Proposed Citizens Right To Standing Act—Finding The Keys To Unlock The Courthouse Doors

Recent Supreme Court decisions severely restrict the right of citizens to litigate in federal courts. The Court’s standing requirements not only limit the ability of citizens to successfully invoke federal court jurisdiction, but also confuse lower courts and litigants attempting to apply the requirements. The restrictive standing requirements have met with increasing criticism, and Congress is now considering legislative modification of standing doctrine. Unfortunately, the Court’s employment of constitutional foundations in establishing current standing requirements imposes substantial roadblocks Congress must avoid to enact remedial standing legislation. This comment examines the constitutional and pragmatic difficulties of statutory modification of standing requirements and recommends an approach to remedial legislation. After comparing recent proposals for standing legislation, this comment concludes that positive and comprehensive legislation is needed for citizens and taxpayers to adequately challenge unlawful government action in federal courts.


2. The Court’s goal apparently was reduction of the federal courts’ workload, but ironically the requirements inflate time expended on threshold issues in cases that reach the merits, thus failing to perform this function. See note 33 infra.


I. BACKGROUND

Standing doctrine determines whether plaintiffs have a right to present a case. Although theoretically the right to appear in court is an issue in all suits, as a practical matter problems with standing occur only when plaintiffs assert public causes of action. Standing issues commonly occur when citizens challenge administrative agency action, challenge the constitutionality of a statute, challenge federal expenditures as taxpayers, or attempt enforcement of a regulatory statute.

The doctrine of standing to sue, especially in federal courts, once imposed severe restrictions on litigation, then underwent a period of modern liberalization, and most recently has again posed a barrier to judicial access. Early federal standing law required a plaintiff to allege that government action invaded a legal right. This restrictive test denied standing to a person alleging injury resulting from government action “unless the right invaded was a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.” In 1970, the Supreme Court rejected this legal right test in the landmark case of Association of Data Processing Service Organizations v. Camp. Data Processing established a two-pronged test for standing to challenge administrative agency action: a constitutional requirement of “injury in fact” and a nonconstitutional requirement that the

5. In private lawsuits, standing is subsumed by doctrines such as “real party in interest” or limitation of implied causes of action, which serve to control access to the courts. Further, in the private context, the plaintiff establishes a stake in the controversy by proving the elements of a cause of action, as when a plaintiff claims physical injury in a tort action or economic injury by breach of contract. In litigation involving allegations of illegal government activity, however, courts address the standing question as a separate threshold inquiry. While in practice the standing inquiry is not always entirely a threshold question, see note 22 infra, in essence “[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.” Flast v. Cohen, 392 U.S. 83, 99 (1968) (emphasis added).


9. The Court mentioned that beyond economic injury, it would consider injury to
litigant's interest be "arguably within the zone of interests" of the substantive statute, if any, forming the basis of the action. This two-pronged test became the universal standard permitting an increasing number of litigants to challenge unlawful government actions by invoking federal court jurisdiction.  

Although commentators and litigants praised the liberalized law of standing, the Court retained the relative simplicity of the *Data Processing* test only briefly. The doors to the courthouse began to swing closed again when the Court began to find new grounds to deny standing, notwithstanding the presence of an injury. First, in *Linda R. S. v. Richard D.*, the Court denied standing for lack of sufficient causation between an alleged injury and the challenged government action. Then, in *United States v. Richardson* and *Schlesinger v. Reservists Committee to Stop the War*, the Court denied standing because plaintiffs' complaints were generalized grievances common to all members of the public. Third, in *Warth v. Seldin*, the Court developed a requirement demanding a substantial probability that judicial relief would directly provide the plaintiffs' desired remedy. These three tests have been the focus of recent proposals for legis-

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aesthetic, conservational, or recreational interests, or to spiritual interests in first amendment values of freedom of religion. 397 U.S. at 154.


11. Subsequent interpretations of the injury in fact requirement were so broad that allegations of future injury to plaintiffs' aesthetic and recreational interests, resulting indirectly from government actions, satisfied the standing test. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). Although *SCRAP* was the high water mark in the modern liberalization of standing, subsequent cases rejected *SCRAP*'s acceptance of injuries which were not both direct and substantial. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975).

14. Id. at 617-18.
17. 422 U.S. 490 (1975).
18. Id. at 499.
II. CONSTITUTIONAL VS. PRUDENTIAL DERIVATION OF STANDING RULES

Congressional power to modify standing requirements depends on whether the standing doctrine in question is constitutionally, or merely prudentially, grounded. The Supreme Court frequently has stated that Congress may create a statutory right conferring standing, subject only to article III limitations. Unfortunately, evolving conceptions of standing fail to differentiate clearly between constitutional and "prudential" requirements. This ambiguity makes the assessment of Congress's power to enact corrective legislation difficult.

In federal courts, the standing concept has two distinct elements, one constitutionally derived and the second judicially created. The "case" or "controversy" clause of the United States Constitution supports an indefeasible requirement. The second aspect of standing involves prudential rules. The Court has developed these nonconstitutional requirements as rules of self-restraint. The distinction between the two sources of standing

19. See note 4 supra.

20. "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing' . . . Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." Warth v. Seldin, 422 U.S. 490, 500-01 (1975) (quoting Linda R. S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)).


22. Apart from [the] minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. . . . Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.


Among the prudential limitations the Court has formulated are: whether causation of the injury complained of is too attenuated, see Linda R. S. v. Richard D., 410 U.S. 614 (1973), whether the grievance is too generalized, see Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 166 (1974); United States v. Richardson, 418 U.S. 208 (1974), whether an appropriate remedy can be fashioned, see Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), whether the plaintiff may justifiably assert rights of third parties, see Tileston v. Ullman, 318 U.S. 44 (1943), whether the plaintiff claims interest
doctrine is important because Congress can modify prudential, but not constitutional, requirements.\(^\text{23}\)

The Supreme Court articulated its rationale for constitutional standing requirements in *Flast v. Cohen*.\(^\text{24}\) The Court identified three criteria for the article III limitation on standing: concreteness, adverseness, and adequacy of representation.\(^\text{25}\) To as-


Many of these prudential concerns involve a cursory consideration of the merits. Questions of causation, generalized grievance, redressability, and zone of interests all require inquiry into the substance of the claim. Only questions of third parties and taxpayer standing directly raise the issue of the appropriateness of the plaintiff to be a party. In a strict sense, however, authentic standing issues, whether constitutional or prudential, involve only the question of whether the plaintiff is an appropriate person to maintain the lawsuit. See *Flast v. Cohen*, 392 U.S. 83, 99 (1968), quoted at note 5 supra. Permitting the standing inquiry to examine the merits rather than the parties leads to abuse by using standing as a substitute for a decision on the merits. Critics accuse the Court of using prudential standing rules to defeat claims of which it disapproves when precedent supports the merits of the claim. See *Davis*, supra note 3; *Tushnet*, supra note 3.

Another criticism of these prudential standing rules seems even more appropriate today than when it was first made: "The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance." *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 861 (D.C. Cir. 1970).


