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Gary C. Leedes
University of Richmond

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Some may lament the results of Mr. Justice Powell's attempts to clarify the law of standing. Indeed, public interest lawyers who advocate granting standing on a surrogate basis to individuals who are members of a large unorganized class of diffuse interests have cause to complain about a return to a more orthodox conception of standing.[1] However, Mr. Justice Powell has a different outlook, *viz.*, in a democratic society, a federal court is not necessarily an appropriate or the most effective institution to redress the grievances of people upset by alleged lawless government action.

The Justice has labored to produce a sound and logical test which is suitable to assess the adequacy of a plaintiff's stake in a controversy. It is my purpose to evaluate whether the Powellian test is an appropriate, neutral and principled way to screen out improper plaintiffs.[2]

Justice Powell took an active role in writing the Court's standing opinions after the Court had relaxed plaintiff access barriers to the point where some questioned if a personalized injury in fact was still "a core constitutional ingredient of the standing requirement."[3] As a result of Powell's efforts, it is now clear that (1) the plaintiff must aver that his injury is fairly traceable to the challenged action of the defendant officials, and that (2) the order he seeks, if granted, is

* B.S., University of Pennsylvania, 1960; LL.B., Temple University, 1962; LL.M., Harvard University, 1973. Professor of Law, University of Richmond Law School.

1. Recently a headline in the New York Times charged: "Law Deans Say Justices Grant Access to Bench to Groups They Favor but Deny it to Others." N.Y. Times, Oct. 10, 1976, at 31, col. 1.

The article reported that the board of governors of the Society of American Law Teachers cited two cases, Warth v. Seldin, 422 U.S. 490 (1975), and Simon v. Eastern Ky. Welfare Rights Org'n, 96 S. Ct. 1917 (1976), as "rulings on procedural issues that curtailed access to courts [which are] a serious concern of civil liberties and and public interest lawyers . . . ." N.Y. Times, Oct. 10, 1976, at 31, col. 1. *See also* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1305 (1976).

2. The test screens out plaintiffs who do not meet the "cases and controversies" requirement of article III of the United States Constitution or who for prudential reasons lack standing. For a discussion of these prudential considerations see notes 36-45 *infra* and accompanying text.

3. G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 1562 (9th ed. 1975).

likely to provide him with meaningful relief.[4] Moreover, if the plaintiff's injury is the indirect result of alleged lawless action, the plaintiff's burden (to establish the requisite causal injury, and the effectiveness of the relief requested) is substantially heavier.[5]

For Powell, the law of standing, like the doctrine of ripeness,[6] has a constitutional dimension (but prudential considerations also operate to bar access to improper plaintiffs).[7] Although the standing question focuses on plaintiffs, not issues, the majority of the Justices now shares Justice Powell's view that not every injury sustained by a plaintiff presents issues that are justiciable. The plaintiff's injury, at the very least, must be distinct,[8] remediable and a consequence of lawless official action. Thus, even Congress cannot confer standing upon *anyone* to sue as a private attorney-general in order to vindicate the public interest.[9] Quite to the contrary, a plaintiff who sues pursuant to an act of Congress which confers standing must demonstrate with specificity that *he* has sustained an article III injury.[10] However, before the Powellian approach can be analyzed in proper perspective, it is first necessary to evaluate the cases that had weakened traditional standing barriers.

Flast v. Cohen[11]

The plaintiff was a federal taxpayer who challenged a federal statute which provided financial aid to religious schools. The plaintiff claimed the statute violated the religion clauses of the first amendment. The Court held that plaintiff taxpayer had standing to sue because the establishment clause operated as a specific constitutional limitation upon the exercise by Congress of its taxing and

4. Simon v. Eastern Ky. Welfare Rights Org'n, 96 S. Ct. 1917 (1976).

5. *Id.* at 1927-28; *See also* Warth v. Seldin, 422 U.S. 490, 505 (1975).

6. *Id.* at 499 n.10. *See also* United States v. Richardson, 418 U.S. 166, 190 (1974) (Powell, J., concurring).

7. Warth v. Seldin, 422 U.S. 490, 500-01 (1975).

8. The Court has noted that "[a] plaintiff must allege some particular injury that sets him apart from the man on the street." United States v. Richardson, 418 U.S. 166, 194 (1974) (Powell, J., concurring).

9. Simon v. Eastern Ky. Welfare Rights Org'n, 96 S. Ct. 1917, 1921-25 (1976).

10. *Id.*

11. 392 U.S. 83 (1968).

spending powers. The Court laid down a novel two-step test to determine if federal taxpayers met its standing requirements. The first step of this test was to determine if the federal taxpayer had status *qua* taxpayer to challenge the statute.[12] The second step was to determine whether the plaintiff had established a nexus between his taxpayer's status and the nature of the alleged constitutional infringement.[13]

In applying this test to the plaintiff in *Flast,* the Court held he had status since he challenged an exercise by Congress of its constitutional power to spend for the general welfare. Hence, plaintiff established a logical link between his status as a taxpayer and the type of power exercised by Congress.[14] Chief Justice Warren's opinion explains that a federal taxpayer has status *qua* taxpayer only if the statute he attacks is an exercise of power under the taxing and spending clauses of the Constitution.[15] Conversely, a federal taxpayer would not have status *qua* taxpayer if the statute he attacks is an exercise of one of Congress' delegated powers other than the taxing and spending power. For example, if pursuant to its commerce clause power Congress enacts a statute which benefits religious schools, a federal taxpayer would not have status to challenge that law according to a literal reading of *Flast.* Nor would a taxpayer have status to attack a regulatory statute which requires for its enforcement an expenditure of the government's tax funds.[16] Obviously, the class of federal taxpayers who have status is not very broad, being limited by the nature of the power Congress exercises.

