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Standing Alone: Do We Still Need the Political Question Doctrine?

Linda Sandstrom Simard*

I. Introduction

Almost two decades ago, Professor Louis Henkin posed two heretical questions: (1) Is there a political question doctrine? and (2) Do we need one?1 Describing the political question doctrine, he wrote:

The political question doctrine saw its heyday in the New Deal Court, and received its highest measure of devotion from Justice Frankfurter, perhaps its boldest articulation by Justice Black in Coleman v. Miller. . . .

Since Frankfurter and Black wrote, judicial review has had a new birth, its character and content reformed, and its place established as a hallmark of American political life, even a birthright of every inhabitant. I see no place in it for an exemption for uncertain “political questions.” Would not the part of the courts in our system, the institution of judicial review, and their public and intellectual acceptance, fare better if we broke open that package, assigned its authentic components elsewhere, and threw the package away?2

In questioning the theoretical underpinnings of the political question doctrine, Professor Henkin relied to some extent upon what he perceived to be the “new birth” of judicial review.3

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1. Louis Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597 (1976). The political question doctrine is based on the notion that certain issues are not subject to judicial review because the issue falls within the appropriate sphere of federal executive or legislative power. Charles A. Wright, Law of Federal Courts 75 (4th ed. 1983).

2. Henkin, supra note 1, at 625 (citation omitted).

3. Id.
During the decade preceding Professor Henkin's article, the Court decided several cases in which it adopted a liberal interpretation of the standing doctrine, thereby diminishing the barriers to judicial review and expanding the judicial power.\(^4\) Professor Henkin's perception that judicial review had taken on a renewed level of importance may have derived in part from this relaxation of standing requirements.\(^5\)

Since the mid-1970s, however, the Court's attitude toward the standing doctrine has been increasingly restrictive. In a string of cases decided in the mid-1970s, the Court held that, to meet the requirements of standing, a litigant had to prove not only that she suffered an injury in fact, but also that her injury was caused by the defendant's conduct and could be redressed by the court.\(^6\) Over the last two decades the Court has applied the "causation" and "redressability" requirements of standing in many instances.\(^7\) Moreover, during the last decade the Court has rejected the notion that standing is related only to whether a dispute will be presented in an adversary context.\(^8\) Rather, the Court has relied heavily upon separation of powers principles to interpret the requirements of standing.\(^9\) Thus, the adoption of the causation and redressability elements and the incorporation of separation of powers principles have broadened the reach of standing and made judicial review more restrictive.

Rather than critique the current state of standing doctrine,\(^10\)

4. For example, in Flast v. Cohen, 392 U.S. 83 (1968), the Court held that a taxpayer had standing to challenge a congressional statute on the grounds that the statute violated the First Amendment, notwithstanding previous decisions rejecting the notion of taxpayer standing. Several years later in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970), the Court for the first time held that a litigant need not show violation of a legal interest to meet the requirements of standing. Rather, the Court held that standing will exist as long as the litigant can show injury in fact.


8. See infra notes 89-93 and accompanying text.


10. For a critical analysis of the standing doctrine, see, e.g., Craig Gottlieb, How Standing Has Fallen: The Need To Separate Constitutional and Prudential Concerns, 142 U.
this Article analyzes the effect of the developments in the law of standing on the political question doctrine. Interestingly, the "sea-change[s]" that have occurred in the Court's treatment of standing over the last three decades have coincided with a decrease in the number of cases in which the Court has invoked the political question doctrine to deny judicial review. In 1962, Justice Brennan synthesized the modern political question doctrine in the landmark case *Baker v. Carr.* Analyzing representative cases, the *Baker* Court inferred six analytical threads comprising the political question doctrine, all of which stemmed from separation of powers principles. Since *Baker,* the Court has dismissed only two cases on the ground that they involved a nonjusticiable political question, while expressly rejecting the application of the doctrine in more than a dozen cases.

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12. 369 U.S. 186 (1962). It is interesting to note that while *Baker v. Carr* represents the Court's most thorough description of the political question doctrine, the Court ultimately held that the case did not present a political question.

13. *Id.* at 217; see infra text accompanying note 159.


Professor Henkin, in his 1976 article, argued that there is no need for a separate political question doctrine.\textsuperscript{16} He suggested that the “authentic components” of the doctrine could be assigned elsewhere and the “package” thrown away.\textsuperscript{17} While the contours of justiciability have changed significantly since Professor Henkin’s article, these changes, particularly recent changes narrowing the window of judicial review, appear to strengthen rather than weaken Professor Henkin’s assertion that there is no need for a separate political question doctrine. Specifically, when one analyzes the changes that have occurred in the doctrines of standing and political question during the last two decades, it appears that the two doctrines have grown together creating a common ground based upon the notion of separation of powers. As the Court has heightened standing requirements to deny judicial review to a broader range of cases, it has found little need to invoke the political question doctrine. Thus, during the last several decades, the Court has rarely applied the political question doctrine. In light of these developments, this Article submits that the separation of powers concerns, which have historically led the Court to declare an issue to be a nonjusticiable political question, could lead the Court today to find a lack of standing. Since the political question doctrine apparently retains little or no functional purpose, it should be abolished.

II. Professor Henkin’s Thesis

Professor Henkin described the political question doctrine — in “pure theory” — as an “extra-ordinary” exercise of abstention by the courts pursuant to which they “forego their unique and paramount function of judicial review of constitutionality” in favor of allowing the political branches to decide the issue.\textsuperscript{18} He recognized that there are questions that the Constitution delegates exclusively to the political branches of government and about which

\textsuperscript{16} Henkin, supra note 1.
\textsuperscript{17} Id. at 625.
\textsuperscript{18} Henkin, supra note 1, at 599 (“[S]ome issues which prima facie and by usual criteria would seem to be for the courts, will not be decided by them but, extra-ordinarily, left for political decision.”).
the courts should play no role in deciding.\textsuperscript{19} He argued, however, that such delegation does not require a separate political question doctrine because it merely involves the court’s traditional function of constitutional interpretation to determine if the issue in controversy has been exclusively committed to one of the political branches.\textsuperscript{20} The political question doctrine, according to Professor Henkin, is an artificial extension of this “ordinary respect” for the constitutionally permitted activities of the political branches of government, which undermines the judiciary’s responsibility to interpret the Constitution.\textsuperscript{21} For this reason, he asserted that the political question doctrine “cries for strict and skeptical scrutiny.”\textsuperscript{22}

In reviewing the cases that established the so-called political question doctrine, Professor Henkin suggested that in fact none of them required the courts to invoke “extra-ordinary abstention.”\textsuperscript{23} Rather, the cases could be characterized as examples of the ordinary respect the court owes to the activities of the political branches within the authority granted by the Constitution.\textsuperscript{24} Accordingly, Professor Henkin asserted that the most prevalent justification for invoking the political question doctrine — that there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department”\textsuperscript{25} — does not involve extra-ordinary judicial abstention at all.\textsuperscript{26}

This Article submits that Professor Henkin was correct in recognizing that many of the leading political question cases could have been decided without reliance upon a separate doctrine of abstention for political questions. This Article reaches Professor Henkin’s conclusion, however, via a different analysis based on recent developments in the law of standing.

\textsuperscript{19} Id. at 597.
\textsuperscript{20} Id. at 599.
\textsuperscript{21} Id. at 598.
\textsuperscript{22} Id. at 600.
\textsuperscript{23} Henkin, supra note 1, at 601.
\textsuperscript{24} Id.
\textsuperscript{26} Henkin, supra note 1, at 605-06.
III. Evolution of the Standing Doctrine

The doctrine of standing inquires whether a particular person is a proper party to seek adjudication of a particular issue.27 Stated more directly, standing is "the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'"28 While the three requirements of the modern standing doctrine are derived from Article III of the Constitution,29 a look at the history of the doctrine illustrates that both its source and content have changed considerably over the years.30

Although the case or controversy requirement of Article III dates back to the enactment of the Constitution in 1788, the first standing cases were not decided until the early 1920s.31 Prior to that time, "[c]ourts, whose jurisdiction was defined by the system of writs, did not need to speak of standing. The question was whether a challenger was entitled to a writ, whether he had a cause of action, [and] whether the writ lay."32 Essentially, a plaintiff was allowed to bring suit only if he could show that some source of law

27. Warth v. Seldin, 422 U.S. 490, 498 (1975) (Standing asks "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."); Flast v. Cohen, 392 U.S. 83, 99-100 (1968) ("[W]hen 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 . . . .").

