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Standing and the Propriety of Judicial Intervention: Reviving a Traditional Approach

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STANDING AND THE PROPRIETY OF JUDICIAL INTERVENTION: REVIVING A TRADITIONAL APPROACH?

I. Introduction

Within the context of particular cases, the federal judiciary has been increasingly willing to address broad social policy issues. This trend has encouraged public resort to the courts as a forum for settling grievances arising from conflicting individual or group rights, rather than to the more traditional electoral and legislative processes to formulate social policy.[1] Supporters of this development point approvingly to the increased opportunity it provides for direct input by individuals or groups into the democratic process. Yet critics question the wisdom of this increasingly frequent judicial intrusion into areas of policy making traditionally reserved to legislatures and other policy-making bodies.[2] The trend of judicial policy-making represents a distinct departure from the courts' historical respect for the co-equal status of the three branches of government and for the role the executive and the legislature play in formulating public policy.

From a more practical point of view, this trend has created great congestion in the courts, particularly in the United States Supreme Court.[3] This congestion has aroused fears of declining quality of federal opinions due to time pressures. In turn, overcrowded dockets have produced a seeming lack of conformity in federal law due to the Supreme Court's inability to adequately supervise the circuits.[4] Proposals advanced to counteract these developments range from a National Court of Appeals,[5] with intermediate jurisdiction between the circuits and the Supreme Court, to the abolition of diversity jurisdiction.[6]

However, none of these suggestions addresses the underlying question of whether the federal courts should continue to intervene in social policy. Continuation of social engineering by the courts creates a risk of government by injunc-

1 Archibald Cox has articulated the basic public confidence in the Court, stating that:

> [M]odern government is simply too large and too remote, and too few issues are fought in elections, for a citizen to feel much more sense of participation in the legislative process than the judicial.

Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes,* 55 N.C.L. Rev. 1, 115 (1976).

2 *See* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,* 116 U. Pa. L. Rev. 1033 (1961); Kurland, *Toward a Political Supreme Court,* 37 U. Chi. L. Rev. 47 (1969).

3 In 1951, for example, the number of cases filed in the Court was 1,234. By the 1971 Term, it had tripled to 3,643. More recent figures reveal 3,741 filings for the 1972 Term and 4,186 in the 1973 Term. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do,* 60 Cornell L. Rev. 335, 337 (1975). One cause for this increase is that there are more people and more complex forms of regulation protecting interests that were less valued earlier, such as civil rights and the environment. Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity,* 64 Calif. L. Rev. 943, 952 (1976).

4 Kurland, *supra* note 2, at 59.

5 The National Court of Appeals is a proposal growing out of the 1972 Report of the Study Group on the Caseload of the Supreme Court by the Federal Judicial Center. This report (commonly referred to as "The Freund Report") was commissioned by Chief Justice Burger to analyze the workload of the Court and to make recommendations for its redistribution. As one such recommendation, the National Court of Appeals would operate on a national level to screen cases on appeal from the circuits before they are considered by the Supreme Court. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change,* 59 Cornell L. Rev. 617, 626 (1974).

6 Griswold, *supra* note 3, at 337-46.

tion, which would undermine the integrity of both the electoral process and legislative compromise as means to resolve social policy disputes. Courts, which are not as subject to control by the electorate as is the legislature, substitute their own views of desirable social policies for those which have been formulated by public debate and legislation.

In contrast to the proposed more radical solutions, the traditional doctrine of standing comes closest to specifically addressing the problem of improper use of the courts to air generalized grievances, which may more appropriately be resolved by another governmental branch. The rules of standing are not only part of the threshold inquiry into the justiciability of a particular case[7] but include as well aspects of the traditional self-restraint exercised by the federal courts when faced with plaintiffs who raise social policy issues. Often, standing rules have been used successfully as a screening device to eliminate cases which the court feels present issues inappropriate for judicial resolution. Such issues may include disputes concerning legislative funding decisions, administrative action by an executive agency, alteration of de facto housing patterns by court action, or the right to receive government benefits.

The initial inquiry concerning standing addresses not only the question of whether the court should hear the case, but also whether this particular plaintiff is the party that may most properly raise the constitutional issue or challenge the agency action. When the plaintiff's standing is in issue, the court must make a careful inquiry into the his status, the nature of the injury he alleges, and the type of issues he presents for the court's determination. Broadly stated, a litigant will have standing to assert a right or enjoin a governmental action if he can show that the right or the injury is personal or, at the very least, that he has a personal interest which will be affected by the outcome of the litigation.