If the taxpayer meets the requirements of the status test, he still must pass a "nexus" test.[17] What Chief Justice Warren meant by the nexus test is this: Not all infringements of the Constitution can be challenged by a federal taxpayer with status; instead, only violations of specific prohibitions on Congress' taxing and spending power can be challenged.[18] The tenth amendment and the due process clause of the fifth amendment were regarded by Warren as

12. *Id.* at 105-06.
13. *Id.*
14. *Id.* at 102.
15. U.S. CONST. art. I, § 8.
16. Flast v. Cohen, 392 U.S. 83, 102 (1968).
17. *Id.* at 102-03.
18. *Id.*

general rather than specific prohibitions.[19] Thus, a federal taxpayer cannot challenge a spending program on the ground that it violates the due process clause or the reserved powers of the states. Such infringements of the Constitution are not specific prohibitions within the meaning of *Flast.* Indeed, no specific prohibitions on Congress' spending and taxing power besides the establishment clause of the Constitution have been identified.[20] In retrospect, the *Flast* opinion can be seen as an experiment by the Court trying to retreat from the traditional rigid standing barriers without being sure how far it should go.[21]

Justice Powell, echoing the view of Mr. Justice Harlan,[22] has demonstrated by force of argument the unsuitability of the *Flast* test as a gauge to measure whether plaintiffs have an adequate stake in controversies.[23] Justice Powell, as Justice Harlan contended before him,[24] argues that a taxpayer's interest in the subject matter of any given case does not become more or less adequate because it is a taxing and spending statute he has challenged rather than a regulatory statute. Nor does the adequacy of the taxpayer's interest vary depending on which constitutional provision is allegedly violated, or how specific or general it might be. The *Flast* test does not relate to "concrete adverseness."[25] Thus Powell disparages the test as neither a sound nor logical limitation on standing.[26]

The Court's application of the *Flast* test in *United States v. Richardson*[27] illustrated the doctrinal confusion that worried Powell. Richardson was a taxpayer who had attempted to get detailed information regarding the expenditures of the Central Intelligence Agency (CIA). His attempt was unsuccessful because the officials refused to disclose the information owing to their interpretation of

19. *Id.* at 105.
20. *Id.*
21. United States v. Richardson, 418 U.S. 166, 183 n.2 (1974)(Powell, J., concurring), *citing* Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 HARV. L. REV. 645, 661 (1973).
22. Flast v. Cohen, 392 U.S. 83, 121-30 (1918) (Harlan, J., dissenting).
23. United States v. Richardson, 418 U.S. 166, 180-85 (1974)(Powell, J., concurring).
24. *See* Flast v. Cohen, 392 U.S. 83, 121-30 (1968) (Harlan, J., dissenting).
25. United States v. Richardson, 418 U.S. 166, 182 (1974)(Powell, J., concurring).
26. *Id.* at 184.
27. *Id.* at 171-75.

the pertinent statute.[28] Richardson brought an action as a taxpayer, alleging that certain provisions of the statute which authorized withholding the information violated the Constitution.[29] The Court held that Richardson lacked standing to bring the action.[30] Richardson had not established a logical link between his status as a taxpayer and the type of enactment challenged.[31] The Court explained that his challenge was not addressed to the taxing or spending power but to what was essentially a regulatory statute.[32] Furthermore, Richardson had not claimed that funds were being spent in violation of any specific constitutional limitation upon the taxing or spending power.[33] Of course, Richardson could not, in good faith, make such a claim because the detailed information he sought was needed to verify any allegation of improper expenditures. Indeed, his injury was his inability to get the information; an injury which he claimed interfered with his duty to monitor the actions of Congress and the executive branch of government.[34] The Court dismissed this injury as a kind of generalized grievance not suitable to give Richardson an adequate stake in the controversy.[35]

Justice Powell concurred in the opinion of the Court because he agreed Richardson's injury was not particularized enough.[36] But Justice Powell stressed that constitutional limitations were not the only relevant considerations.[37] He enumerated several prudential reasons why it would be inappropriate for the Court to dilute the requirement of a particularized injury. For example, he noted it

28. *See* 50 U.S.C. § 403 (b)(1949).

29. The plaintiff alleged that the withholding of such information violated the seventh clause of article I, section 9 of the U.S. Constitution, which 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.

U.S. CONST. art. I, § 9.

30. United States v. Richardson, 418 U.S. 166, 180 (1974)(Powell, J., concurring).

31. *Id.* at 175.

32. *Id.*

33. *Id.*

34. *Id.* at 176. Richardson also claimed he could not "properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office." *Id.*

35. *Id.* at 176-80. *See also* Schlesinger v. Reservists Comm. To Stop The War, 418 U.S. 208 (1974).

36. *Id.* at 190-95.

37. *Id.* at 185.

would be awkward in a democratic society for non-elected judges to supervise the representative branches of government merely because a taxpayer requested a district court to grant him relief.[38] Aside from depriving the elected branches from serving, with courts, as the ultimate guardians of liberty,[39] the allowance of unrestrained public actions would produce uneven and sporadic review of varying quality depending on the resources of the particular plaintiff.[40] Another prudential consideration was Justice Powell's concern that Congress might exercise its power to curb the use of judicial power.[41] Justice Powell also expressed concern that wholesale judicial receptivity to public interest suits by persons who cannot distinguish themselves from other citizens risks impairment of the federal court's effectiveness in protecting the personal rights and liberties of individuals and minority groups.[42] According to Justice Powell, the prudent use of the federal judicial power is "incompatible with unlimited notions of taxpayer and citizen standing."[43] In short, Powell perceived the need to confine the federal courts to their "properly limited" sphere.[44] That sphere of limited judicial power, since *Marbury v. Madison,*[45] is to decide constitutional questions as an incidental by-product of traditional cases and controversies. In the traditional case the plaintiff had to allege how the defendant injured him in some distinct and concrete way. The *Richardson* concurrence was the starting point for the evolution of the Powellian test in standing cases.

