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Litigant Access Doctrine and the Burger Court

Tinsley E. Yarbrough

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I. INTRODUCTION

In the fashion of stern older brothers, a shifting majority on the Burger Court seems determined to protect Lady Justice from the clutches of panting federal suitors. The Court has readily invoked the doctrine of mootness,[1] the requirements of concrete adverseness,[2] and related standards to eliminate significant claims from federal court, and varieties of the abstention doctrine enjoy new vitality.[3] The Court has held that only Congress, and not the courts,

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* Professor of Political Science, East Carolina University. B.A., 1963, M.A., 1965, Ph.D., 1967, University of Alabama.

1. *See, e.g.*, Kremens v. Bartley, 424 U.S. 964 (1977) (dismissing a challenge to a Pennsylvania statute granting parents considerable authority over the voluntary commitment of children to mental institutions); DeFunis v. Odegaard, 416 U.S. 312 (1974) (dismissing a challenge to a university's affirmative action admissions program). *But see* Allee v. Medrano, 416 U.S. 802 (1974) (refusing to dismiss on mootness or other grounds a suit by a farmworkers' union challenging the application by state and local officials of unconstitutional statutes to interfere with rights of expression, assembly, and association).

2. In addition to the cases discussed in this Article, see, *e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976) (dismissing a broad challenge to allegedly unconstitutional mistreatment of minority and other Philadelphia residents by city police and other officials); O'Shea v. Littleton, 414 U.S. 488 (1974) (dismissing a class action challenging allegedly discriminatory bond, sentencing, and jury-fee practices in criminal cases); Laird v. Tatum, 408 U.S. 1 (1972) (dismissing a challenge to a scheme for military surveillance of civilians).

3. *See, e.g.*, Wainwright v. Sykes, 97 S. Ct. 2497 (1977) (defendant, who failed to object to the admission of inculpatory statement at trial despite state requirement of contemporaneous objection, is precluded from challenging admission of the statement in federal habeas proceeding); Francis v. Henderson, 425 U.S. 536 (1976) (absent a showing of "cause" and "actual prejudice," a defendant who failed to comply with a state requirement that he object before trial to the composition of his grand jury is precluded from raising the claim in federal habeas corpus proceeding); Estelle v. Williams, 425 U.S. 501 (1976) (although a state cannot

may authorize exceptions to the rule that attorneys' fees ordinarily are not recoverable by the prevailing litigant absent statutory authorization.[4] In another blow to the pocketbooks of those seeking relief in the federal courts, plaintiffs in certain class actions now are required to bear the often prohibitively expensive burden of providing notice to each identifiable member of the prospective class.[5] Furthermore, each plaintiff with a separate and distinct claim, as well as each plaintiff in a spurious class action, must now satisfy the jurisdictional amount when federal jurisdiction depends upon a statutory amount in controversy.[6] Federal habeas review of state cases also has been drastically curtailed,[7] and the Court has embraced a restrictive approach to federal ancillary or pendent jurisdiction under which federal courts have been allowed to decide nonfederal claims if the federal question is substantial and the federal and nonfederal claims constitute a single cause of action.[8]

Similarly, the reach of federal relief has been narrowed considerably. The Court, for example, recently has construed the eleventh amendment to bar certain suits for accrued damages by private citizens against a state,[9] and government officials have been granted immunity from damage suits for infringements of constitutional rights unless they reasonably should have known that their actions

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constitutionally compel an accused to stand trial before a jury while dressed in identifiable prison garb, failure to make an objection to the court, whatever the reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation). *But see, e.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972) (rejecting application of the abstention doctrine in a case challenging a state pollution control law).

4. *E.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Congress has taken steps to dispel the effects of the *Alyeska* decision. In enacting the Civil Rights Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 641 (amending 42 U.S.C. § 1988 (1970)), Congress provided federal courts with discretionary power to award attorneys' fees to successful plaintiffs in actions brought pursuant to various civil rights acts. According to the Senate Judiciary Committee, the *Alyeska* "decision and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alyeska*, suddenly unavailable in the most fundamental civil rights cases." S. REP. No. 1011, 94th Cong., 2d Sess. 4 (1976). Thus the Act is viewed as "an appropriate response to the *Alyeska* decision" that meets the technical requirements imposed by the Supreme Court on the awarding of attorneys' fees. *Id.* at 4, 6. For a discussion of both the *Alyeska* decision and the Act, see Note, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 34 WASH. & LEE L. REV. 205 (1977).

5. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

6. Zahn v. International Paper Co., 414 U.S. 291 (1973).

7. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (precluding federal habeas review of state prisoners' fourth and fourteenth amendment claims when a full and fair opportunity to raise the claim is provided in the state courts).

8. Aldinger v. Howard, 427 U.S. 1 (1976).

9. Edelman v. Jordan, 415 U.S. 651 (1974). *But see* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (eleventh amendment does not prevent a federal court from awarding retroactive money damages against a state that has discriminated against employees in violation of federal civil rights legislation).

were unconstitutional.[10] The Court has read the "state action" concept narrowly, holding, *inter alia,* that utility companies may suspend service without providing due process[11] and that shopping centers have no first amendment obligations.[12]

The decisions of potentially most far-reaching significance, however, are the Burger Court's pronouncements concerning the nature and application of the personal injury standard in the field of standing, the status of public action lawsuits, and the propriety of federal district court intervention in state judicial proceedings. This Article critically analyzes the Court's developing position in each of these areas and suggests that in each its doctrinal stance is conceptually weak, rarely serves the functions that it ostensibly was designed to perform, and is extremely vulnerable to capricious application.

II. THE PERSONAL INJURY STANDARD

Standing doctrine in the federal courts is based upon both the case or controversy requirement of Article III and the prudential considerations relating to the need for restrained exercise of judicial power and economical use of scarce judicial resources.[13] In its constitutional dimension, the concept of standing requires that a litigant present his claims "in an adversary context and in a form historically viewed as capable of judicial resolution."[14] The litigant also must allege " 'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[15] Augmenting these constitutional requirements are a number of prudential limitations, including the rule that federal courts "normally" will not grant standing when the harm alleged "is a 'generalized grievance' shared in substantially equal measure by all

10. Wood v. Strickland, 420 U.S. 308 (1975). For a discussion of the immunities of government officials after *Wood,* see Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions,* 30 VAND. L. REV. 941 (1977).

11. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

12. Hudgens v. NLRB, 424 U.S. 507 (1976); *cf.* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). *See also, e.g.,* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (refusal of broadcasters to sell editorial advertisements is not governmental action subject to constitutional requirements); Moose Lodge v. Irvis, 407 U.S. 163 (1972) (refusal of a state licensed private club to serve the Negro guest of a member is not state action subject to constitutional requirements).

13. For an excellent examination of some functions served by the standing doctrine, see Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 HARV. L. REV. 645 (1973).

14. Flast v. Cohen, 392 U.S. 83, 101 (1968).

15. Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

or a large class of citizens"[16] and the general policy of opposing suits asserting the rights or interests of third parties.[17]

A number of Supreme Court decisions rendered since Chief Justice Burger's appointment have reflected a generous conception of standing.[18] Prior to enactment of the Administrative Procedure Act (APA), a litigant could challenge the lawfulness of an administrative agency's action only if he had suffered injury to a common-law, constitutional, or statutory right; a mere allegation of injury in fact was insufficient to establish standing.[19] Those seeking to contest the actions of federal agencies now rely most often upon the section of the APA providing that "[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."[20] Early Supreme Court interpretations of this provision limited standing to those litigants alleging violation of a "legal right,"[21] essentially the same injury required before passage of the APA. In two 1970 decisions, *Association of Data Processing Service Organizations, Inc. v. Camp*[22] and *Barlow v. Collins*,[23] however, the Court concluded that a litigant has standing to contest agency action if he alleges (a) "that the challenged action has caused him injury in fact, economic or otherwise," and (b) that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[24] Moreover, while Justice Brennan has contended that only allegations of injury in fact should be required to establish standing,[25] the Court has given the "zone of interests" criterion an expansive reading.[26]

Particularly in cases arising under statutes authorizing challenges to federal agency action, the Court has emphasized that a claim to standing may be based upon "aesthetic, conservational, and recreational"[27] interests, as well as economic injury. In *Sierra*

16. 422 U.S. at 499.

17. *See, e.g.*, Tileston v. Ullman, 318 U.S. 44 (1943).

18. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Roe v. Wade, 410 U.S. 113 (1973).

19. *See, e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

20. 5 U.S.C. § 702 (1966).

21. *See, e.g.*, Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

22. 397 U.S. 150 (1970).

23. 397 U.S. 159 (1970).

24. *Id.* at 152, 153.

25. *Id.* at 167 (Brennan, J., concurring and dissenting).

26. *See, e.g.*, Investment Co. Inst. v. Camp, 401 U.S. 617 (1971).

27. 397 U.S. at 154. The *Camp* Court granted standing in a "competitor's suit" to a

Club v. Morton,[28] for example, Justice Stewart observed for the Court: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[29] Furthermore, in *Trafficante v. Metropolitan Life Insurance Co.*,[30] two apartment complex tenants, one white and one black, were allowed to challenge their landlord's discriminatory policies against nonwhites on the basis of their contention that, because of such practices, they were losing the benefits of living in a racially integrated community.

