Recent Standing Cases and a Possible Alternative Approach

Nicholas L. Lucich Jr.
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The standing requirement in federal court concerns whether or not the plaintiff is a proper party to seek a judicial decision on the issues which he presents. In making this determination, the Supreme Court has articulated several distinct elements of standing. For example, the Court has demanded that the plaintiff have a sufficient interest in the outcome of the controversy to assure an adverse presentation of the issues.\(^1\) In addition, the Court has construed article III, section 2 to limit the judicial power to situations which give rise to a case or controversy.\(^2\) Such a situation is usually said to exist when the plaintiff has sustained an injury or is in immediate danger of sustaining one.\(^3\)

The nebulous concept of standing has resisted clarification through any exact rules, and attempts at precision have created a confusing range of holdings.\(^4\) A comparison of different holdings often reveals seemingly illogical and inconsistent results, many of which seem unjust, as well. For example, a citizen is allowed to challenge government action which might remotely affect his environmental and aesthetic interests,\(^6\) yet he is prevented from contesting violation of a constitutional provi-

\(^4\) "Standing has been called one of the most amorphous concepts in the entire domain of the public law . . . . "The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance. The Court has itself characterized its law of standing as 'a complicated specialty of federal jurisdiction.'" Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 861 (D.C. Cir. 1970) (citations omitted).
sion designed to protect him from legislators passing laws for their own economic gain.7

The Supreme Court faced these problems in two recent cases, United States v. Richardson8 and Schlesinger v. Reservists Committee to Stop the War.9 In both, the Court attempted to resolve uncertainties by limiting the circumstances under which standing would be allowed. The plaintiff in each case was said to lack standing as a citizen to challenge government action unless he had suffered a concrete and tangible injury. The Court also narrowly construed the rule under which a citizen could sue based on his interest as a taxpayer.

Such a narrow view of standing raises one major problem. The requirement of a concrete injury ignores the fact that some statutes and constitutional provisions are designed specifically to protect against intangible harm. Moreover, the recent cases fail to delineate consistent standing requirements beyond the necessity of some type of injury.

This note will analyze the development of the law of citizen and taxpayer standing through Richardson and Reservists and suggest alternative standing guidelines which could help resolve these remaining problems.

Citizen Standing

The Requirement of an Injury

Citizen standing has customarily centered on the case or controversy requirement. This aspect of standing is fulfilled if the plaintiff has been injured in fact.10 The constitutional requirement of an injury is usually deemed to necessitate a "direct" injury as opposed to one that is only "abstract" or "speculative." In Ex parte Lévitt11 the plaintiff challenged the constitutionality of the appointment and confirmation of a Supreme Court justice who had been a senator when a statute was passed which increased retirement benefits to members of the Court. The appointment was contested as a violation of the ineligibility clause of article I, section 6, clause 2, which provides that a senator or representative cannot be appointed to a civil office for which a salary increase was determined while he served in the legislature. The Court held that the plaintiff did not have standing because he could show neither a direct injury nor an immediate threat of such an injury.

7. Ex parte Lévitt, 302 U.S. 633 (1937). For a discussion of this case see text accompanying note 11 infra.
10. See cases cited note 3 supra.
The result in *United States v. SCRAP*12 in which a tenuous injury was held sufficient for standing provides a clear contrast to the requirement of a direct injury as expressed in *Lévitt*. In *SCRAP*, five law students challenged the failure of the Interstate Commerce Commission to suspend a temporary railroad surcharge on most freight rates. The plaintiffs alleged that the surcharge violated the part of the National Environmental Policy Act13 which requires that an environmental impact statement be made on every federal action that may affect the quality of the environment.14 The students complained of the possibility of harm to their recreational, aesthetic, and economic interests, claiming that the surcharge could have an adverse effect on their Washington environment. The majority opinion traced the plaintiffs' argument as follows:

> [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...15

Although the injury alleged was obviously indirect and speculative, the Court held that it met the standing requirement.

In recent cases, the Court has indicated that a case or controversy can be found when the rights created by a statute are violated even though there would be no injury without the statute.16 This rule greatly broadens the scope of possibilities for judicially cognizable injuries, as it allows Congress to determine which injuries will meet the case or controversy requirement. For example, if Congress made it unlawful to open an umbrella in a dwelling place, an owner of a house in which infractions of the statute occurred would have standing to enforce it, even though his only "injury" would be to his right to be free from open umbrellas in his house.

Although the Court has deemed an increasingly wide range of injuries sufficient to confer standing, a plaintiff has not been allowed to bring an action to benefit the public unless he asserted actual injury to himself. A mere interest in the subject matter of the litigation has been inadequate. In *Sierra Club v. Morton*17 the Sierra Club sought to block a proposed development of part of the Sequoia National Forest, alleging

15. 412 U.S. at 688.
violation of federal laws for the preservation of national parks and forests. In view of its special expertise and concern in the area of conservation, the group sought to represent the aesthetic and environmental interests of the public. The Court pointed out that injuries in fact could include injuries to the plaintiff's environmental and aesthetic interests, but that whatever the injury, it must be sustained by the plaintiff and a sincere interest in the litigation could not substitute for such injury. Since the Sierra Club had not alleged that any of its members would be affected by the proposed development, standing was denied.

**Rules of Self Restraint**

In addition to the general constitutional requirement of an injury, the Court has limited citizen standing by excluding some cases which nonetheless meet the case or controversy requirement. The criteria for these limitations are known as rules of self restraint because they enable the courts to disallow constitutionally permissible suits.