The Administrative Procedure Act Cases

Subsequent to the *Flast* decision, the Warren Court found another avenue to travel in its quest to lower barriers blocking access to persons seeking review of federal administrative agency action. The Administrative Procedure Act (APA)[46] was susceptible to an interpretation that afforded many more "adversely affected or ag-

38. *Id.* at 188-89, 196-97.
39. *Id.* at 189.
40. *Id.* at 190.
41. *Id.* at 191.
42. *Id.* at 192.
43. *Id.* at 191.
44. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975).
45. 5 U.S. (1 Cranch) 137 (1803).
46. 5 U.S.C. § 551 *et seq.* (1970).

grieved"[47] persons access to federal courts. The pertinent provisions are as follows:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.[48]
>
> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.[49]

These provisions permitting judicial review of agency action enabled the plaintiff in *Association of Data Processing Service Organizations, Inc. v. Camp,*[50] to challenge the validity of a ruling made by the Comptroller of the Currency. The Comptroller, whose duty *inter alia* is to regulate national banks, issued a ruling that permitted national banks to compete with the plaintiff's members. The plaintiff's complaint sought relief on the theory that the marketing of data processing services by national banks is illegal, and that the Comptroller's approval was an arbitrary abuse of discretion in excess of statutory authority. The district court held the plaintiff had no standing to redress the economic injury of its members.[51] The Court of Appeals for the Eighth Circuit affirmed.[52] The plaintiff argued it had standing because Congress, when it enacted the Bank Service Corporation Act, evinced a specific legislative purpose to protect the competitive interests of commercial data processors against national bank competition.[53] Moreover, the plaintiff asserted it had standing to challenge the action of the Comptroller by virtue of section 10 of the Administrative Procedure Act.[54] The Government argued the opposite, contending the purpose of the Bank Service Corporation Act was neither to create nor to protect legal rights of the plaintiff and that only the competitive interests of the

47. *See id.* § 702.
48. *Id.* § 701(a).
49. *Id.* § 702.
50. 397 U.S. 150 (1970).
51. 279 F. Supp. 675 (D. Minn. 1968).
52. 406 F.2d 837 (8th Cir. 1969).
53. *See* Brief for Appellant, 25 L. Ed. 2d 884, 884-85 (1970).
54. *Id.*

national banks were protected.[55] The Court attempted to wrestle with the standing issue without implicating the merits.[56] It held the Administrative Procedure Act did confer standing because the plaintiff alleged the challenged action caused him injury in fact, and because competitors with national banks are arguably within the zone of interests protected by the relevant statute.[57] As Justice Powell later noted, the plaintiff's injury was "directly traceable to the action of the defendant federal official, for it complained of injurious competition that would have been illegal without that action."[58]

The injury-in-fact test of *Data Processing* is just the first step in the Court's bi-partite inquiry concerning what persons fit the APA's description of persons "adversely affected or aggrieved within the meaning of a relevant statute." If a plaintiff's injury is not the result of a common law wrong, he must point to a statute (or constitutional provision) other than the APA which arguably protects or regulates that particular interest adversely affected by the defendant's challenged action. The Court in *Data Processing* did not explain and has yet to explain how a plaintiff could meet this requirement. It is therefore uncertain at this time how much bite the zone-of-interest test has. If the plaintiff's burden is merely to argue his general interests are protected or regulated by some arguably relevant statute, and the Court agrees without checking the legislative history, and without discussing the purposes of the statute, then the test is a superfluous and meaningless appendage to the injury-in-fact requirement. The zone-of-interest inquiry would be meaningless because it would add nothing of substance to the injury-in-fact inquiry. On the other hand, if the zone-of-interest test is interpreted strictly or is used to warrant the application of prudential considerations which screen out plaintiffs, this would enable judges to deny access to plaintiffs who have sustained distinct and palpable injuries that allegedly result from challenged official action.[59]

In *Barlow v. Collins,*[60] the Court's loose handling of the zone-of-

55. *Id.*
56. 397 U.S. at 156.
57. *Id.*
58. Simon v. Eastern Ky. Welfare Rights Org'n, 96 S. Ct. 1917, 1927-28 n.25 (1976).
59. *See generally* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 22.02-1, 22.02-5 (1976).
60. 397 U.S. 159 (1970).

interest test aroused suspicions that the search for a protective legislative intent was largely a fiction.[61] These suspicions blossomed into reasonable doubts when in *Arnold Tours, Inc. v. Camp,*[62] and in *Investment Company Institute v. Camp,*[63] the Court required still less of a showing of the plaintiff's particularized interests protected by a relevant statute. Indeed, "the Court afforded relief without inquiring into whether the plaintiff had a protected legal interest."[64]

Thereafter the Court dramatically relaxed the injury-in-fact inquiry in *United States v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.).*[65] Significantly, in this most outstanding example of the Court's relaxation of traditional standing barriers, Mr. Justice Powell did not participate in the consideration of the *S.C.R.A.P.* case or its decision.