Finally, in *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP),[31] the Burger Court granted standing to litigants whose claims to judicial review seemed inadequate under even the most lenient reading of traditional standing requirements. SCRAP, an unincorporated association formed by five law students, joined several other environmental groups in challenging the Interstate Commerce Commission's failure to suspend a temporary railroad surcharge on most frieght rates. SCRAP, alleging that each of its members breathed the air and used the forests, rivers, streams, mountains, and other natural resources in the Washington metropolitan area, claimed that the surcharge caused its members economic, recreational, and aesthetic harm because, as the Court summarized the organization's position,

> a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.[32]

Although acknowledging the highly "attenuated line of causation" between the contested surcharge and the claimed injury and insisting that "pleadings must be something more than an ingenious academic exercise in the conceivable," the Court concluded that the appellees had alleged an injury sufficiently "specific and percepti-

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seller of data processing services. Petitioners alleged that a ruling of the Comptroller of the Currency permitting banks to make available similar data processing services violated the federal banking laws.

28. 405 U.S. 727 (1972).
29. *Id.* at 734.
30. 409 U.S. 205 (1972).
31. 412 U.S. 669 (1973).
32. *Id.* at 688.

ble" to warrant a grant of standing.[33]

In spite of these rulings, the Burger Court generally has assumed a restrictive posture in its interpretation and application of the personal injury standard, denying review in a wide variety of contexts and emphasizing that "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself suffered an injury."[34] Even when Congress has authorized challenges to federal agency actions that would not be proper under prudential rules of standing, the Court has insisted that litigants satisfy constitutional standing requirements and has applied such rules strictly.[35] Critics of the Court's conception of the personal injury standard have raised three basic complaints: (1) that litigants seeking standing must make showings that can be developed adequately only during the discovery and trial stages of a proceeding; (2) that application of the standard has been arbitrary and often based on hostility to the merits of a litigant's claim; and (3) that precedents recognizing the authority of Congress in the field of standing have been undermined.[36]

The broad outlines of the Court's developing position on the personal injury standard are reflected perhaps most clearly in *Linda R.S. v. Richard D.*,[37] *Warth v. Seldin*,[38] and *Simon v. Eastern Kentucky Welfare Rights Organization*.[39] In *Linda R.S.* the mother of an illegitimate child was denied standing to contest the constitutionality of a Texas child support statute that consistently had been construed to apply only to parents of legitimate children. Justice Marshall noted for the majority that the appellant had suffered an injury as a result of the failure of her child's father to provide support payments, but contended that requiring the state to enforce the statute against the child's father would not necessarily remedy the mother's injury:

> Although the Texas statute appears to create a continuing duty, it does not follow the civil contempt model whereby the defendant "keeps the keys to the jail in his own pocket" and may be released whenever he complies with his

33. *Id.* at 688, 689.

34. Sierra Club v. Morton, 405 U.S. 727, 738 (1972).

35. *See, e.g.*, Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

36. In addition to the criticism contained in the judicial opinions discussed below, see Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard*, 20 ST. LOUIS U.L.J. 663 (1976).

37. 410 U.S. 614 (1973).

38. 422 U.S. 490 (1975).

39. 426 U.S. 26 (1976).

> legal obligations. On the contrary, the statute creates a completed offense with a fixed penalty as soon as a parent fails to support his child. Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the "direct" relationship between the alleged injury and the claim sought to be adjudicated . . . is absent in this case.[40]

In dissent, Justice White challenged the majority's conclusion that enforcement of the support statute against the father would provide the appellant with only a "speculative" remedy for the injury claimed:

> I had always thought our civilization had assumed that the threat of penal sanctions had something more than a "speculative" effect on a person's conduct. This Court has long acted on that assumption in demanding that criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their conduct to the mandates of law. Certainly Texas does not share the Court's surprisingly novel view. It assumes that criminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children.[41]

Justice White mustered little support for his views. Only Justice Douglas joined his dissent, with Justices Blackmun and Brennan dissenting on other grounds. Thus, under *Linda R.S.*, the availability of a remedy apparently must be a virtual certainty before standing will be granted.

Warth v. Seldin is undoubtedly the Court's most significant pronouncement on the nature of the personal injury standard. In *Warth* the Court denied standing to various litigants who sought declaratory and injunctive relief and damages against the town of Penfield, a suburb of Rochester, New York, and several town boards, claiming that the local zoning ordinance effectively excluded persons of low and moderate income. Low income residents of Rochester desiring to move to Penfield were denied standing for failing to allege facts establishing a causal relationship between the town's zoning practices and their claimed injury. Justice Powell observed for the majority that the low income residents were "rely[ing] on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief."[42] Other Rochester taxpayers claimed that Penfield's restrictive zoning policies had forced the city to encourage construction of more low and moderately priced housing by expanding the city's tax-abated property, thereby increasing the burden on

40. 410 U.S. at 618.
41. *Id.* at 621.
42. 422 U.S. at 507.

Rochester taxpayers. Justice Powell, relying on both an inadequate line of causation and the prudential rule barring litigants from asserting the legal rights of third parties, refused to grant standing to these plaintiffs. The Court employed similar grounds in denying standing to Metro-Act, a nonprofit corporation concerned with alleviating the shortage of housing for persons of low and moderate income in the Rochester area.

Another petitioner, the Home Builders Association, had failed to allege that it had suffered monetary damages and was denied standing to claim damages on behalf of its members who allegedly had been prevented from constructing low and moderately priced housing in Penfield. Any injury, Justice Powell observed, had been suffered only by the Association's individual members. Moreover, the Association itself had no standing to seek prospective relief because no proposed construction project currently was precluded by the Penfield ordinance and no member-builder had been denied a building permit or zoning variance for a current project. The Court also refused the petition of the Housing Council, which claimed standing as a nonprofit corporation consisting of organizations interested in housing problems. One of its members, the Penfield Better Homes Corporation, had applied unsuccessfully in 1969 for a zoning variance to construct housing for persons of moderate income. Justice Powell concluded that "neither the complaint nor the record supplie[d] any basis from which to infer that the controversy between respondents and Better Homes, however vigorous it may once have been, remained a live, concrete dispute when this complaint was filed" in 1972.[43]

In an elaborate dissent,[44] Justice Brennan, joined by Justices White and Marshall, condemned the majority opinion as "toss[ing] out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional [and as based upon] an indefensible hostility to the claim on the merits."[45] Justice Brennan found that the "interwoven interests" of at least three groups—the low income minority plaintiffs, the Home

43. *Id.* at 517.

44. In a brief dissent, Justice Douglas decried the increasing role of standing as a bar to federal judicial relief and recommended that such "technical barriers" be lowered. "The American dream teaches," he asserted, "that if one reaches high enough and persists there is a forum where justice is dispensed." Metro-Act and the Housing Council represented "the communal feeling" of residents in the Rochester area and should have been allowed to attack the area's brand of residential discrimination—in Douglas' words, one of the "festering sores in our society." *Id.* at 518, 519.

45. *Id.* at 520.

Builders Association, and the Housing Council—warranted granting them standing. A "glaring defect" in the majority's thinking, according to Brennan, was its refusal "to recognize that [these groups'] interests are intertwined, and that the standing of any one group must take into account its position vis-à-vis the others:"[46]

> For example, the Court says that the low-income minority plaintiffs have not alleged facts sufficient to show that but for the exclusionary practices claimed, they would be able to reside in Penfield. The Court then intimates that such a causal relationship could be shown only if "the initial focus [is] on a particular project." . . . Later, the Court objects to the ability of the Housing Council to prosecute the suit on behalf of its member, Penfield Better Homes Corp., *despite* the fact that Better Homes *had* displayed an interest in a particular project, because that project was no longer live. Thus, we must suppose that even if the low-income plaintiffs had alleged a desire to live in the Better Homes project, that allegation would be insufficient because it appears that the particular project might never be built. The rights of low-income minority plaintiffs who desire to live in a locality, then, seem to turn on the willingness of a third party to litigate the legality of preclusion of a particular project, despite the fact that the third party may have no economic incentive to incur the costs of litigation with regard to one project, and despite the fact that the low-income minority plaintiffs' interest is *not* to live in a particular project but to live somewhere in the town in a dwelling they can afford.[47]

Justice Brennan complained that such reasoning in effect had led the Court to deny the plaintiffs standing simply because earlier nonjudicial efforts to breach Penfield's "total, purposeful, intransigent" exclusionary policies had failed.[48]

Turning to specific plaintiffs' claims of standing, Justice Brennan scored the requirement that low income minority plaintiffs demonstrate a direct injury as unduly stringent. These plaintiffs had alleged that Penfield's zoning policies had denied them and their children the educational and other opportunities available to the town's residents. The Court, having found the record "devoid of any indication" that any low or middle income housing projects were anticipated, concluded that the ability to live in Penfield depended ultimately not upon Penfield's zoning practices, but upon the efforts and willingness of homebuilders to construct housing that the plaintiffs could afford. Nevertheless, Justice Brennan found the allegations sufficient to establish standing under applicable precedents, stating that "prior to discovery and trial," to require "such unachievable specificity" of litigants seeking standing was "indefensible."[49] Justice Brennan also challenged the majority's re-

46. *Id.* at 521.
47. *Id.* at 521-22.
48. *Id.* at 523.
49. *Id.* at 528.

fusal to allow the Home Builders Association and Housing Council to seek prospective relief absent a showing that their members were "*currently* involved in developing a *particular* project."[50] Their members' past experience with Penfield officials had demonstrated that the town was "engaged in a purposeful, conscious scheme" to exclude low and moderately priced housing projects. Moreover, the court costs of challenging the town's rejection of a particular project could be prohibitive. As Justice Brennan concluded, "When this sort of pattern-and-practice claim is at the heart of the controversy, allegations of past injury . . . and of future intent, if the barriers are cleared, again to develop suitable housing for Penfield, should be more than sufficient" to establish standing.[51]

Simon, unlike *Warth,* involved a challenge to federal agency action initiated under the judicial review section of the Administrative Procedure Act.[52] Federal tax regulations long had granted favorable tax treatment to any hospital that provided service for indigent patients to the "extent of its financial ability."[53] In 1969 the Internal Revenue Service promulgated a ruling extending this favorable treatment to certain hospitals not operating "to the extent of [their] financial ability for those not able to pay for the services rendered."[54] Several low income persons and welfare rights organizations representing their interests challenged the ruling in a federal class action, claiming that the ruling was based on an erroneous interpretation of federal tax regulations and encouraged hospitals to deny services to indigents.