28. Scalia, supra note 11, at 882.

29. U.S. CONST. art. III, § 2; see also Scalia, supra note 11, at 882 ("The requirement of standing has been made part of American constitutional law through (for want of a better vehicle) the provision of Art. III, Sec. 2 . . . .").

30. See Winter, supra note 10, at 1375 ("The notion that standing is a bedrock requirement of constitutional law has a surprisingly short history.").

31. Massachusetts v. Mellon, 262 U.S. 447 (1923), aff'g Frothingham v. Mellon, 288 F. 252 (D.C. Cir. 1923) (plaintiff taxpayer could not bring suit challenging constitutionality of federal expenditures) (The author notes that throughout this Article, this case will be referred to as Frothingham v. Mellon.); Fairchild v. Hughes, 258 U.S. 126, 129 (1922) (plaintiff challenging the constitutionality of the Nineteenth Amendment granting women the right to vote failed to show a sufficient interest "to afford a basis for this proceeding"). Although neither of these cases expressly refer to standing, the Court subsequently stated that it "first faced squarely the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in federal court in Frothingham v. Mellon . . . ." Flast v. Cohen, 392 U.S. 83, 91 (1968) (footnote omitted). The first case to expressly refer to the doctrine of standing as we know it today was United States v. Rock Royal Coop., 307 U.S. 533, 560 (1939).

32. JOSEPH Vining, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 5 (1978). Once the writ system broke down, the modern doctrine of standing began to develop. See Winter, supra note 10, at 1377.
granted him a right to sue. In retrospect, this requirement was consistent with the language of Article III to the extent that a litigant without a legal right to bring suit suffers no legally cognizable harm that is redressable by a court and, thus, can show no "case" or "controversy."

A. The Early Standing Doctrine

_Frothingham v. Mellon_ is one of the first cases espousing what appears to be the nascent standing doctrine. In _Frothingham_, taxpayers brought suit challenging the constitutionality of a congressional statute providing for state appropriations that would allegedly "increase the burden of future taxation." The Court refused to consider the merits of the claim, holding:

The party who invokes the [judicial] power must be able to show not only that the statute is invalid but 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.

It is unclear whether the _Frothingham_ decision is based on judicial self-restraint or constitutional limitation. At one point,

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33. Winter, supra note 10, at 1396 ("Under the eighteenth century common law, rights were synonymous with remedies, remedies were synonymous with the forms of action, and, by algebraic logic, the forms of action were synonymous with the concept of redressable (that is, cognizable) injuries."); see also Cass R. Sunstein, _What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III_, 91 MICH. L. REV. 163, 170-71 (1992) ("If neither Congress nor the common law had conferred a right to sue, no case or controversy existed. Whatever harm had occurred was not legally cognizable at all; this was a case of _damnum absque injuria_. . . . There was therefore a sharp distinction between an injury on the one hand (a 'harm') and a legal injury on the other.").

34. 262 U.S. 447 (1923).

35. Winter, supra note 10, at 1375-76. Although _Frothingham_ is generally considered the first modern standing case, _Fairchild v. Hughes_, 258 U.S. 126 (1922), was the first case to reject a taxpayer suit: "Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute [a suit] in the federal courts . . . ." Id. at 129-30.

36. _Frothingham_, 262 U.S. at 486.

37. Id. at 488.

38. See _Flast v. Cohen_, 392 U.S. 83, 92-93 (1968) (noting that the opinion in _Frothingham_ can be read in both ways). Prior to _Frothingham_, the Court had considered the merits of several taxpayer claims. See _Leser v. Garnett_, 258 U.S. 130, 137 (1922); _Hawke v. Smith_, 253 U.S. 221, 227 (1920); _Wilson v. Shaw_, 204 U.S. 24, 31 (1907); _Millard v. Roberts_, 202 U.S. 429, 438 (1906); _Bradfield v. Roberts_, 175 U.S. 291, 295 (1899). In light of these
the Court referred to the "inconveniences" that would result if taxpayers were allowed to challenge the administration of any statute that would likely produce additional taxation.\(^{39}\) Additionally, recognizing that standing had been conferred on municipal taxpayers in previous cases, the Court stated that the federal taxpayers' interest in the total federal tax revenues was "comparatively minute and indeterminable," implying that if the taxpayers' bills had been larger, the Court may have conferred standing.\(^{40}\) Later in the opinion, however, the Court noted that, in light of the separate functions apportioned to each of the three branches of government, the judicial power may be exercised only when an allegedly unconstitutional act of Congress causes some direct injury:

> We [the judiciary] have no power \textit{per se} to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such act.\(^{41}\)

Thus, while \textit{Frothingham} imposed a limitation on the federal judicial power, it did not clearly articulate the source of that limitation.

It was not until the late 1930s that "standing" was even considered in connection with the "case" or "controversy" requirement of Article III. In his concurring opinion in \textit{Coleman v. Miller},\(^{42}\) Justice Frankfurter linked the concept of standing with cases, one might argue that the barrier to taxpayer standing established in \textit{Frothingham} was a function of equity jurisprudence as opposed to constitutional restriction. \textit{See Winter, supra note 10, at 1442.} However, in \textit{Ex Parte Levitt}, 302 U.S. 633, 634 (1937), the Court implied that \textit{Frothingham} had created a constitutional limitation on the Court's judicial power. Several years later, the Court stated that a claimant's "interest must rise to the dignity of an interest personal to him and not possessed by the people generally" to present a claim "which constitutionally permits adjudication by courts under their general powers." \textit{Stark v. Wickard}, 321 U.S. 288, 304 (1944).

\(^{39}\) \textit{Frothingham}, 262 U.S. at 487.

\(^{40}\) \textit{Id.} at 486-87.

\(^{41}\) \textit{Id.} at 488.

\(^{42}\) 307 U.S. 433 (1939). In \textit{Coleman}, a group of Kansas legislators filed suit challenging the ratification of the Child Labor Amendment to the United States Constitution. The Court held that the legislators had a sufficient interest in the question to invoke the Court's jurisdiction because their "votes against ratification have been overridden and . . . if they are right in their contentions their votes would have been sufficient to defeat ratification." \textit{Id.} at 438. Notwithstanding the existence of standing, the Court dismissed the case under the political question doctrine. \textit{Id.} at 446, 456.
the language of Article III, opining that the federal judicial power should be limited to

matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies." It was not for courts to meddle with matters that required no subtlety to be identified as political issues. And even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law.\footnote{Id. at 460 (Frankfurter, J., concurring) (citations omitted). Justice Frankfurter went on to state that "[n]o matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all." Id. at 464.}

Justice Frankfurter argued that because the legislators asserted public — not private — rights, the legislators had no standing to maintain the suit.\footnote{Id. at 464-65.}

It was not until the 1950s and 1960s that a majority of the Court subscribed to the notion that the standing doctrine derives from the case or controversy requirement. In \textit{Doremus v. Board of Education},\footnote{342 U.S. 429 (1952) (dismissing a challenge to a New Jersey statute providing for the daily reading of verses from the Old Testament in public school on ground that plaintiff taxpayers lacked standing).} the Court stated:

\[B\]ecause our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.\footnote{Id. at 434.}

Yet, despite the Court's recognition of the link between standing and the case or controversy requirement of Article III, the Court's standing analysis remained the same; it continued to focus on the litigant's interest in the controversy and the existence of a legally cognizable injury. For example, in discussing whether a group of voters had standing to challenge an apportionment statute in \textit{Baker v. Carr},\footnote{369 U.S. 186 (1962). In \textit{Baker}, a group of Tennessee voters brought suit alleging denial of their right to equal protection under the law as guaranteed by the Fourteenth} the Court focused on the voters' interest in the
issue and whether they could present a cogent argument. Ultimately, the Court held that the plaintiffs had standing to pursue the suit, noting:

It would not be necessary to decide whether appellants' allegations of impairment of their votes . . . will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it.

Thus, consistent with the development of the doctrine up to this point, the crucial element of standing was the allegation of a legally cognizable injury.