Prior to recent trends, the most important rule of self restraint in citizen standing was the requirement that plaintiff assert a legal right. In order to have standing plaintiff had to assert a right either recognized at common law or created by a statute. For example, in *Tennessee Electric Power Co. v. Tennessee Valley Authority* eighteen corporations sought to enjoin the allegedly unconstitutional activities of the TVA. Although the plaintiffs were injured by competition from the TVA, the Court denied standing, holding that one injured by government action could not challenge that action unless "the right invaded is a legal right—one of property, one arising out of contract, one protected

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18. *Id.* at 738-39.
19. *Id.*
20. One such rule of self restraint is mentioned in *Barrows v. Jackson*, 346 U.S. 249 (1953). This case began with a state court damage suit for breach of a racially restrictive covenant. The defendant in the contract action challenged enforcement of the restrictive covenant as a violation of the fourteenth amendment rights of non-Caucasians, whom the covenant purported to exclude from the area. Although the defendant would have been injured by having to pay damages for breach, he would normally have been prevented from asserting the constitutional claim by the rule that was generally applicable in such situations: a litigant cannot claim standing to assert the constitutional rights of some third party. However, the Court chose not to follow this general rule because the unique factual situation might prevent the third party from ever being able to bring the suit in his own behalf. Thus, such general rules of self restraint are not binding on the Court.
against tortious invasion, or one founded on a statute which confers a
privilege.\textsuperscript{23}

In \textit{Federal Communications Commission v. Sanders Brothers Radio
Station}\textsuperscript{24} the legal right doctrine was bypassed to some extent. In
this case the Court allowed standing on the basis of a statute, but the
statute did not create a legal right in the sense of "[conferring] a
privilege" as expressed in \textit{Tennessee Electric}.\textsuperscript{25} Rather, the Court decid-
ed that the statute manifested a congressional intent to allow standing
even without infringement of a legal right. The issue in \textit{Sanders} con-
cerned whether an existing radio station could challenge the FCC’s
grant of a broadcasting license to a new rival station. The statute
involved was the Communications Act of 1934, which provided that any
person "aggrieved or whose interests are adversely affected" by FCC
action was entitled to judicial review.\textsuperscript{26} Plaintiff’s alleged injury, the loss
of business resulting from increased competition, was not an interest
protected by a legal right. In recognizing standing, the Court reasoned
that Congress:

may have been of the opinion that one likely to be financially
injured by the issue of a license would be the only person having
a sufficient interest to bring to the attention of the appellate court
ers of law in the action of the Commission in granting the
license.\textsuperscript{27}

Analogous interpretations of similar statutes have resulted in a
significant lowering of the citizen standing barrier.\textsuperscript{28} The Administrative
Procedure Act\textsuperscript{29} has been the basis for standing in numerous suits.\textsuperscript{30}
This statute provides: "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."\textsuperscript{31}

In \textit{Association of Data Processing Service Organizations, Inc. v.
Camp},\textsuperscript{32} a suit brought under the Administrative Procedure Act, the

\begin{itemize}
\item\textsuperscript{23} \textit{Id.} at 137-38 (footnote omitted).
\item\textsuperscript{24} 309 U.S. 470 (1940).
\item\textsuperscript{25} 306 U.S. at 137.
\item\textsuperscript{26} 47 U.S.C. § 402(b)(6) (1970).
\item\textsuperscript{27} 309 U.S. at 477.
\item\textsuperscript{28} \textit{See}, e.g., \\
granted standing to challenge TVA power sales in violation of statutory restrictions).
\item\textsuperscript{29} Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified at 5 U.S.C. §§ 551-59,
\item\textsuperscript{30} \textit{E.g.}, \textit{Sierra Club v. Morton}, 405 U.S. 727 (1972); \textit{Barlow v. Collins}, 397 U.S.
159 (1970); \textit{Association of Data Processing Serv. Organizations, Inc. v. Camp}, 397 U.S.
\item\textsuperscript{31} 5 U.S.C. § 702 (1970).
\item\textsuperscript{32} 397 U.S. 150 (1970).
\end{itemize}
Court announced a test which has been widely used\textsuperscript{33} to determine standing. The plaintiff, a seller of computer services, challenged a ruling of the Comptroller of the Currency which had allowed national banks to provide data processing services to their customers. The plaintiff alleged that this ruling violated the portion of the Bank Service Corporation Act of 1962 which provides that corporations covered by the statute can engage in no activities other than providing financial services for banks.\textsuperscript{34} The Court developed a two part test for standing. First, the plaintiff must allege that the challenged administrative action has caused him injury in fact, thereby fulfilling the case or controversy require-\textsuperscript{1}ment.\textsuperscript{35} Second, the interest for which the plaintiff seeks protection must be “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”\textsuperscript{36} In this case the first part of the test was satisfied because the challenged ruling would create competition for the plaintiff, causing him economic injury. The Court decided that the second requirement was also met as the plaintiff’s interest in being free from illegal competition was arguably within the zone of interests to be protected by the Bank Service Corporation Act. \textit{Data Processing} emphasizes that any injury in fact will satisfy the first part of the test\textsuperscript{37} and thus also the constitutional requirement of a case or controversy. The Court’s use of the word “arguably” suggests that the second part of the test is very flexible.

Thus, largely by concluding that certain statutes show congressional intent to allow standing, the courts have permitted suits involving injuries to an increasing range of interests. As in the case of the APA, these statutes are commonly ones which allow challenges to administrative or other government action. Even if the statute does not mention the specific injury claimed by the plaintiff, the Court often allows the suit, reasoning that Congress has manifested an intent that someone be allowed to sue in the particular area treated by the statute, no matter what the injury.

