminal justice process, *some* blacks would more than likely be arrested in the future, and if the allegations were true, they too would suffer such discrimination.

In cases such as these, as in "public actions" generally, the interest asserted is a group interest, and some members of the group have suffered or will suffer "injury in fact" from the challenged action. Consequently, there would seem to be no constitutional bar to allowing their injury to be redressed by an organizational plaintiff that proposes to protect the interests of the group or class that it represents. In discussing third-party standing some years ago, this author proposed the corollary to such standing that "[w]here the rights of members of a class are affected because of their membership in that class, an organization which has as a purpose the protection of the interests of the class . . . should have standing to assert the rights of the class members."¹¹³ A suit by the NAACP challenging racial discrimination is a primary illustration of this corollary, which could be the basis for representational standing in a case such as *O'Shea*. Similarly, an organization representing low-income persons would have representational standing to challenge discrimination against the poor in a situation like that in *Warth*. With the exception of the "injury in fact" hurdle imposed by *Simon*, which cannot be overcome in the absence of citizen standing, representational standing would significantly obviate the requirement that particular plaintiffs show a particular injury to themselves resulting from the challenged action. It would allow the assertion of group interests whenever those interests are adversely affected by governmental action.

In summary, Congress, using an approach that operates within the existing standing framework, could enact legislation which would (1) remove all nonconstitutional barriers to standing, (2) create a federal substantive right to challenge the violation of the Constitution or laws of the United States by federal officials, and (3) establish representational standing to protect group interests from violation by state and local governments.

B. *Elimination of the Standing Requirement for the Public Action*

Under a second approach, standing itself would be eliminated as a limitation on judicial review in the "public action." Citizens and residents would be authorized to challenge the validity of laws and gov-

112. 414 U.S. 488 (1974) (named plaintiff denied standing because threat of injury too remote).

113. Sedler, *supra* note 97, at 653-56.

ernmental action, not as individuals moved by their own interests, but on behalf of the United States, seeking to vindicate the public interest in the enforcement of the Constitution and laws of the United States. Using this approach, it is not necessary for constitutional purposes to distinguish between challenges to federal laws and governmental action on the one hand, and challenges to state and local laws and governmental action on the other. Authorizing citizens and residents to sue in the public interest would avoid any problem of "injury in fact" since the plaintiff would not be bringing the action as an individual but on behalf of the United States, and therefore the action would necessarily present a case or controversy. This is illustrated by prosecutions under federal criminal statutes, civil suits instigated by the government under regulatory statutes such as the antitrust laws, and suits that seek to vindicate federally protected constitutional and statutory rights such as suits challenging racial segregation or employment discrimination.

The "case or controversy" requirement, however, does not necessitate that such suits be brought by the "public" Attorney General. It has long been recognized that Congress can authorize citizens to sue on behalf of the United States as "private Attorney Generals,"¹¹⁴ which then presents a case or controversy in the same manner as if the suit were brought by the United States itself. Suits by private persons to vindicate the public interest originated with the historic "informer's action" and "relator's action" in English law¹¹⁵ and have existed in this country "since the foundation of our government."¹¹⁶ Such suits are called *qui tam* actions¹¹⁷ and depend on express congressional authorization.¹¹⁸ The False Claims Act,¹¹⁹ a present-day example of the *qui tam* action, authorizes suit to be brought by "any person, as well for himself as for the United States . . . in the name of the United States," against any person who has made or presented a false or fraudulent claim for payment to the federal government.¹²⁰

114. The phrase was coined by Judge Jerome Frank in *Associated Industries, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

115. See Berger, *supra* note 77, at 825-27.

116. *Marvin v. Trout*, 199 U.S. 212, 225 (1905). See also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 nn.4, 5 (1943).

117. "Qui tam is the phrase used to describe an informer's action brought by one who sues for the State or the United States as well as for himself." *United States ex rel. Vance v. Westinghouse Elec. Corp.*, 363 F. Supp. 1038, 1040 n.1 (W.D. Pa. 1973).

118. See *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 84 (2d Cir. 1972) (*qui tam* action not authorized by Rivers and Harbors Act of 1899).

119. 31 U.S.C. §§ 231, 232 (1970).

120. According to 31 U.S.C. § 232(c) (1970), the party bringing the suit must notify the government, and if the government chooses to prosecute the suit itself, the private party must step aside.