S.C.R.A.P., an unincorporated association, on behalf of its members, challenged an order of the Interstate Commerce Commission (ICC) that permitted the railroads to collect a surcharge. The plaintiff alleged the ICC order was illegal because the agency failed to file an environmental impact statement[66] pursuant to the National Environmental Protection Act (NEPA).[67] Arguably, NEPA requires all agencies of the federal government, including the ICC, to file an environmental impact statement whenever their actions significantly affect the quality of the human environment. S.C.R.A.P.'s theory in the case was that its members used camping, hiking and fishing areas around Washington, D.C., and their enjoyment of such areas would be disturbed by the "illegal" rate increase.[68] The Court was asked to accept the following line of causation as a demonstration of plaintiff's "direct" stake in the controversy:

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61. *See generally* Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 HARV. L. REV. 645, 662-66 (1973); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief,* 83 YALE L.J. 425, 471 (1974)[hereinafter cited as *Standing to Challenge*].

62. 400 U.S. 45 (1970).

63. 401 U.S. 617 (1971).

64. *Standing to Challenge, supra* note 61, at 471.

65. 412 U.S. 669 (1973).

66. 412 U.S. at 679.

67. 42 U.S.C. § 4332(2)(c)(1970).

68. 412 U.S. at 682.

> [A] general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources *might* be taken from the Washington area, and resulting in more refuse that *might* be discarded in national parks in the Washington area.[69]

The controversial issue was whether such a relatively insubstantial, non-economic threat based on a tenuous theory of causation was sufficient for standing. The Court held that the district court was correct in denying the government's motion to dismiss for failure to allege sufficient standing.[70] In dissent, Mr. Justice White complained the injuries were "remote, speculative and insubstantial," and as generalized as any concerned citizen's interest in challenging government action.[71] As Professor Albert has remarked, "The major difficulty in *S.C.R.A.P.* stems from the attempt to isolate injury for threshold adjudication"[72] without even tangentially considering the merits. This "produces confusion and piecemeal litigation."[73]

The Court did not intend to dispense with the injury-in-fact requirement when it held that S.C.R.A.P. had standing to sue. The majority opinion took pains to point out that S.C.R.A.P was not merely a concerned bystander seeking to vindicate its value preferences. It was not a bystander because S.C.R.A.P., on behalf of its members, alleged a specific and perceptible injury.[74] Although the threatened harm was relatively trifling in nature, the harm was different in kind from a purely ideological injury.[75]

S.C.R.A.P., at the moment, is still law insofar as the Court continues to recognize relatively minor injuries of a non-economic nature as sometimes sufficient to meet article III requirements so long as the litigant suffers a specific and perceptible harm. However, it is doubtful that the Court will continue to accept at face value conclusory allegations which establish only a very weak line

69. *Id.* at 688 (emphasis added).
70. *Id.* at 690.
71. *Id.* at 723 (White, J., dissenting in part).
72. *See Standing to Challenge*, *supra* note 61, at 490 (footnote omitted).
73. *Id.* at 491.
74. *Id.* at 688-89.
75. *Id.* at 689 n.14.

of causation between wrongful act and injury. The allegations in *S.C.R.A.P.* merely demonstrated a potential invasion of the plaintiff's legally protected interests which required the Court to speculate as to what *might* occur. *S.C.R.A.P.* was the culmination of the movement away from traditional standing and case and controversy requirements and toward the public interest action. This movement has now been brought to a halt and the foundation has been laid for a movement back to the more orthodox view of standing.

Evolution of a New Test

In *Warth v. Seldin*[76] and *Simon v. Eastern Kentucky Welfare Rights Organization,*[77] Justice Powell's opinions established precedent that will enable the Court to avoid suspending judgment when dubious plaintiffs fail to flesh out conclusory allegations in their complaints. His opinions were foreshadowed in *Linda R.S. v. Richard D.,*[78] where a mother of an illegitimate child sued a Texas district attorney for not prosecuting the child's father. State officials had been prosecuting only fathers of legitimate children for their refusal to provide for the support and maintenance of children under eighteen years of age. The mother's action presented an equal protection clause issue, but the Court never reached the merits. Mr. Justice Marshall explained that the plaintiff made no showing that her failure to secure support payments resulted from the non-enforcement of the Texas statute making non-support a misdemeanor.[79] Moreover, he noted it would be speculative to assume that the requested relief would redound to her benefit.[80] Thus, the Court concluded that "the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which . . . is a prerequisite of standing, is absent. . . ."[81] Because the case did not involve the federal Administrative Procedure Act, but arose in the unique context of a challenge to prosecutorial discretion, it was not generally understood that the decision was a harbinger of a tightening up of the nexus requirement between the wrong and the injury across the

76. 422 U.S. 490 (1975).
77. 96 S.Ct. 1917 (1976).
78. 410 U.S. 614 (1973).
79. *Id.* at 618.
80. *Id.*
81. *Id.*

board—especially since *S.C.R.A.P.* was decided three and one-half months *after Linda.*

However, prior to the most recent opinions of Mr. Justice Powell, there were decisions that denied standing during the very years the Court seemed preoccupied with liberalizing standing. The Court in *Sierra Club v. Morton*[82] had tried to make it clear that a plaintiff's abstract concern with a subject that could be affected by an adjudication does not substitute for the Court's requirement of a concrete injury. The Court held in *Moose Lodge No. 107 v. Irvis*[83] that a black plaintiff lacked standing to challenge a club's membership practices because he had not applied for or been denied membership. In *Laird v. Tatum,*[84] the plaintiffs' complaint that army surveillance of citizens chilled their first amendment rights was dismissed for want of a justiciable controversy. The plaintiffs, according to the majority, had failed to allege the chilling effect was caused by specific action of the army against them.[85] Furthermore, they failed to allege the threat of specific future harm.[86] In *Roe v. Wade,*[87] the Court held that a childless married couple had no standing to challenge state abortion laws since the wife was not pregnant. In *O'Shea v. Littleton,*[88] the Court held a complaint that defendant county officials engaged in "unconstitutional and selectively discriminatory enforcement and administration of criminal justice" failed to allege a case and controversy. The complaint was deficient *inter alia* because the claim was presented in the most general terms taking the court into the areas of speculation and conjecture.