\textbf{Taxpayer Standing}

One particular area of citizen standing that is usually considered separately is taxpayer standing. A citizen who asserts only the interest of a taxpayer funding the government has generally been held to lack standing.\textsuperscript{38} This conclusion has prevailed even when the specific govern-

\begin{itemize}
  \item \textsuperscript{33} See, e.g., Barlow v. Collins, 397 U.S. 159 (1970); Association of Letter Carriers v. Independent Postal Sys. of America, 470 F.2d 265 (10th Cir. 1972).
  \item \textsuperscript{34} 12 U.S.C. § 1864 (1970).
  \item \textsuperscript{35} 397 U.S. at 152.
  \item \textsuperscript{36} \textit{Id.} at 153.
  \item \textsuperscript{37} \textit{Id.} at 154.
  \item \textsuperscript{38} E.g., Frothingham v. Mellon, 262 U.S. 447 (1923); Fairchild v. Hughes, 258 U.S. 126 (1922).
\end{itemize}
ment action that is challenged would clearly result in an expenditure of some small portion of the plaintiff's tax dollars.\(^39\)

The Supreme Court seems first to have considered the question of taxpayer standing in *Wilson v. Shaw*.\(^40\) The plaintiffs, based on their interests as property taxpayers, sought an injunction against expenditure of funds for the Panama Canal on the grounds that the United States did not have clear title to the land. While deciding against the plaintiff on other grounds, the Court treated with skepticism the idea that a taxpayer should be able to bring the suit. The Court stated that to decide the case on behalf of such a plaintiff "would be an exercise of judicial power which, to say the least, is novel and extraordinary."\(^41\)

In *Frothingham v. Mellon*\(^42\) the Court set forth the general rule that if the plaintiff's only interest is that of a taxpayer, a suit to challenge the constitutionality of a federal statute will not be allowed. The plaintiff in *Frothingham* complained that a federal aid program designed to reduce infant mortality violated the fifth and tenth amendments. She alleged that the statute was an attempt by Congress to usurp powers reserved to the states and that her increased tax burden in financing the program would be a deprivation of property without due process of law. Thus, the harm that she claimed was the economic injury caused by an increased tax. The Court in *Frothingham* said that such a statute cannot be challenged unless a plaintiff is able to show that he "has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."\(^43\) The Court decided that revenue needed to finance the program would affect taxation in only a "remote, fluctuating and uncertain" manner.\(^44\) The plaintiff's insignificant share in such an uncertain burden did not provide the injury necessary for standing.

The rule of *Frothingham* remained a barrier to taxpayer standing until the decision in *Flast v. Cohen*.\(^45\) In *Flast* taxpayers challenged the constitutionality of a statute which provided federal funds to religious schools.\(^46\) The plaintiffs contended that the statute violated the establishment and free exercise clauses of the First Amendment.\(^47\) The Court

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40. 204 U.S. 24 (1907).
41. *Id.* at 31.
42. 262 U.S. 447 (1923).
43. *Id.* at 488.
44. *Id.* at 487.
45. 392 U.S. 83 (1968).
47. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONSTR. amend. I.
explained that taxpayers who challenge statutes through their status as taxpayers must generally be denied standing because they lack a necessary "personal stake" in the outcome\(^{48}\) and are therefore unable to meet the case or controversy requirement. The Court proceeded to develop a test designed to identify this "necessary stake" so that where it was found standing could be allowed.\(^{49}\) Taxpayer standing exists, according to *Flast*, where the following two part test can be satisfied:

First, the taxpayer must establish a logical link between [his] status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.\(^{50}\)

The Court indicated that the first part of the test would be satisfied if the taxpayer contested the constitutionality of an exercise of congressional power under the taxing and spending clause of article I, section 8.\(^{51}\) In contrast, a challenge to legislative action which was essentially regulatory and involved only "an incidental expenditure of tax funds"\(^{52}\) would be insufficient. The second requirement would be met if the taxpayer were able to show that the challenged enactment violated a specific constitutional limitation of the taxing and spending power.\(^{53}\)

In *Flast* the Court found that the statute involved was an exercise of the taxing and spending power and that the establishment clause was a specific limitation of that power; thus, standing was recognized. The Court determined that the establishment clause qualified as a specific limitation on the taxing and spending power because the Court determined that the purpose of the clause was to prevent spending to support religion or to favor any religion.

*Frothingham* was distinguished on the basis that the plaintiff there had failed to satisfy the second part of the test.\(^{54}\) Although she attacked an exercise of the taxing and spending power, the constitutional provisions which she alleged to have been violated were not deemed to be specific limitations on that power. Her tenth amendment claim was considered to be merely an allegation that Congress had exceeded the general powers given it by article I, section 8. Her fifth amendment claim also failed to confer standing as the Court found that the fifth amendment was not designed to protect taxpayers against increased tax liability.

Although the Supreme Court did not again apply the *Flast* rule to

\(^{48}\) 392 U.S. at 101.
\(^{49}\) *Id.* at 102.
\(^{50}\) *Id.*
\(^{51}\) *Id.* at 103.
\(^{52}\) *Id.* at 102.
\(^{53}\) *Id.* at 103-04.
\(^{54}\) *Id.* at 105.
taxpayers until 1974, the lower courts have often considered the problem. In *Richardson v. Kennedy* a taxpayer challenged the Postal Revenue and Federal Salary Act of 1967 which provided for congressional pay raises. The statute authorized the president to recommend salaries which would become effective unless Congress chose to modify them. The plaintiff contended that this procedure violated article I, section 6, clause 1 of the Constitution which provides that “[t]he Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law . . . .” The plaintiff argued that “by Law” referred only to legislation which itself fixed the salary. Finding that the *Flast* test was not satisfied, the Court denied standing. The appropriation sought to be enjoined, the Court reasoned, arose not under the taxing and spending power but rather under article I, section 6, since the latter provision would give Congressmen the right to receive a salary even without a taxing and spending power. Furthermore, article I, section 6 was found not to be the necessary specific limitation. The Court pointed out that the *Flast* holding was carefully limited to establishment clause violations and that article I, section 6 “unlike the Establishment clause . . . does not secure fundamental rights in which all taxpayers and citizens have an equal, direct, and personal stake.”