24. 392 U.S. 83 (1968). Prior to *Flast*, federal taxpayers lacked standing to challenge any governmental spending program because courts not only required litigants to show the challenged spending program was unconstitutional or otherwise invalid, but also that the program caused a direct injury to the plaintiff. The direct injury test permitted taxpayers to challenge IRS rulings affecting their personal tax status, but denied standing where the injury was suffered "in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). The Court ended debate on whether the direct injury standard was constitutional or prudential by recognizing it explicitly as a rule of self-restraint, then discarding it in favor of a standard requiring a logical nexus between the status of the plaintiff and the claim to permit adjudication. Thus, the "taxpayer must show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the power delegated to Congress by Art. I, § 8." 392 U.S. at 102-03. This creates only a very limited exception to the general denial of taxpayer standing. Today, the Burger Court appears to be hearkening back to the antiquated rationale of *Frothingham*. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974).

25. "[I]n terms of the Article III limitation on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." 392 U.S. at 101. Compare the remark by Professor Davis: "The purpose of the law of standing is to determine who is justly entitled to use the judicial machinery, not to sharpen the presentation of issues for the benefit of the judiciary." *Davis*, supra note 3, at 81.
sure the adequate presentation of issues in an adversary context, the Court has held that constitutional standing requires a "personal stake" or an "injury in fact."

By contrast, the prudential requirements are founded on principles of judicial self-restraint. The Court, however, has not distinguished the differing rationales for prudential and constitutional standing. This confusion between prudential and consti-

26. Relying on identical language from an earlier case, the Court in Flast concluded, without revealing its reasoning, that adjudication of issues "historically viewed as capable of judicial resolution" required litigants to have a "personal stake in the outcome of the controversy." 392 U.S. at 101 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). Professor Raoul Berger believes that the Court's imposition of a constitutionally mandated requirement of a personal stake is historically unjustified. He argues that the case or controversy requirement of article III presupposes the historical context of the courts of Westminster when the Constitution was framed. History discloses that litigants without a personal stake were permitted to challenge jurisdictional usurpations in the English courts on behalf of the public interest. Thus, a personal stake limitation on standing cannot rest on historically derived constitutional compulsions. Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L.J. 816 (1969).


28. See Warth v. Seldin, 422 U.S. 490, 499-500 (1975), quoted at note 22 supra. Because prudential rules are motivated by concerns for judicial self-restraint, they need not be immutably applied. The Court has enumerated several countervailing considerations where other values will outweigh its reluctance to exert judicial power:

For example, where, as a result of the very litigation in question, the constitutional rights of one not a party would be impaired, and where he has no effective way to preserve them himself, the Court may consider those rights as before it. N.A.A.C.P. v. Alabama, 357 U.S. 449, 459-460 (1958); Barrows v. Jackson, 346 U.S. 249, 257 (1953) . . . . This Court has indicated that where the application of these rules would itself have an inhibitory effect on freedom of speech, they may not be applied. See Smith v. California, 361 U.S. 147, 151, . . . . Thornhill v. Alabama, 310 U.S. 88, 97-98 . . . . United States v. Raines, 362 U.S. 17, 22 (1960) (parallel citations omitted). Accord, Warth v. Seldin, 422 U.S. 490, 501 (1975). Compare the remark by Professor Jaffe:

My own view has been and continues to be that a plaintiff who does not have a "protected interest" whether as an individual or a group, does not have a right to review, but that a court in its discretion may at the suit of such a person review the legal question if it deems such consideration to be in the public interest.

Jaffe, Standing Again, 84 Harv. L. Rev. 633, 634-35 (1971). But Professor Broderick argues that courts should not be able to decide on an optional, ad hoc basis which cases to decide merely on the basis of judicial economy: "[S]uch a practice raises 'equal protection' aspects of the Fifth Amendment on which the Court would quickly 'pounce' if other government agencies were so involved in such selectivity." Broderick, supra note 3, at 525.

29. For example, the Court treated the generalized grievances limitation as a prudential bar in United States v. Richardson, 418 U.S. 166 (1974), but apparently as a constitutional barrier in Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), where the Court stated:

All citizens, of course, share equally an interest in the independence of each branch of Government. In some fashion, every provision of the Constitution was
tutional considerations resulted in a blending of rationales in *Simon v. Eastern Kentucky Welfare Rights Organization.* Without discussion, the Eastern Kentucky Court imposed a new constitutional test for standing. The Court required constitutionally not only injury in fact but also the formerly prudential elements of causation and substantial likelihood that a favorable judicial determination would redress the plaintiff's injury.

By constitutionalizing standing barriers, the Court failed to distinguish properly between prudential concerns and constitutional restrictions. The need for judicial self-restraint motivated meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a "case or controversy" appropriate for judicial resolution. *Id.* at 226-27 (footnote omitted).

The Court confused the two rationales further in *Warth,* stating: "[T]he standing inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society." 422 U.S. at 498 (citation omitted). Such combination of the two aspects of standing is not uncommon. In *Barrows v. Jackson,* 346 U.S. 249 (1953), the Court also noted that rules of self-restraint and constitutional limitations were not always clearly distinguished. Nevertheless, the motives for each are conceptually distinct. Prudential concerns involve questions of judicial self-restraint, while constitutional considerations require only an examination of the parties to decide whether they are entitled to sue. *See Warth v. Seldin,* 422 U.S. 490, 499-500 (1975), quoted at note 22 *supra.*


31. The Court held that a plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision" and that "[a]bsent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Id.* at 38.

32. By labeling standing barriers of generalized grievance, causation, and redressability as constitutional the Court ignores their origins as prudential doctrines. Mr. Justice Brennan dissented in *Eastern Kentucky,* insisting that redressability was and should remain a prudential consideration and that the Constitution requires only concrete adverseness flowing from a personal stake in the outcome. He objected to reliance on the irreducible article III minimum, fearing that such a rationale would deny Congress the power to rectify an increasingly muddled and restrictive approach to standing. Brennan insisted:

In our modern-day society, dominated by complex legislative programs and large-scale governmental involvement in the everyday lives of all of us, judicial review of administrative action is essential both for protection of individuals illegally harmed by that action, . . . and to ensure that the attainment of congressionally mandated goals is not frustrated by illegal action . . . . *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 65 (1976) (Brennan, J., concurring in the judgment and dissenting) (citations omitted). *Cf.* Berger, *supra* note 26 (rejection of personal stake test as constitutional limitation).

Despite such criticism, the majority of the Court shows no signs of reconsidering its position. Recently, in *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59 (1978), the Court upheld standing for a citizen group, but nonetheless employed a two-pronged test for constitutional standing: "injury in fact" and a "substantial likelihood" that the relief requested will redress the injury. *Id.* at 75 n.20. The Court expressly rested these two criteria on the case and controversy requirement of article III.
the development of prudential requirements. Paradoxically, however, complex standing rules promote only judicial diseconomy by causing time delays and litigant confusion.33 By contrast, the Constitution historically permitted a court appearance by any plaintiff presenting specific claims in an adversary context.34 Dissatisfied with restrictive standing barriers, Congress is considering legislative action aimed at reducing standing to this constitutional minimum.

Although the constitutional basis for the two-pronged injury-in-fact requirement seems clear, the Court referred to other, previously constitutional standing doctrines, relating to generalized grievances and purported representation of the rights of third parties, as prudential concerns. See notes 29 & 31 supra. In a sweeping summation, the Court made a puzzling statement creating further ambiguity as to the constitutional or prudential foundation of the new standing principles, stating: "Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met." 438 U.S. at 80-81. The circuitous reasoning of this statement fails to provide any guidance in determining the Court's view of which doctrines are prudential and which are constitutional.