Despite these cases,[89] the signal that the Court was not prepared to further dilute standing requirements was not strong or clear. Commentators noted that the majority in *Sierra* "expressly disclaimed reliance upon the cases and controversies clause of article III."[90] *Moose Lodge* focused on the jus tertii problem. The

82. 405 U.S. 727 (1972).
83. 407 U.S. 163 (1972).
84. 408 U.S. 1 (1972).
85. *Id.* at 13-14.
86. *Id.* at 14.
87. 410 U.S. 113 (1973).
88. 414 U.S. 488 (1974).
89. *See also* Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).
90. *The Supreme Court, 1971 Term,* 86 HARV. L. REV. 1, 236 (1972).

O'Shea case presented comity and equity concerns. It also involved the problem of prosecutorial discretion as did *Linda*. *Roe v. Wade* has been interpreted as a ripeness opinion that was inadvertantly flawed by its reliance on the law of standing.[91] The *Laird* opinion was based on the premise that the situation did not present the plaintiff with any present or immediately threatened injury resulting from specific official action. None of these cases really clarified the law of standing in situations where a plaintiff's opportunity to obtain tangible benefits was stymied by governmental regulatory activity outside of the military and criminal justice areas. However, the cases of *Warth v. Seldin* and *Simon* did involve issues where plaintiffs arguably were denied opportunities and tangible benefits which they alleged resulted from unlawful government regulation. It is to those cases that I now turn.

Warth v. Seldin

In *Warth*, the Court elaborated on the theme of *Linda* as well as the variations of the standing doctrine discussed in the other Supreme Court cases that denied standing since *Flast*. Justice Powell established a new starting point which may yet evolve into a coherent body of law answering the question: Who is a proper party plaintiff? There were four different groups of plaintiffs in *Warth*. One group of plaintiffs consisted of low and moderate income individuals who resided outside of the town of Penfield. They claimed Penfield's zoning ordinance and zoning practices had prevented persons of low and moderate income from acquiring residential property in the town. However, these plaintiffs did not allege there was a substantial probability that they personally would be able to obtain residential property in town if the Court granted them the relief sought.[92] As Justice Powell read their complaint, and affidavits filed in opposition to defendants' motion to dismiss, the plaintiffs suggested their inability to obtain housing in Penfield was the consequence of the "economics of the area housing market" as opposed to the defendants' zoning practices.[93] Thus, by their own admission, Powell noted, realization of their desires to live in Penfield

91. *See* Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1381 (1973).

92. 422 U.S. 490, 503-07(1975).

93. *Id.* at 506.

always has depended on the efforts of third parties.[94] No plaintiff alleged that he had any specific project in mind or that there was any builder willing to construct a house which fit his needs and which he could afford.[95] These omissions to assert a sufficiently demonstrable and concrete injury proved fatal. The plaintiffs were denied access to federal court for two reasons: (1) the facts alleged failed to support an actionable causal relationship between Penfield's zoning practices and the plaintiff's asserted injury[96] and (2) the plaintiffs had not demonstrated they personally would benefit in a tangible way from federal court intervention. The fact that the plaintiffs shared attributes common to persons excluded from residence in the town was insufficient to support a conclusion that the defendant violated the plaintiff's rights.[98] It therefore appears that, except in unusual cases, a plaintiff attacking an exclusionary zoning ordinance in federal court should focus the court's attention on a particular contemplated project. For implied in the interstices of the opinion is the principle of law that no "legal" cause between a zoning ordinance and an alleged exclusion can be established by a non-resident plaintiff, not subject to the strictures of a town's zoning ordinance, if he has taken no specific practical steps to obtain housing. The bare allegation by a plaintiff that he has looked for housing located in the town where he wants to live and has not found suitable housing he can afford is insufficient to demonstrate the official action proximately caused the plaintiff's exclusion. To be sure, the Court's opinion is couched in terms of standing rather than the plaintiff's failure to state a cause of action but, as in this case, the two concepts are often organically related. The opinion, by specifying the grounds on which standing was denied, may well prevent erroneous decisions on the merits and will encourage narrower, better focused decisions.

A second group of plaintiffs consisted of Rochester taxpayers. Their complaint was also insufficiently specific in alleging a "line of causation"[99] between Penfield's zoning practices and their higher

94. *Id.* at 505.
95. *Id.* at 503-07.
96. *Id.* at 507.
97. *Id.* at 508.
98. *Id.* at 502.
99. *Id.* at 509.

taxes. Since the requisite causal connection between the asserted wrong and their injury was conjectural,[100] article III limitations barred their access to the federal courts. It is doubtful that a taxpayer *qua* taxpayer in one community has any personal constitutional rights to be free of governmental action in a neighboring municipality that has some incidental harmful effect upon his tax liability.[101] Moreover, according to the Court, the plaintiff taxpayers were asserting the rights of legal interests of third parties with whom they had no substantial relationship.[102] Since none of the exceptions to the prudential rule forbidding the assertion of constitutional jus tertii was pleaded[103] or evident, the Court discerned no reason to recognize the Rochester taxpayers' standing.