Many lower court decisions regarding taxpayer standing deal with challenges to the constitutionality of the Vietnam War. In *Velvel v. Nixon* a professor of constitutional law sought a declaratory judgment that the Vietnam War was unconstitutional. The Court denied taxpayer standing, stating that the challenged expenditures for the war resulted from the congressional powers to raise and support armies and to provide and maintain the Navy, not from the taxing and spending power as required by *Flast*. In *Atlee v. Laird* the plaintiff contested the Vietnam conflict on the grounds that it violated article I, section 8, clause 11. This clause gives Congress the power to declare war, and

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55. In the period between the *Flast* decision and the *Richardson* and *Reservists* cases the Supreme Court did not directly apply the *Flast* rule to determine whether or not a taxpayer had standing. *Flast* has often been cited, however, to support certain general principles of standing. *See* O'Shea v. Littleton, 414 U.S. 488, 493 (1974) (standing involves the case or controversy requirement); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973) (there must be some threatened or actual injury); Socialist Labor Party v. Gilligan, 406 U.S. 583, 586-87 (1972) (plaintiff must have a personal stake in the outcome).

58. 313 F. Supp. at 1286.
plaintiff argued that a war was being carried on without a congressional declaration. Again, the Flast test was not met and taxpayer standing was denied, as the constitutional provision was deemed not to be a specific limitation on spending.

The foregoing cases illustrate that the Flast rule has been given a very narrow interpretation. Taxpayer standing has been granted only when a spending measure has been attacked as a violation of the establishment clause. Thus, the general rule of Frothingham, that taxpayer interest alone cannot create a sufficient injury for standing, remains, for the most part, unchanged.

The Setting for Richardson and Reservists

Prior to the 1974 Supreme Court decisions in United States v. Richardson and Schlesinger v. Reservists Committee to Stop the War, the law of standing had been changing rapidly. Taxpayer standing had been allowed for the first time in the 1968 Flast case, and although the rule in Flast had been narrowly construed, it had at least established the possibility of standing based solely on taxpayer status. In addition, the scope of judicially cognizable injuries had greatly increased in other areas of citizen standing, largely through cases which held that certain statutes demonstrated congressional intent to allow standing. The lowering of the barriers to standing lead the district court in Reservists to say, "In recent years the Supreme Court has greatly expanded the concept of standing and in this Circuit the concept has now been almost completely abandoned." Nonetheless, the Supreme Court opinions in Richardson and Reservists make it clear that a majority of the Court continue to view standing as a significant barrier to access to the federal courts.

United States v. Richardson

The Richardson case arose when the plaintiff, a citizen and taxpayer in Pennsylvania, wrote to the Treasury Department inquiring about the annual expenditures of the Central Intelligence Agency. He was informed that the Treasury Department did not receive information regarding the CIA because Congress, by passing the Central Intelligence Agency Act of 1949, had determined that such information should not be made public.

62. Standing was granted, however, on other grounds.
be made public. This act permits the transfer of funds between the CIA and other agencies "without regard to any provisions of law limiting or prohibiting transfers between appropriations." The only accounting for these funds is a certificate given by the director of the CIA which is not made available to the public. Thus, the only information that Richardson could obtain regarding the expenditures of the CIA was that some of the money the CIA spent had originally been appropriated to other agencies. Richardson brought suit complaining that the CIA act violated article I, section 9, clause 7 of the Constitution. This clause provides that "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."

The district court granted a motion for dismissal on the ground that the plaintiff lacked standing. The court of appeals reversed,68 deciding that Richardson had standing as a taxpayer under Flast. The court broadly interpreted the Flast rule, emphasizing the reasoning behind the rule rather than the limited factual situation which the Flast Court had indicated would fit within its holding. The first part of the Flast test, as noted above, requires that the taxpayer challenge a government appropriation under the taxing and spending power, as that basis would establish a sufficient nexus between his status and the challenged government activity. The court of appeals held, however, that whether or not a direct appropriation was challenged, the first part of the Flast test was met if there existed a nexus between the taxpayer plaintiff and the challenged government activity. The court said:

The Government argues that Flast must be limited to challenges to appropriations. That view attempts to confine the case to its facts without regard to its reasoning. Flast is concerned with adverseness and specificity of issues for 'standing,' not spending per se.69

The court decided that there was a sufficient nexus between the lack of reporting of expenditures and the plaintiff's status as a taxpayer to give the plaintiff a personal stake in the outcome and thus fulfill this interpretation of the first part of the Flast rule. The second part of the Flast rule was also found to be satisfied, as the court decided that the requirement that the government account to the public for expenditures was a specific limitation on the spending power.70

The court also used the first part of the Data Processing test to find a personal stake in the outcome for the plaintiff Richardson, relying on

67. Id. § 403f(a).
68. 465 F.2d 844 (3d Cir. 1972).
69. Id. at 852 (citation omitted).
70. Id. at 853-54.
that case for the principle that any injury in fact could provide the personal stake.\(^7\) Injury was found in the plaintiff’s inability to know how his tax money was being spent.

In a majority opinion by Chief Justice Burger, the Supreme Court reversed the court of appeals’s decision and denied standing. The Court emphasized the narrowness of the \textit{Flast} rule, reiterating the idea that the rule is satisfied only when the plaintiff challenges a spending measure and alleges violation of a specific constitutional limitation on the taxing and spending power.\(^7\) The Court decided that neither aspect of the test was met, as Richardson was challenging a statute regulating the CIA rather than a provision for spending. Furthermore, the Court found, the constitutional provision in question was designed not to limit spending, but simply to allow citizens to learn how money is being spent.