Since many individuals raising social policy issues in the federal courts have only a "public welfare" interest in the determination of these issues, the standing requirement offers a convenient device to aid a court in avoiding judicial resolution of essentially non-judicial matters of social policy formulation. Such "ideological"[8] plaintiffs were granted standing most frequently during the Warren Court's activist years. The resulting proliferation of public actions and the broadening judicial incursions into policy-making has revived fears of judicial usurpation of the legislature's role as a policy-maker in a democratic society.[9] Inappropriate judicial policy decisions not only raise serious separation of powers questions. From a practical standpoint, they disproportionately divert the court's attention and energy from pressing criminal, anti-trust or other private civil litigation to cases raising social policy issues.

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7 Standing is thus an issue which must be determined before a court will permit the plaintiff to proceed to the merits of his case. Warth v. Seldin, 422 U.S. 490, 518 (1975).

8 The source of this term appears to be the distinction drawn by the legal philosopher Hohfeld who distinguished this group from the usual plaintiff who invokes the court process to vindicate or enforce a right or a power he personally holds. Jaffe, *supra* note 2, at 1033.

9 Justice Moore, criticizing the interference of the majority in public policy by upholding one competing social value (housing) over another (use of land for a wild life preserve) feared the "establishment of a principle that the judgment and discretion exercised by the executive and legislative of government can be examined . . . (or even overturned) by any citizen, aided by the judiciary. . . ." Evans v. Lynn, 537 F.2d 571, 583 (2d Cir. 1975) (Moore, J., dissenting).

Partly in reaction to this increasing intervention, the Supreme Court has recently scrutinized carefully the standing of the plaintiff bringing the action, and has imposed a more stringent application of standing requirements than that of its predecessor. Certainly, holding a plaintiff as the improper party to raise the issue, and denying access to the courts to litigate the matter on that basis, is one effective method of limiting court influence on public policy.

However, questions remain concerning the feasibility of further narrowing the standing doctrine as a means to control judicial policy-making. To address these questions, one must undertake an examination of both the current status of the doctrine, in the context of its historical background, and the policy considerations underlying standing. Some predictions concerning future developments may be made based upon this analysis. Finally, the wisdom and effectiveness of a stricter standing doctrine must be measured against its probable impact upon the public plaintiff seeking to invoke a federal court's jurisdiction.

II. Standing: Its Expansion from *Frothingham* to *Flast*

A. *Standing and the Public Action*

Standing issues frequently arise in the context of public actions.[10] Private individuals may sue on their own and on the public's behalf as "private attorney generals,"[11] challenging the acts of an executive agency alleged to be outside the scope of its legal authority. Moreover, citizens may sue to challenge the constitutionality of a federal or state law. Both types of public actions may raise a *jus tertii*[12] standing problem since the nature of the action requires these citizen-plaintiffs to assert the rights of third persons not parties to the suit when alleging injury.

Traditionally, federal courts focus on two separate aspects when considering standing issues. First, standing is an aspect of the Article III "case or controversy" requirement and, thus, derives in part from the Constitution.[13] Secondly, standing is an administrative rule formulated by the court to prevent undue judicial intervention in decisions by other governmental branches.[14]

To establish the existence of an Article III case or controversy, a public plaintiff must allege an injury to himself, or at least a personal stake in the action's outcome. In *Baker v. Carr*[15] the Supreme Court emphasized that this requirement will guarantee sharpened issues necessary for an adversarial proceeding. The adverseness of self-interested parties insures that the issues will be framed with sufficient specificity and pursued with the requisite vigor to establish an Article III case or controversy. A court, when faced with carefully framed

10 They also arise in disputes between private litigants when the defendant alleges that the plaintiff's injury is not a right or privilege recognized by law. *See* Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968).

11 First mentioned in FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1941), this term refers to a private plaintiff attempting to enforce the limitations Congress has placed on an agency or other institution. *Accord,* Data Processors Serv. v. Camp, 397 U.S. 149 (1970).

12 Literally, the right of a third party. BLACK'S LAW DICTIONARY 1001 (4th ed. 1951).

13 422 U.S. at 500.

14 Ashwander v. TVA, 297 U.S. 288, 345-48 (1939) (Brandeis, J., concurring).

15 369 U.S. 186, 204 (1962).

issues, supported by specific facts, may then fashion a remedy appropriate only to the particular dispute before it, and avoid overly broad solutions to some real or imagined social evil.