33. The imposition of restrictive standing requirements is an ineffective and ill-advised attempt to promote judicial economy. A rigid application of causation and redressability requires courts to spend excessive time analyzing the merits of a case for standing purposes. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978), illustrates the hardship of complex standing rules on both courts and litigants. The district court had to conduct a four-day trial on the issues of standing and ripeness alone before reaching the merits. Carolina Environmental Study Group v. Nuclear Regulatory Comm'n, 431 F. Supp. 203 (W.D.N.C. 1977). Before the case reached the Supreme Court, a member of the House Judiciary Committee predicted that because of the new standing doctrines the Court would decide the plaintiffs lacked standing. See State of the Judiciary and Access to Justice, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 35 (1977) (remarks by Rep. Drinan during Ralph Nader's testimony). But on appeal the Supreme Court upheld standing, despite defense efforts to dismiss the case on standing grounds. The disparate results from application of the same standards creates uncertainty and unpredictability for litigants, delays consideration of the merits in most cases, and tends to preclude decisions entirely in cases where plaintiffs may actually deserve to litigate their claims.

34. Indeed, plaintiffs willing to carry a case all the way to the Supreme Court have a sufficient adversary interest to satisfy article III concerns, absent a clearly political question. In fact, the Court has analyzed such problems in precisely such terms. In Sosna v. Iowa, 419 U.S. 393 (1975), the Court held that although the legal issue as to the representative plaintiff of a class action suit had become moot, the Court could reach the merits of the claim because "the interests of [the] class have been competently urged at each level of the proceeding." Id. at 403. A major criticism of the Supreme Court's recent standing decisions, however, is properly founded on the fact that the Court often denied standing on appeal after the merits had been thoroughly aired and judgment rendered on them in the lower courts. Senator Metzenbaum's proposed Citizens Right to Standing in Federal Courts Act removes this problem by providing that unless a plaintiff's lack of standing to sue is raised prior to entry of judgment in the court of first impression, it may not be raised on appeal except as required by article III. S. 3005, 95th Cong., 2d Sess., 124 CONG. REC. S6498 (daily ed. April 27, 1978).
III. CONGRESSIONAL AUGMENTATION OF STANDING

Responding to the Supreme Court's restrictive approach to standing, members of the House and Senate Judiciary Committees have proposed the "Citizens Right to Standing in Federal Courts Act."35 The bill, introduced by Senator Howard Metzenbaum and others, specifies in a negative, prohibitory fashion four grounds the federal courts may not apply in dismissing an action for lack of a plaintiff's standing.36 The four prohibited grounds for dismissal are: first, the injury complained of is a generalized grievance; second, the defendant's conduct is not the primary cause of the injury; third, a decision for the plaintiff on the merits of the case is not substantially likely to remedy or redress the injury the plaintiff suffered; or fourth, the plaintiff seeks to protect an interest not arguably within the zone of the interests protected by the law in question. The bill's obvious purpose is to declare the holdings of recent restrictive standing cases void.37

The congressional proposal creates several potential separation of powers problems, impacting both judicial independence and, perhaps, the balance of powers. Any legislation modifying standing doctrine reduces the power of courts to decide which cases to hear. Such action clearly infringes on judicial independence. This infringement is a critical issue today because of the Supreme Court's current emphasis on judicial self-restraint.38 At least one commentator believes that "judicial power expands as the requirements of standing are relaxed."39 This observation questions whether judicial power may be excessively expanded, thus upsetting the balance of coordinate branches of government. Both the judicial independence and the balance of powers consid-

35. See note 4 supra.
36. The bill applies only to actions brought against the United States or any officer or agency thereof, against any state or local governmental entity or officer, or against the District of Columbia. S. 680, 96th Cong., 1st Sess. § 3, 125 CONG. REC. S2822 (daily ed. March 15, 1979).
erations are relevant in analyzing the validity of any congressional action modifying standing barriers.

The situation most analogous to congressional alteration of standing requirements is congressional authority to adjust the jurisdiction of the federal courts. While many cases and commentators assert that Congress has extremely broad power to alter federal court jurisdiction, limitations exist, resting upon both concern for the independence of the judiciary and due process requirements.

Whatever may be the due process limits to withdrawing jurisdiction and thereby preventing persons harmed by government action from litigating their claims, such concerns are inapposite where Congress seeks to expand rather than withdraw jurisdiction. Nonetheless, the separation of powers concerns remain, albeit for a different reason. Most of the jurisdictional worries center on the elimination of an independent judiciary as a check on other branches of government. By contrast, in the standing context, the independence of the judiciary centers on judicial ability


41. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (Congress may not enact legislation eliminating an area of jurisdiction in order to control results in particular case); Hart, supra note 40, at 1365 (Congress may not constitutionally make exceptions to jurisdiction of Supreme Court that would destroy its essential role in constitutional plan); Rotunda, Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 Geo. L.J. 839, 844-51 (1976) (independence of judiciary as coordinate branch of government able to serve as check on other branches is frustrated by any interstitial elimination of lower federal courts' jurisdiction).

42. Estep v. United States, 327 U.S. 114, 120 (1946) (Constitution may require judicial review); Central of Ga. Ry. v. Wright, 207 U.S. 127 (1907) (due process clause of fourteenth amendment entitles taxpayer opportunity to contest to legality of state taxes imposed); Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 527 (1974) (congressional power to enact jurisdictional laws cannot include authorization to prevent any vindication of a constitutional right); Hart, supra note 40, at 1365; Redish & Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45, 93 (1975) (congressional power to regulate jurisdiction of federal courts is limited by due process clause of fifth amendment in cases where the doors of state courts are closed); Rotunda, supra note 41, at 854 ("To prevent the legislature from using the federal courts to accomplish unconstitutional ends, Congress' article III power must be subject to the due process guarantees of the Fifth Amendment."); Note, Congressional Power over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples, 49 N.Y.U.L. Rev. 131 (1974) (Pipeline Act's denial of any forum to litigate otherwise justiciable claim may be invalid as deprivation of due process).