After a brief disposition of the particular claim of taxpayer standing, the opinion turned to a discussion of the type of injury that is necessary for standing in any situation. The Chief Justice concluded that a plaintiff never has standing unless he can show that “‘he has sustained or is immediately in danger of sustaining a direct injury. . . .’”\(^7\) Furthermore, this injury must be a “particular concrete injury”\(^7\) and not a “mere ‘interest in a problem’”\(^7\) or part of “‘generalized grievances about the conduct of government.’”\(^7\) Richardson’s complaint was deemed to be of the “general grievance” variety.\(^7\)

\begin{itemize}
\item \(71. \) \textit{Id.} at 853.
\item \(72. \) 418 U.S. 166, 173 (1974).
\item \(73. \) \textit{Id.} at 177-78, \textit{quoting} \textit{Ex parte Lévitt}, 302 U.S. 633, 634 (1937).
\item \(74. \) 418 U.S. at 177.
\item \(75. \) \textit{Id.}, \textit{quoting} Sierra Club v. Morton, 405 U.S. 727, 739 (1972).
\item \(76. \) 418 U.S. at 175, \textit{quoting} \textit{Flast} v. Cohen, 392 U.S. 83, 106 (1968).
\item \(77. \) In a concurring opinion Justice Powell reiterated much of the second part of the majority opinion, emphasizing the necessity of an injury for standing. Justice Powell stated that when no statute exists which grants a right of review, “a plaintiff must allege some particularized injury that sets him apart from the man on the street.” 418 U.S. at 194 (citation omitted). Justice Powell also argued that the \textit{Flast} test for standing should be abolished and that the Court should return to pre-\textit{Flast} criteria. \textit{Id.} at 184-85. He indicated that it is necessary to maintain the traditional standing barriers if the Court is to keep its proper function in government. \textit{Id.} at 188. He argued that to allow unlimited standing would give the Court general supervisory powers over Congress, which would be contrary to our democratic system. He further explained that increased standing would dilute judicial resources and cause the public to be less accepting of the Court in its proper role.

Justice Brennan, in one dissent applicable to both \textit{Richardson} and \textit{Reservists}, stated that the only consideration for standing should be whether or not the plaintiff has made a “good-faith allegation that ‘the challenged action has caused him injury in fact.’” Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 235 (1974), \textit{quoting} Barlow v. Collins, 397 U.S. 159, 167-68 (1970). Justice Brennan concluded that Richardson had alleged sufficient injury in the detriment to his right as a voter to receive information that would aid ballot decisions. Justice Brennan also indicated that he be-
Schlesinger v. Reservists Committee to Stop the War

In the Reservists case the plaintiffs sought a declaration that the incompatibility clause of the Constitution prevented members of Congress from also being officers of the armed forces reserves. This provision states that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” The plaintiffs claimed standing as reservists, as persons opposed to the Vietnam War, as taxpayers, and as citizens.

The district court denied standing on the first three of these grounds. In applying a test similar to that in Data Processing, the court rejected standing based on reservist status because it was unlikely that plaintiffs’ interests merely as reservists were designed to be protected by the incompatibility clause. The court felt that plaintiffs’ opposition to the war had no bearing on standing. Standing as taxpayers was similarly rejected because the constitutional provision in question was not a limitation on spending, and thus failed to meet the Flast test.

Nonetheless, through use of a test derived from Data Processing, the district court did allow standing based on each plaintiff’s interest as a citizen. The first step of this test requires an allegation of an injury in fact. The court pointed out that the injury which might result to plaintiffs from Congressmen being in the reserves was hypothetical. It was deemed to be a sufficient injury for standing, however, because the hypothetical nature of the injury “underlies the constitutional provision itself;” that is, the incompatibility clause addresses itself “to the potential for undue influence rather than to its realization.” Turning to the second part of the test, the court decided that the plaintiffs’ concerns as citizens were within the zone of interests to be protected by the incompatibility clause because the sole purpose of the clause was to protect citizens’ interests in having legislators free from conflicts of interest.

lieves the Flast rule is of value only when a taxpayer challenges violations of the establishment and free exercise clauses of the first amendment. Id. at 238.

Two other dissenting opinions were written in Richardson. Justice Douglas used a broad interpretation of the Flast rule and found taxpayer standing. 418 U.S. at 197. Justice Stewart, joined by Justice Marshall, developed a rule which allows standing when the plaintiff seeks performance of an affirmative duty owed to him by the government. Id. at 202. The duty to provide Richardson with a statement of expenditures was found to fit this rule.

78. U.S. Const. art. I, § 6, cl. 2.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id. at 841.
The district court offered several additional reasons why citizen standing should be granted. The plaintiffs were not seeking to "... air generalized grievances about the conduct of government," the court felt, but were seeking enforcement of a "precise self-operative provision of the Constitution." Moreover, the litigants were clearly adversaries. Finally, if the plaintiffs did not have standing then no one would, and the problem would go unchallenged.

The court of appeals affirmed the district court without writing an opinion, but the Supreme Court reversed, with Chief Justice Burger again writing for the majority. The Court addressed only two of the grounds originally asserted by the plaintiffs, citizen standing and taxpayer standing. The claim of taxpayer standing was summarily dismissed as the Court emphasized that the Flast rule applies only in situations in which spending is challenged.

The Court dealt most thoroughly with citizen standing. The opinion explained that the standing requirement is a blend of the constitutional necessity of a case or controversy and the more uncertain area of policy considerations. A case or controversy arises when a plaintiff has suffered an injury. Chief Justice Burger emphasized that no matter how much the standing barrier has been lowered by the expansion of the category of judicially cognizable injuries, the necessity of a concrete injury remains as a constitutional imperative. Moreover, the requirement of an injury is advantageous to the Court, according to the Chief Justice, as it allows the Court to base its decision on a specific factual situation and to avoid speculating as to future conditions. The requirement of an injury also enables the Court to frame relief no more broadly than necessary, thus comporting with a generally recognized principle of constitutional law.