This insistence upon the Article III requirement has defeated public actions in the past. For example, in *Frothingham v. Mellan,*[16] the Court dismissed a taxpayer suit challenging the constitutionality of Congress' appropriation of funds to administer a maternal health program in the states. To meet the standing test, the Court required the taxpayer to allege not only the invalidity of the statute, but also a direct injury, or the threat of a direct injury, to himself. The mere fact that his increased tax burden causes him to suffer "in some way with people generally" was an injury insufficient to meet the standing requirement of a particularized injury.[17]

To meet this requirement, a plaintiff must specifically establish the harm done to his personal interests by a private or governmental action. A vague allegation of some general injury to these same interests is insufficient. For example, in an action challenging a municipality's refusal to issue a building permit for a low-cost housing project, a plaintiff may allege that as a result of this refusal he has been unable to locate housing suitable to his needs and income, and incurred greater expense and inconvenience when forced to obtain housing elsewhere. By contrast, a plaintiff who only alleges that a community's general opposition to low-cost housing has deprived him of the opportunity to live in the area, without additional allegations of personal economic or other harm, suffers in no more particular way than others whose income limits their available housing choices. This type of general harm to a member of an identifiable social group is the result of fundamental social attitudes better altered by public opinion and legislative action than court-ordered social engineering. The former situation presents not only an on-going pattern of discrimination but also a specific instance of individual harm. It may be appropriately redressed by court action in the form of an award of damages, an invalidation of a discriminatory zoning ordinance, or reversal of a zoning decision.

The basic standing tests formulated by *Frothingham* evidence two major concerns. First is the Court's concern that by sanctioning taxpayer suits a flood of litigation would ensue.[18] More significant is the Court's fear that permitting such suits, without the prerequisite of a direct injury to the complaining taxpayer as a result of Congress' appropriation, would create unwarranted judicial restraint on a separate, equal branch of the government.

The *Frothingham* standing rule has served for nearly forty years as an absolute bar to taxpayer suits. Its "direct injury" test was also applied in other types of public suits, and generally defeated the plaintiff's standing claim.[19]

16 262 U.S. 447 (1923).
17 *Id.* at 488.
18 *Id.* at 487.
19 The "direct injury" test of *Frothingham* has stubbornly survived the more liberal constructions of the degree of interest an individual litigant must have in a public action. Although the Warren Court found an allegation of an "injury in fact" sufficient for a case-or-controversy, Barlow v. Collins, 397 U.S. 159 (1970), the Burger Court by its decision in *Warth* has revitalized a form of the direct injury test. The plaintiff must now allege that he has personally suffered injury due to the defendant's acts. In part this stricter approach is due to the present Court's more conservative view on the wisdom of judicial policy making.

However, the Warren Court radically departed from the *Frothingham* rule by formulating the more liberal "nexus" test to be applied in taxpayer suits. First articulated in *Flast v. Cohen,*[20] the Court focused on status, rather than injury.

Flast involved a taxpayer suit challenging the constitutionality of Congress' appropriation of funds to provide textbooks for religious schools. Concluding that an emphasis on the nature of the plaintiff's injury was improper to resolve a standing controversy because it addressed the merits of the action, the Court held that a determination of the plaintiff's standing depends upon the nature of the plaintiff himself.

> When standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.[21]

Thus, a new test for standing was fashioned under *Flast*: the plaintiff must show a nexus between his status as a taxpayer and the specific constitutional prohibition involved.[22] If the taxpayer can demonstrate this nexus, then he has alleged a sufficient "personal stake in the outcome of the controversy" to sharpen the issues into the necessary adverseness.[23] However, the court may still decline to hear the case on the merits upon grounds unrelated to standing.[24]

The most noteworthy aspect of *Flast* is its conclusion that standing is not a purely constitutional requirement.[25] Of course the basis of the standing requirement is rooted in the Article III limitation that the federal courts decide issues only in the context of an actual case or controversy.[26] However, the language does not define the precise nature of a case or controversy. The rules of standing represent the judicial response to this imprecision and constitute part of the threshold inquiry into a case. Therefore, establishment of a personal stake by the plaintiff is a court-imposed condition to the existence of a case or controversy. Indeed, even if the plaintiff satisfies this condition, the court may still rule that its historical reticence in treating many social issues warrants dismissal of the case. Standing, thus, includes the additional component of judicial discretion.