43. In standing, however, the issue is the reverse: whether expansion of judicial power may upset the balance of powers. See Brown, supra note 39.
to control court dockets. But, if the independence of the judiciary is important, it is in its role as one of the tripartite branches of government, as a balance to the majoritarian branches of government and as the final arbiter of the Constitution.44 The independence of the judiciary is not a value in itself; it has meaning only to promote the balance of powers. In our system of government, the Congress retains a great deal of control over the jurisdiction of the federal courts. The legislative branch makes the law as a matter of substantive policy, and also may promulgate the rules of procedure and evidence that the courts are bound to follow. In fact, because the legislature may change an unwanted development in decisional law,45 Congress may even prescribe rules of analysis in judicial opinions.46 Rather than legislatively intruding on the province of the courts, statutes prescribing rules of interpretation prevent courts from usurping the legislature's functions by misinterpreting legislative pronouncements of policy.47

In fact standing is best understood as a procedural doctrine, modifiable under Congress's power to prescribe rules of procedure for the federal courts.48 With standing thus understood, the fears of unwarranted expansion of judicial power resulting from relaxed standing requirements are themselves unwarranted.49 In the first place, neither legislative nor judicial definitions of standing modify jurisdictional requirements. Congress cannot alter justiciability requirements by authorizing judicial consideration of a "political question" or advisory opinions. Standing, however, addresses not what may be decided but who may bring a claim.50 Some of the Court's recent standing rules, such as generalized

46. A very few cases and commentators contradict this proposition. See United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) (Congress may not prescribe rules of decision in a pending case); Roney v. Warwick, 172 Pa. 140, 33 A. 373 (1895) (statute specifying what a phrase "shall be construed to mean" struck down as unconstitutional); Thomas, Statutory Construction Where Legislation is Viewed as a Legal Institution, 3 HARV. J. LEGIS. 191, 211 n.85 (1965-66) (legislature violates separation of powers where a statute seeks to control attitudes or subjective thoughts of judiciary). But see note 45 supra.
49. See Brown, supra note 39.
grievances and causation, are criticized justifiably as going to the merits of the claim, because they regulate "what" rather than "who." Therefore, congressional authority to modify such standing requirements is recognizable under its powers both to regulate procedure and to control substantive law.

Even though broadened standing would not create an inherent increase in judicial power, it may have the practical effect of expanding judicial power simply because the courts would resolve more controversies. Such an effect, however, merely provides a check on excessive regulatory bureaucracy and encourages a balance of judicial power concomitant with the phenomenal modern growth of the legislative and administrative spheres of government.\(^5\) Arguably, even outright jurisdictional expansion may be justified. Congress apparently has already recognized a need for greater judicial review by eliminating the amount in controversy requirement in suits against the federal government.\(^5\)

The foregoing considerations support congressional authority to legislate standing rules consistent with separation of powers concerns and illustrate that, absent other constitutional objections, the proposed Citizens Right to Standing in Federal Courts Act is constitutionally valid. Unfortunately, recent constitutionalization of formerly prudential standing doctrines poses just such serious constitutional difficulties. As discussed earlier, the Supreme Court now seems to treat causation, redressability, and sometimes issues of generalized grievances as constitutional limitations.\(^5\) Because the Court is the final and authoritative expositor of the Constitution, Congress may be without authority to decide that the article III case or controversy requirement is satisfied without the fine spun refinements of injury in fact such as causation and redressability.\(^4\) Whether Congress could determine that an injury exists where the Court does not perceive one, or whether it could reject the injury in fact requirement itself presents the crucial question.\(^5\) A simple congressional denial of principles the Court has pronounced as constitutional would be

\(^51\) See generally K. Davis, Administrative Law Treatise § 1 (2d ed. 1978) (importance of seven federal regulatory agencies in the 1930's overshadowed by over 76 administrative agencies in the 1970's).


\(^53\) See text accompanying notes 29-31 supra.


fatally defective.

Nonetheless, assuming the Court will insist that injury in fact, causation, and redressability are constitutional requirements, it is submitted that Congress still has the power to remove the standing barriers imposed by the Court. Congress can modify standing barriers and give citizens the right to challenge unlawful government action in several ways: (1) remove prudential standing requirements; (2) create a substantive right the invasion of which creates standing; (3) provide for judicial review in connection with substantive legislation; (4) provide for citizen suits within substantive legislation; (5) create representational standing; and (6) create taxpayer standing. To determine which approach or combination of approaches should be employed, the policy justifications and constitutional authority for each must be examined.

A. Removal of Prudential Standing Barriers

The Metzenbaum proposal would eliminate at least two prudential standing requirements relating to the generalized grievances concept and the zone of interests test. One commentator proposes the removal of all prudential standing requirements, including limits on asserting the rights of third parties and the ripeness requirement.\(^{56}\) Although Professor Sedler bases the power to remove the nonconstitutional aspects of standing on the congressional article III power to regulate the jurisdiction of the federal courts,\(^{57}\) a broader rationale rests on congressional power to control substantive law within the constitutional framework. The Supreme Court has repeatedly recognized congressional power to remove prudential requirements.\(^{58}\)

Although purporting to remove a few prudential barriers, the Metzenbaum proposal is singularly weak because it does not address other nonprudential barriers and thereby fails to provide clear guidelines for citizens challenging unlawful government action. By specifying only grounds courts may not apply to bar access to the federal courts, the proposed act fails to establish what a plaintiff must allege to attain standing.\(^{59}\) Indeed, a plain-

\(^{56}\) Sedler, Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform, 30 Rutgers L. Rev. 863, 878 (1977).

\(^{57}\) Id.

\(^{58}\) See, e.g., Warth v. Seldin, 422 U.S. 490, 501 (1975), quoted at note 23 supra.

\(^{59}\) Pleading requirements for standing are sometimes reminiscent of long obsolete technical requirements. The confusing and often inconsistent line of precedents makes it difficult for litigants to determine what they must show to gain standing. The litigant also
tiff could not use the proposed act in court except as a defense against application of the proscribed standards. This approach would be analogous to abolishing common law writs but failing to substitute a permissible form of action. Mere negation will only lead to more appellate review, leaving litigants in essentially the same position of uncertainty. The Metzenbaum bill, therefore, does not achieve its goal of clarifying the existing law of standing.\(^6^0\)

The Sedler proposal, though including all prudential requirements, likewise fails to broaden the citizen’s ability to challenge unlawful government actions.\(^6^1\) Eliminating prudential requirements still leaves the new constitutional requirements intact, thus failing to establish any procedure for assuring standing.\(^6^2\)

B. Creating a Substantive Right

Substantive legislation may create standing by establishing a legal right which may be invaded.\(^6^3\) Rather than attempting to

faces uncertainty in knowing whether a court will take an expansive or restrictive view of standing requirements. As testimony in Congress has indicated,

what is needed is comprehensive standing legislation setting out precise standards under which citizens are assured access to the courts to protect their rights. By incorporating meaningful and easy to apply standards, such legislation would eliminate the needless drain of the federal judiciary caused by the Supreme Court’s confusion of the law of standing.


60. In introducing H.R. 13434, the Metzenbaum standing proposal, Representative Kastenmeier stated that “restrictive decisions on standing often result in a tremendous waste of judicial resources while lower court judges are left to decipher confusing commands from the higher courts. . . . [T]he purpose of the proposed legislation is to address and resolve growing confusion in the area of standing to bring suit.” 124 Cong. Rec. E3733-34 (daily ed. July 13, 1978) (remarks of Rep. Kastenmeier).

61. A broader view of standing is consistent with contemporary advocacy of increased citizen participation in government. Judicial review does not usurp democratic power, but rather encourages the fundamental principles of representative government: “Citizen participation is not simply a vehicle for minority protection, but a creative element in government and lawmaking. The usual taxpayer and citizen suit is thoroughly consistent with the primacy of majority rule.” Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033, 1045 (1968).