In denying standing, the Supreme Court, per Justice Powell, agreed that prudential limitations on standing were inapplicable to suits brought under the Administrative Procedure Act or other congressional authorizations of judicial review. The Court emphasized, however, that such plaintiffs still must satisfy Article III requirements that limit standing to litigants alleging a personal injury likely to be redressed by a favorable judicial decision. The respondent organizations qua organizations lacked standing, Justice Powell observed, because their claim was based on a mere abstract concern with promoting health services for the poor. Furthermore, individual respondents could not contest the Internal Revenue Service ruling. Powell maintained that their claim that the hospitals'

50. *Id.* at 529-30.
51. *Id.* at 530.
52. 5 U.S.C. § 702 (1966).
53. 426 U.S. at 30.
54. *Id.* at 31.

decision to deny services to indigent patients resulted from the ruling rather than from other considerations was sheer speculation, as was the contention that a federal court's exercise of its remedial powers against tax officials would result in the extension of services to the individual respondents and other needy persons. As the Court observed:

> So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forego favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services. It is true that the individual respondents have alleged . . . that the hospitals that denied them service receive substantial donations deductible by the donors. This allegation could support an inference that these hospitals, or some of them, are so financially dependent upon the favorable tax treatment afforded charitable organizations that they would admit respondents if a court required such admission as a condition to receipt of that treatment. But this inference is speculative at best. The Solicitor General states in his brief that, nationwide, private philanthropy accounts for only 4% of private hospital revenues. Respondents introduced in the District Court a statement to Congress by an official of a hospital association describing the importance to nonprofit hospitals of the favorable tax treatment they receive as charitable corporations. Such conflicting evidence supports the common-sense proposition that the dependence upon special tax benefits may vary from hospital to hospital. Thus, respondents' allegation that certain hospitals receive substantial contributions, without more, does not establish the further proposition that those hospitals are dependent upon such contributions.[55]

One of the *Warth* dissenters, Justice Douglas, had retired from the Court when *Simon* was decided, and another, Justice White, joined the majority. Two otber *Warth* dissenters, Justices Brennan and Marshall, concurred in the Court's judgment on the ground that the respondents had failed to establish "a concrete and reviewable" controversy. In an opinion registered by Justice Brennan, however, these Justices again took exception to the majority's conception and application of standing doctrine. Wbile concluding that the threatened future injury cited by the respondents was not of "sufficient immediacy" to satisfy Article III ripeness requirements, Brennan contended that they bad alleged a personal stake in the outcome of the suit adequate to establish standing in its constitutional dimension:

> [I]f respondents have a claim cognizable under the law, it is that the Internal Revenue Code requires the Government to offer economic inducements to the relevant hospitals only under conditions which are likely to benefit respondents. The relevant injury in light of this claim is, then, injury to this beneficial interest—as respondents alleged, injury to their "opportunity and ability" to receive medical services. Respondents sufficiently alleged this injury . . . .[56]

55. *Id.* at 43-44 (footnote omitted).
56. *Id.* at 56.

When, as in *Simon,* litigants have proceeded under a congressional statute conferring standing and authorizing judicial review of agency action, Brennan added, such an allegation of personal injury is adequate to establish standing under the Court's prior rulings; "prudential, nonconstitutional considerations" of judicial self-restraint were "simply inapposite." The majority purported to base its decision on the injury-in-fact requirement, but in Justice Brennan's judgment, had given the concept an unduly restrictive "treatment [which threatened to] 'become a catchall for an unarticulated discretion on the part of this Court' to insist that the federal courts 'decline to adjudicate' claims that it prefers they not hear."[57] Far from reflecting judicial deference to other agencies of government, such an approach meant, in the *Simon* context, that

> any time Congress chooses to legislate in favor of certain interests by setting up a scheme of incentives for third parties, judicial review of administrative action that allegedly frustrates the congressionally intended objective will be denied, because any complainant will be required to make an almost impossible showing.[58]

The general tenor of the Burger Court's position regarding standing doctrine seems obviously to be reflected more clearly in its disposition of *Linda R.S., Warth,* and *Simon* than by its grant of standing in *SCRAP.* Indeed, *SCRAP* is probably best viewed as an aberration, arguably little more than the Court's way of demonstrating in the aftermath of *Sierra Club* that it recognizes the special problems of certain litigants seeking to establish standing and is willing to be moderately flexible in its application of the personal injury standard. The present Court's general policy, therefore, is one of retrenchment and resistance to innovative claims in the field of standing.

As Justice Brennan and others have contended, any principled basis for the different results in *SCRAP,* on the one hand, and in *Linda R.S., Warth,* and *Simon,* on the other, is difficult to discern. The Court's approach in the 1977 case, *Village of Arlington Heights v. Metropolitan Housing Development Corp.,*[59] further reflects this apparent inconsistency. At issue was a restrictive suburban zoning pattern very similar to that challenged in *Warth.* While ultimately rejecting constitutional and statutory claims, the Court did grant standing both to a developer seeking to construct a racially integrated low income housing project and to one of its prospective

57. *Id.* at 66.
58. *Id.* at 64.
59. 429 U.S. 252 (1977).

tenants. Justice Powell held for the Court that since a specific project was involved the case was distinguishable from *Warth*. The developer's project, however, was contingent not only on its ability to procure rezoning, but also on its capacity to obtain financing and qualify for federal subsidies. Given these factors, the Court easily could have concluded that the impact of court-ordered rezoning upon construction of the project was entirely too "speculative" to warrant a grant of standing to the developer, and that, because the tenant's application for standing depended upon the probable success of the project, he too was to be denied standing.

One can readily sympathize with the Court's insistence that standing be granted only in those lawsuits in which the remedy sought will effectively relieve the injury alleged. Moreover, failure to achieve godlike precision and consistency in the application of the standing concept obviously is understandable. If, however, the Court is to avoid further charges that its application of the personal injury standard is capricious and little more than a reflection of its hostility to the merits of a litigant's claim, it should attempt to explain more fully not only why standing is granted or denied in specific cases, but also why different results were required in other apparently similar contexts.

III. NON-HOHFELDIAN ACTIONS

Increasingly, federal litigants have sought standing as "private attorneys general,"[60] claiming a right as citizens or taxpayers to seek judicial relief for injuries to the constitutional polity rather than for harms of a distinctly personalized nature. While occasionally straining to find concrete personal injury in order to grant such litigants standing,[61] the Burger Court's policy has been one of opposition to public action lawsuits unless authorized by Congress and otherwise conforming to Article III case or controversy requirements.

This element of the Court's position regarding litigant access has been reflected especially in rulings rejecting an expansive read-

60. The term apparently was coined by Judge Jerome Frank in Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), in which he stated:

> Congress . . . 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 . . . 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.

61. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

ing of the Warren Court's decision in *Flast v. Cohen.*[62] The *Flast* Court relaxed the long-standing rule, originally announced in *Frothingham v. Mellon,*[63] that prohibited challenges by taxpayers to federal spending. Speaking for the *Flast* majority, Chief Justice Warren characterized standing doctrine as based upon a mixture of constitutional and policy considerations and concluded that no absolute constitutional bar to taxpayer suits existed. As with other litigants, a taxpayer merely had to show the requisite personal stake in a lawsuit's outcome, a relationship that could be established through allegations that the program was an exercise of Congress' taxing and spending powers, rather than essentially regulatory in nature, and that the program violated a specific constitutional limitation on the taxing and spending authority. "When both nexuses are established," Warren stated for the Court, "the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction."[64] In *Flast* the taxpayer challenged federal aid for parochial education. Although significant religious establishment questions were at issue, a judicial challenge to the program would have been highly unlikely, if not impossible, if the Court had not relaxed the *Frothingham* barrier to taxpayer suits. Thus *Flast* is viewed most accurately as an endorsement by judicial fiat of public or "non-Hohfeldian"[65] actions in a field of adjudication in which tradi-

62. 392 U.S. 83 (1968). *See also* Sierra Club v. Morton, 405 U.S. 727 (1972).

63. 262 U.S. 447 (1923).

64. 392 U.S. at 103.

65. The phrase is that of Louis L. Jaffe. *See* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,* 116 U. PA. L. REV. 1033 (1968). In his article discussing the rights of private citizens to bring public interest lawsuits, Professor Jaffe distinguished between the public and private litigant by employing the analysis of Wesley N. Hohfeld. *See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1946). According to Professor Jaffe:

> The crucial question, then, is whether it is a necessary element of a case that there be a plaintiff who proffers for judicial determination a question concerning his own legal status. It may be something of an analytic task to say what is meant by "a question concerning" the plaintiff's legal status. One can fall back on Hohfeldian terminology. In those terms the meaning would be that the plaintiff is seeking a determination that he has a right, a privilege, an immunity or a power. Might we be permitted to characterize this plaintiff as a Hohfeldian or ideological plaintiff?