B. The "Revolution" in Standing Doctrine: Expanding the Definition of Injury

The years following *Baker v. Carr* marked the beginning of a "revolution" in the standing doctrine characterized by the Court's increased interest in the doctrine and the expansion of categories of injuries that would satisfy standing requirements. One case that illustrates how the Court expanded the definition of injury is *Flast v. Cohen*. In *Flast*, the Court departed from its

Amendment. *Id.* at 187-88. Voters residing in five different counties of Tennessee brought suit against the Tennessee Secretary of State, Attorney General, Coordinator of Election, and members of the State Board of Elections. *Id.* at 204-05. The voters alleged that they were injured because an outdated Tennessee statute apportioning the seats of the General Assembly effected a grossly disproportionate representation of the voting population, thus diluting the political voice of some counties compared to other, more favored counties. *Id.* at 207. The voters requested that the Court declare the Tennessee statute unconstitutional and enjoin any further elections pursuant to the statute. *Id.* at 194-95.

48. *Id.* at 204 (noting that the “gist of the question of standing” is whether the voters have “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions”).

49. *Id.* at 208.

50. Apparently, the Court was not concerned with whether the defendants had caused the alleged injury or whether the Court would be able to fashion an appropriate remedy.


52. Sunstein, *supra* note 33, at 169. The Supreme Court has discussed standing in terms of Article III on 117 occasions. *Id.* Of those 117 discussions of standing, 55 occurred after 1985; 71 occurred after 1980; and 109 occurred after 1965. *Id.*


54. 392 U.S. 83 (1968). In *Flast*, a group of taxpayers filed suit challenging Titles I and II of the Elementary and Secondary Education Act of 1965 (the “Act”). The complaint alleged that the Act contravened the Establishment and Free Exercise Clauses of the First
previous standing doctrine by creating an exception to the bar against taxpayer standing announced in *Frothingham*.\textsuperscript{55} According to the Court, the case or controversy requirement embodies two separate but related policy considerations: (1) that the business of the federal courts is limited to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process; and (2) that the role assigned to the judiciary shall not intrude upon areas committed to the other branches of government.\textsuperscript{56} The Court stated that only the first of these policies is relevant to standing:

[W]hen 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 . . . .

. . . The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an

Amendment by appropriating federal funds to finance instruction in religious schools and purchase textbooks and other instructional materials for use in such schools. *Id.* at 85-86. The taxpayers requested (1) a declaration that the Act did not authorize the appropriation of funds for religious purposes or, in the alternative, to the extent the Act did authorize appropriations for such religious purposes, it is unconstitutional and void; and (2) an injunction prohibiting those charged with administering the Act from approving any expenditure of federal funds for religious purposes. *Id.* at 87-88.

\textsuperscript{55} *Id.*

\textsuperscript{56} *Id.* at 94-95. The Court described the case or controversy requirement as follows: As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

*Id.*
adversary context and in a form historically viewed as capable of judicial resolution.\textsuperscript{57}

Quoting \textit{Baker v. Carr}, the Court stated that a litigant will be considered a proper party to request an adjudication if the party has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”\textsuperscript{58} The Court concluded that there is no absolute constitutional barrier to taxpayer standing as some may have inferred from \textit{Frothingham}.

Thus, if a taxpayer can allege the requisite personal stake in the outcome, the Court will find standing.\textsuperscript{60}

In the early 1970s, the Supreme Court effected a “major doctrinal shift” in the law of standing.\textsuperscript{61} Recognizing a “trend \ldots toward enlargement of the class of people who may protest administrative action,” the Court, in \textit{Association of Data Processing Service Organizations, Inc. v. Camp}, held that a plaintiff need not show violation of a “legal interest” to meet the requirements of standing.\textsuperscript{62} In \textit{Camp}, petitioners\textsuperscript{63} filed suit challenging a ruling by the Comptroller of the Currency allowing national banks to provide data processing services to other banks and to bank


\textsuperscript{58} \textit{Flast}, 392 U.S. at 99.

\textsuperscript{59} \textit{Id.} at 101.

\textsuperscript{60} \textit{Id.} To determine whether the taxpayers in \textit{Flast} had satisfied the constitutional requirements of Article III, the Court stated that the taxpayers had to show a logical nexus between their status as taxpayers and the claim they sought to adjudicate. \textit{Id.} at 102. To establish a nexus, the claimant must show: (1) a logical link between her status as a taxpayer and the challenged legislation; and (2) a nexus between her status as a taxpayer and the nature of the constitutional infringement alleged. \textit{Id.} Applying these criteria to the taxpayers in \textit{Flast}, the Court held that since the Establishment Clause imposes a specific restriction on Congress’s tax-and-spend power and because the taxpayers wished to challenge Congress’s exercise of its tax-and-spend power, the taxpayers had sufficiently satisfied the two-pronged test and thus had standing to pursue the suit. \textit{Id.} at 103.

\textsuperscript{61} BATOR ET AL., \textit{supra} note 56, at 162.

\textsuperscript{62} Association of Data Processing Serv. Orgs., Inc. \textit{v. Camp}, 397 U.S. 150, 153-54 (1970) (“The ‘legal interest’ test goes to the merits. The question of standing is different. It concerns, apart from the ‘case’ or ‘controversy’ test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”).

\textsuperscript{63} The petitioners were in the business of selling data processing services.
customers. Abandoning the legal interest test to determine petitioners’ standing, the Court instead applied a two-pronged test: (1) did the petitioners suffer an injury in fact, economic or otherwise? and (2) are the petitioners arguably within the zone of interest protected by a relevant statute? The Court found that the petitioners had met the injury in fact requirement because they had alleged that the additional competition in providing data processing services might entail future loss of profits and also that one of the respondent banks was performing, or preparing to perform, services for two customers to whom one of the petitioners had already agreed to provide services. The Court held that since the petitioners were within the "zone of interest" of the Bank Service Corporation Act of 1962, and since Congress had not expressly precluded judicial review in that Act, the petitioners had standing to bring suit. The Court expressly reserved judgment, however, on whether the Bank Service Corporation Act or any other statute provided a legal interest that protected petitioners from the alleged activity, noting that these questions go to the merits of the dispute rather than to standing.

The Camp Court apparently wished to simplify the test for standing by focusing on the factual determination of whether an injury exists, as opposed to the arguably more complex legal question of whether a legal interest has been violated. In reality, however, the Court did not simplify the analysis. It merely rephrased the ultimate question: what is a judicially cognizable

64. Camp, 397 U.S. at 151.
65. Id. at 152.
66. Id. at 155-56. In subsequent cases, the Court declared that this "zone of interest" test is not a constitutional requirement, but rather a prudential concern. See Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39 n.19 (1976).
68. Id.; see also Barlow v. Collins, 397 U.S. 159 (1970) (holding that tenant farmers had standing under the Administrative Procedure Act to challenge a regulation promulgated by the Secretary of Agriculture because they suffered injury in fact and were within the zone of interest of the Food and Agriculture Act of 1965). Additionally, there was no evidence that Congress intended to preclude judicial review.
69. Camp, 397 U.S. at 158.
70. See Gene R. Nichol, Jr., Injury and the Disintegration of Article III, 74 CAL. L. REV. 1915, 1924 (1986) ("The terminology employed — injury 'in fact' rather than 'in law,' layperson's injury rather than lawyer's injury — suggests the Court's desire to convert the case or controversy hurdle to a straightforward and objective measurement uninfluenced by the attractiveness of the cause of action or the political predilections of the decisionmaker.").
Regardless of the terminology used, the injury determination involves an exploration of what we wish to recognize as harm. It is not merely a fact-based inquiry; rather, it is based on a normative judgment about what ought to constitute a judicially cognizable injury.

C. Development of the Causation and Redressability Elements

While the Court in Flast and Camp expanded the categories of injuries that would satisfy the standing requirements — thereby making it easier for litigants to obtain federal judicial review — this so-called "revolution" in the standing doctrine was short-lived. Several years after the Camp decision, the Court began to narrow the standing doctrine, first by adding additional requirements, and later by relying on separation of powers considerations.

In a line of cases decided during the mid-1970s, the Court established that standing requires a plaintiff to show not only that she has been injured, but also that her injury is fairly traceable to the defendant's conduct and that the injury is likely to be redressed by a favorable court decision. One case that illustrates how these additional criteria — causation and redressability — have narrowed the application of standing is Linda R.S. v. Richard D.

In that case, the mother of an illegitimate child filed suit challenging the discriminatory application of Article 602 of the Texas Penal Code, which required that any parent who neglected to pay child support be prosecuted and, if convicted, punished by confinement in the county jail. The plaintiff requested an injunction against the district attorney prohibiting him from declining to prosecute the father of her child because the child was born out of wedlock. Considering whether the plaintiff had standing to sue, the Court stated:

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71. Sunstein, supra note 33, at 188-89. "[I]n every case, the person who brings a lawsuit believes that she has indeed suffered an injury in fact." Id. at 189. Thus, whether referred to as a "legally cognizable injury" or as an "injury in fact," the courts necessarily must make policy judgments on what injuries they will recognize.


73. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 54 n.5 (2d ed. 1994); Sunstein, supra note 33, at 193.


75. Id. at 614-15.

76. Id. at 616.
To be sure, appellant no doubt suffered an injury stemming from the failure of her child’s father to contribute support payments. But the bare existence of an abstract injury meets only the first half of the standing requirement. “The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of [a statute’s] enforcement.”

The Court held that the appellant lacked standing because she failed to show that her injury was caused by the district attorney’s alleged violation of the Texas Penal Code and because it was “only speculative” that prosecution of the father would result in future payment of child support.

Two years later in Warth v. Seldin, the Court again relied upon the causation/redressability requirement to deny standing. In Warth, various residents of the Rochester, New York area brought suit against the Town of Penfield and its Zoning, Planning, and Town Boards. The suit challenged a Penfield zoning ordinance on the ground that it unconstitutionally excluded persons of low and moderate income from living in the town. The plaintiffs requested that the Court enjoin the defendants from enforcing the zoning ordinance, order the defendants to enact a new ordinance, and award actual and exemplary damages. The Court denied standing to the low and moderate income plaintiffs because they failed to establish that, but for the exclusionary zoning ordinance, suitable and affordable housing would be constructed in Penfield.

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77. *Id.* at 618 (alterations in original) (emphasis in original) (citation omitted).
78. *Id.* 618-19. In his dissent, Justice White stated that the Court should not consider redressability an element of standing. *Id.* at 620.
79. 422 U.S. 490 (1975).
80. *Id.* at 493.
81. *Id.* at 493-96.
82. *Id.* at 496.
83. Specifically, the Court noted that the record is devoid of any indication that these projects, or other like projects, would have satisfied petitioners’ needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners’ descriptions of their individual financial situations and housing needs suggest precisely the contrary — that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents’ assertedly illegal acts. *Id.* at 506. The Court also denied standing to individual taxpayers and several other organization plaintiffs.
One year later, in Simon v. Eastern Kentucky Welfare Rights Organization, groups of indigent individuals brought suit against the Secretary of the Treasury and the Commissioner of the IRS challenging a Revenue Ruling that provided tax-exempt status to nonprofit hospitals that offered only limited medical services to indigent patients. The plaintiffs alleged that they had been disadvantaged by several tax-exempt hospitals that refused to provide the plaintiffs with needed hospital services because they were unable to pay. Although the Court recognized that at least some of the plaintiffs had suffered actual injury from denial of medical services, such injuries were insufficient to create standing to sue the government officials named as defendants. As a result, the Court refused to grant standing because the plaintiffs failed to show that the denial of access to hospital services resulted from the IRS policy or that a change in the policy would provide the plaintiffs with the medical treatment they desired.

D. Standing and Separation of Powers

During the 1980s the Court continued to apply the injury, causation, and redressability requirements of standing, but it changed the thrust of the standing analysis by emphasizing a close relationship between standing and the principle of separation of powers. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc. illustrates this change.

85. Id. at 29-32.
86. Id. at 32-33.
87. Id. at 40-41.
88. Id. at 42-43 ("It is purely speculative whether the denials of service specified in the complaint fairly can be traced to [defendants' policy] or instead result from decisions made by the hospitals without regard to the tax implications.").
89. 454 U.S. 464 (1982). The Valley Forge case arose out of the transfer of surplus government land by the Department of Health, Education, and Welfare (HEW) to the Valley Forge Christian College (Valley Forge). Learning of the transfer through a news release, a nonprofit organization consisting of 90,000 taxpaying members filed suit alleging that the transfer violated the Establishment Clause of the First Amendment. Id. at 468-69. The plaintiffs requested the Court to declare the conveyance null and void and to order Valley Forge to convey the property back to the United States. Id. The plaintiffs alleged that they suffered a sufficient injury to confer standing because each member "‘would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution.’" Id. at 469 (citation omitted). The Court denied standing. Applying the Flast two-pronged test, the Court held that the plaintiffs did not have standing as taxpayers because their claim was not a challenge to a congressional exercise of the tax and spend power under
Acknowledging that its own lack of precision in prior decisions had created ambiguity in the limits and contours of the standing doctrine, the Court in *Valley Forge* attempted to clarify the doctrine. The Court stated:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."  

In a notable departure from its statement in *Flast v. Cohen*, the Court stated that "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."

The Court in *Valley Forge* emphasized that separation of powers principles are closely related to standing. While the *Flast* Court specifically stated that the question of standing does not "raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government," the Court in *Valley Forge* identified the three constitutional requirements of standing and stated that through these requirements

Art[icle] III limit[s] the federal judicial power "to those disputes which confine federal courts to a role consistent with a system

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Article I, Section 8, as in *Flast*, but rather was a challenge to a HEW decision to transfer property pursuant to a congressional act created under the Property Clause, Article IV, Section 3, Clause 2. *Id.* at 478-80. Additionally, the Court held that the plaintiffs could not meet the requirements for citizen standing because the plaintiffs could show no personal injury suffered as a result of the alleged constitutional violation. *Id.* at 485.

90. *Id.* at 471, 475 ("[T]he concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . . ").

91. *Id.* at 472 (citations omitted). In addition to the Article III requirements, the Court recognized several prudential limitations that bear on the question of standing. These limitations include the bar against asserting the rights of third parties, the bar against asserting generalized grievances and the requirement that the plaintiff's complaint fall within the zone of interest intended to be regulated by the law at issue. *Id.* at 474-75.

92. 392 U.S. 83, 101 (1968) ("Standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.").

93. *Valley Forge*, 454 U.S. at 486.

94. *Flast*, 392 U.S. at 100.
of separated powers and which are traditionally thought to be capable of resolution through the judicial process."

Echoing the reasoning often used to justify the political question doctrine, the Court noted:

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

Two years after Valley Forge, the Court went even further in drawing a link between Article III standing and separation of powers. In Allen v. Wright, the Court stated that

95. Valley Forge, 454 U.S. at 472 (quoting Flast v. Cohen, 392 U.S. at 97). It is interesting that the Court chose to quote Flast for this proposition. In fact, the language was lifted from a portion of the Flast opinion in which the Court discusses the doctrines of justiciability generally, not standing particularly. Later in the Flast opinion, the Court specifically states that standing does not raise separation of powers problems. Flast, 392 U.S. at 99-100.


97. 454 U.S. at 474 (quoting United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (alteration in original)). The Court had used similar reasoning several years earlier in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 222 (1974) (standing denied when "the relief sought [would] produce[] a confrontation with one of the coordinate branches of the Government").

98. 468 U.S. 737 (1984). In Allen, the Court denied standing to the parents of black school children who challenged the effectiveness of IRS procedures for denying tax-exempt status to private schools engaged in racially discriminatory practices. Id. The named plaintiffs were parents of children attending public schools in school districts undergoing desegregation. They brought a nationwide class action suit alleging that despite IRS policy denying tax-exempt status to racially discriminatory schools, some private schools located in desegregating districts were granted tax-exempt status even though they had racially discriminatory policies. Id. at 744. The plaintiffs alleged that the grant of tax-exempt status to these institutions was unlawful and caused them harm by (1) providing federal financial aid and support to racially segregated and discriminatory schools; and (2) encouraging discriminatory schools to create opportunities for white children who would then avoid attendance in desegregating public schools and thus frustrate the efforts of the federal courts to desegregate the public schools. Id. at 745. Significantly, the parents did not allege that their children had been denied admission to a school allegedly involved in discriminatory practices. The plaintiffs requested the court to declare the IRS policies and practices unlawful, to require the IRS to deny tax-exempt status to any private school meeting certain criteria, and to order the IRS to adopt new guidelines consistent with the court's order. Id. at 746-47.
the law of Art. III standing is built on a single basic idea — the idea of separation of powers . . . . .

... [T]he standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise powers only "in the last resort, and as a necessity," and only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process."9

Applying these principles, the Court held that the plaintiffs had failed to allege an injury sufficient to confer standing.100 In reaching this conclusion, the Court stated:

The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury "fairly can be traced to the challenged action" of the IRS. That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations . . . .

"Carried to its logical end, [respondents'] approach would have the federal courts as virtually continuing

While the case was pending, the IRS proposed new procedures to tighten the requirements for tax-exempt status. Id. at 747-48. Congress, however, refused to allow implementation of the proposed new procedures. The District Court apparently felt uneasy about contradicting the will of Congress and thus dismissed the plaintiffs' complaint, concluding "that respondents lack standing, that the judicial task proposed by respondents is inappropriately intrusive for a federal court, and that awarding the requested relief would be contrary to the will of Congress . . . ." Id. at 748.

99. Id. at 752 (alterations in original) (citations omitted). Interestingly, the Court again chose to lift a portion of the quoted language from Flast v. Cohen, even though that case specifically denied the existence of a relationship between standing and separation of powers.

100. Id. at 753. The first alleged injury — the provision of financial aid by the government to discriminatory schools — was insufficient to support standing because it did not amount to a judicially cognizable injury. Id. The mere fact that the government allegedly acted illegally was not an adequate injury to support standing because individuals have no "shared individuated right" to require the government to act in accordance with the law. Id. at 754-55. Alternatively, while racial discrimination may cause a "stigmatizing injury" sufficient to support standing, such an injury was not present in this case because neither the plaintiffs nor their children were personally denied equal treatment. Id. The second alleged injury — that financial advantages provided to discriminatory schools in desegregating districts impaired the plaintiffs' children's ability to obtain an education in a desegregated public school — was also insufficient to confer standing. Id. at 756. Although the Court stressed that this injury is "not only judicially cognizable but . . . one of the most serious injuries recognized in our legal system," id. at 756, the injury was nonetheless insufficient to confer standing because "[t]he line of causation between [the IRS conduct] and desegregation of respondents' schools is attenuated at best." Id. at 757.
monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the ‘power of the purse’; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.”

In the wake of *Allen v. Wright*, the Court has reaffirmed the close relationship between Article III standing and separation of powers. For example, in 1992, Justice Scalia authored the majority opinion in *Lujan v. Defenders of Wildlife*. In *Lujan*, the Court stated that the case or controversy requirement of Article III contains “landmarks” — including standing — that restrain the judicial power to the “common understanding of what activities are appropriate to ... courts.” In the same year, Justice Scalia asserted that the notion that standing exists to “assure that concrete adverseness which sharpens the presentation of issues” has been repudiated. Justice Scalia explained that it is currently understood that standing serves as a mechanism to protect the separation of powers.

In 1993, Justice Clarence Thomas brought the standing doctrine into focus once more in *Northeastern Florida Chapter of*...

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101. *Id.* at 759-60 (alteration in original) (indenting in original) (citation omitted).
102. 504 U.S. 555 (1992). In *Lujan*, several organizations dedicated to the conservation of wildlife filed suit against the Secretary of the Interior (“Secretary”) alleging that the interpretation by the Interior Department of the Endangered Species Act (“ESA”) was too narrow. The plaintiffs sought a declaratory judgment and an injunction requiring the Secretary to promulgate a new regulation incorporating a broader interpretation of the Act. *Id.* at 559. The Court held that the plaintiffs lacked standing because they could not show an imminent threat of harm. *Id.* at 564.

After holding that the plaintiffs failed to show an injury sufficient to confer standing, the Court explained that plaintiffs could not acquire standing under the citizen suit provision in the ESA. *Id.* at 572-74. The Court stated:

Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch — one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than of the political branches. “The province of the court ... is, solely, to decide on the rights of individuals.” Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.

*Id.* at 576.

103. *Id.* at 559-60.
105. *Id.*
Associated General Contractors of America v. City of Jacksonville. Justice Thomas stated:

The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III" which itself "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." Thus, it appears that the Court continues to recognize a close relationship between the standing doctrine and the concept of separation of powers.

IV. The Standing Requirements: What Do They Mean?

The modern standing doctrine consists of three constitutionally required elements:

First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

A. The Injury Requirement

Analysis of the injury requirement requires an assessment of: (1) the directness or actuality of the alleged injury; and (2) the judicial cognizability of the interest alleged to be injured. The first inquiry protects traditional standing concerns by ensuring that the plaintiff has a "personal stake" in the litigation. To satisfy this aspect of the injury requirement, plaintiffs must show that they "ha[ve] sustained or [are] immediately in danger of sustaining some

106. 113 S. Ct. 2297 (1993).
107. Id. at 2301 (citations omitted).
109. Nichol, supra note 70, at 1918. Professor Nichol asserts that while the Court regularly addresses the directness and actuality of the alleged injury, it has failed to adequately articulate or address the judicial cognizability prong of the injury calculus. Id. at 1918, 1930 n.97, n.100.
110. Id. at 1927.
direct injury”; an “[a]bstract injury” will not be enough. The Court illustrated the application of this requirement in City of Los Angeles v. Lyons. In Lyons, the plaintiff brought suit against the city of Los Angeles and four of its officers seeking damages, injunctive relief and a declaratory judgment. The complaint alleged that the plaintiff was stopped by Los Angeles police officers for a routine traffic violation and the officers, without provocation or justification, applied a chokehold, which injured the plaintiff’s larynx and caused him to lose consciousness. Lyons challenged the use of the chokehold and requested the Court to declare this practice unconstitutional and to issue an injunction prohibiting the use of chokeholds unless an officer is threatened with deadly force. In evaluating the alleged injury for purposes of standing, the Court distinguished between those counts seeking damages and those counts seeking equitable relief. Although Lyons had standing to seek damages for the injuries he actually incurred, he did not have standing to stop the Los Angeles Police Department from applying chokeholds prospectively because the threat that Lyons would again be subjected to an illegal chokehold was speculative.

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112. Id.
113. Id. at 97.
114. Id. at 97-98. Justice Marshall described the uncontested facts as follows:
   [A]t about 2 a.m. on October 6, 1976, Lyons was pulled over to the curb by two officers of the Los Angeles Police Department (LAPD) for a traffic infraction because one of his taillights was burned out. The officers greeted him with drawn revolvers as he exited from his car. Lyons was told to face his car and spread his legs. He did so. He was then ordered to clasp his hands and put them on top of his head. He again complied. After one of the officers completed a patdown search, Lyons dropped his hands, but was ordered to place them back above his head, and one of the officers grabbed Lyons’ hands and slammed them onto his head. Lyons complained about the pain caused by the ring of keys he was holding in his hand. Within 5 to 10 seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.
115. Id. at 114-15 (Marshall, J., dissenting).
116. Lyons, 461 U.S. at 105.
117. Id. at 105-06, 108. To have standing to seek injunctive relief, the plaintiff would have to allege a real and immediate threat that not only would he be stopped by Los Angeles police officers in the future, but also that he would be subjected to a chokehold.
Prior to Lyons, the Court had never before determined standing based upon the remedy sought. This reliance on the remedy may have reflected the Court's concern with allowing federal courts to interfere with the operations of state governments. The Court recognized that although individual states may choose to allow their courts to oversee the conduct of law enforcement authorities on a continuing basis, this in not the appropriate role of the federal courts absent compelling facts. Thus, by holding that the threat of future harm to Lyons was too speculative to satisfy the injury requirement of standing, the Court protected the delicate balance of powers between the state and federal governments.

The second aspect of the injury analysis—the judicial cognizability of the interest alleged to be injured—requires the courts to make a normative judgment about which interests merit the exercise of the federal judicial power. While the Court has not expressly identified judicial cognizability as a distinct aspect of the injury requirement, various Supreme Court decisions indicate that certain interests will be sufficient for judicial review while others will not. For example, the Court has held that injury to the following interests will be sufficient for standing: the interest in observing an animal species; the interest in bringing suit in the forum of one's choice; the interest in achieving economic advantage; and the interest in maintaining an undiluted

Id.

118. In his dissenting opinion, Justice Marshall notes that "the Court's approach to standing is wholly inconsistent with well-established standing principles and clashes with our longstanding conception of the remedial powers of a court and what is necessary to invoke the authority of a court to resolve a particular dispute." Id. at 131 (Marshall, J., dissenting); see also CHEMERINSKY, supra note 73, at 63.

119. Lyons, 461 U.S. at 112 ("[R]ecognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws in the absence of irreparable injury which is both great and immediate.").