The Court decided that the injury claimed by the plaintiffs as citizens (the possibility of an unfaithful discharge of duties by members of Congress) did not meet the requirement of a concrete injury. The harm to the plaintiffs was determined to be a speculative and abstract injury which concerned only the "generalized interest of all citizens in constitutional governance."

The majority opinion rejected all of the district court's arguments.

86. 323 F. Supp. at 840.
87. Id. at 841.
88. Id.
90. Id. at 228.
91. Id. at 218.
92. Id.
93. Id. at 220-21.
94. Id. at 217.
First, the Court pointed out the inapplicability of the *Data Processing* test. That test was said to apply only in suits brought under the Administrative Procedure Act. Further, the Court argued that even if that test were appropriate, the portion of it that requires an injury in fact was not met because there had not been a concrete injury. The Court agreed with the district court that the injury in question was hypothetical but held the simple fact that a hypothetical injury might be the type of harm contemplated by a constitutional provision to be an insufficient substitute for a concrete injury.

The fact that plaintiffs alleged a violation of a "precise and self-operative provision" did not create a judicially cognizable injury. As to the district court's argument that the parties were adverse, the Court stated that "motivation is not a substitute for the actual injury needed . . . ." Chief Justice Burger concluded that since no one had the requisite injury to confer standing, the problem was not a proper one for the judiciary and should be resolved by other branches of the government.

The Law of Standing in Light of Richardson and Reservists

The opinions in *Richardson* and *Reservists* make it clear that a majority of the Court favors a very narrow interpretation of the *Flast* rule. Apparently, standing as a taxpayer exists almost exclusively within the factual situation present in *Flast*. Other areas of citizen standing are more unsettled. The justices do seem to agree that the plaintiff must allege an injury or the possibility of a future injury; the type of injury required is variously described as concrete, direct, and palpable. The widespread confusion which remains despite these descriptions stems

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95. *Id.* at 227 n.16.
96. *Id.* at 224.
97. *Id.* at 225.
98. *Id.* at 226.
99. *Id.* at 227.

Four other opinions were written in *Reservists*. Justice Stewart concurred in the denial of standing because the plaintiffs had not suffered a "direct, palpable" injury. *Id.* at 228-29. The rule he developed in *Richardson* was not applicable. Justice Douglas dissented, as he would have granted the plaintiffs standing as both taxpayers and citizens. *Id.* at 229. Justice Douglas determined that the plaintiffs had standing as taxpayers because taxpayers should be able to enforce the incompatibility clause in order to prevent executive influence over the legislature. He found that they had standing as citizens because the constitutional provision in question was of such importance that each citizen had a personal stake in enforcing it. Justice Marshall, in his dissent, found sufficient injury for citizen standing. *Id.* at 238. He described the interest that had been injured as the interest in exercising the first amendment right to persuade Congressmen to end the war. Justice Brennan also dissented as he found sufficient injury to allow taxpayer standing.
chiefly from the impossibility of determining whether or not a particular injury fits one of these descriptions.

The problem of determining what injuries will be deemed concrete is particularly apparent when *Richardson* and *Reservists* are compared with *SCRAP*,

100 in which speculative harm to aesthetic and environmental interests was considered a sufficient injury in fact. In Justice Marshall's dissent in *Reservists* he expressed concern about the different results reached in these cases, stating that it is "a sad commentary on our priorities"

101 that the federal court will hear a claim involving interference with aesthetic appreciation of natural resources, but not one involving violation of a specific constitutional provision.

102 The majorities in *Richardson* and *Reservists*, by emphasizing the necessity of specific and tangible harm, direct that a largely speculative injury provides an insufficient basis for standing. This demand for concreteness suggests a break in the trend toward more relaxed standing requirements which had been indicated by such cases as *SCRAP* and *Data Processing*.

Since the majority in *Reservists* decided that there was not a sufficient injury for standing, there was no discussion of any requirements for standing beyond the necessity of an injury. However, it is clear that the principles developed in this area through earlier cases remain in effect. That is, even if the injury is deemed sufficiently concrete, standing will be denied unless the injury is to a legal right or to some interest that Congress has intended to protect.

### The Effect of the Present Standing Rules and a Possible Alternative

#### The Requirement of an Injury

What is the effect of a stringent "concreteness" requirement in the law of standing? The practical effect of deciding that plaintiffs' injuries were too remote and uncertain in *Reservists* was that no one was able to bring suit on the matter. As a result, Congressmen were allowed to continue unchallenged a practice which possibly violates a constitutional provision aimed at regulating their activities. In situations in which no one has standing, Justice Burger suggests alternative remedies, such as

101. 418 U.S. at 239.
102. *Id.* at 239-40.

A possible explanation of the inconsistency in these two cases is that in *SCRAP* the suit was brought under the Administrative Procedure Act. It may be argued that when a suit is brought under that statute, an injury need be less direct and palpable because through the statute, Congress has shown an intention that citizens should be able to challenge administrative action.
voting for different Congressmen, but this process would be a time-consuming and ineffective remedy to use in attempting to end a practice shared by many Congressmen. In short, denial of standing prevents anyone from determining whether or not Congressmen are performing their constitutional duties and results in a constitutional provision with little or no force.