Jaffe, *supra,* at 1033 (footnote omitted). Professor Jaffe argues that a Hohfeldian plaintiff is not "a necessary requisite of a case," but rather that the central function of the courts is the determination of an individual's claim to 'just' treatment." *Id.* at 1034. For example, in discussing the so-called taxpayer suit, Jaffe maintains that the taxpayer seeking to enjoin an expenditure, as opposed to enjoining collection of a tax, need not pay an amount so substantial that his tax liability actually will be affected if his injunction is granted. Thus, according to Jaffe: "If a personal stake is a *significant* element of a case, clearly [a] . . . remote, virtually hypothetical monetary involvement cannot supply that element. Thus the taxpayer suit must be accounted for if it is to be justified as one form of citizen action." *Id.* at 1034.

tional principles of standing were inadequate to assure vindication of constitutional guarantees. The standing criteria announced in *Flast* clearly bear no relationship to the degree of a particular taxpayer's injury. As Justice Harlan observed in his masterful dissent:

> It is surely clear that a plaintiff's interest in the outcome of a suit in which he challenges the constitutionality of a federal expenditure is not made greater or smaller by the unconnected fact that the expenditure is, or is not, "incidental" to an "essentially regulatory program."
>
> . . . .
>
> The Court's second criterion is similarly unrelated to its standard for the determination of standing. The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the fact that the constitutional provision under which he claims is, or is not, a "specific limitation" upon Congress' spending powers. . . .
>
> The absence of any connection between the Court's standard for the determination of standing and its criteria for the satisfaction of that standard is not merely a logical ellipsis. Instead, it follows quite relentlessly from the fact that, despite the Court's apparent belief, the plaintiffs in this and similar suits are non-Hohfeldian, and it is very nearly impossible to measure sensibly any differences in the intensity of their personal interests in their suits.[66]

The vacuity of the *Flast* standards furnished the Burger Court an opportunity to recognize public interest lawsuits without formally rejecting traditional standing principles. The Court, however, has firmly declined the invitation, even in cases in which the constitutional violation seemed clear and a remedy impossible under the traditional standing requirements. In *Schlesinger v. Reservists Committee to Stop the War,*[67] the Court dismissed for lack of standing a challenge to the practice of allowing congressmen to serve in the military reserves. The Committee and certain of its members claimed that the reserve memberships violated the Constitution's incompatibility clause, which prohibits congressmen from holding other federal offices during their tenure. The only injury alleged was that those congressmen serving in the reserves might be unduly influenced by the executive branch and that reserve membership would "place upon Members of Congress possible inconsistent obligations which might cause them to violate their duty faithfully to perform as reservists or as Members of Congress."[68]

The Supreme Court concluded that the respondents lacked standing both as citizens and as taxpayers. In rejecting their claim to citizen standing as based upon an assertion of "only the generalized interest of all citizens in constitutional governance, . . . an

66. 392 U.S. at 122-24.
67. 418 U.S. 208 (1974).
68. *Id.* at 212.

abstract injury,"[69] Chief Justice Burger recited the traditional arguments supporting the requirement of concrete injury:

> First, concrete injury removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party. . . . Second, the discrete factual context within which the concrete injury occurred or is threatened insures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied. . . .
>
> To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."[70]

Burger responded to the complaint that reservist membership for congressmen could not be challenged without a recognition of citizen standing by stating: "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[71] The Chief Justice required but two paragraphs to reject the respondents' claim to standing as taxpayers under *Flast.* Burger observed that *Flast* was inapposite because the respondents raised no challenge to an exercise of Congress' taxing and spending power. In *United States v. Richardson,*[72] decided with *Schlesinger,* the Chief Justice employed the same reasoning to reject what the majority viewed as solely a taxpayer challenge to secret funding for the Central Intelligence Agency, a policy allegedly in violation of the Constitution's statement and account clause.

Seven separate opinions were filed in the two cases. Justice Douglas dissented in each. In a brief concurrence in *Flast* in which he proposed discarding the *Frothingham* rule, Justice Douglas characterized *Frothingham* as having been decided during "the heyday of substantive due process, when courts were sitting in judgment on the wisdom or reasonableness of legislation."[73] The threat of judicial supremacy was posed by that "judicial attitude," rather than by the theory of standing rejected in *Frothingham.* The Justice contended that because judges no longer sought to exercise super-legislative powers, a generous conception of standing would create no significant threat to separation of powers. Taxpayers could serve as "vigilant private attorneys general" in protecting the Constitution

69. *Id.* at 217 (footnote omitted).
70. *Id.* at 221-22.
71. *Id.* at 227.
72. 418 U.S. 166 (1974).
73. 392 U.S. at 107.

from violation, and "where wrongs to individuals are done by violation of specific guarantees, it [would be] abdication for courts to close their doors."[74] Moreover, Douglas concluded, wise application of the ripeness principle, the distinction between frivolous and substantial questions, and related maxims of restraint would prevent innundation of the federal courts with public actions.

Justice Douglas' *Schlesinger* and *Richardson* dissents avoided mention of the "private attorneys general" concept, but they did lend support to an expansive view of the direct and concrete injury doctrine. The respondents in *Schlesinger,* he maintained, clearly had an interest as citizens in keeping the Constitution "intact,"[75] and because the incompatibility clause was designed to prevent abuse of congressional spending power, they also met the criteria for standing developed in *Flast.* Justice Douglas also construed *Richardson* as falling within the *Flast* exception to *Frothingham.* While ignoring the *Flast* requirement that taxpayer suits be directed only at taxing and spending legislation rather than at essentially regulatory programs, he said of the statement and account provision:

> From the history of the clause it is apparent that the Framers inserted it in the Constitution to give the public knowledge of the way public funds are expended. No one has a greater "personal stake" in policing this protective measure than a taxpayer. Indeed, if a taxpayer may not raise the question, who may do so?[76]

Justice Marshall, registering a brief dissent in *Schlesinger,* agreed with Justice Douglas' finding that the respondents had standing as citizens. According to Marshall, the respondents were not citing abstract, generalized grievances; rather, they had a "specific interest"[77] not shared by all citizens in American withdrawal from Vietnam. This interest allegedly had been infringed by violations of the incompatibility clause. To Justice Marshall, the denial of a hearing on the merits to a litigant claiming a violation of a specific constitutional provision was a "sad commentary"[78] when viewed against the grant of standing in *SCRAP* to a litigant claiming a mere statutory interference "with his aesthetic appreciation of natural resources."[79] Justice Marshall concluded, therefore, that the respondents had asserted a "direct and concrete injury to

74. *Id.* at 109, 111.
75. 418 U.S. at 234.
76. *Id.* at 200.
77. *Id.* at 239.
78. *Id.*
79. *Id.*

a judicially cognizable interest" entitling them to a hearing in federal court on the merits of their claim.

In *Richardson,* Justice Marshall joined a dissent authored by Justice Stewart. Stewart previously had joined the *Flast* majority on the ground that the taxpayer had relied on "an explicit constitutional prohibition"[80] of federal aid to religious facilities and "every taxpayer [could thus] claim a personal constitutional right not to be taxed for the support of a religious institution."[81] In *Richardson,* however, he advanced the rather murky thesis that a taxpayer has automatic standing to challenge any governmental failure to perform an "affirmative [constitutional] duty."[82] Accordingly, he characterized such litigants as "traditional Hohfeldian plaintiff[s]."[83] Because the statement and account clause arguably imposed such an affirmative duty, Stewart contended that standing should be accorded. When he applied his thesis in the *Schlesinger* context, on the other hand, he found no allegations of governmental failure to perform an affirmative duty and therefore concurred in the majority's decision to deny standing.

In a brief dissent filed for both cases, Justice Brennan reiterated his position[84] that a good-faith allegation of injury in fact is sufficient to establish standing. Richardson was not alleging merely that secret funding of the Central Intelligence Agency violated the Constitution; he also was claiming that the challenged practice injured him both as a citizen entitled "to know how Congress was spending the public fisc" and as a voter entitled "to receive information to aid his decision how and for whom to vote."[85] In Brennan's judgment, the respondents in *Schlesinger* likewise had made an adequate allegation of injury that, "while at first glance seeming extraordinarily difficult to prove, is neither impossible nor, on the basis of this record, made in bad faith."[86]

Justice Powell employed a lengthy concurrence in *Richardson* as a vehicle for a strong defense of a restrictive conception of standing. Tracking Justice Harlan's *Flast* dissent, Powell concluded that the *Flast* criteria were irrelevant to the issue of concrete adverseness and recommended confining the decision strictly to its facts. Powell

80. 392 U.S. at 114.
81. *Id.*
82. 418 U.S. at 202.
83. *Id.* at 203.
84. *See, e.g.,* Association of Data Processing Serv. Organizations v. Camp, 397 U.S. at 167.
85. 418 U.S. at 236.
86. *Id.*

read Justice Stewart's opinions in *Flast* and *Richardson* as advocating "federal taxpayer standing, and perhaps citizen standing, in all cases based on constitutional clauses setting forth an affirmative duty and in unspecified cases where the constitutional clause at issue may be seen as a plain or explicit prohibition."[87] He also complained that no meaningful distinction existed between affirmative constitutional duties and prohibitions, that neither related to a litigant's interest in a lawsuit's outcome, and that the Stewart formula thus "fail[ed] to provide a meaningful stopping point between an all-or-nothing position with regard to federal taxpayer or citizen standing."[88] Arguing that the alternatives of a liberalized conception of standing as reflected in Justice Douglas' dissents or an adherence to traditional limitations were bi-polar, Justice Powell embraced the latter approach. In selecting such a course, Powell pointed to a litany of evils normally discussed by critics of expansive notions of standing: undue expansion of judicial power; consequent threat to democratic principles, decline in public confidence in the courts, and possible retaliatory measures by the political branches of government; poorly framed cases; and impairment of the federal courts' historic role in protecting "the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action" as the courts become increasingly occupied with "amorphous general supervision of the operations of government" and serve as "open forum[s] for the resolution of political or ideological disputes about the performance of government."[89] For Powell, like Harlan before him, strict adherence to traditional standing limitations and confinement of public actions to those specifically authorized by Congress was the only proper approach in determining whether to grant a litigant access to a federal forum.