120. Id. at 113.

121. Id.

122. Nichol, supra note 72, at 1157-59; Nichol, supra note 70, at 1918.

123. Nichol, supra note 70, at 1918, 1930 n.97 (asserting that the Court's treatment of the injury requirement has been incomplete to the extent that the Court has not recognized the cognizability aspect of the inquiry).


vote. On the other hand, the Court has held that injury to the following interests will not be sufficient for standing: the interest in maintaining a certain racial composition of statewide voting districts; the interest in stopping the government from providing financial aid to discriminatory schools; the interest in "marital happiness"; the interest in obtaining public disclosure of the CIA budget; and the interest in compliance by government officials with the Incompatibility Clause of the United States Constitution. Although the Court actively distinguishes between those interests that are and are not judicially cognizable, it has not defined the criteria by which it makes these distinctions.

In an attempt to define criteria for the cognizability analysis, Professor Nichol suggests that courts assessing judicial cognizability should focus on two factors: (1) the "public acceptance of the interest in question"; and (2) the appropriate role of the judiciary vis-a-vis the other branches of government. The recent explosion of environmental suits provides a good example of how public acceptance of an interest bears upon cognizability. Suppose a plaintiff filed suit alleging that certain conduct violated her interest in the use and enjoyment of the environment. If the suit were filed around the turn of the century, it is likely that the case would have been dismissed for failing to allege a judicially cognizable injury sufficient to confer standing. If the suit were filed today, however, the Court would likely find the injury sufficient to confer standing. The standing analysis of a factually identical scenario at these two different points in time leads to different conclusions

133. Nichol, supra note 70, at 1943 ("Cognizability analysis ... must incorporate a substantial evaluation of the public acceptance of the interest in question. Cognizable interests must have been 'capped' as public values. Moreover, in the 'generalized grievance' actions challenging noncompliance with the Constitution, cognizability analysis must focus on the propriety of judicial recognition of the proffered claims."). Professor Nichol suggests that "[i]t might be best to assume ... that generalized constitutional claims are not the appropriate subject of judicial recognition unless they trigger a special need for intervention.". Id. at 1944. Such a special need might exist when a constitutional claim calls into question a violation or infringement of the democratic process.
134. Id. at 1933-34.
because, during the intervening years, the public has accepted concern for the environment as a value worthy of judicial protection.136

"Public acceptance" of an issue is not necessarily sufficient, however, to make an injury judicially cognizable. For example, the Court has held that an individual's interest in enforcing certain constitutional provisions is not sufficient to confer standing,137 even though it would seem that inclusion of the interest in the text of the Constitution is strong evidence of public acceptance.138 Rather, cognizability also depends on whether a claim is appropriately vindicated by the judiciary.139 This aspect of the cognizability analysis focuses on the role of the federal courts in a constitutional democracy based upon separated powers.

The Constitution creates three branches of government and divides governmental power among them. Consistent with democratic principles, the Constitution delegates the power to make policy decisions to the representative branches of government.140

136. Nichol, supra note 70, at 1933. In certain cases, public acceptance of an interest may be inferred from legislative recognition of the interest. In Warth v. Seldin, 422 U.S. 490 (1975), an organization (Metro-Act), comprised in part of residents of the town of Penfield, challenged an allegedly exclusionary Penfield zoning ordinance on the ground that it deprived its members of the “benefits of living in a racially and ethnically integrated community.” Id. at 512. The Court denied standing to Metro-Act on the ground that the alleged injury — deprivation of the right to live in an integrated community — did not satisfy the injury in fact requirement. Id. at 513-14. In reaching this conclusion, the Court distinguished the situation in Warth from that in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972).

In Trafficante, residents of an apartment complex alleged that their landlord violated the Civil Rights Act of 1968 by discriminating against rental applicants and thus deprived them of “the social benefits of living in an integrated community.” Trafficante, 409 U.S. at 208. Although the Court held that the plaintiffs in Trafficante had standing to sue, the Court in Warth found a “critical distinction” between the two cases which resulted in an opposite conclusion. Warth, 422 U.S. at 513. Noting that “Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute,” the Court held that because Metro-Act did not allege violation of a congressional statute, the alleged injury to an interest in interracial association was insufficient to confer standing. Id. at 514. Thus, the Court in Warth apparently believed that legislative recognition was necessary to show public acceptance of this particular interest.


139. Id. at 1943.

140. See U.S. CONST. arts. I, II.
While the decisions of the representative branches are driven by the will of the majority of the citizenry, such decisions must fall within boundaries established by the Constitution. These constitutional boundaries are mandatory, as opposed to advisory, and may only be amended through a detailed process requiring a super-majority vote. Because these mandatory counter-majoritarian boundaries would be virtually meaningless if the political branches served as the final arbiters of their meaning, the judicial branch — formally insulated from majoritarian influence — is entrusted with the tasks of interpreting the provisions and enforcing the boundaries of the Constitution. Judicial cognizability, therefore, depends not only on whether a claim invokes a generally accepted or legislatively endorsed public value, but also on whether the claim falls within the policy-making prerogative of the representative branches or whether the claim implicates a constitutional limitation that is intended to be enforced by the unrepresentative judicial branch.

B. Causation and Redressability

In addition to showing an actual and judicially cognizable injury, plaintiffs must allege that their injuries resulted from the defendant's conduct and that a favorable court decision will redress the injury. Although the Court has identified causation and redressability as separate requirements of the standing analysis, they are closely related and often prompt identical inquiries.

Satisfaction of the causation and redressability requirements is dependent on what the Court characterizes as the alleged injury. For example, in *Linda R.S. v. Richard D.*, the Court characterized the plaintiff's alleged injury as a lack of child support. Based on this characterization, the Court held that the plaintiff lacked...
standing because she failed to show that her injury was caused by the district attorney's failure to prosecute the father of her child for support since it was only speculative whether prosecution of the father would result in payment. If the Court had characterized the injury as a denial of equal protection of the law rather than as a lack of child support payments, the causation and redressability requirements would have been satisfied. The district attorney's alleged refusal to prosecute the fathers of illegitimate children would have satisfied the causation requirement, while the requested relief — an injunction prohibiting the district attorney from declining to prosecute the father of the plaintiff's child — would have satisfied the redressability requirement. Although the standing analysis consists of three separate inquires, they are closely related to one another.

By tracing the evolution of the modern standing doctrine, this Article has illustrated how the Court's standing analysis has changed over time. Rather than commenting on the pros and cons of these developments, the following section of this Article analyzes the effect the changes in the standing doctrine have on the political question doctrine. Specifically, if the purpose of the modern standing doctrine is to protect the separation of powers among the three branches of the federal government, what purpose, if any, does the political question doctrine serve?

V. The Overlap of the Standing and the Political Question Doctrines

The political question doctrine is based upon the notion that certain subjects are inappropriate for judicial review and should be left to and addressed by the political branches of the government, even though all of the jurisdictional and other justiciability requirements are satisfied. It is well settled that the "nonjusticiability of a political question is primarily a function of the separation of powers." Beyond this general statement, however, few com-

149. See Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea — the idea of separation of powers.").
150. CHEMERINSKY, *supra* note 73, at 142.
mentators agree on the appropriate scope of or rationale for the doctrine.\textsuperscript{152}

On one hand, some commentators have asserted that the only justifiable rationale for allowing a court to refuse judicial review under the political question doctrine is "that the Constitution has committed the determination of the issue to another agency of government than the courts."\textsuperscript{153} According to this school of thought, the judicial branch does not forgo its duty to interpret the Constitution; instead, it makes the determination that an issue has been committed to one of the political branches of government through the normal process of constitutional interpretation.\textsuperscript{154}

On the other hand, other commentators have asserted that the political question doctrine is based, not on constitutional construction and principle, but rather on flexibility and prudence.\textsuperscript{155} Professor Alexander Bickel offered the following justification for the doctrine:

Such is the basis of the political-question doctrine: the court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be, but won't; finally and in sum ("in a mature democracy"), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.\textsuperscript{156}

The Court has not defined the attributes of the political question doctrine with clarity or consistency.\textsuperscript{157} In the leading case describing the doctrine, the Court appeared to lend support both to Professor Wechsler's requirement that the issue be

\textsuperscript{152} Martin H. Redish, \textit{Judicial Review and the "Political Question,"} 79 NW. U. L. REV. 1031, 1031 (1984-1985) ("The [political question] doctrine has always proven to be an enigma to commentators. Not only have they disagreed about its wisdom and validity . . . , but they have also differed significantly over the doctrine's scope and rationale.").


\textsuperscript{154} \textit{Id.}

\textsuperscript{155} Bickel, supra note 96, at 46.