63. See note 20 supra.
remove judicially established standing doctrine, this approach simply legislatively creates a type of case or controversy for which citizens are to have standing. The creation of this substantive right would be based not upon Congress's power to regulate the jurisdiction of the federal courts, but upon its power to create a substantive claim. For example, Chief Justice Burger has called upon Congress to create a statutory cause of action to vindicate the rights of persons who have had their fourth amendment rights violated by government officials.44 Professor Sedler recommends an even broader approach: creation of a substantive right to compliance with the Constitution and laws of the United States on the part of all government officials.45 Congressional authority to create a substantive right in this context arises from the "necessary and proper" clause of the United States Constitution.46 Just as Congress may enact civil rights laws or regulate interstate commerce under constitutional authority, Congress can make a legislative finding that a citizen right of action is necessary to enforce the laws of the United States. In effect, such a determination entails congressional recognition that citizens suffer injury in fact whenever Congress, the President, executive officials, or administrative agency personnel violate the Constitution or laws of the United States, thus translating an abstract injury into a specific one. The new substantive claim does sound suspiciously akin to Congress declaring that a litigant need not possess the requisite judicially redressable injury in fact which the Court has stated is a constitutional requirement.47 But if the Court applies a test of presumption of constitutionality, which it

65. Professor Sedler recommends a statute in these terms:
    All citizens and residents of the United States have a substantive right to compliance with the Constitution and laws of the United States on the part of the Congress, the President, executive officials, and administrative agencies. Any citizen or resident may maintain an action in the courts of the United States against the United States or against the appropriate officer thereof, challenging the constitutionality of any Act of Congress, or challenging any action of the President, any Member of Congress, any executive official, or any administrative agency as violating the Constitution or laws of the United States.
Sedler, supra note 56, at 879.
66. The Constitution gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. A congressional decision to create a right of action to enforce the Constitution and the laws of the United States is well-founded upon this power.
ordinarily does in deference to congressional fact-finding, the Court might interpret this kind of statutory cause of action as merely identifying the requisite injury, legislatively creating a type of case or controversy. Numerous statements by the Court indicate that this approach should, and probably would, be upheld as constitutional, because it does not reverse any constitutional principle, realign the judiciary vis-a-vis Congress, or give the judiciary more jurisdiction or power. The approach simply creates a legal right that courts are accustomed to enforcing.

C. Judicial Review Statutes

Congress can also augment standing procedurally by providing for judicial review. For example, the Administrative Procedure Act (APA) provides for judicial review. The Court, however, has stated that under this provision the Constitution requires not only injury in fact, but also redressability. These requirements reflect the APA formulation bestowing standing only on parties “aggrieved” or “adversely affected.” Although the APA and similar judicial review provisions do not automatically confer standing, a more broadly worded judicial review provision might do so. In fact, existing legislation already has resulted in judicial recognition of congressional power to augment standing despite limiting requirements for injury in fact, causation, and redressability. A broader judicial review provision confers standing by authorizing review and explicitly identifying who may be a suitable plaintiff.

68. See, e.g., notes 20 & 23 supra.
69. See, e.g., Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (standing approved because statute gave right of action to “[a]ny person who claims to have been injured.” 42 U.S.C. § 3610 (1970)).
71. “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” Id. § 702.
74. See also O'Shea v. Littleton, 414 U.S. 488, 493 n.2 (1974) (“party injured” formulation of Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970) held to not bestow standing in absence of showing that invasion of statutory right has occurred or is likely to occur).
75. See examples cited in notes 20 & 69 supra.
76. “[W]here the suit is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue', Flast v. Cohen, 392 U.S. 83, 109 (1968), . . . is one within the power of Congress to determine.” Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972). Undeniably, Congress may not confer jurisdiction to render advisory opinions, to entertain collusive suits, or to resolve political questions,
The rationale for judicial review statutes rests upon the policy of providing review of delegated authority given to administrative agencies. Arguably, without such review, there would be a denial of due process. Congress undoubtedly has the power to say who may invoke judicial review, but this must be consistent with constitutional limitations.

In 1976, Senator Edward Kennedy introduced legislation amending the restrictive language of the APA by bestowing standing on three classes of "interested persons": any person who participated in an agency proceeding, citizens, and residents. This proposal would confer standing on categories of individuals beyond the existing APA "persons aggrieved" formulation, on the theory that government caused injury may be intangible but nonetheless damages society and individuals. Clearly, violations of law not harming a person directly may nonetheless cause citizens to lose confidence in their government, make them less likely to vote, and otherwise create cynicism discouraging citizen participation in government. Participants in agency proceedings clearly have a stake in seeking judicial review, because of their investment in time and money. But the bill also would grant standing to citizens and residents because governmental action affects them both directly and indirectly. The bill would establish a policy that all such persons have a stake in assuring that government officials lawfully conduct operations.

because such suits clearly violate the judicial function under article III. Id. See also 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3529 (1975).

77. In the American system, where even legislative action is subject to judicial control, there has never been any question of the propriety of judicial review of agency action. Judicial review is the balance wheel of administrative law. . . . The responsibility of enforcing the limits of statutory grants of authority is a judicial function . . . . Without judicial review, statutory limits would be naught but empty words.

B. SCHWARTZ, ADMINISTRATIVE LAW 429 (1976).

78. See note 42 supra.


80. 122 CONG. REC. S5434 (daily ed. April 12, 1976) ("Commentary on the 'Administrative Procedure Review Act' " submitted by Sen. Kennedy). The scope of this legislation, being confined to administrative agency action, justifies a grant of standing to residents as well as citizens. Outside the area of direct agency action, however, only citizens and not mere residents have a stake in the lawfulness of government action. Because residents lack such privileges as the ability to petition Congress or to vote, they lack a sufficient stake in legislation to permit them to challenge the constitutionality of government enactments. But see Graham v. Richardson, 403 U.S. 365 (1971) (fourteenth amendment entitles both resident aliens and citizens of the United States to equal protection of the laws of the state in which they reside); Bickel, Citizenship in the American
Such an attempt to liberalize standing law by expanding the concept of who is entitled to seek judicial review is not likely to succeed. First, the Court could construe the bill as an attempt to give standing to those without an injury in fact. The Court might hold that Congress could no more overturn the Court’s articulation of a constitutional definition in this context than it could, for example, abrogate a criminal defendant’s right to counsel. Alternatively, the Court might employ a judicial presumption of constitutionality, construing the bill as conferring standing only to citizens who suffer injury in fact. Should the Court make the first interpretation, this approach would be unconstitutional; but should the Court make the second interpretation, the intent of the statute would be defeated. In either view, therefore, judicial review statutes will have a limited role in liberalizing standing.

D. Citizen Suit Provisions

In addition to judicial review statutes, Congress has enacted “citizen suit” provisions authorizing citizen enforcement of substantive legislation. These statutes define the class of persons authorized to bring suit as including the familiar persons aggrieved or adversely affected, and “any interested person” or,

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Constitution, 15 Ariz. L. Rev. 369 (1973) (Constitution bestows rights on people and persons and not merely citizens).

81. A third approach might recognize the compelling similarity between the Data Processing standing formulation and the Administrative Procedure Act. Arguably, Data Processing's injury-in-fact requirement need not be based on the Constitution but may be only a matter of somewhat overly broad statutory construction.

82. Citizen suits, sometimes referred to as citizen enforcement actions, permit enforcement against both private parties and governmental entities. See note 86 infra. The present comment considers only the question of standing against government entities.