Since *Schlesinger* and *Richardson* were decided, Justice Douglas has retired from the Court and the position of his successor, Justice Stevens, on the public action issue is not yet entirely clear. That a definite majority of the present Court opposes recognition of non-Hohfeldian suits unless authorized by Congress would appear obvious. Although scholarly response to the question has been mixed,[90] most commentators urging acceptance of non-Hohfeldian

87. *Id.* at 185-86.

88. *Id.* at 187.

89. *Id.* at 192.

90. *Compare, e.g.*, Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961), *with* Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

suits have suggested that they be limited to those authorized by Congress[91] or kept "under leash" by the courts.[92]

Congress logically should be given discretion to determine whether alleged infringements of legal rights that it has conferred by statute should be subject to challenge by non-Hohfeldian as well as Hohfeldian plaintiffs. With respect to allegations of constitutional violations for which redress through private action is not readily available, however, employment of a largely prudential rule of personal injury as a bar to a non-Hohfeldian suit would appear inconsistent with the conception of the Constitution as paramount law and with the historic role of the federal courts as guardians of the Constitution.[93] Moreover, a policy that recognizes only those public actions authorized by Congress is an inadequate safeguard of constitutional provisions whose violation cannot be vindicated through a traditional suit, since, as *Schlesinger* and *Richardson* so clearly demonstrate, in certain contexts Congress itself may be the fox in the constitutional henhouse.

A number of other considerations militate in favor of judicial acceptance of non-Hohfeldian suits in constitutional cases. First, of course, the ease with which the Court in such recent cases as *SCRAP* and *Flast* has attached the Hohfeldian label to suits bearing all the characteristics of a non-Hohfeldian case suggests that the restraint on judicial power raised by the distinction between public and private actions may be more apparent than real. Second, public confidence in the courts arguably would be jeopardized less by judicial acceptance of public actions than by judicial refusal, such as occurred in *Schlesinger* and *Richardson,* even to hear challenges to governmental policies clearly violating explicit constitutional provisions. Indeed, much of the lay public likely is not even aware of, much less appreciative of, the complexities of standing doctrine. Third, complaints that a liberalized standing doctrine will jeopardize appreciably congressional and executive support for the courts

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

92. *See, e.g.,* Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 HARV. L. REV. 255, 304 (1961). *But see* Note, *Recent Standing Cases and a Possible Alternative Approach,* 27 HASTINGS L.J. 213 (1975) (recommending rather vaguely that standing should he extended to any plaintiff alleging injury contemplated by the authors of the statutory or constitutional provision in question).

93. For a defense of public actions based on the courts' "special function" as guardians of the Constitution that ultimately argues that such suits should be limited to those authorized by Congress, see Monaghan, *supra* note 91. Discussions of other functions served by the public action include Comment, *Standing, Separation of Powers, and the Demise of the Public Citizen,* 24 AM. U.L. REV. 835, 872 (1975).

and strain limited judicial resources through increased caseloads are largely speculative. If serious problems of this nature do arise, the courts possess ample devices for coping with the situation, devices that, unlike the rule against non-Hohfeldian suits, would not create an absolute bar to constitutional claims of the *Schlesinger-Richardson* genre. Fourth, with due respect for Justice Powell and other critics of a liberalized standing doctrine, acceptance of the non-Hohfeldian suit would not necessarily engender either general judicial supervision of governmental operations or resolution of political or ideological disputes. Such abuse of judicial power is obviously possible regardless of whether non-Hohfeldian cases are permitted. Failure to recognize public actions, however, would prevent the courts in certain cases from performing their historic role as guardians of the Constitution. As Justice Douglas observed in *Flast*: "If the judiciary were to become a super-legislative group sitting in judgment on the affairs of people, the situation would be intolerable. But where wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors."[94]

Fifth, the distinction drawn by the Court between the "abstract" claims raised by non-Hohfeldian plaintiffs and the "concrete adverseness" reflected in the Hohfeldian suit is artificial at best. The willingness of a non-Hohfeldian plaintiff to incur the enormous expense of a law suit arguably is sufficient to satisfy Article III case or controversy requirements. Moreover, the intensity of the non-Hohfeldian plaintiff's injury or interest in the outcome of a case may be as great as that of the traditional plaintiff, and the relief provided as satisfactory. The real difference between the two types of suits, of course, is that the non-Hohfeldian plaintiff normally seeks relief for an injury imposed on all members of the polity while injury suffered by the Hohfeldian plaintiff has a more restricted reach. This distinction, however, only demonstrates further the need to recognize the non-Hoheldian suit, at least when the injury is of constitutional dimensions and traditional avenues of relief are unavailable.

Finally, precedential support for bestowing standing upon non-Hohfeldian plaintiffs in constitutional cases is considerable. As Raoul Berger has demonstrated convincingly, "the notion that the constitution demands injury to a personal interest as a prerequisite to attacks on allegedly unconstitutional action is historically unfounded."[95] Furthermore, even if standing requirements are based

94. 392 U.S. at 111.

95. Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969).

solely upon prudential rather than constitutional grounds, Supreme Court decisions waiving these requirements in order to assure adequate protection for constitutional liberties provide a basis for recognition of non-Hohfeldian suits. Even when their own actions may have been subject to control under a properly drawn law, litigants long have been allowed to raise facial vagueness and overbreadth challenges to statutes whose very existence allegedly chilled the exercised of constitutional rights. Although the Burger Court has curtailed facial review to a great extent,[96] the technique has not been formally abandoned.[97] The Court also has preserved the line of *jus tertii* or third party standing decisions[98] granting litigants standing to assert the constitutional rights of others, and a plurality in one recent *jus tertii* case, *Singleton v. Wulff*,[99] embraced an especially generous conception of third party standing.[100]

Among the issues in *Singleton* was the question whether two physicians could assert the rights of patients when challenging a state statute excluding abortions not "medically indicated" from Medicaid coverage for needy persons. In an opinion joined by Chief Justice Burger and Justices Stewart and Rehnquist, Justice Powell maintained that third party standing should be denied unless litigation by a rightholder himself was "in all practicable terms impossible."[101] Justice Blackmun, joined by Justices Brennan, White, and Marshall, on the other hand, concluded that the plaintiffs were proper proponents of needy patients' constitutional rights. Applying traditional criteria of third-party standing, Justice Blackmun found that the patients' enjoyment of the right to abort was inextricably bound up with the physicians' medical practice and that "genuine obstacle[s]"[102] hindered the patients' personal assertion of their rights. Moreover, although ultimately failing to demonstrate effectively that genuine obstacles precluded the patients from asserting

96. *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974); Broadrick v. Oklahoma, 413 U.S. 601 (1973). *See also* Yarbrough, *The Burger Court and Freedom of Expression*, 33 WASH. & LEE L. REV. 37 (1976).

97. *See, e.g.*, Lewis v. New Orleans, 415 U.S. 130 (1974).

98. *E.g.*, NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953).

99. 428 U.S. 106 (1976).

100. Burger Court decisions granting third party standing include Carey v. Population Services Int'l, 431 U.S. 678 (1977); Craig v. Boren, 429 U.S. 190 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972); *cf.* Roe v. Wade, 410 U.S. 113 (1973) (doctor who was a defendant in pending state criminal proceedings for performing an abortion was denied standing to sue in federal court as a "potential future defendant"). For a recent analysis of *jus tertii* cases, see Comment, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

101. 428 U.S. at 126.

102. *Id.* at 116.

their rights under the challenged statute, Justice Blackmun developed a brief but effective rejoinder to Justice Powell's restrictive reading of prior cases granting third party standing.[103] Because Justice Stevens expressed uncertainty on the issue, the *Singleton* Court divided evenly on the question of third party standing. When examined together with the Court's other decisions in the area, however, *Singleton* suggests that recognition of third party standing to assure vindication of threatened constitutional rights remains a viable policy of the Burger Court.

The considerations underlying the Court's waiver of normal standing requirements in facial review and *jus tertii* cases parallel those supporting recognition of non-Hohfeldian suits in constitutional cases. Both approaches are designed to protect constitutional provisions from violation when adequate redress is either improbable or impossible under traditional standing requirements. Litigants in each type of case, moreover, lack standing in the traditional sense. Admittedly, the Court's willingness to waive standing requirements in facial review and *jus tertii* cases has been based partially upon the paramount significance of civil liberties in a free society. Surely, however, every constitutional provision is sufficiently important to justify the hearing of a constitutional claim advanced by the non-Hohfeldian litigant when necessary to preserve the provision from governmental interference. The facial review and

103. In a rejoinder to Justice Powell's assertion that the genuine-obstacle standard represented a relaxation of the rule that third party standing should be denied unless vindication of constitutional rights would otherwise be virtually impossible, Justice Blackmun cited Barrows v. Jackson, 346 U.S. 249 (1953), which granted standing to a white real-estate seller to assert the rights of potential black buyers in challenging judicial enforcement of a racially restrictive housing covenant; NAACP v. Alabama, 357 U.S. 449 (1958), which granted standing to an organization's officials to assert the rights of its members to anonymous association; and Eisenstadt v. Baird, 405 U.S. 438 (1972), which granted a distributor the right to assert the rights of unmarried persons in challenging a law forbidding distribution of contraceptives to such persons. Justice Blackmun argued that Justice Powell had given these decisions an unduly restrictive reading:

> The Negro real-estate purchaser in *Barrows*, if he could prove that the racial covenant alone stood in the way of his purchase (as presumably he could easily have done, given the amicable posture of the seller in that case), could surely have sought a declaration of its invalidity or an injunction against its enforcement. The Association members in *NAACP* v. *Alabama* could have obtained a similar declaration or injunction, suing anonymously by the use of pseudonyms. The recipients of contraceptives in *Eisenstadt* . . . could have sought similar relief as necessary to the enjoyment of their constitutional rights. The point is not that these were easy alternatives, but that they differed only in the degree of difficulty, if they differed at all, from the alternative in this case of the women themselves seeking a declaration or injunction that would force the State to pay the doctors for their abortions.