\textsuperscript{156} \textit{Id.} at 75 (quoting Greene v. McElroy, 254 F.2d 944, 954 (D.C. Cir. (1958))).

\textsuperscript{157} In Baker v. Carr, 369 U.S. 186, 210 (1962), the Court stated that the doctrine's attributes "diverge, combine, appear, and disappear in seeming disorderliness."
constitutionally committed to another branch and to Professor Bickel's prudential concerns. In *Baker v. Carr*, the Court stated:

> It is apparent that several formulations ... may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Although the Court has quoted this language in virtually every political question case it has considered since *Baker*, these formulations are not particularly useful in identifying political questions. For example, the text of the Constitution does not even discuss judicial review of its own provisions let alone limit it by creating a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department." Moreover, because the Constitution was drafted with the intent that it would adapt to changing conditions and values, many justiciable constitutional provisions require the federal courts to interpret broad, open-textured language and to develop judicial standards for enforcement. Thus, it is difficult to determine when a provision will be subject to judicial interpretation and when a court will find a "lack of judicially discoverable and manageable standards."

The last four attributes listed in *Baker* are phrased in such conclusory terms that they beg the question of how one may

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158. See *id.* at 217.
159. Id.
161. Id. at 145.
162. Id. For example, one would think that the Due Process Clause would be a prime example of a constitutional clause that lacks "judicially discoverable and manageable standards" and yet the Court has not shied away from interpreting it.
identify a political question. For example, the Court provided no
criteria for ascertaining when a "policy determination" is "clearly
for nonjudicial discretion." 164 Similarly, the Court did not explain
how to determine when it is permissible for a court to review
conduct by another branch of the federal government and in what
instances such review will express lack of "respect." 165 Likewise,
the Court did not elaborate on when an "unusual need for
unquestioning adherence to a political decision" exists, or when the
"potentiality of embarrassment" is sufficiently high to warrant
declaring the case nonjusticiable. 166 Thus, while the Court in
Baker defined the characteristics of a political question, these
characteristics do not provide a meaningful way for lower courts to
identify political questions.

While the Baker attributes do not provide specific criteria for
identifying political questions, they do carry a common thread:
each attribute focuses on the appropriate role of the federal courts
vis-a-vis the other branches of the federal government. The first
three Baker attributes — a "commitment of the issue to a coordi-
nate political department"; "lack of judicially discoverable and
manageable standards"; and the impossibility of deciding without
making "policy determination[s] of a kind clearly for nonjudicial
discretion" 167 — focus on whether the federal courts have the
power and competence to determine the issue presented, or put
another way, whether the alleged injury is judicially cognizable.
These attributes attempt to determine whether the asserted claim
falls within the policy-making prerogative of the representative
branches of the government, or whether the claim implicates a
constitutional limitation that is intended to be enforced by the
nonrepresentative judiciary. 168

On the other hand, the last three Baker attributes — "the
impossibility of a court's undertaking independent resolution
without expressing lack of the respect due coordinate branches of
government"; "an unusual need for unquestioning adherence to a
political decision already made"; and "the potentiality of embar-
rassment from multifarious pronouncements by various depart-

164. Id. (emphasis added).
165. Id.
166. Id. (emphasis added).
167. Id.
168. See supra text accompanying notes 137-42.
ments on one question"169 — focus on the federal courts' ability to adequately redress the issue presented without infringing on the powers of the other coequal branches of the federal government. These attributes do not derive from specific constitutional limitations. Rather, the last three attributes derive from the courts' exercise of remedial prudence and discretion in light of general principles of separation of powers.

By categorizing the political question attributes set out in Baker in terms of cognizability and redressability, the overlap between the political question doctrine and the modern standing doctrine becomes apparent. Specifically, because the modern standing doctrine requires the federal courts to interpret the three requirements of standing — injury, causation, and redressability — in light of the principles of separation of powers, one may argue that the standing analysis as it has evolved has subsumed the concerns that led the Court in Baker to declare an issue to be a nonjusticiable political question. In essence, it appears that the two doctrines have converged.

VI. Post-Baker Political Question Cases

Since Baker, a majority of the Court has dismissed only two cases on the ground that the issue involved a nonjusticiable political question.170 In Nixon v. United States,171 the Court held that a challenge to the Senate impeachment procedures presented a nonjusticiable political question because the issue was constitutionally committed to the Senate, and there were no judicially manageable standards for review."172 In Gilligan v. Morgan,173 the Court held that a challenge to the training, weaponry, and orders of the National Guard presented a nonjusticiable political question because the Court could not fashion appropriate relief without invading "critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government."174 Although the Court relied on the political question doctrine in both

172. Id. at 226.
174. Id. at 7.
of these cases, a review of these cases reveals that the Court could have reached the same result by applying a standing analysis.

In *Nixon*, the former Chief Judge of the United States District Court for the Southern District of Mississippi, Walter L. Nixon ("Nixon"), was convicted on criminal charges and sentenced to prison.\(^{175}\) While serving his prison sentence, Nixon continued to receive his judicial salary.\(^{176}\) The House of Representatives sought Nixon's impeachment charging Nixon with committing criminal activity and bringing disrepute on the federal judiciary.\(^{177}\) The Senate voted to appoint a committee to receive evidence and take testimony regarding Nixon's impeachment.\(^{178}\) Ultimately, the full Senate voted by more than a two-thirds majority to convict Nixon on the articles and remove him from office.\(^{179}\) Nixon filed suit challenging the impeachment on the ground that the appointment of a subcommittee to collect evidence violated the Impeachment Trial Clause.\(^{180}\) The Impeachment Trial Clause requires the full Senate to "try" impeachments.\(^{181}\) Nixon requested the Court to declare his impeachment void and to reinstate his judicial salary and privileges.\(^{182}\)

The Court held that "the word 'try' in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions . . . ."\(^{183}\) This conclusion places the issue squarely within the parameters of the political question doctrine as set forth in *Baker*. However, the Court's reasoning for denying review does not illuminate how the Court arrived at a conclusion based on the political question doctrine. The Court refused to hold that the Framers intended to limit the methods by which the Senate could "try" impeachments because the word "try" is susceptible to a

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176. *Id.*
177. *Id.* at 226-27.
178. *Id.* at 227.
179. *Id.* at 228.
180. The Impeachment Trial Clause states:
   
   *The Senate shall have the sole Power to try all Impeachments.* When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

U.S. CONST. art. I, § 3, cl. 6 (emphasis added).
182. *Id.* at 228.
183. *Id.* at 230.
variety of definitions. While the word "try" is susceptible to different interpretations, one may argue that "try" presents no greater, and perhaps fewer, interpretive difficulties than some other constitutional standards that have been found amendable to familiar techniques of judicial construction, including, for example, "Commerce ... among the several States" ... and 'due process of law.' While the word "try" is not as precise as the other requirements in the Impeachment Trial Clause, many justiciable constitutional provisions are written in similarly broad, open-textured language.

The Court also held that the use of the word "sole" in the Impeachment Trial Clause represents a textually demonstrable constitutional commitment of the issue to a coordinate political department. While it is true that the Constitution grants to the Senate exclusive power to try impeachments, this does not necessarily mean that the Senate shall have final responsibility for determining the scope and nature of such power. For example, in Article I, Section 8, the Constitution commits to Congress exclusive responsibility for many governmental functions. Yet, the courts retain the power to determine whether the Congress has acted within the powers conferred. In Nixon, on the other hand, the Court concluded that if the Senate's impeachment procedures were subject to judicial review, the Senate would not have the "sole" power of impeachment but, rather, would be sharing that power with the judiciary. This conclusion assumes that judicial review of impeachment procedures is the same as judicial determination of whether to impeach. However, rather than determining whether Nixon should be acquitted or convicted — which it would not be empowered to do — the Court was merely asked to review

184. Id. The Court cited the following definitions of "try": "to examine"; "to examine as a judge"; "to examine or investigate judicially"; "to conduct the trial of"; "to put to the test by experiment, investigation, or trial"; and "to examine as a judge; to bring before a judicial tribunal." Id.
185. Id. at 247 (White, J., concurring) (citation omitted).
186. See CHEMERINSKY, supra note 73, at 145.
188. Among the governmental functions committed exclusively to Congress are the power to tax and the power to pay debts and to provide for the common defense and welfare of the United States. U.S. CONST. art. I, § 8.
190. Id. at 231.
the procedures employed by the Senate in reaching its decision. Thus, even if the Court had chosen to review the case, the Senate still would have retained the "sole" power to try impeachments.