The *Flast* Court, therefore, defined standing as a blend of Article III limitations, and a policy of judicial self-governance, which prevent courts from intruding into areas reserved to other branches of government. According to the

20 392 U.S. 83 (1962).

21 *Id.* at 99-100.

22 The taxpayer-plaintiffs in *Flast* were challenging the congressional appropriation of funds to provide textbooks for religious schools on the grounds that it violated the establishment and free exercise clauses of the first amendment to the United States Constitution. 492 U.S. at 86.

23 392 U.S. at 102. The *Flast* opinion left very unclear, however, the degree of nexus necessary to establish a personal stake. In subsequent opinions the nexus was established by as little as the imposition of a $1.50 poll tax (Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)), or a $5.00 fine plus costs (McGowan v. Maryland, 366 U.S. 420 (1961)).

> The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.

Davis, *Standing: Taxpayers & Others,* 35 U. CHI. L. REV. 601, 613 (1972).

24 For example, a court may dismiss a case because it presents a political question or a moot issue.

25 The decision in *Frothingham* did not specifically address the issue of whether standing was a constitutional requirement. Until the decision in *Flast,* this question had remained unresolved.

26 U.S. CONST. art. III, § 9, cl. 2.

Court, standing is an aspect of justiciability which is "not a legal concept with a fixed meaning susceptible of scientific definition. Its utilization is the resultant of many subtle pressures."[27]

Resolution of a standing question after *Flast* becomes a delicate balancing test between the Court's desire to consider an important social issue and its respect for the role of other government branches in influencing the decision to be reached. The predominant attitude concerning judicial policy-making among the Court's members often may tip the balance in favor of one of these two considerations.[28]

The need for judicial self-restraint assumes greater importance when federal courts are faced with the possible invalidation of actions of Congress, federal agencies or state legislatures. Judicial hesitancy at undue interference with actions of the legislature or the executive branch and its agencies particularly exists in cases where the relevant statute does not expressly grant standing.[29] For example, an individual is not expressly authorized by the Internal Revenue Code of 1954 to challenge an IRS grant of tax-exempt status to a charitable institution by disputing its fulfillment of the statutory "charitable purpose" requirement. Thus, the aggrieved plaintiff must attempt to challenge the executive agency's action by invoking § 10, the general standing provision of the Administrative Procedure Act (APA).[30] Further problems arise in those situations when the plaintiff attempts to challenge as unconstitutional the operation of the statute upon him.

Initially, the Supreme Court approached these problems by liberally construing the pertinent language of § 10 of the APA. The Court found a congressional intent to grant standing to persons adversely affected by an agency action. However, it limited this construction by developing a twofold test in the companion cases of *Data Processors Service v. Camp* and *Barlow v. Collins*.[31]

27 392 U.S. at 100.

28 For example, Justice Douglas has frequently urged the Court not to hesitate to reach great issues. His activist philosophy envisions the Court as an aggressive overseer of Congress and the Executive whose actions may threaten individual rights. 392 U.S. at, 109-12 (Douglas, J., concurring).

29 It is also mentioned in those cases where Congress has specifically granted standing by statute to the "public" to challenge the legitimacy of an agency action under the authority of that statute. In such instances, courts have carefully examined the legislative intent of the express grant of standing to determine how broad a category of plaintiffs was envisioned. *See* Data Processing Serv. v. Camp, 397 U.S. 159 (1970); Chicago v. Atchison, T. & S. F. Ry. Co., 357 U.S. 77 (1958); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1941); Local 194, Retail v. Standard Brands, Inc., 540 F.2d 864 (7th Cir. 1976).

30 Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970) (hereinafter cited as the APA), states: "A person suffering legal wrong because of agency action or is adversely affected or aggrieved within the meaning of a relevant statute is entitled to judicial review thereof." For cases construing this provision, *see* Simon v. Eastern Ky. Welfare Rights Organization, 96 S. Ct. 1917 (1976); Data Processing Serv. v. Camp, 397 U.S. 150 (1970); Evans v. Lynn, 537 F.2d 571 (2d Cir. 1975); Scanwell Laboratories, Inc. v. Thomas, 424 F.2d 859 (D.C. Cir. 1970).

31 397 U.S. 159 (1970). These tests are developed more fully in *Data Processing*. There, the Court found that the plaintiff's allegation of economic harm created by the competition of national banks in providing data processing services was a sufficient claim of "injury in fact." The question remained as to whether the economic interest was also within the zone of interests protected by the Bank Service Corporation Act. The Act's purpose, according to the Court, was essentially to prevent bank involvement in non-bank activity. Any interest, such as the plaintiff's, which fairly fell within the public interest in limiting the dominance of large financial institutions in non-banking activities.