83. In addition to the APA, other legislation has taken this approach. For example, the Federal Communications Act, 47 U.S.C. § 402(b)(6) (1976), provides for judicial review on appeal for any person “aggrieved or whose interests are adversely affected.” The Court interpreted this provision expansively in FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), holding that the legal right test then in effect did not bar a suit by a competitor radio station that lacked any legal right because Congress’s purpose was to confer standing to those financially injured by the issuance of a license to a competitor. The statute did not purport to protect economic injury, but the Court permitted litigation because the plaintiff ultimately was arguing on behalf of the listening public by alleging that the agency failed to comply with the statutory mandate. Thus, the Court granted standing to the radio station even though the statute protected the public and not the station.

The Court broadly enunciated the same principle in Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942), and recognized an explicit grant to the radio station to act as a private attorney general. The Court held that “these private litigants have standing only as representatives of the public interest.” Id. at 14. A recognizable economic injury, however, was present in the case. Distinguishing the case on this fact, the Court later
even more liberally, "any person." Judicial response to the broadened standing provisions has been inconsistent. A very few courts interpret article III as denying Congress the power to permit citizen standing where the citizen shows no personal injury, even assuming the existence of illegal action. Courts striking down the citizen suit as incompatible with the case or controversy limitation fail to see that by creating a substantive right and an enforcement mechanism, Congress has created a claim "arising under the Constitution and laws of the United States." Thus, this approach recognizes constitutional limits and therefore establishes the requisite right/injury called for by the Supreme Court.

The better view is that Congress may recruit "private attorneys general" to enforce the laws of the land by authorizing citizens to litigate such cases. In this view, nothing precludes Con-

rejected an invitation to apply this approach to the APA provision in Sierra Club v. Morton, 405 U.S. 727 (1972), where the plaintiff did not allege injury to itself or its members.

84. The citizen suit provision of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365(g) (1976), granted standing to persons having an interest which is or may be adversely affected. Although the Supreme Court has decided a citizen suit under the act without a comment on the standing question, Train v. Colorado Pub. Interest Research Group, 426 U.S. 1 (1976), one federal court denied standing under the act to a citizen group for lack of a direct and legally protectable interest. Commonwealth Edison Co. v. Train, 71 F.R.D. 391 (N.D. Ill. 1976).


These citizen suit provisions contain extensive guidelines for notice, timeliness, pend-ency of official action, right of intervention, venue, agency cooperation, consent judg-ments, and provisions for costs and attorney fees. Such provisions clarify procedures to provide a predictable framework for litigants.

87. The Ninth Circuit construed the Clean Air Act provision, 42 U.S.C. § 7604 (1976), authorizing suit for any person, to deny standing to an organization that did not show injury in fact to itself or its members. Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905 (9th Cir. 1974). The court said the "inexorable interrelationship between standing and the constitutional prerequisites of federal jurisdiction under article III" precluded use of the statute without a showing of injury. Id. at 909.

88. See U.S. Const. art. III, § 2.

89. The District of Columbia Circuit, construing the same Clean Air Act provision considered by the Ninth Circuit, see note 87 supra, permitted a citizen suit without a
gress from authorizing citizens to assert public causes of action otherwise permitted only by a government attorney general. The Supreme Court has declined to use the private attorney general theory to judicially create standing, but might recognize congressional application of the theory.\textsuperscript{91}

Citizen suit statutes rest upon a theoretical rationale similar to the historic "informer's action" or \textit{qui tam} action of English common law.\textsuperscript{92} Because \textit{qui tam} actions ordinarily seek only injunctive or declaratory relief,\textsuperscript{93} article III should pose no problems.\textsuperscript{94} Even though citizen enforcement of laws does not conform showing of injury in fact. Metropolitan Wash. Coalition for Clean Air v. District of Columbia, 511 F.2d 809 (D.C. Cir. 1975). The court said that Congress determined any citizen is a proper party and "[i]n this way citizens are recruited to serve as private attorneys-general to facilitate enforcement of the Act in the face of official inaction." \textit{Id.} at 814 & n.26. The source of the theory originated in an analysis made by Judge Jerome Frank:

While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person or on a designated group of non-official persons, authority to bring suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.


91. The Court has confirmed the power of Congress to open the federal courts to representatives of the public interest through specific statutory grants of standing. . . . [O]bjections to public actions are ameliorated by the congres-sional mandate. Specific statutory grants of standing in such cases alleviate the conditions that make "judicial forbearance the part of wisdom".


92. "Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." Marvin v. Trout, 199 U.S. 212, 225 (1905) (upholding application of \textit{qui tam} action provided in a state antigambling statute).


to the classic common law action for damages, such litigation should be understood as presenting a case or controversy because the citizen enforcing the law is representing the public interest more than his own interest. A private citizen suit on behalf of the public or the United States is not intrinsically different from actions by a public attorney general who need show only a violation of law and not a personal injury to enforce the law.

In addition to supporting citizen suits in lieu of a public attorney general suit, the private attorney general theory analytically provides enforcement mechanisms for any substantive legislation. The necessary and proper clause provides one basis for authorizing Congress to appoint citizens to enforce its substantive legislation. Thus, a citizen suit provision must operate in tandem with a substantive right. A general citizen suit statute has been proposed, but without a concomitant substantive right. A general citizen suit statute would be more effective if Congress concurrently would create a substantive right to compliance with the Constitution and laws of the United States.

E. Representational Standing

Under present law, a citizen group can gain standing only if the agency action adversely affects either the group's organizational operations or the rights of its members. For example, environmental organizations must allege that their members use the environmental resources that agency actions threaten. Thus, citizen groups must identify a local "front person" to gain standing, even though everyone recognizes the litigation tactics are solely the inspiration and responsibility of the organization. In environmental disputes, if a concerned group or citizen cannot readily identify an individual "user," no one can challenge even the most flagrant violation of law. Actually, an environmental organization in this situation satisfies the traditional constitutional requirement of adequate presentation of issues in a concrete and adversary context. Indeed, an organization with exper-

95. See 40 Fed. Reg. 11,379 (1975) for a proposal made by the Administrative Conference of the United States.
97. "In some environmental situations . . . no one is injured in the Sierra Club v. Morton sense, as when a deep-sea species protected by the law is threatened with extinction . . . . [I]n these cases the injury requirement may frustrate fulfillment of the law." Currie, Judicial Review Under Federal Pollution Laws, 62 Iowa L. Rev. 1221 (1977).
tise, funding, and commitment to stated purposes undoubtedly presents issues more capably than an individual person whose only obvious injury in the environmental context may be loss of recreation, physical discomfort, or unknown long-term health effects. Therefore, public interest organizations should have standing without engaging in the recognized fiction of identifying membership representation. Of course, the Supreme Court’s imposition of prudential limitations on the assertion of rights of third parties has heretofore precluded such a result.\(^9\) Nonetheless, the Court has occasionally permitted the assertion of third-party rights where the third party would have undue difficulty in representing himself.\(^10\)

Representational standing likewise has had its supporters in Congress. Following the Supreme Court decision in *Sierra Club v. Morton*,\(^1\) Senator Phillip Hart introduced legislation to avoid the *Sierra Club* result and to grant legal standing not only to those adversely affected but also to any organization or person who could “speak knowingly for the environmental values asserted in such a suit.”\(^2\) This proposed legislation rested upon a congressional finding that “each person is entitled by right to the protection and enhancement of environmental quality and that each person has a responsibility to contribute to the protection and enhancement of the environment as a trustee for the benefit of future generations.”\(^3\) As with so much other federal environmental legislation, the commerce clause provided the proposal’s constitutional authorization.\(^4\) Although such legislation might go a long way toward aiding litigants in the environmental context,\(^5\) the bill was never reported from committee. Moreover, the