The statute imposes a civil fine, in addition to double damages,¹²¹ and provides for an award to the informer from the proceeds of the suit.¹²²

Just as Congress may authorize *qui tam* actions by private persons against other private persons to vindicate the public interest, it also may authorize such actions against the government itself. In *FCC v. Sanders Brothers Radio Station*,¹²³ decided in 1940, the Court held that a party who individually lacked standing to challenge the grant of a broadcast license to a competitor¹²⁴ was nonetheless a "person aggrieved" under the Communications Act of 1934¹²⁵ and thus could challenge the grant as a "representative of the public interest."¹²⁶ Two years later, in *Scripps-Howard Radio, Inc. v. FCC*,¹²⁷ the Court again emphasized, despite the objection that "citizen standing" was inconsistent with the case or controversy requirement,¹²⁸ that "[t]hese private litigants have standing only as representatives of the public interest."¹²⁹ As previously noted, since there is no question that Congress has the power to create an "informer's action," "[Congress'] preference for encouraging private Attorney Generals to seek only prospective injunctive or declaratory relief should not have any Article III consequences."¹³⁰ Thus, there appears to be general agreement that Congress has broad power to authorize citizen's suits brought by representatives of the public interest on behalf of the United States.¹³¹ This power has not been questioned by the Court. Indeed, even Justice Powell, a strong proponent of restrictive standing, has stated, "The Court has confirmed the power of Congress to open the federal courts to representatives of the public interest through specific statutory

121. See *id.* § 231.

122. The Act additionally states that if the government prosecutes the suit, the award cannot exceed 1/10th of the proceeds; and if the private party prosecutes the suit, the award cannot exceed 1/4th of the proceeds. 31 U.S.C. § 232(e) (1970).

123. 309 U.S. 470 (1940).

124. Today, this party would have individual standing under *Data Processing*. See note 10 *supra*.

125. 47 U.S.C. 151-609 (1934).

126. 309 U.S. at 476-77.

127. 316 U.S. 4 (1942).

128. Justices Douglas and Murphy, dissenting in *Scripps-Howard*, argued that if the Communications Act were construed as not creating a substantive right on the part of the assailant, any challenge by the assailant to the action of the administrative agency would not present a case or controversy for article III purposes. See *id.* at 18-22.

129. *Id.* at 14. See the discussion of *Scripps-Howard* in Jaffe, *supra* note 7, at 1035-36.

130. 13 WRIGHT, MILLER, & COOPER, *supra* note 32, § 3531, at 237.

131. See Justice Harlan's discussion of this point in *Flast v. Cohen*, 392 U.S. 83, 120, 130-33 (1968). Justice Harlan argued that because Congress had this power, the Court should not on its own initiative allow standing in the "public action," since numerous unrestricted public actions would place a substantial strain on the judiciary. See also Berger, *supra* note 77, at 839-40; Monaghan, *supra* note 84, at 1375-79. Compare Albert, *supra* note 84, at 478-93.

grants of standing.”¹³² Justice Powell noted further that “. . . objections to public actions are ameliorated by the congressional mandate. Specific statutory grants of standing in such cases alleviate the conditions that make ‘judicial forbearance the part of wisdom.’”¹³³

Another modern illustration of a *qui tam* action against the government is found in the provisions of the Clean Air Act.¹³⁴ The Act permits any person to commence an action against the United States, against any other governmental instrumentality (including state agencies) to the extent permitted by the eleventh amendment, and against the Administrator of the Environmental Protection Agency, in order to enforce its legislative mandate.¹³⁵ The District of Columbia Circuit has specifically held that the statute does not require any showing of “injury in fact,” and that standing as such is completely irrelevant:

The standing argument presents no barrier to plaintiff's action. Under the Clean Air Act's citizen suit provision, the general requirements for standing have been relaxed to permit suits by “any citizen.” In this way citizens are recruited to serve as private attorneys-general to facilitate enforcement of the act in the face of official inaction. Appellants responded to this Congressional invitation to invoke the judicial process and assert the public interest. . . . It is clear appellants had standing under the statute to represent the public.¹³⁶

The District of Columbia Circuit did not even discuss *Schlesinger*¹³⁷ and *Richardson*,¹³⁸ although they had been decided only a year earlier. Similarly, the Second Circuit has recently noted that “the [Clean Air] Act seeks to encourage citizen participation rather than to treat it as curiosity or a theoretical remedy. Possible jurisdictional barriers to citizens actions, such as amount in controversy and standing requirements, are expressly discarded by the Act.”¹³⁹

In recommending that the citizen's suit provision be included in the Clean Air Act, the Senate Public Works Committee stated that “[a]uthorizing citizens to bring suits for violations of [pollution] standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.”¹⁴⁰ Likewise,

132. *United States v. Richardson*, 418 U.S. 166, 193 (1974) (concurring opinion).