Another plaintiff, Metro-Act of Rochester, Inc. (Metro-Act), asserted the rights of its members including members living in Penfield who were deprived of the social benefits of living in a racially and ethnically integrated community.[104] But unlike the plaintiffs in *Trafficante v. Metropolitan Life Insurance Co.*,[105] Metro-Act did not assert any rights or entitlements created by Congress. Powell concluded prudential considerations governed.[106] The Court blocked the access of these litigants pressing social reform because their deprivation of social benefits was perceived to be an indirect result of the harm sustained by those excluded.[107] Thus, the canon of restraint that often bars plaintiffs asserting constitutional jus tertii was again applicable.

As to the prayer for prospective relief submitted by the intervenor Home Builders, this too failed.[108] Home Builders alleged the defendants' zoning restrictions deprived Home Builder's members of

100. *Id.*
101. *Id.*
102. *Id.* at 509-10.
103. *Id. Compare* Singleton v. Wulff, 96 S. Ct. 2868 (1976).
104. *Id.* at 512.
105. 409 U.S. 205 (1972).
106. 422 U.S. at 514.
107. *Id.*
108. The plaintiff Home Builders also claimed damages in the amount of $750,000. The Court held that "each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf." *Id.* at 516.

" 'substantial business opportunities and profits' ".[109] However, its complaint referred to no specific, viable project that was precluded at the time the lawsuit was filed.[110] Powell concluded, therefore, that Home Builders and another plaintiff, the Housing Council, had not shown "the existence of any injury of sufficient immediacy and ripeness to warrant judicial intervention."[111]

One commentator has said the "effect of the *Warth* holding is to alter the nature of the injury necessary to create justiciability from a loss of opportunity to actual denial of access to existing or planned housing."[112] However, it seems, this interpretation reads too much substantive law into a decision on standing. Justice Powell carefully kept his options open to subject all exclusionary zoning laws to judicial review in a proper case.[113] Surely the loss of a meaningful opportunity in which plaintiff has a particularized personal interest, under some circumstances, may be a proper case if judicial intervention can remedy the harm.[114]

It has been suggested that the Court "implicitly declined to read the Constitution as guaranteeing a right to live in an integrated community."[115] This is misleading. First of all, a court, when it denies standing, is not likely to announce the existence of a new constitutional right. Furthermore the plaintiff's (Metro-Act) complaint in *Warth* alleged the defendants' zoning practices prevented its members from living in a community with low and moderate income groups which, in turn, had the effect of depriving its members of the benefits of living in an integrated community.[116] The Court correctly noted that those nonresidents indirectly injured had failed to allege that any of the exceptions to the normal jus tertii rule were operative.[117] Therefore, I do not read the opinion to say that nonresidents can never have standing to complain of purposeful discrimination aimed at others which interferes with a substantial relationship between the plaintiff and others who are also injured.[118]

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109. *Id.* at 515, *citing* Brief for Appellant at 156.
110. *See* 422 U.S. at 516.
111. *Id.* at 516.
112. *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 191 (1975).
113. 422 U.S. at 508 n.18.
114. *Id.* at 504-08.
115. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47 (1975).
116. *See* 422 U.S. at 512.
117. *Id.* at 514.
118. *See* 422 U.S. at 514 n.22.

Another criticism of the *Warth* opinion is Professor Davis' lament that no builder should be forced to plan a specific project when it is cheaper to attack an unconstitutional ordinance. He asks, "[W]hy should they lack standing to challenge the ordinance that prevents them from doing what they seek to do for business advantage?"[119] The answer is that the Court merely did not hold Home Builders and Housing Council lacked standing; the Court declined to decide the merits because the issue presented was not ripe, and because of prudential reasons.[120] In *Warth,* by invoking the ripeness doctrine, the Court was careful not to fuse two distinct but related doctrines[121] but kept them isolated from one another, as well as it reasonably could—given their close affinity.[122]

Of course the *Warth* opinion is disappointing for those, like Professor Davis, who want the Court to decide any reviewable case where the case and controversy requirements are met.[123] But Professor Davis' approach to standing, while more liberal than the Court's, is basically a one dimensional view. The Davis view overlooks the prudential considerations that are part of the whole ball of wax presented by a constitutional case.[124] Powell was careful in *Warth,* as he was in *Richardson,* to emphasize and distinguish as best he could between constitutional limitations and prudential

119. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-4, at 495-96 (1976). *But see id.* § 22.21, at 522.

120. 422 U.S. at 516-17.

121. Powell pointed out on the standing issue that an association has no standing to sue as a representative of its members if the issues presented by the members' grievances are not ripe. *Id.* at 516.

122. *Id.* at 499. The question of ripeness focuses attention primarily on the nature of the issues rather than the adequacy of plaintiff's stake in the controversy. However, on occasion there is a reciprocal relationship between the fitness of the issues and the plaintiff's injury. For example, if the harm to the plaintiff is contingent on future events that may never occur, the issues may not be well developed or concretely presented. *See* Roe v. Wade, 410 U.S. 113, 128 (1973); Poe v. Ullman, 367 U.S. 497 (1961). On the other hand, if the plaintiff has no sufficiently distinctive personal interest in the controversy, the issues presented are likely to be too abstract to illuminate difficult questions of law. Laird v. Tatum, 408 U.S. 1, 14 (1972). Moreover, the close affinity between ripeness and the plaintiff's stake in the controversy is evident in cases in which the courts evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). In short, standing and ripeness cannot always be separated into two watertight compartments.

123. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.00, at 486 (1976).

124. Professor Davis' discussion of *Richardson* and *Warth* largely ignores the prudential consideration discussed in Justice Powell's opinions. *See id.* § 22.02-4, at 493-96, § 22.02-7, at 499-501.

considerations. Even in *Simon v. Eastern Kentucky Welfare Rights Organization,*[125] where he relied solely on article III limitations, Powell helps us distinguish between the constitutional prohibitions and the self imposed canons of constraint. In this respect, no one, including Professor Davis, has contributed more common sense to the law of standing.

Simon was a suit brought against the Secretary of the Treasury and the Commissioner of Internal Revenue by several indigents and organizations representing indigents. Plaintiffs asserted that the Internal Revenue Service violated the Internal Revenue Code and the Administrative Procedure Act by issuing a revenue ruling in 1969[126] that allowed favorable tax treatment to a non-profit hospital which offered only emergency services to indigents. The plaintiffs submitted affidavits recounting incidents in various parts of the country where indigents were denied hospital services by institutions enjoying tax exempt status as "charitable" organizations. The plaintiffs' prayer for relief requested the district court to declare the 1969 ruling invalid and to enjoin its implementation.[127] The Court held the plaintiffs lacked standing because the requested exercise of judicial power would be inconsistent with the case and controversies requirement of article III.[128]

The plaintiffs were denied standing in part because they failed to establish a crucial causal link between the claimed injury and the asserted wrong. The plaintiffs claimed the 1969 ruling "encouraged" hospitals to deny services which allegedly deprived the indigents of their opportunity and ability to receive the charitable benefits contemplated by the Internal Revenue Code.[129] However, the Court concluded it was purely speculative whether the "denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement'."[130] The missing link in the plaintiffs' case was their

125. 96 S. Ct. 1917 (1976).

126. Rev. Rul. 545, 1969-2 CUM. BULL. 117.

127. The district court concluded the plaintiffs had standing to sue and granted summary judgment in favor of the plaintiffs. 370 F. Supp. 325 (D.D.C. 1973). The court of appeals reversed on the merits. 506 F.2d 1278 (D.C. Cir. 1974). The Supreme Court vacated the judgment of the court of appeals and remanded the case to the district court with instructions to dismiss the complaint. 96 S. Ct. at 1928.

128. 96 S. Ct. at 1924.

129. *Id.* at 1926.

130. *Id.*

failure to allege facts supportive of a fairly drawn inference that some hospitals enjoying the tax advantage would admit indigents at reduced charges (1) if the IRS ruling were rescinded or (2) if a court required a reduced charge admission as a condition for the favorable tax treatment afforded by the ruling.[131] The Court also noted that no hospital denying service was a defendant,[132] and concluded the complaint suggested no substantial likelihood that the requested relief, if granted, would result in the desired hospital services for indigents.[133] The fact that plaintiffs brought this action under section 10 of the Administrative Procedure Act and pursuant to the Declaratory Judgment Act did not and could not cure the article III defects in their complaint.[134] In sum, the Court held the plaintiffs failed to establish their standing to sue because the requested relief, if ordered, was inconsistent with the article III cases and controversies limitation upon federal court jurisdiction.

Powell's recognition that plaintiff's standing is a distinct aspect of the cases and controversies requirement is a helpful clarification of what has often been a confusing meld.[135] Moreover, he does not consider every disadvantage to be an injury in fact for article III purposes. He also recognizes, however, that the inability of the Court to give meaningful relief can be so patent that it amounts to more than a prudential limitation but becomes a problem with constitutional dimensions.[136] In such circumstances, any judicial decision on the merits would be tantamount to an advisory opinion which is the best established example of decision-making beyond the outer boundaries of judicial power.[137] Moreover, the Powellian corollary that courts are without power to decide questions when it is patent that it cannot give meaningful relief is consistent with Justice Powell's conviction that in some cases the pure standing requirements bear a close affinity with the ripeness[138] doctrine in its purely constitutional dimension. However, had Justice Powell decided *Simon* purely on the basis of the ripeness doctrine, the

131. *Id.*
132. *Id.* at 1925.
133. *Id.* at 1926-28.
134. *Id.* at 1924-25.
135. No longer can one question if a personalized injury in fact a core constitutional ingredient. See note 3 *supra*.
136. 96 S. Ct. at 1928.
137. *See* G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 1535 (9th ed. 1975).
138. Warth v. Seldin, 422 U.S. 490, 499 n.10 (1975).

Court's signal that it was returning to the more orthodox view of standing would not have been clear.

The precedent Justice Brennan relied on to support his attack on Powell's concept of standing was the line of cases citing section 10 of the Administrative Procedure Act as a vehicle to liberalize the law of standing.[139] Justice Brennan convincingly demonstrates that the *Simon* matter presented a line of causation no less attenuated than *S.C.R.A.P.*[140] However, his dissent will probably accelerate *S.C.R.A.P.'s* demise as a viable precedent. The injuries alleged in *S.C.R.A.P.* do not meet all of Powell's requirements. Indeed, Powell, who did not take any part in the consideration of *S.C.R.A.P.*, noted that the *S.C.R.A.P.* allegations might not have survived a motion for summary judgment.[141] Possibly *S.C.R.A.P.* may be cited as a makeweight in some cases, but as Professor Davis notes,[142] *O'Shea*,[143] *Linda*[144] and *Warth*[145] reflect an attitude that cannot be reconciled with the attitude in the *S.C.R.A.P.*[146] opinion as to what is a sufficient injury in fact. Thus it would appear that *S.C.R.A.P.* is the aberration and that Justice Powell's opinions in *Richardson*,[147] *Warth*[148] and *Simon*[149] are in the mainstream.