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100. See cases cited in United States v. Raines, 362 U.S. 17, 22-23 (1960), quoted at note 28 supra. See also Sosna v. Iowa, 419 U.S. 393 (1975).
103. Id. § 102(a).
104. “The Congress further finds and declares that hazards to environmental quality are caused largely by persons who are engaged in interstate commerce or in activities which affect interstate commerce.” Id. § 102(c).
105. Only 12 states have broad standing provisions which allow citizens to bring suit to enforce environmental protection legislation; they are collected in *Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 94th Cong., 2d Sess. 45 (1976) (supplemental material prepared by Public Citizen).
bill did nothing to confer standing to challenge other kinds of unlawful government action.\textsuperscript{106}

Another difficulty is that the commerce clause might not as readily support standing for litigation outside the environmental context. A proposal by Senator Kennedy would simplify standing requirements for institutional litigants by amending the APA.\textsuperscript{107} His bill proposed three criteria for organizational standing: first, the organization must maintain an office in the United States; second, its ability to exist or conduct operations must be threatened by the agency action; or third, in lieu of the second, its organizational purposes must relate to the agency action for which judicial review is sought.\textsuperscript{108} Contrary to existing law, the third criterion was once espoused by a number of courts.\textsuperscript{109} Although somewhat unclear, the constitutional rationale of this proposal derived from congressional power to modify the Court’s prudential standing requirements.\textsuperscript{110} Since 1976, however, the Court appears to have rested its new standing rules on a constitutional foundation. Therefore, this kind of proposed legislation might be better predicated upon congressional authority to provide for judicial review of administrative action or to regulate procedure of the lower federal courts.

Another proposal for representational standing would rest upon the assertion of third-party rights, which analytically have been prudential limits on judicial review. Professor Sedler suggests that “where the rights of members of a class are affected because of their membership in that class, an organization which has as a purpose the protection of the interests of the class . . . . should have standing to assert the rights of the class members.”\textsuperscript{111}

\begin{footnotesize}
\textsuperscript{106} Professor Albert contends:

The interests of consumers and environmentalists, while held in common with many, are plainly not equivalent to a citizen’s interest in good government. To the contrary, such interests going to matters that affect the quality of life, leisure, and health, are as tangible and palpable as the typical fare for adjudication.


\textsuperscript{107} \textit{Id.} § 103(b).

\textsuperscript{108} \textit{Id.} § 102(b).


\textsuperscript{111} Sedler, \textit{supra} note 56, at 881.
\end{footnotesize}
Examples would be suits by the NAACP challenging racial discrimination or by an organization representing the indigent challenging discrimination against the poor.  

Sedler believes that because the interest asserted is a group interest, at least some members of the group will have suffered injury in fact from the challenged action and, consequently, there should be no constitutional bar to allowing their injury to be redressed by an organizational plaintiff.

F. Taxpayer Standing

A sixth major change in federal standing law could be achieved by allowing federal taxpayers to challenge the legality of federal expenditures. Senator Kennedy's 1976 standing reform legislation would have permitted taxpayer standing. Unfortunately, Metzenbaum's proposed Citizens Right to Standing in Federal Courts Act expressly declines to modify standing law for taxpayers.

Because taxpayer precedents support restrictive standing barriers, such a provision is an essential component of any standing reform. Moreover, citizen complaints of unlawful government activity often are combined factually with issues of revenue expenditures. A statutory grant of taxpayer standing could clarify the law in an important area and bring federal practice into conformity with the great weight of American taxpayer standing doctrine.

The theoretical rationale to support a congressional grant of standing to taxpayers would be the same as for any modification

112. Id.

113. Id. Professor Sedler concedes that the injury-in-fact hurdle itself as imposed by Data Processing and Eastern Kentucky could not be overcome by representational standing without citizen standing as well.


115. "This section shall not affect the standing or lack of standing of persons to sue as taxpayers . . . ." S. 680, 96th Cong., 1st Sess. § 3, 125 CONG. REC. S2822 (daily ed. March 15, 1979).

116. The vitality of the restrictive rule denying taxpayer standing originating in Frothingham v. Mellon, 262 U.S. 447 (1923), is shown by its modern use in cases such as United States v. Richardson, 418 U.S. 166 (1974). Likewise, the Court has cited the other major taxpayer case, Flast v. Cohen, 392 U.S. 83 (1968), in virtually every standing case since, even where taxpayer standing was not in issue.

affecting prudential requirements. The justification rests upon a recognition that taxpayers are more likely to attack potentially invalid legislation or government practices than are state or federal officials, and that individual citizen-taxpayers may take a more active role in their government by this means.

IV. A PROPOSAL FOR REFORM

Each of the six approaches discussed above illustrates that Congress is not barred from effecting drastic changes in the law of standing. Even if the Court is wrong in denominating standing requirements as constitutional, Congress cannot simply say it disagrees with the Court's interpretation and establish its own criteria. The Metzenbaum proposal is clearly violative of the Supreme Court's current formulation and, therefore, may not withstand constitutional attack. Although one element, the zone of interest test, may be upheld as modifying only a prudential barrier, the other barriers, rooted in constitutional doctrine, cannot be eliminated summarily. To establish the most coherent reform, Congress should implement a combination of approaches based on sound constitutional theory. The following three-tiered recommendation will integrate these approaches most effectively. Congress should: (1) establish a substantive right that government officials comply with the laws and Constitution of the United States; (2) provide for enforcement of that substantive right by citizens and taxpayers, as well as organizations representing them; and (3) provide for systematic means of judicial review.

These three provisions, operating in tandem, establish a comprehensive outline for standing and would supersede judicially created prudential requirements and the varying provisions of citizen suit statutes. The substantive right is necessary as the

118. See text accompanying notes 20-23 supra.
120. "Where the [legislature] has codified the law on a subject, such statutory provisions are to govern to the exclusion of prior nonstatutory law unless there is a clear legislative intention expressed or necessarily implied that the statutory provisions are merely cumulative." Bolles v. Toledo Trust Co., 144 Ohio St. 195, 197, 58 N.E.2d 381, 384 (1944). Rather than creating a plethora of possibly conflicting guidelines, see note 86 supra, a more general citizen suit statute would standardize the procedural incidents for citizen enforcement actions. The policy questions of the scope of such provisions is beyond
bedrock foundation for standing reform. By providing in essence a right and a remedy for a public wrong, Congress would be acting within its constitutional authority. Then, by providing for enforcement and judicial review, based in part on the private attorney general theory and in part on a simple recognition that private parties can enforce the legislative right created, citizens will once again have access to the courts to prevent government illegacies. The tripartite system of government can operate for the protection and welfare of the people only if people are permitted to communicate fully with each branch of government.