Aside from this undesirable practical effect, a rule requiring a concrete injury is illogical and inappropriate when applied to a constitutional provision which, like the one at issue in Reservists, is designed to protect against injuries that are not necessarily concrete. Specifically, the incompatibility clause in Reservists is aimed at eliminating the possible ill effects on the legislature of conflicts of interest in Congressmen and protecting citizens from having to be concerned about such possible effects. Thus, if the plaintiffs in this case are concerned that Congressmen may fail to discharge their duties faithfully because of conflicts of interest, then the plaintiffs are suffering the injury against which the incompatibility clause is designed to protect. The injury is indeed speculative, but to deny standing on that ground is to disregard the meaning and purpose of the constitutional provision in question.

By the same reasoning, the result in SCRAP, allowing standing for a remote and speculative injury, seems sensible because the speculative injury was of the type contemplated by the statute alleged to be violated. The statute required an environmental impact report; thus, the purpose of the legislation was to protect against possible future harm to the environment. If the Court had denied standing on the ground that the plaintiff's only harm was concern over such possible ill effects on the environment, it would have defeated the goal of the statute.

Therefore, the question of whether an injury is sufficient for standing should not always stop with the determination of whether or not the injury is direct or palpable or concrete. When the harm claimed is more uncertain or intangible, it should be viewed in terms of the statute or constitutional provision alleged to be violated. The injury should be deemed sufficient for standing, even though speculative or indirect or intangible, if the statute or constitutional provision in question anticipates such an injury and seeks to protect against it.

104. See notes 13-14 & accompanying text supra.
105. A similar idea was posited by the district court in Reservists. See text accompanying note 82 supra. The plaintiffs' injury was held to be sufficient for standing despite the fact that any harm was hypothetical because the court found that the plaintiffs' complaint embodied precisely the type of harm designed to be prevented by the constitutional provision in question. The provision was designed to prevent a conflict of interests and to free citizens from concern about the possible effects of such a conflict, whether or not the conflict would necessarily result in more tangible harm.
In deciding whether a nonconcrete injury will meet such a test, a court should be required to examine carefully the statute or constitutional provision in question to determine the legislators' or framers' intent as to the type of injury anticipated. The court should proceed cautiously, as extension of standing to other than concrete injuries should be limited to interests that authors of the provisions actually intended to protect. This procedure may be somewhat cumbersome, but it seems preferable to ignoring such injuries and letting the rights involved to go unprotected.

In sum, two types of injury should satisfy the case or controversy requirement: injuries that are tangible and direct or concrete, and injuries that, even if not concrete, are of the type contemplated by a statute or constitutional provision alleged to be violated.

Necessity of Standing Rules
Beyond an Injury Requirement

If the requirement of an injury is met, should anything more be necessary before standing is allowed? Even without a standing requirement beyond the necessity of an injury, many cases that are currently rejected on additional standing grounds could be rejected for reasons not concerned with standing. For example, if the Court in Richardson had found sufficient injury for standing, and had ended the standing inquiry at that point, the case might still have been dropped on the ground that it raised a political question. There are cases, however, especially in the area of injury to business interests, in which the plaintiff has been injured sufficiently to satisfy the case or controversy requirement and no other factors of justiciability would exclude the suit, yet standing should be denied because the plaintiff is an improper party. Suppose, for example, a statute forbids the showing of pornographic movies. Plaintiff owns a theater and shows only family movies. A new theater opens two blocks away and shows pornographic movies in violation of the statute. Plaintiff loses business because everyone in town goes to the new theater. In fact, plaintiff himself goes to the new show and enjoys it without any moral objections. Plaintiff should not be a proper party to bring suit against the new theater because one who is injured should not be able to bring suit when his only injury is to an interest not intended to be protected by the violated statute. Although plaintiff has suffered a concrete economic injury, the statute is designed to protect against what might be termed a moral injury. It would seem especially inappropriate to allow plaintiff to sue when

106. Justice Brennan has argued that whether or not there has been a good faith allegation of injury should be the only consideration for standing. He has asserted that other aspects of justiciability would serve to screen objectionable cases in which a plaintiff has alleged an injury. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 235-36 (1974).
no one is morally offended by the new theater and the people whom
the statute was designed to protect enjoy its violation.

This anomalous situation will not arise if the plaintiff has suffered
a nonconcrete injury which is nonetheless anticipated by the provision in
question. If the procedure suggested above is followed, this type of
injury would provide standing only if, after careful analysis, it were
determined that the legislators or framers intended to protect against it.
Thus, only a concrete injury, as in the example above, could meet the
case or controversy requirement and yet perhaps be inappropriate as a
basis for standing because it is not within the interests to be protected by
the violated provision.

The problem of the concrete injury which nonetheless should not
provide standing can be remedied by use of the second part of the Data
Processing standing test. This portion requires that the interest sought
to be protected be arguably within the zone of interests to be protected
or regulated by the statute or constitutional provision that is violated.
This rule would prevent the plaintiff in the hypothetical from suing
because an antipornography statute would not generally be designed to
protect or regulate a competitive or economic interest.

This "arguably within the zone of interests" test must be distin-
guished from the suggested test for a sufficient nonconcrete injury. The
suggested test, it will be recalled, asks whether or not the injury is
anticipated by the statute or constitutional provision. The difference
between the two tests is that the "arguably within the zone of interests"
requirement should be interpreted broadly, with an emphasis on the
word "arguably." Once the plaintiff has alleged a concrete injury he
need not show conclusively that it was intended to be protected against
by the violated statute or provision, rather he need only make a plausible
argument on the point. In contrast, this showing of intent should be
required before a nonconcrete injury is considered to be anticipated by a
provision. The requirement of only a plausible argument concerning
intent is appropriate in the case of a concrete injury because the plaintiff
must have suffered an obvious injury even before this consideration, and
a court should be reluctant to turn away an injured plaintiff. Such a
plaintiff should be denied standing only if the legislator or constitutional
framer clearly did not intend to protect the interest that is claimed to
have been harmed. On the other hand, when the plaintiff has suffered a
nonconcrete injury, the decision is merely whether an intangible and

107. 397 U.S. at 153. The Court in Reservists stated that the Data Processing test
is applicable only in suits under the Administrative Procedure Act and that its use neces-
sitates a concrete injury. See text accompanying notes 95-96 supra. Thus, the standing
guidelines suggested by the author do not reflect an attempt to state a rule approved
of by the Court. They simply draw on one aspect of a rule that the Court formulated
but proceeded to use in a limited area.
indirect effect on the plaintiff should be considered an injury at all. The latter determination requires greater care in order to select proper plaintiffs, and, thus, a much closer reading of the provision is appropriate.