428 U.S. at 116 n.6.

jus tertii decisions, therefore, apparently provide precedential support for acceptance of public actions in constitutional cases.[104]

IV. District Court Intervention in State Proceedings

Since the appointment of the Chief Justice in 1969, the Burger Court has developed a significant body of case law regarding the propriety of federal district court declaratory and injunctive intervention in state judicial proceedings. The Court's present position may be summarized as follows:

Injunctive Relief Against Pending State Criminal Proceedings. Although civil rights equity suits brought pursuant to section 1983[105] presently are recognized as an exception to Congress' long-standing policy of opposition to federal injunction of state proceedings,[106] federal courts are forbidden to enjoin pending state criminal proceedings absent a showing of irreparable injury "both great and immediate."[107] In *Younger v. Harris*[108] and companion cases,[109] Justice Black reaffirmed prior holdings that only "special circum-

104. The Warren Court's decision in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968), also is supportive of judicial recognition of non-Hohfeldian suits. *Hanover Shoe* involved an antitrust treble-damage action brought under the Clayton Act by a shoe manufacturer against a manufacturer of shoe machinery. The machinery manufacturer claimed in defense that the plaintiff had alleged no injury to a business interest as required under the Act because the claimed illegal overcharges had been passed to the ultimate customers. The Court rejected this defense that indirect rather than direct purchasers were the parties injured by the antitrust violation and thus the only parties entitled to standing. One reason for its rejection of the pass-on defense was that antitrust violators would go unchallenged if direct purchasers had no standing because indirect purchasers individually "would have only a tiny stake in a lawsuit" and thus little incentive to sue. *Id.* at 494. In *Hanover Shoe,* therefore, the Court arguably was relaxing normal standing limitations in order to assure vindication of statutory rights. If protection of statutory rights warrants such action, preservation of every constitutional provision from infringement would be an even more compelling justification for waiving traditional standing requirements. For a recent decision based on a strained reading of *Hanover Shoe,* see Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977).

105. 42 U.S.C. § 1983 (1970).

106. Mitchum v. Foster, 407 U.S. 225 (1972).

107. Younger v. Harris, 401 U.S. 37, 46 (1971). For historical discussions of the congressional and Supreme Court policies regarding federal judicial intervention in state court proceedings, see, *e.g.,* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski,* 48 Tex. L. Rev. 535 (1970); Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts,* 42 Yale L.J. 1169 (1933); Warren, *Federal and State Court Interference,* 43 Harv. L. Rev. 345 (1930); Yarbrough, *Federal Court Intervention in State Judicial Proceedings,* in Trends in Federalism 21 (T. Yarhrough ed. 1972).

108. 401 U.S. 37 (1971).

109. Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

stances," including bad faith enforcement of a statute and harassment by state officials, would warrant such a finding. According to Justice Black, the Court's policy was based on two distinct considerations. The first was the doctrine that equitable relief should be denied when adequate alternative remedies, such as the vindication of federal rights in the state proceedings, are available. The second consideration rested upon the principles of federalism and comity, which Black characterized as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the helief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[110]

This policy required neither "blind deference" to states' rights nor national control over every important issue.

> What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may he to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[111]

Although *Younger* by its terms related to federal court injunction of state court enforcement of an allegedly unconstitutional state criminal statute, the principles and policies underlying Justice Black's opinion have been echoed in several related contexts in which state and federal proceedings have come into conflict.

Declaratory Relief Against Pending State Criminal Proceedings. Declaratory relief against pending state criminal proceedings also should be denied in most instances. In *Samuels v. Mackell*,[112] decided along with *Younger*, Justice Black conceded that there might be unusual circumstances in which a declaratory judgment may be appropriate although an injunction is unacceptable. He concluded, however, that "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid."[113] The Court observed that after a declaratory judgment is issued a federal court can enforce the judgment through "further necessary or proper relief," including the issuance of an

110. 401 U.S. at 44.
111. *Id.*
112. 401 U.S. 66 (1971).
113. *Id.* at 72.

injunction, and that "declaratory relief alone [had] virtually the same practical impact as a formal injunction."[114] Thus the Court held that "the propriety of declaratory and injunctive relief should be judged by essentially the same standards."[115]

Declaratory Relief Against Threatened State Criminal Proceedings. Assuming the presence of a controversy suffient to satisfy Article III requirements, declaratory relief against a threatened state criminal proceeding is appropriate even in the absence of bad faith action by state officials or other "special circumstances." In *Steffel v. Thompson*,[116] Justice Brennan observed for the Court that the *Younger* principles of equity, comity, and federalism

> have little force in the absence of a pending state proceeding. . . . When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.[117]

Thus the considerations that led the *Younger* Court to preclude federal relief are not present in cases in which an individual seeks federal declaratory relief against state action that only has been threatened. The Court, however, refused to consider the appropriateness of injunctive relief under such circumstances.

Injunctive Relief Against Threatened State Criminal Proceedings. Subsequent to the *Steffel* decision, the Court has undertaken consideration of the propriety of federal injunctive relief against threatened state action. The Court has determined that when a "genuine threat" of state criminal prosecution exists but no proceeding is pending, "no absolute policy" limits relief to a declaratory judgment—injunctive relief may be granted when warranted by exceptional circumstances less compelling than those required for intervention in a pending proceeding under *Younger*.[118] In *Doran v.*

114. *Id.*
115. *Id.*
116. 415 U.S. 452 (1974).
117. *Id.* at 462.
118. Wooley v. Maynard, 97 S. Ct. 1428, 1433-34 (1977).

Salem Inn, Inc.[119] the Court upheld a preliminary injunction issued in behalf of two plaintiffs against whom no state proceedings were pending at the time of the issuance. Justice Rehnquist observed for the majority that "their claims for preliminary injunctive relief [could be] considered without regard to Younger's restrictions."[120] The Court went one step further in *Wooley v. Maynard,*[121] moreover, by upholding the issuance of a permanent injunction against state enforcement of a criminal statute. Speaking through the Chief Justice, the *Wooley* majority invalidated enforcement of a New Hampshire criminal statute prohibiting obstruction of the state motto, "Live Free or Die," on state license plates. Burger conceded that one of the appellees had been convicted three times under the statute, but had failed to seek state review of the convictions. Because the federal equity suit sought only prospective relief and was not designed to annul the consequences of the prior convictions, however, the Chief Justice concluded that the *Younger* principles did not bar federal jurisdiction. He also found that exceptional circumstances justified injunctive as well as declaratory relief:

> [T]hree successive prosecutions were undertaken against Mr. Maynard in the span of five weeks. This is quite different from a claim for federal equitable relief when a prosecution is threatened for the first time. The threat of repeated prosecutions in the future against both him and his wife, and the effect of such a continuing threat on their ability to perform the ordinary tasks of daily life which require an automobile, is sufficient to justify injunctive relief.[122]

State Criminal Proceedings Against Federal Plaintiffs. When state criminal proceedings are begun against federal plaintiffs who already have filed a complaint seeking declaratory and injunctive relief from the statute under which the state proceedings have been initiated, but before any proceedings on the merits in the federal action, the *Younger* principles "should apply in full force."[123] The Court announced this aspect of its stance in *Hicks v. Miranda.*[124] In *Hicks* the police had seized four copies of an allegedly obscene film from appellees' theater, municipal misdemeanor charges were filed against two theater employees, and a state court declared the film obscene and ordered seizure of all copies found at the theater. Instead of appealing the seizure order, the appellees filed suit for federal declaratory and injunctive relief, and a three-judge district

119. 422 U.S. 922 (1975).
120. *Id.* at 931.
121. 97 S. Ct. 1428 (1977).
122. *Id.* at 1434.
123. Hicks v. Miranda, 422 U.S. 332, 349 (1975).
124. 422 U.S. 332 (1975).

court was convened to hear the case. Subsequently, the appellees were added as defendants in the municipal proceedings. After these local proceedings had progressed, the three-judge federal panel declared the obscenity statute unconstitutional. The panel rejected *Younger-Mackell* challenges to the federal suit, declaring that no state criminal charges were pending at the time the federal suit was filed and that, in any event, the pattern of the initial seizure of the film constituted bad faith and harassment by local authorities.

The Supreme Court reversed, holding the *Younger-Mackell* principles applicable and rejecting the district court's finding of bad faith and harassment. Justice White, writing for the majority, conceded that, although no state proceedings were pending against the appellees when the federal complaint was filed, two of the appellees' employees had been charged and the "[a]ppellees had a substantial stake in the state proceedings, so much so that they sought federal relief, demanding that the statute be declared void and their films be returned to them."[125] No showing had been made that the appellees could not seek return of the film copies and present their federal claims in state proceedings challenging the seizure order. Moreover, the appellees had been charged in the municipal proceedings the day after completion of service of the federal complaint, no proceedings of substance had taken place on the merits of the federal complaint when the state charges were filed, and no prior case had held that "state criminal proceedings must be pending on the day the federal case is filed"[126] for *Younger* principles to apply.