32 *Id.* at 154.

First, the plaintiff must allege an injury in fact, in order to concretely establish the issues and satisfy the case or controversy requirement. Secondly, the court must consider whether the specific interest to which the plaintiff alleges injury is within "zone of interests" protected by the particular statute. The zone of interests can be quite broad; it may include "aesthetic, conservational, and recreational as well as economic values," within the scope of a single statute.[32] If the plaintiff's interest arguably falls within this zone of interests, then the Court will permit him to pursue the substantive elements of his attack upon the particular agency action.

Since the zone of interests is a non-constitutional test applied by judicial discretion in appropriate cases,[33] it has been used both to recognize and deny the public plaintiff's standing claim. Depending upon a court's attitude towards judicial intervention to achieve a particular social result, a narrow or broad delineation of the relevant zone of interest can provide a receptive court an opportunity for social engineering. Primarily, definition of the appropriate zone of interests depends on the court's view of the magnitude of the issues involved, the injury alleged, and the wisdom of judicial intervention.[34] It may further depend upon whether the plaintiff also asserts injury to the interest of third persons who are not parties to the action. If the court permits the plaintiff to assert *jus tertii,* it must also inquire whether these third parties' interests also fall within the zone protected by the relevant statute.

B. *Assertion of Third-Party Rights*

Frequently plaintiffs who challenge a statute's validity will argue that its application injures the constitutional or legislatively protected rights of third persons not joined as plaintiffs in the action. Generally, these ideological plaintiffs[35] have been denied standing. This denial is based upon a judicial belief that the assertion of rights not personal to the plaintiff prevents the framing of issues with sufficient adverseness. Thus, from the threshold of his case the plaintiff fails to establish the personal stake needed for an Article III case or controversy.

Exceptions to this broad rule, however, have developed in the area of public actions. The Court has isolated four relevant factors by examining the factual situations underlying the assertion of third-party rights. If these factors are present in a particular case, the plaintiff will be permitted to raise third-party rights.

A court must first examine the interest of the plaintiff in the outcome of the

33 96 S. Ct. at 1925 n. 19.

34 The zone of interests test as applied to the facts in Barlow v. Collins, 397 U.S. 159, actually overrode the broad authority of the Secretary of Agriculture to promulgate regulations under the Tenant Farmers Act. In a challenge by tenant farmers to a U.S. Department of Agriculture regulation permitting the assignment of cash subsidies to landlords, the Court found that other purposive language in the Act created a broad zone of interests. It thus imposed a special duty upon the Secretary of Agriculture to "provide adequate safeguards . . . for the benefit of tenants." The tenant need show only the lack or loss of benefits by the agency's action to fall within the protected zone of interests. *Id.* at 164-65.

35 *See* note 8, *supra.*

controversy. Usually some personal stake is necessary, such as a potential liability for damages[36] or a risk of criminal prosecution, unless the challenged state or federal action is invalidated. Secondly, a court considers the nature of the right asserted. Generally, the more fundamental the third-party right asserted, the more likely it is that the court will rule that the plaintiff has standing. For example, in *Singleton v. Wulff*,[37] a group of Missouri doctors alleged that the Missouri statute denying Medicaid payments to indigent women seeking non-medically indicated abortions abridged the rights of these women. Although the doctors themselves did not risk personal liability under the statute, the Court permitted them to assert their patients' rights.

The third factor to be considered is the relationship between the plaintiff and the third party. It appears that an ongoing relationship involving some substantial or intimate association with the persons whose rights are being asserted is required. This can include organizations asserting members' rights, doctors asserting rights of patients, or even individual public advocates of the rights of the third parties involved.[38]

A last consideration is the practicality or possibility for the third to assert his own rights. An example of such impracticality or impossibility involves challenges to the constitutionality of anti-birth control statutes which criminalize the distribution, but not the use of, contraceptive devices.[39] These statutes allegedly interfere with a woman's privacy rights by limiting her access to such information. However, the holder of these infringed rights has no opportunity to challenge the statute's constitutionality, for a mere user of contraceptives is not liable for prosecution under the statute. Only the person who makes the contraceptives available is in a position to raise as part of his own defense the issue of these third-party privacy rights.