Since effective standing rules should contain the "arguably within the zone of interests" test and should include both types of injuries mentioned above, proper criteria for standing should include the following: Plaintiff must allege either (1) a concrete injury that is arguably within the zone of interests to be protected or regulated by the statute or constitutional provision alleged to be violated, or (2) an injury of the type contemplated by the statute or constitutional provision alleged to be violated.

The suggested rule would have allowed standing in *Reservists*. As indicated earlier, the injury to the plaintiff, although it was not concrete, was of the type anticipated by the incompatibility clause. Thus, the plaintiff in *Reservists* would meet the second alternative.

The first alternative in the suggested rule would allow standing in the usual case. For example, if a woman sues, complaining that she is being denied a job solely because of her sex in violation of the equal protection clause of the fourteenth amendment, she would have standing. She is suffering a concrete economic injury, and the interest in being free from discrimination in hiring is arguably within the zone of interests to be protected by the equal protection clause.

The rule for determining standing need not be any different when the plaintiff is asserting standing based on his interest as a taxpayer. The fact that the plaintiff is a taxpayer is simply a factor in determining whether or not the statute or constitutional provision is designed to protect against the injury that plaintiff alleges. For example, the constitutional provision relied on in *Richardson*, in its requirement that government expenditures be reported, is directed more toward protecting the interests of taxpayers than toward securing the interests of other citizens. The purposes for which the provision was drafted probably included letting taxpayers know how their money is spent and preventing unauthorized secret expenditures. Thus, a taxpayer who is upset because he does not know how his money is being spent has suffered an injury anticipated by the provision and sufficient for standing, even if it is not concrete.

**Injury to the Plaintiff**

The rules for standing suggested above should also require that there be an injury to the plaintiff, as opposed to an injury to anyone.109

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108. 418 U.S. at 198-201 (Douglas, J., dissenting).
109. Of course, a statute could provide that a sufficient injury to the plaintiff is his concern for others. See text accompanying note 16 *supra*. 
Filling this criterion is usually deemed necessary for satisfaction of the case or controversy requirement. In order to insure an adversary presentation of the issues, it is necessary to have a plaintiff who is motivated by an injury or a threat of injury to himself. Some commentators, including Professor Raoul Berger, have argued that the case or controversy requirement does not include the idea of standing at all and that thus there need not be an injury to the plaintiff for standing. By analyzing the state of American and English law at the time that the Constitution was written, Professor Berger concluded that courts have been incorrect in including standing in the case or controversy requirement. He determined that English practice in the eighteenth century encouraged suits by "strangers to attack unauthorized action." Berger indicated that there may be policy reasons for requiring a personal interest on the part of the plaintiff but that such interest should not be thought of as mandated by the Constitution. Berger admitted, however, that his evidence was scanty. At any rate, a majority of the Supreme Court today views injury in fact to the plaintiff as a constitutional prerequisite for standing.

Even if the requirement of an injury to the plaintiff were not mandated by the constitution, there are policy considerations which support such a rule. This requirement serves the function of screening certain cases from the federal court. In his concurring opinion in Richardson, Justice Powell offered the customary reasons for the importance of such a screening device: the need to conserve judicial resources and the necessity of preventing expansion of the Court's authority in a way that would upset the balance of powers among the three branches of government. It does seem clear that the courts should not be a forum for anyone who disputes any government practice for any reason. Since presumably some cases do have to be rejected, a requirement that the plaintiff himself must have suffered an injury before he can sue is logical because such a rule would generally work to reject less deserving plaintiffs in favor of more deserving ones. Also, as long as someone is hurt by the challenged practice, a suit can be brought as soon as a willing injured plaintiff is located. Moreover, as Professor Kenneth Davis points out, drawing the line between a plaintiff with an injury which might be very slight and a plaintiff with no injury to himself is distinguishing "the difference between something and nothing [and] [t]hat is a natural place to draw the line . . . ."

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112. Id. at 827 (emphasis omitted).
113. Id.
114. 418 U.S. at 188-92.
Thus, any standing rules should provide for the same result reached in *Sierra Club.*116 A plaintiff cannot sue on behalf of a segment of the public that is threatened with harm unless the plaintiff belongs to that segment.

**Conclusion**

The current standing rules seem inadequate because they often preclude challenges to violations of statutes and constitutional provisions which are designed to protect citizens from intangible, but real, injuries. This problem could be avoided if standing criteria for all situations were developed by applying the reasoning in *Data Processing* and the district court decision in *Reservists.* Guided by these opinions and a general concern for equitable administration of the law, the following rule for standing might be developed. Standing exists when the plaintiff alleges an injury to himself that is either: (1) a concrete injury that is arguably within the zone of interests to be protected or regulated by the statute or constitutional provision alleged to be violated, or (2) an injury of the type contemplated by the provision in question. This rule would prevent suits initiated by those whom the authors of statutes and constitutional provisions did not anticipate, yet it would allow all the suits necessary to give such provisions their proper force.

*Nicholas L. Lucich, Jr.*

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* Member, Third Year Class.