Federal Intervention Following Appealable State Court Judgments. In *Huffman v. Pursue, Ltd.*,[127] the Court employed the *Younger* principles in reviewing an order of a federal district court permanently enjoining execution of an Ohio trial court judgment. After a state court had closed appellee's theater pursuant to an Ohio public nuisance statute directed at theaters exhibiting obscene films, he sought relief through federal proceedings rather than through the state appellate system. In rejecting both federal declaratory and injunctive relief against application of the statute, the Supreme Court found that as "a necessary concomitant of *Younger* . . . a party . . . must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself

125. *Id.* at 348.
126. *Id.* at 349.
127. 420 U.S. 592 (1975).

within one of the exceptions specified in Younger."[128] In making this determination, the Court cited such considerations as the principles of federalism and comity, the need to avoid disruption of state "efforts to protect interests which it deems important," and the futility and duplication inherent in retrying a case at the federal level when a state trial has just concluded, but has not yet been appealed.

Federal Intervention in State Civil Proceedings. The *Younger* principles also apply to federal court intervention in pending state civil proceedings, at least in those cases in which a state is a party to a suit implicating iinportant state interests or policies. In addition to its application of *Younger* to final state court judgments in *Huffman v. Pursue, Ltd.*, the Burger Court also took the opportunity for the first time to extend *Younger* to such civil proceedings. Because appellee had shown no special circumstances warranting federal intervention and because the nuisance proceeding was "more akin to a criminal prosecution than are most civil cases,"[129] Justice Rehnquist concluded for the Court that *Younger* should have been followed. Explaining the majority's position, Rehnquist observed:

> The component of *Younger* which rests upon the threat to our federal system is . . . applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding. *Younger* . . . also rests upon the traditional reluctance of courts of equity, even within a unitary system, to interfere with a criminal prosecution. Strictly speaking, this element of *Younger* is not available to mandate federal restraint in civil cases. But whatever may be the weight attached to this factor in civil litigation involving private parties, we deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the . . . proceeding, and the proceeding is both in aid of and closely related to criminal statutes whic prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding. . . . Similarly, while in this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws.[130]

In *Huffman,* therefore, the Court not only extended the *Younger* principles to federal intervention in state court processes occurring between the time of final judgment and appeal, but also made those principles applicable to a civil proceeding deemed by the Court to be closely related to state criminal statutes.

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128. *Id.* at 608.
129. *Id.* at 604.
130. *Id.* at 604-05.

In two more recent decisions, *Juidice v. Vail*[131] and *Trainor v. Hernandez*,[132] the Court has employed similar reasoning to extend *Younger* to other forms of civil litigation. In *Juidice* the Court rejected federal injunction of contempt actions initiated by state courts in civil proceedings to collect judgment. Justice Rehnquist declared for the majority:

> Whether disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of contempt of court, is labeled civil, quasi-criminal, or criminal in nature, . . . federal court interference with the State's contempt process is "an offense to the State's interest . . . likely to be every bit as great as it would be were this a criminal proceeding."[133]

Justice Rehnquist added that federal interference also would reflect negatively on the integrity of state courts in preserving federal constitutional principles. In *Trainor* the Court reserved judgment on the question whether "*Younger* principles apply to all civil litigation,"[134] but specifically rejected federal relief against a civil proceeding seeking to recover state welfare payments alleged to have been wrongfully received and to attach the defendants' property. Justice White wrote for the majority:

> [T]he State was a party to the suit in its role of administering its public assistance programs. Both the suit and the accompanying writ of garnishment were brought to vindicate important state policies such as safeguarding the fiscal integrity of those programs. The State authorities also had the option of vindicating these policies through criminal prosecutions. . . . Although, as in *Juidice*, the State's interest here is "perhaps . . . not quite as important as is the State's interest in the enforcement of its criminal laws . . . or even its interest in the maintenance of a quasi-criminal proceeding . . .," . . . the principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity.[135]

These three decisions reflect the Court's continuing reluctance to permit federal intervention in state court proceedings and demonstrate that this philosophy is not restricted to pending criminal state proceedings.

Several elements of the Burger Court's developing position regarding federal intervention in state judicial proceedings have been the focus of considerable controversy among the Justices. In each of the cases extending *Younger* principles to civil proceedings, Justice Brennan, joined by Justice Marshall and, until his retirement, by

131. 97 S. Ct. 1211 (1977).
132. 97 S. Ct. 1911 (1977).
133. *Id.* at 1217.
134. *Id.* at 1919 n.8.
135. *Id.* at 1918 (footnote omitted).

Justice Douglas, has registered vehement dissents.[136] Justice Brennan views the Court's decisions as moving toward an extension of *Younger* to civil proceedings generally and claims that such an approach is incompatible with precedent, with the considerations underlying *Younger,* and with proper regard for federal constitutional rights. *Younger,* he asserted, reflects respect for the "paramount role" of the states in the administration of criminal justice, but a state's interest in its civil proceedings

> cannot be assumed . . . of [sufficiently] compelling importance [to] outweigh the interests of litigants seeking vindication of federal rights in federal court, particularly under a statute [42 U.S.C. § 1983] expressly enacted by Congress to provide a federal forum for that purpose. Even assuming that federal abstention might conceivably be appropriate in some civil cases, the transformation of what I must think can only be an exception into an absolute rule crosses the line between abstention and abdication.[137]

In Justice Brennan's judgment, extension of *Younger* to civil proceedings also provides state officials with a ready device for delaying or preventing federal judicial challenges to state laws and procedures.

> The extension . . . threatens serious prejudice to the potential federal-court plaintiff not present when the pending state proceeding is a criminal prosecution. That prosecution does not come into existence until completion of steps designed to safeguard him against spurious prosecution—arrest, charge, information, or indictment. In contrast, the civil proceeding . . . comes into existence merely upon the filing of a complaint, whether or not well founded. To deny by fiat of this Court the potential federal plaintiff a federal forum in that circumstance is obviously to arm his adversary (here the public authorities) with an easily wielded weapon to strip him of a forum and a remedy that federal statutes were enacted to assure him.[138]

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136. Trainor v. Hernandez, 97 S. Ct. 1911, 1921 (1977); Juidice v. Vail, 97 S. Ct. 1211, 1220 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 613 (1975). Note also Justice Stevens' observation in *Trainor* that the Court's holding "rest[ed] squarely on the fact that the State, rather than some other litigant, is the creditor that invoked the Illinois Attachment procedure" under challenge, and his contention that:

> [t]his rationale cannot be tenable unless principles of federalism require greater deference to the State's interest in collecting its own claims than to its interest in providing a forum for other creditors in the community. It would seem rather obvious to me that the amount of money involved in any particular dispute is a matter of far less concern to the sovereign than the integrity of its own procedures. Consequently, the fact that a State is a party to a pending proceeding should make it *less* objectionable to have the constitutional issue adjudicated in a federal forum than if only private litigants were involved. I therefore find it hard to accept the Court's contrary evaluation as a principled application of the majestic language in Mr. Justice Black's *Younger* opinion.

97 S. Ct. at 1928 (dissenting).

137. Trainor v. Hernandez, 97 S. Ct. at 1924.

138. Huffman v. Pursue, Ltd., 420 U.S. at 615.

The Court's holding in *Hicks* that *Younger* principles apply when a state criminal charge is filed at any point after the commencement of a federal suit challenging the statute on which the state charge is based, "but before any proceedings of substance on the merits"[139] in the federal proceeding, evoked a similar complaint from four Justices. Dissenting in *Hicks,* Justice Stewart, joined by Justices Douglas, Brennan, and Marshall, scored as unduly vague the phrase "proceedings of substance on the merits." More fundamentally, he charged that the majority's position was inconsistent with the conclusion in *Steffel* that the denial of a federal forum to a litigant seeking vindication of federal rights when no state proceeding was pending would serve to "turn federalism on its head."[140]

> The duty of the federal courts to adjudicate and vindicate federal constitutional rights is, of course, shared with state courts, but there can be no doubt that the federal courts are "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." . . . The statute under which this action was brought, 42 U.S.C. § 1983, established in our law "the role of the Federal Government as a guarantor of basic federal rights against state power." . . . Indeed, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people." . . . And this central interest of a federal court as guarantor of constitutional rights is fully implicated from the moment its jurisdiction is invoked. How, then, does the subsequent filing of a state criminal charge change the situation from one in which the federal court's dismissal of the action under *Younger* principles "would turn federalism on its head" to one in which *failure* to dismiss would [in the majority's words] "trivialize" those same principles?[141]

Justice Stewart, concurring strongly with the teaching of *Younger* and other cases that "Our Federalism" forbids federal judicial interference "with the legitimate functioning of state courts," added that "surely the converse is a principle no less valid."[142] In Justice Stewart's view, the majority's decision was "an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction."[143] There was "something unseemly," he observed, "about having the applicability of the *Younger* doctrine turn solely on the outcome of a race to the courthouse," particularly when the state was permitted "to leave the mark later, run a shorter course, and arrive first at the finish line."[144]

Differences also have arisen among the Justices over the ques-

139. 422 U.S. at 349.
140. 415 U.S. at 472.
141. 422 U.S. at 355-56.
142. *Id.* at 357.
143. *Id.*
144. *Id.* at 354.