This recommendation accomplishes three things. First, it explicitly identifies the injury triggering standing, thus meeting the constitutional rules governing generalized grievances, causation, redressability, and injury in fact. Second, it identifies citizens and taxpayers as appropriate plaintiffs to challenge unlawful government action. Third, it provides a comprehensive, statutory outline of standing requisites, thus superseding judicially created prudential rules.

the scope of this comment, but it should be noted that there may be some controversy concerning such requirements. See J. Duarte, Memorandum on Public Comments on Mashaw Report and Recommendations (April 16, 1975) (unpublished memorandum on file with the Administrative Conference of the United States). Moreover, there may be some wisdom in retaining flexible and individual approaches in specific statutory provisions which currently exist. There may be no substantial reason, for example, to have the same notice requirements for pollution as compared to consumer fraud.

121. Cf. SCRAP, 412 U.S. at 688 ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.").

The Court came to the opposite conclusion only a year later:

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process . . . . Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls.


This referral to the political system for redress is unjustified in the absence of a clearly political question. A grievance may be generalized but not actually be a political question, as where Congress has enacted an unconstitutional statute or where an administrative agency acts beyond its authority. If safeguarding constitutional values and enforcing the laws of the land is the special function of the judiciary, particularized personal interests that are a prerequisite in private litigation are inappropriate where the government is the defendant. While the political system undeniably is the forum for resolving policy issues, where the dispute is over constitutional or legal limitations only a judicial forum is appropriate. The line between a political question and a generalized grievance may at times be a thin one, but it is one which must be drawn.

122. But see note 120 supra.
V. POLICY JUSTIFICATIONS FOR PROPOSED STANDING REFORM

Congress has abolished the doctrine of sovereign immunity as a bar to judicial review of federal administrative action because the notion that the king can do no wrong is clearly out of place in a modern democracy based on law.\textsuperscript{123} Likewise, standing is an unacceptable way to defend unlawful government action. Restrictive standing rules are justified only if one accepts the proposition that citizens have insufficient interest in their government’s actions to obtain any test of the legality of those actions. Citizens and citizen groups have a stake in assuring that government officials conduct operations lawfully because ultimately the only proper function of government in the United States is to serve the citizenry.\textsuperscript{124}

Legislative reform is greatly needed to clarify the confusing law of standing. The findings of the Metzenbaum bill recognize the needs to redress public injuries, resolve the uncertainty of present standing rules, and avoid wasting time on technical threshold standing questions.\textsuperscript{125} There are additional policy justifications for congressional reform giving citizens standing to chal-

\textsuperscript{124} "In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship." Afroyim v. Rusk, 387 U.S. 253, 257 (1967).
\textsuperscript{125} The bill provides:
SEC. 2. The congress finds and declares that—
(a) the ability of members of the public to have access to the Federal Courts to obtain redress for unlawful governmental action is essential to the democratic process, both to enable members of the public to protect their own interests and to allow redress of injuries that affect many members of the public in relatively equal measure;
(b) substantial uncertainty surrounds the specific requisites for standing to sue in the Federal courts, forcing both the courts and individual litigants to devote inordinate amounts of their resources to this issue;
(c) unduly restrictive standing requirements have prevented the prompt resolution of meritorious lawsuits, and have resulted in the dismissal of complaints alleging serious violations of the Constitution and laws of the United States without consideration of their merits, even where plaintiffs have shown injuries sufficient to enable adequate presentation of relevant issues in a concrete and adversary context;
(d) it is a more efficient and productive use of limited judicial resources to reach prompt resolution of meritorious lawsuits alleging violations of the Constitution and laws of the United States by officers and agencies of Government rather than utilizing those resources for the interpretation of unduly restrictive or complex nonconstitutional standing requirements.
lenge unlawful government action. Such reform (1) recognizes that citizen interest in good government includes interest in lawful government, 126 (2) improves judicial access to check abuses of regulatory agencies, 127 (3) eliminates inconsistencies in existing citizen suit statutes by providing a uniform framework for all citizen suits, 128 (4) encourages enforcement of the public interest as viewed from unofficial perspectives, 129 (5) provides added enforcement at little cost to the public treasury, 130 (6) stimulates the productivity of public enforcers, 131 (7) allows citizens to assume part of the responsibility for effective operation of government, 132 (8) helps prevent government illegalities from going uncorrected, 133 and, finally, (9) gives all government officials incentive to uphold the Constitution and laws of the United States. 134

A statutory change in the law of standing will not, however, remove valid measures protecting judicial resources from misuse. The traditional safeguards of mootness, ripeness, political question, and advisory opinions will remain intact. 135 Judicial deference to administrative expertise will continue. 138 Further, experi-

126. "The role of the judiciary is integral to the doctrine of separation of powers. It is unacceptable now by any process of continued quarantine to exclude the very persons most likely to invoke its powers." Boryszewski v. Brydges, 37 N.Y.2d 361, 364, 334 N.E.2d 579, 581, 372 N.Y.S.2d 623, 626 (1975).
127. See B. SCHWARTZ, supra note 77, at 429.
128. But see note 120 supra.
130. Id.
131. Id.
132. "First, such suits augment the enforcement efforts of Federal officials. Second, they allow citizens to assume part of the responsibility for the effective operation of their government. . . . The legislation recognizes that citizen access to the Federal courts to redress unlawful governmental action is essential to the democratic process." 124 CONG. REC. S6498 (daily ed. April 27, 1978) (remarks of Sen. Metzenbaum).
134. Id.
135. The way to protect against too much government by judges is to limit what the judges decide, not to limit who can raise a question for the court to decide. . . . The appropriate tools are the law[s] of unreviewability and . . . scope of review, not . . . standing . . . . The law of "political question" is a much better judicial tool than the law of standing for deciding what the court should decide.
K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.21, at 522-23 (1976) (supplementing K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958)).
136. "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers." American Tel. & Tel. Co. v. United States, 299 U.S. 232, 236 (1936).
ence under existing citizen suit statutes and state statutes relaxing standing barriers has shown that the expense and burden of litigation limits the filing of frivolous suits. 137 In any given case, plaintiffs must still state a reasonable cause of action. Thus, while reform will lower standing barriers, appropriate constraints on judicial processes will remain intact. 138

VI. CONCLUSION

The purpose of the law of standing to sue is neither to serve judicial economy, nor to help courts avoid consideration of claims they prefer not to hear, nor even to sharpen the presentation of issues. Although the courts have used standing to achieve these ends, the true purpose of standing is simply to determine whether a particular plaintiff is entitled to invoke judicial processes. Citizens are proper litigants wherever a government spending program or operation threatens their welfare, even if the activity is indirect, shared by many, and the court's remedy will be only one step toward accomplishing a larger social objective. By its pervasive nature, unlawful government action can create injury. 139 Congress must insist the courts recognize that government officials are just as capable of breaking the law as any other person and that citizens and citizens groups have a right to challenge such illegal conduct.

Congress should act swiftly to enact remedial standing legislation, but it should also adopt the most effective measure possible. Because of serious doubts concerning the constitutionality and effectiveness of Senator Metzenbaum's Citizens Right to Standing in Federal Courts Act, Congress should adopt a more positive and comprehensive approach removing technical standing barriers for citizen enforcement actions and providing a clear exposition of the citizens' right to seek judicial review of unlawful government action.

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137. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966) (economic reality will limit the number of plaintiffs resulting from expansion of standing criteria).


139. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Mapp v. Ohio, 367 U.S. 643, 659 (1961).