Despite the wide range of cases in which third party rights are asserted, the Supreme Court has required that all four factors must be present in order to meet the standing requirement.[40] It is clear, however, that particular emphasis is placed upon the first factor mentioned, namely, the presence of some allegation of a personal stake however attenuated. This attitude reflects the lingering judicial suspicion of actions brought by plaintiffs to vindicate the rights of absent third parties. The personal stake requirement at least insures a measure of

36 In Barrows v. Jackson, 346 U.S. 249 (1953), where the plaintiff was allowed to assert the discriminatory effect of a racially restrictive covenant on future black purchasers of her property, the plaintiff was threatened with liability for damages for breaching the contract.

37 96 S. Ct. 2868 (1976).

38 *See* Roe v. Wade, 410 U.S. 113 (1973) (privacy rights of women seeking abortions); Eisenstadt v. Baird, 405 U.S. 438 (1972) (privacy of couples attempting to obtain birth-control information); NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of association rights of members asserted by organization); Local 194, Retail v. Standard Brands, Inc., 540 F.2d 864 (7th Cir. 1976) (union asserting its members civil rights under 42 U.S.C. §§ 1983-1984 (1970)).

39 This type of statute was invalidated by the Supreme Court in Eisenstadt v. Baird, 405 U.S. 438 (1972). The defendant, an advocate of increasing the availability of contraceptive information, was prosecuted under a Massachusetts statute forbidding distribution of such information by anyone other than a licensed physician or pharmacist. As part of his defense, he raised the issue of the interference of an individual's privacy rights by the operation of the statute.

40 Justice Powell, dissenting in *Singleton*, particularly notes that only the joint presence of these factors outweighs the policies behind the general disapproval of *jus tertii* actions. 96 S. Ct. at 2877 (Powell, J., dissenting).

selfish interest on the plaintiff's part even in the most altruistic of actions. It guarantees that the plaintiff will pursue the action with the vigor essential to sharpen issues into an Article III case or controversy.

III. The Burger Court: A Stricter Standing Doctrine?

Despite the liberalization of standing tests in modern decisions, the Supreme Court has remained conscious of the role standing has played in limiting judicial consideration of certain social policy issues. The judicial activist philosophy of the Warren Court frequently minimized the dangers of too much Court-interference in public policy. But the present Court appears to be carefully scrutinizing each plaintiff's status in cases presenting a standing issue. With certain notable exceptions, recent decisions have adopted a stricter approach to standing questions. This attitude is especially prevalent when the Court fears that a decision on the issues raised by the plaintiff would constitute an undue intrusion upon the policy-making province of other governmental branches.

In *Warth v. Seldin,*[41] a sharply divided Court refused to grant standing to a group of minority plaintiffs who claimed that the zoning ordinances of the defendant-town prevented them from finding suitable housing within their means. The majority opinion emphasized that standing, in addition to determining whether a case or controversy exists, also operates as a rule of judicial self-restraint. Standing may take into account the respect which the supreme judicial body has for the role of other governmental branches in resolving policy controversies. The *Warth* Court noted:

> The rules of standing, whether as aspects of the Article III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts are threshold determinants of the propriety of judicial intervention.[42]

According to this view, the factors affecting the question of propriety depend primarily upon the plaintiff's allegation that his important personal stake in the dispute warrants his invocation of the court's jurisdiction. The plaintiff must show a "demonstrable, particularized injury" to himself, even though he may represent a class which has been generally injured by the defendant's action.[43] Failure to allege a personal injury, in addition to an injury to third persons, will warrant dismissal of the action for lack of standing.[44]

In contrast to the *Flast* status test enunciated earlier by the Supreme Court, the Court today appears more willing to inquire into the injury alleged, despite the fact that this implies some examination of the merits at a preliminary stage

41 422 U.S. 490.
42 *Id.* at 518.
43 *Id.* at 508. The plaintiffs in *Warth* brought their action under Congress' broad grant of standing in the Civil Rights Act, 42 U.S.C. § 1983 (1970).
44 However, even if the plaintiff alleges some personal injury, the Court may still dismiss the action for lack of standing by invoking the rule of judicial restraint. Ruling that one of the organizational plaintiffs did not have standing, the Court conceded nonetheless that it had alleged the injury of its members who were deprived of the benefits of living in an interracial community. Nevertheless, the Court felt that "prudential counseling" strongly advised against granting the plaintiffs' claim of standing. *Id.* at 514.

in the case. Nevertheless, a requirement that the plaintiff demonstrate a particularized injury to himself does guarantee that he will present his cause vigorously to obtain the requested relief. In response, the court can fashion an appropriate legal remedy whose scope is limited to repairing actual harm done to this individual. The standing tests adopted by the present Court establish more fully the existence of the requisite case or controversy than the mere examination of a plaintiff's status. Furthermore, the *Warth* injury test more effectively reduces the risk of congestion in a court's docket by eliminating those plaintiffs whose injury is either unspecific or results from an otherwise legitimate policy decision by another governmental branch.