tion whether the "special circumstances" required for intervention in *Younger* are present in a given case. The Court's consideration of *Trainor v. Hernandez* led to one such dispute. In addition to bad faith enforcement of state laws and harassment by state officials, the *Younger* majority had included among the "special circumstances" justifying federal intervention the existence of a statute that "might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[145] Although the district court in *Trainor* had found the statute under consideration to be "patently" unconstitutional, a majority of the Supreme Court nevertheless expressed doubt whether the lower court had found the entire statute within the *Younger* exception and concluded that, in any event, such a finding was not warranted under the Court's prior decisions on the constitutional issue. In dissent, Justice Stevens condemned the rigidity of the Court's position, suggesting that its reading of the " 'patently and flagrantly unconstitutional' exception to *Younger*-type abstention" apparently would forbid federal intervention "whenever a statute has a legitimate title, or a legitimate severability clause, or some other equally innocuous provision."[146] Such an interpretation of *Younger,* Justice Stevens charged, would practically eliminate the exception altogether. Justice Brennan's dissent, echoing the sentiments of Justice Stevens, condemned the Court's position as elevating "to a literalistic definitional status what was obviously meant only to be illustrative and non-exhaustive."[147]

Not all of the internal criticism of the Court's position, however, has been directed at extensions of *Younger.* The propriety of permitting both declaratory and injunctive intervention in threatened state proceedings, rather than allowing declaratory relief alone, has evoked considerable comment on the Court. In *Wooley,* for example, the majority upheld the issuance of a permanent injunction against further enforcement of an unconstitutional statute at the request of a litigant who had been convicted under the statute on three occasions, but had not sought state appellate review of the convictions. Justice White, joined by Justices Blackmun and Rehnquist, dissented in the case, contending that even when no state proceedings are pending and the provision of declaratory relief is not subject to *Younger* restrictions, "further equitable relief

145. 401 U.S. at 53-54 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).
146. 97 S. Ct. at 1928.
147. *Id.* at 1925.

[should] depend on the existence of unusual circumstances."[148] While concluding that the *Younger* standards were inapplicable in such contexts, the majority cited both the previous prosecutions and the threat of future prosecutions as exceptional circumstances indicating that declaratory relief alone would not have been adequate to assure vindication of the appellees' constitutional rights. Justice White's response was succinct:

> Here the State's enforcement of its statute prior to the declaration of unconstitutionality by the federal court would appear to be no more than the performance of their duty by the State's law enforcement officers. If doing this much prior to the declaration of unconstitutionality amounts to unusual circumstances sufficient to warrant an injunction, the standard is obviously seriously eroded.[149]

Concurring in *Steffel,* Justice Rehnquist also rejected any notion that a favorable federal declaratory judgment action should be viewed as supporting issuance of injunctive relief. Citing language from *Steffel* that distinguished declaratory judgments and injunctions in terms of their relative impact on state criminal processes, Rehnquist contended that such distinctions made "declaratory relief appropriate where injunctive relief [might] not be."[150] He noted that state authorities are free to accept or ignore a declaratory judgment, which is simply "a statement of rights" and "not a binding order."[151] Its issuance, therefore, does not create the sort of improper federal interference with state functions contemplated by *Younger* and characteristic of the injunctive remedy.

Among the Justices sitting on the Court at the time *Younger* was decided and among those subsequently appointed, Justice Douglas has raised the most sweeping objections to the *Younger* formula. Dissenting in *Younger,* Justice Douglas acceded to "the general rule that federal courts should not interfere with state criminal prosecutions."[152] In registering a strong statement in support of federal intervention when needed "to prevent an erosion of the individual's constitutional rights,"[153] however, Douglas contended that an allegation of the facial unconstitutionality of a state statute was among the "special circumstances" justifying intervention—a proposition largely rejected by the *Younger* majority. Characterizing the provisions of the Civil Rights Act of 1871[154] as an authorized excep-

148. *Id.* at 1437.
149. *Id.*
150. 415 U.S. at 481.
151. *Id.* at 482.
152. 401 U.S. at 58.
153. *Id.*
154. Ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1970)).

tion to the general congressional policy of opposing federal injunction of state proceedings,[155] he maintained that both the Civil War and the constitutional amendments adopted during that period had altered fundamentally the nature of the federal system and converted the protection of civil rights into a matter of primarily national concern. Pre-Civil War conceptions of federalism, he concluded, should not be allowed to prevent effective enforcement of section 1983 and other legislation rooted in an increased congressional concern for the protection of civil rights. In post-*Younger* cases, Justice Douglas remained faithful to his view that "federal abstention from interference with state criminal prosecutions is inconsistent with demands of our federalism where important and overriding civil rights (such as those involved in the First Amendment) are about to be sacrificed."[156] His position is well taken. Although a proper respect for state functions should temper federal court intervention in state proceedings, a regard for individual rights is also a fundamental value, and one given decidedly more explicit constitutional recognition than those values reflected in the concept of comity. In opposing extension of *Younger* to civil proceedings and other contexts, other Justices also have stressed the primacy of the federal role in the protection of civil rights.[157] Since Justice Douglas' retirement, however, no member of the Court has urged *Younger's* complete or substantial dismantling.

The *Younger* standards and their application by the Burger Court are vulnerable to attacks on other grounds as well. First, an important consideration underlying the tenor of the Court's decision in *Younger,* the distrust of facial challenges to state statutes in federal actions, is no longer compelling. The Warren Court had been extremely receptive to such claims and in one case, *Dombrowski v. Pfister,*[158] suggested that allegations of facial invalidity might constitute a "special circumstance" justifying federal injunction of a proceeding pending under the statute. Justice Black devoted much of his *Younger* opinion to a rejection or substantial limitation of this proposition and to a general discourse on the evils of facial review. Because the Burger Court has curtailed drastically the application of the facial review doctrine, a federal court asked to enjoin enforcement of a statute in a pending state proceeding will be much less

155. As was noted earlier, his interpretation later was adopted by the Court in Mitchum v. Foster, 407 U.S. 225 (1972).

156. Huffman v. Pursue, Ltd., 420 U.S. at 618 (dissenting).

157. *See, e.g., id.* at 616-18 (Brennan, J., dissenting).

158. 380 U.S. 479 (1965).

likely to declare the statute facially invalid and thereby in effect forbid all future applications of its provisions. The ultimate impact of federal suits seeking declaratory and injunctive relief against pending state proceedings, therefore, is now likely to be less sweeping than was the case when *Younger* was decided.

Second, the Court now recognizes an exception to the general congressional policy forbidding federal injunction of state court proceedings that permits the use of federal equity suits to vindicate federal rights. In light of this development, the Court's construction of the principles of federalism to provide state courts with greater protection from federal interference than that accorded other state agencies is difficult to understand. For example, the Court has held that the *Younger* restrictions do not apply and federal intervention is proper if police or other state officials have only threatened state action and no proceedings are pending before a court. Under principles of federalism, however, a state's administrative officials apparently are entitled to as much respect as its courts, unless one assumes that state judges are inherently more deserving of respect and trust than are other state officials.

Third, the Court's establishment of general rules concerning when the *Younger* principles apply seems inconsistent with the considerations of federalism and comity upon which those standards are based. The Court has concluded that *Younger* is never applicable when state proceedings are only threatened, but always is applicable when they are pending. As a practical matter, however, not every federal intervention in threatened state proceedings may be assumed to be an inherently more attentuated interference with proper state functions than every federal intervention in pending proceedings. The degree of interference obviously depends upon the circumstances. Similarly, district court abstention, when followed by state court proceedings rejecting a litigant's federal claims and subsequent reversal of the state court by the United States Supreme Court, arguably engenders a more highly resented, tension-creating interference with the independence of state tribunals than does federal court intervention at the trial stage. Obviously, the force of the latter argument is blunted by the significant limitations on the number of state cases accorded appellate review by the Supreme Court in each term, but it does underscore the need for the Court both to rethink the basic premises underlying *Younger* and its progeny and to develop more subtle rules for determining *Younger's* application. Those who exalt the primacy of constitutional rights over largely unspecified principles of federalism and who believe that federal tribunals are generally more effective protectors of fed-

eral rights than are their state counterparts are confronted by the problem that a major reconsideration of the *Younger* doctrine or its outright rejection by the Court are highly unlikely developments. Such persons can only hope for an eventual expansion of exceptions to the *Younger* standards and for firmer warnings from the Burger Court than already have been registered that federal courts stand ready to vindicate federal rights—even to the extent of halting state criminal processes.

V. Conclusion

Limitations on access to the federal courts, including those examined in this Article, are defended largely as functions of the need for judicial economy and self-restraint. In fact, such controls appear to serve neither function well. They clearly are more a reflection of judicial convenience than restraint, designed to enable courts to avoid troublesome claims, to pace the development of their positions on legal issues, and to reject litigant claims without formal pronouncement. In the final analysis, the time-consuming efforts of litigants to persuade judges that they and their claims deserve a hearing on the merits probably do more to aggravate than to alleviate pressures on scarce judicial resources. In addition, the failure of one set of litigants to win review of their claims does not end the matter, but simply means that other litigants will attempt to frame the issue more effectively and succeed in circumstances in which their predecessors have failed.

Whatever the motives underlying their application and whatever their deficiencies, access controls are firmly rooted in federal jurisprudence. When they fall largely into disuse, as in the Warren years, the functions that they serve, the consistency with which they are invoked, and related concerns as to their general application are largely academic. When limitations on access assume a prominent role in the decisional process, however, such concerns and the obligation of judges to explain and justify their decisions become matters of critical importance to the maintenance of public respect and support for the courts.

The ultimate impact of the Burger Court's access rulings on its rate of public support is yet unknown. In terms of the vigor and frequency with which it has limited access to federal judicial relief, however, the Court seemingly has no peer. Moreover, as this Article has demonstrated, the Court's approach to litigant access is vulnerable to attack on a variety of fronts. Ironically, therefore, restrictive access rulings arguably designed in part to counter opposition to the

Court generated during the activist Warren years ultimately may pose support problems for the Burger Court comparable to those that expansive civil liberties rulings created for its predecessor in the 1960's.