The most persuasive portion of the Court's analysis deals with the drafting history of the Impeachment Trial Clause. The history of the Constitutional Convention indicates that the Framers of the Constitution believed impeachment trials should be conducted by representatives of the people and that the judiciary lacked the political fortitude to execute an impeachment trial or carry out its judgment. The Framers asserted that the power to try impeachments should not rest with such a small number of individuals, particularly when the same body would conduct a related criminal trial, and that judicial involvement in the impeachment process would "eviscerate the 'important constitutional check' placed on the Judiciary." Based on this historical evidence, the Nixon Court concluded that the Framers intended to grant impeachment power exclusively to the legislature. While this reasoning is persuasive, it does not directly implicate any of the Baker political question attributes. Instead, the Court appears to have been conducting a standing analysis of whether the claim asserted by Nixon — violation of the Impeachment Trial Clause — presented a judicially cognizable injury.

According to Professor Nichol, judicial cognizability should focus on two factors: (1) the "public acceptance of the interest in question"; and (2) the appropriate role of the judiciary vis-a-vis the other branches of government. In Nixon, the plaintiff alleged that the Senate violated the Impeachment Trial Clause by failing to "try" him. The first factor of Nichol's cognizability analysis is satisfied because the interest is incorporated in the text of the Constitution — probative evidence that the interest is accepted as a public value. Cognizability, thus, depends on the second factor — whether the issue falls within the policy-making prerogative of the representative branches or whether it implicates a constitutional limitation that is intended to be enforced by the nonrepresentative judicial branch.

The Court in Nixon held that the Impeachment Trial Clause does not place a judicially enforceable constitutional limitation on

193. Nichol, supra note 70, at 1943.
194. See supra text accompanying notes 138-42.
the Senate's power to "try" impeachment. In reaching this conclusion, the Court distinguished Powell v. McCormack, in which it refused to apply the political question doctrine. In Powell, the Court reasoned that the word "qualifications" contained in Article I, Section 5 of the Constitution, is modified by the three requirements for membership in the House contained in Article I, Section 2. Powell held that while each House shall be the judge of the qualifications of its own members, the Constitution defines the outer bounds of these qualifications. Thus, the situation in Powell presented a judicially cognizable interest because it implicated a judicially enforceable constitutional limitation. Unlike the situation presented in Powell, the Nixon Court determined that the case did not involve a judicially cognizable interest. In essence, the Nixon Court concluded that the plaintiff had not presented a judicially cognizable injury because the power to "try" impeachments falls squarely within the policy-making prerogative of the Senate; hence, no judicially enforceable limitations on the Senate's power to try impeachments exists.

Pursuant to this analysis, the Court could have avoided reliance upon the political question doctrine merely by dismissing the case for lack of standing because Nixon failed to show that he suffered injury in fact to a judicially cognizable injury.

In Gilligan v. Morgan, a group of students at Kent State University brought suit alleging that during a period of civil disorder, the Ohio National Guard violated their rights of speech and assembly and caused injury or death to some students. The students sought an injunction restraining the Ohio National Guard from committing future violations of students' constitutional

197. Id. at 548-49.
198. Id. at 520-22. Article I, Section 5 of the Constitution states: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members...."
199. Article I, Section 2, Clause 2 of the Constitution requires that a member of the House must be at least 25 years of age, a citizen of the United States for no less than seven years, and an inhabitant of the State he is chosen to represent.
201. Id. at 237-38.
202. The Nixon Court also noted that "the lack of finality and the difficulty of fashioning relief counsel against justiciability." Id. at 236.
203. 413 U.S. 1 (1973).
204. Id. at 3.
The Court found it "important to note" that the students did not seek damages for injuries sustained or an injunction for "imminently threatened unlawful action." Rather, the plaintiffs made a "broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard." It was this "far-reaching demand for relief" that troubled the Court. In holding that the case did not present a justiciable controversy, the Court cited a combination of deficiencies, including "the advisory nature of the judicial declaration sought[,] ... [the fact] that the nature of the questions to be resolved on remand are subjects committed expressly to the political branches of government[,] ... [and] the uncertainties as to whether a live controversy still exists and the infirmity of the posture of respondents as to standing ...."

Ten years after the Court decided Gilligan, it was faced with a strikingly similar situation in City of Los Angeles v. Lyons. In Lyons, the Court refused to grant the equitable relief requested — relief that would have required overseeing the conduct of the Los Angeles Police Department on a continuing basis — because the plaintiff lacked standing. In Lyons, a plaintiff who was allegedly subjected to an illegal chokehold by members of the Los Angeles Police Department was denied standing to seek an injunction prohibiting the Los Angeles Police Department from applying chokeholds in the future. Although he had standing...

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205. Id. The students also sought injunctive relief against the governor of Ohio restraining him from "prematurely" calling the National Guard in the future and a declaratory judgment that section 2923.55 of the Ohio Revised Code is unconstitutional. The lower courts dismissed these claims and respondents did not seek certiorari with respect to these claims. Id. at 3-4.

206. Id. at 5.

207. Id.

208. Gilligan, 413 U.S. at 5.

209. Id. at 10. Although the Court cited a number of justiciability deficiencies, its analysis focused on Article I, Section 8, Clause 16 of the Constitution, which vests in Congress the power to organize, arm, and discipline the Militia. Based on this provision and the fact that Congress had authorized the President to prescribe regulations governing organization and discipline of the National Guard, the Court held that "[t]he relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard, would ... embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the government." Id. at 7.


211. Id. at 105.

212. See supra text accompanying notes 112-21.
to seek damages for the injuries he sustained during the alleged incident, he did not have standing to obtain equitable relief because he could not show any real or immediate threat that he would again be subjected to an illegal chokehold.\textsuperscript{213}

During the intervening years between \textit{Gilligan} and \textit{Lyons}, the Court refocused the standing analysis, emphasizing that standing served to protect the limited role of the federal courts vis-a-vis other governmental bodies.\textsuperscript{214} In both \textit{Gilligan} and \textit{Lyons}, the Court was troubled by the fact that the relief sought would require the federal courts to oversee the activities of a separate governmental body. The political question doctrine was inapplicable in \textit{Lyons} because there was no threat that the Court would infringe on the role of one of the political branches of the federal government. Thus, the Court applied the modern standing doctrine to protect the delicate balance of power between the state and federal governments. Ten years earlier, the \textit{Gilligan} Court relied upon a combination of justiciability deficiencies — including that the issue presented was a political question — to deny judicial review of the activities of the Ohio National Guard. If \textit{Gilligan} were decided today, however, the Court could apply a standing analysis similar to that applied in \textit{Lyons}. Specifically, since the students in \textit{Gilligan} could not show that they were likely to be subjected to a similar incident in the future, the Court could find that they lack standing to obtain prospective relief against the Guard because they could not allege an actual or imminently threatened injury.\textsuperscript{215} In this manner, the Court could protect the delicate balance of powers among the branches of the federal government by applying a standing analysis. Instead, \textit{Gilligan} stands as one of the last cases in which the Court applied a political question analysis — albeit weakly — to deny judicial review.

\textbf{VII. Conclusion}

In 1976 Professor Louis Henkin asserted that there is no need for a separate political question doctrine. In making this assertion,
he relied in part on what he perceived to be the "new birth" of judicial review.\textsuperscript{216} Noting that judicial review had become virtually a "birthright of every inhabitant,"\textsuperscript{217} Professor Henkin stated that the political question doctrine was not only unnecessary but that it cried for strict and skeptical scrutiny.\textsuperscript{218} Since Professor Henkin's article, the trend has been toward less — not more — judicial review. Nonetheless, this Article submits that while the contours of justiciability have changed significantly since 1976, these changes — particularly changes in the doctrine of standing — strengthen rather than weaken the assertion that there is no need for a separate political question doctrine. Thus, this Article asks — as Professor Henkin asked almost two decades ago — "[w]ould not the part of the courts in our system, the institution of judicial review, and their public and intellectual acceptance, fare better if we broke open th[e political question] package, assigned its authentic components elsewhere, and threw the package away?"\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{216} Henkin, \textit{supra} note 1, at 625.
\item \textsuperscript{217} \textit{Id}.
\item \textsuperscript{218} \textit{Id}. at 600.
\item \textsuperscript{219} \textit{Id}. at 625.
\end{itemize}