Somewhat limited exceptions to the strict standing tests recently enunciated by the Supreme Court appear in the line of privacy cases challenging state anti-contraception and abortion statutes. These cases still require the plaintiff to allege some injury to himself as well as injury to the privacy rights of the affected women. However, the Court appears somewhat more lenient concerning the *type* of allegations of personal injury to the plaintiff which may be sufficient. In *Singleton v. Wulff*[45] the plaintiff doctors alleged that the Missouri statute forbidding Medicaid payments to indigent women for non-medically indicated abortions caused economic harm to their practices. The Court found this a sufficient allegation of a personal stake to establish the doctors' standing to challenge the constitutionality of the state law on their patients' behalf.

Yet, in *Singleton,* no apparent bar existed to the patients' own assertion of their right to abortions. Although this fact has been found dispositive in other *jus tertii* actions, it appears that the sensitivity of the issues involved in *Singleton* resulted in a different treatment by the Court of the third party standing question.[46] However, the Court failed to take the same approach as it did in *Singleton* when faced with analogous facts in *Simen v. Eastern Ky. Welfare Rights Organization.*[47] In that case a welfare rights organization claimed injury to its members by their inability to obtain emergency treatment in tax-exempt "charitable" hospitals. The Court held that the organizational and individual plaintiffs had failed to allege injury in fact and dismissed for lack of standing. This conclusion seems inconsistent with the decision in *Singleton.* Inability to receive adequate hospital care clearly interferes with an individual's interest in preserving his good health. If this interest is not protected, his right to pursue employment and a normal family life[48] is as greatly jeopardized as would be an indigent woman's privacy rights by a statute denying her Medicaid payments for an abortion. Since in both *Singleton* and *Eastern Ky. Welfare Rights Organization* the interests at stake seem equally fundamental, the cases cannot be dis-

45 96 S. Ct. 2868.

46 The dissent in *Singleton* particularly noted this lack of a bar to the third-party's own assertion of his rights and questioned whether "cautious reserve" might not indicate the use of the judicial self-restraint rule to deny this action. Justice Powell particularly feared that the holding in *Singleton* could provide authority for any provider of services to attack a welfare statute for exempting his particular transaction. However, given the Court's usual focus on the sensitive nature of the rights involved in an action, this result seems unlikely. *See* accompanying text *supra* at note 38.

47 96 S. Ct. 1917.

48 These interests have been included by the Court, for example, within the scope of the fourteenth amendment protection of individual liberty. Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

tinguished on substantive grounds. Hence, it appears that the Court applied a looser standard in *Singleton* for reasons of policy rather than substance.

Although justification of the Court's more lenient approach to standing in *Singleton* may be in part a necessary concession to the volatile nature of the abortion issue involved, its decision reveals the possible arbitrariness inherent in undue court formulation of social policy. Whether to provide government funds for abortions involves a legislative choice among numerous political and social views. Any decision thus reached is ultimately subject to approval or rejection by the electorate. This type of basic policy decision clearly belongs to a legislature constitutionally empowered to appropriate funds to implement the chosen policy. Court involvement in this process constitutes an encroachment upon a co-equal governmental branch.

IV. Standing: Present and Future

Although the present state of the standing doctrine is somewhat confused, its future development will predictably continue to reflect the Court's growing dissatisfaction with its role as arbiter of public policy. Of course, public plaintiffs will continue to be granted standing. However, as recent opinions indicate, the present Court will more strictly scrutinize the allegations of each plaintiff to determine if he has alleged sufficient personal injury to sharpen the issues into concrete adverseness.