133. *Id.* at 196 n.18, quoting *Flast v. Cohen*, 392 U.S. 83, 132 (Harlan, J., dissenting).

134. 42 U.S.C. §§ 1857-58a (1970).

135. *See id.* § 1857h-2.

136. *Metropolitan Wash. Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 814 (D.C. Cir. 1975).

137. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). *See* text surrounding notes 45-65 *supra*.

138. *United States v. Richardson*, 418 U.S. 166 (1974). *See* text surrounding notes 45-65 *supra*.

139. *Friends of the Earth v. Carey*, 535 F.2d 165, 172-73 (2d Cir. 1976).

140. S. REP. No. 1196, 91st Cong., 2d Sess. 36-37 (1970).

authorizing citizen's suits to challenge unconstitutional laws and invalid governmental actions should motivate legislators to enact laws that are constitutional and also should motivate government officials, from the President of the United States to the police officer on patrol, to conform their conduct to the requirements of the Constitution and laws of the United States.¹⁴¹

The authorization of citizen's suits would demonstrate both a strong commitment on the part of Congress to adhere to the rule of law in American society and to recognize the vital role of American citizens and residents in insuring that the rule of law becomes a reality. Citizen's suits will not be brought frivolously, since the cost of initiating federal litigation is, indeed, quite high.¹⁴² They will be brought, as they are now, by interested citizens and organizations, seeking to protect group interests and to implement group values that they believe are protected by the Constitution and laws of the United States. The only difference will be that standing will no longer present a possibly insurmountable obstacle.

IV. CONCLUSION

This article has explored the Burger Court's reintroduction of the standing bar. In four cases, decided between 1974 and 1976,¹⁴³ the Court has held that a showing of "injury in fact" is constitutionally required by article III's case or controversy provision. The Court has proceeded to redefine this term, limiting it to a situation in which particular plaintiffs can show that they have suffered or will suffer a specific and present injury from the challenged governmental action, and that this injury is likely to be redressed if the court invalidates that action. In so doing, the Court not only has eliminated citizen's suits, but has also effectively ruled out taxpayer's suits in situations other than those challenging the expenditure of funds under the establishment clause.¹⁴⁴ As part of an ongoing process of restricting access to the federal courts, the Court has reintroduced the standing bar and again has erected it as a formidable obstacle to judicial review.

141. A discussion of the details of citizen's suits acts is beyond the scope of the present article. The provisions of the Clean Air Act, however, might serve as a guide.

142. See Scott, *supra* note 84, at 673-74: "The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom." See also Monaghan, *supra* note 84, at 1397: "To recognize a citizen's stake in a constitutional principle and allow him access to the Court absent some specific complaint of injury in fact or effect on primary conduct need not open up floodgates to frivolous constitutional litigation. But it is up to Congress to fashion the boundaries of a model of judicial competence better suited to the Court's special function."

143. See text accompanying notes 45-48 *supra*.

144. See text accompanying notes 49-55 *supra*.

Despite the Court's constitutionalization of standing, it is submitted that Congress can exercise its power to lower significantly or even remove completely the standing bar that the Court has imposed. If Congress chooses to operate within the standing framework, it can (1) remove all nonconstitutional limits on standing, (2) create a federal substantive right to assure that at least the actions of Congress, the President, executive officials, and administrative agencies comply with the Constitution and laws of the United States, and (3) create representational standing, which would effectively protect group interests by allowing them to be asserted in actions against state and local governments by an organization having as a purpose the protection of those abridged interests.

More significantly, Congress can eliminate standing itself as a limitation on judicial review in the "public action" by authorizing individuals to bring *qui tam* suits on behalf of the United States to challenge any governmental action considered violative of the Constitution or laws of the United States. If it is "emphatically the province of the judicial department to say what the law is,"¹⁴⁵ American citizens and residents should have the right to vindicate the public interest in compliance with the law on behalf of society as a whole. Through this access to federal forums, individuals can provide the courts with the opportunity to indeed "say what the law is."

145. *United States v. Nixon*, 418 U.S. 683, 703 (1974), quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803).