Conclusion

The stricter standing requirements articulated by Justice Powell are a sound and logical means to assess the adequacy of a plaintiff's stake in a controversy. The Powellian standards distinguish between the abstract injury and the identifiably perceptible injury which is the subject matter of traditional lawsuits geared to a system of private law claims. No longer can the de minimis injury, or the injury not fairly traceable to an asserted wrong, serve as a pre-

139. *See* notes 46-75 *supra* and accompanying text.
140. 412 U.S. 669 (1973).
141. 96 S. Ct. at 1927 n.25, *citing* United States v. S.C.R.A.P., 412 U.S. 669, 689 n.15 (1973).
142. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-3, at 491 (1976).
143. 414 U.S. 488 (1974).
144. 410 U.S. 614 (1973).
145. 422 U.S. 490 (1975).
146. 412 U.S. 669 (1973).
147. 418 U.S. 166, 180-97 (1974)(Powell, J., concurring).
148. 422 U.S. 490 (1975).
149. 96 S. Ct. 1917 (1976).

text for special interest groups to vindicate what they say is in the public interest. Powell articulates what the minimal essential article III requirements are, and yet provides for flexibility by candidly admitting the function prudential considerations serve in causes where the plaintiff's standing is at issue.[150] He also recognizes that to an extent Congress can strip away "judicially created overlays"[151] by designating private attorneys general who are injured in fact to vindicate the public interest in cases and controversies. As Powell noted, his objections to public actions (particularly his separation of power concerns) are ameliorated by congressional mandate.[152]

By way of summary, the standing limitation is an aspect of the cases and controversies requirement, but it also serves as a means to avoid deciding a case when prudential considerations so dictate. For article III purposes, standing rules focus on the nature and extent of plaintiff's injury. The question is whether the record indicates plaintiff has been injured in fact. The injury in fact concept consists of three elements: (1) a distinct disadvantage, economic or otherwise, which is not deemed de minimis or abstract, (2) a substantial probability that the disadvantage was caused by the defendant's alleged *breach of duty* and (3) the existence of a judicial remedy which will remove the disadvantage in a meaningful way. The plaintiff's injury in fact can occur in three ways: (1) from private damage resulting from a common law wrong, (2) from the expenditure of his taxes pursuant to a taxing and spending statute contrary to the establishment clause and (3) from defendant's violation of positive law (such as a statutory or constitutional provision) causing remediable damage. However with respect to the latter, if the plaintiff's injury is deemed a generalized grievance, shared in common by all citizens, the federal courts will consider it an article III injury only if the plaintiff is adversely affected in some special way. A line is drawn between the purely ideological, abstract injury sustained by the polity and the private injury which in some concrete manner disadvantages the plaintiff. A plaintiff's interest in law enforcement for its own sake is an example of an abstract ideo-

150. *See* Singleton v. Wulff, 96 S. Ct. 2868 (1976); Warth v. Seldin, 422 U.S. 490 (1975); United States v. Richardson, 418 U.S. 166 (1974) and note 147, *supra*.

151. *See* United States v. Richardson, 418 U.S. 166, 196 n.18 (1974) (Powell, J., concurring), *citing* G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 106 (8th ed. 1970).

152. United States v. Richardson, 418 U.S. 166, 196 n.18 (1974)(Powell, J., concurring).

logical interest. A plaintiff's special interest in aesthetic, environmental or even spiritual matters, however, may be legally cognizable if the court's order can benefit him in some specific noticeable way. Notwithstanding the principle that some generalized grievances are considered to be article III injuries, the federal courts retain discretion not to recognize plaintiff's standing to sue unless the legislature authorizes him to bring an action to vindicate the public interest. In such cases, the plaintiff's injury in fact must relate to an interest arguably protected or regulated by relevant positive law. The foregoing is implicit in Powell's opinions clarifying the law of standing.[153]

Powell's product should prove more durable and workable than either the *Flast* test or the *S.C.R.A.P.* approach. The Powell test is amenable to principled neutral application. The test screens out the National Association of Manufacturers as well as groups that represent indigents when such plaintiffs fail to meet its relatively strict requirements. The only institution that may derive a disproportionate benefit from the fair application of the test is the judiciary; it can expound controversial doctrines of constitutional and administrative law at a pace which it believes to be politically acceptable. If the Powellian test is not abused, or used as a pretext to beg questions the courts have a duty to decide; the test is merely a descendant of a venerable tradition. While Mr. Justice Powell has not reconciled all the conflicting emanations from the last decade's cases under his generalizations, those who appreciate his contribution can take comfort in the truth that the law is always approaching consistency, never reaching it.[154] I submit Mr. Justice Powell's standing is first rank.

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153. Recently Justice Powell had occasion to summarize the essence of the recent Supreme Court cases clarifying the law of standing. He wrote in *Arlington Heights*:

> The essence of the standing question, in its constitutional dimension, 'is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' . . . The plaintiff must show that he himself is injured by the challenged action of the defendant. The injury may be direct, . . . but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions.

Village of Arlington Heights v. Metropolitan Housing Devel. Corp., 45 U.S.L.W. 4073, 4076 (U.S. Jan. 11, 1977) (citations omitted).

154. B. CARDOZO, *The Nature of the Judicial Process*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 171 (M. Hall ed. 1947).