Nevertheless, it appears that the lower courts, influenced perhaps by the philosophies of their own members, will apply the Supreme Court's various standing tests erratically. Often a lower court will jointly invoke the *Flast* "nexus" test, *Data Processors* "zone of interests" test, and the *Warth* "actual injury to plaintiff's interests" test despite the Supreme Court's de-emphasis of the former two tests in *Warth*.[49] Despite these variations, the primary emphasis in standing decisions will remain on the "injury in fact" test, which in certain decisions has been applied with a strictness resembling the "direct injury" test of *Frothingham*.[50]

After *Warth,* some uncertainty nevertheless persists concerning the type and extent of allegations needed to satisfy the actual injury test. The Court recently clarified how concrete an injury the plaintiff must demonstrate. In *Arlington Heights v. Metropolitan Housing Development Corp.*,[51] upon facts remarkably similar to those of *Warth,* the Court ruled that the respondent, Metro Housing, had standing. Unlike the organizational plaintiff in *Warth* where no such showing was made, Metro Housing alleged that its planned housing project was cancelled by the village's refusal to rezone a single-family dwelling area. The specific nature of the injury alleged established to the Court's satisfaction the existence of an actual harm which could be redressed by a favorable decision.

The Court's treatment of the standing issue with respect to the organizational plaintiff in *Arlington* is not surprising. The Court in *Warth v. Seldin* had

49 *See* Construction Indus. Ass'n v. Petaluma, 522 F.2d 897 (9th Cir. 1975) *cert. denied,* 424 U.S. 934 (1976); Evans v. Lynn, 537 U.S. 571 (2d Cir. 1975).
50 *See,* 96 S. Ct. 1917.
51 97 S. Ct. 555 (1977).

"left open the federal court doors to plaintiffs who have some interest in a particular housing project and who, but for the restrictive zoning ordinances would be able to reside in the community."[52] In *Arlington,* allegations were made showing the specific effect of the zoning ordinance on the project. The Court's opinion strongly supports the conclusion that a clearly stated allegation of personal injury by the plaintiff can be dispositive of the standing issue. As *Arlington* indicates, if the plaintiff can demonstrate that the particular personal injury will be redressed by the favorable outcome of the suit, the Court will be satisfied that the standing tests have been met. Accordingly, the existence of a case or controversy, clearly, will have been demonstrated. This will prevent any "gratuitous" and, thus, unconstitutional exercise of federal judicial power in considering the issues raised.

Nonetheless, a plaintiff who is able to allege a concrete injury must still overcome concern caused by increasing judicial forays into public policy. Courts may feel that other compelling reasons exist for refusing the case, despite the plaintiff's alleged actual injury. To justify such a refusal, there is some indication that the zone of interests test may be revived to deny or grant standing.[53] A narrow or broad delineation of the protected zone of interests may depend on the court's opinion of the wisdom of hearing a case.

In light of the present status of the standing doctrine, future developments in standing guidelines will probably reflect the judiciary's fears of its own increasing power to decide which of many competing social interests are more valuable and worthy of protection. Standing decisions are articulating this uneasiness, and adopting a basically cautious approach to standing questions. This caution becomes especially important "when the relief sought would be impractical in effect; bring about conflict with two coordinate branches; and, cause the judiciary to provide government by injunction."[54]

Particularly in *jus tertii* actions, plaintiffs will be required to carefully allege a concrete injury to themselves. Furthermore, if the interest so injured does not fall within the boundaries of the zone of interests drawn by judicial caution, the plaintiff's action will be dismissed for lack of standing. Despite this cautious attitude, anomalies in standing decisions probably will continue when standing issues are presented in cases in which the sensitive nature of the right itself dictates a more liberal approach.

V. Conclusion

Standing has functioned in the past as an effective bar to judicial consideration of certain issues. It is doubtful that a more rigid application of mechanical rules of standing will have the practical effect of reducing the federal courts' work load by discouraging potential plaintiffs. Certainly, in the short run, there will be no discernible effect. In the long run, the courts' attitude may simply encourage most plaintiffs raising constitutional or other rights to make more careful allegations of personal injury to meet the threshold case-or-

52 522 F.2d at 902.
53 96 S. Ct. 1917.
54 Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974).

controversy requirement. More careful framing of the issues may reassure a court wary of too much intervention to consider more social policy questions in the context of a specifically pleaded, properly adversarial case.

Generally speaking, there is no indication that standing will be simplified to any great extent. Its current complexity is actually a reflection of the negative attitudes of the Court's members towards judicial activism in social policy.

> Without such limitations . . . essentially matters of judicial self-goverance —the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions.[55]

Standing will continue to fulfill one of its major functions as a catchall doctrine used by the Court, in the exercise of its rule of self-restraint, when it feels that the consideration of a certain issue would push the bounds of judicial review to intolerable limits.

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55 422 U.S. at 500.