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COMMENTS

Standing Versus Justiciability: Recent Developments in Participatory Suits Brought by Congressional Plaintiffs

I. Introduction

Article III of the United States Constitution limits the jurisdiction of federal courts to "cases" and "controversies."[1]

> Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to question presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.[2]

Standing is one aspect of justiciability.[3] It is designed to determine "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[4] Thus, *standing,* in its traditional sense, refers to the relationship between the complainant and the claim. Unfortunately, *standing* has also been used by courts and academicians alike as a generic term subsuming all aspects of justiciability.[5] This dual use of the term *standing* has caused much confusion.

Chief Justice Earl Warren, in *Flast v. Cohen,*[6] distinguished

1. U.S. Const. art. III, § 2.
2. Flast v. Cohen, 392 U.S. 83, 94-95 (1968).
3. Other aspects of justiciability include reviewability, mootness, separation of powers concerns, ripeness, and political questions.
4. Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972).
5. *See* Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 Stan. L. Rev. 433 (1962).
6. 392 U.S. 83 (1968).

standing, in its strict sense, from the other questions comprising justiciability:

> The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controvery as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." . . . In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question.[7]

On the other hand, the merits of the case may be proper for adjudication by the judiciary, but the plaintiff may not have a sufficient stake in the controversy to be a proper party to bring the action. In either case, albeit for different reasons, the action should be dismissed.

Perhaps the most graphic example of confusing the issue of standing with the other aspects of justiciability may be found in the adjudication of lawsuits brought by members of Congress alleging injury to their participatory rights as congressmen. The separation of powers concerns involved in such lawsuits are self-evident. Numerous courts have attempted to resolve and articulate these concerns through the employment of standing analysis. The outcomes of these cases, lumped under the general rubric of *standing,* have been varied and, for the most part, have resulted in confusing analytical exercises. However, recent developments in this area seem to indicate an analytical shift. In *Goldwater v. Carter,*[8] five members of the United States Supreme Court and, more recently, in *Riegle v. Federal Open Market Committee,*[9] the United States Court of Appeals for the District of Columbia Circuit have opted for alternatives to standing analysis that focus more directly on the real concern involved in suits by members of Congress against the executive branch—the

7. *Id.* at 99-100 (citation omitted) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
8. 444 U.S. 996 (1979).
9. 656 F.2d 873 (D.C. Cir.), *cert. denied,* 102 S. Ct. 636 (1981).

separation of powers.

This Comment will discuss (1) the judicial development of the tests currently used to determine standing, (2) the application of those tests to cases involving congressional plaintiffs, (3) the analytical defects encountered in applying the ill-suited doctrine of standing to separation of powers concerns, and (4) the alternative analytical doctrines for dealing with these concerns. This Comment endorses the approach taken by the D.C. Circuit in *Riegle*—exercising equitable discretion to determine whether separation of powers concerns outweigh the need for judicial determination of the particular case.

Although much of the analysis herein is limited to cases involving congressional plaintiffs, it is generally applicable to all cases involving standing and other aspects of justiciability. Analytical integrity would be better preserved by clearly separating standing from the other questions of justiciability. Justice Brennan recently stated,

> an approach that treats separately the distinct issues of standing, reviewability, and the merits, and decides each on the basis of its own criteria, assures that these often complex questions will be squarely faced, thus contributing to better reasoned decisions and to greater confidence that justice has in fact been done.[10]

II. The Development of the Law of Standing

The strict question of standing focuses on the identity of the litigant and his relation to the claim asserted rather than the substantive nature of the issue in dispute. To that extent, standing is designed to satisfy that part of the "case and controversy" doctrine which limits the business of federal courts "to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[11] Through the requirement of standing, federal courts avoid resolving disputes involving only generalized grievances or the rights of parties not before the court.[12]

However, as a result of the infiltration of other aspects of justiciability into standing, the term *standing* has taken on a broad, generic meaning, and the strict doctrine of standing has

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10. Barlow v. Collins, 397 U.S. 159, 178 (1970) (Brennan, J., concurring).
11. 392 U.S. at 95.
12. L. Tribe, American Constitutional Law 82 (1978).

been expanded to include various prongs or tests. One jurist has distilled at least four separate elements from the Supreme Court cases on standing: (1) injury in fact (2) to an interest arguably witin the zone of interests sought to be protected by the statute or constitutional guarantee in question (3) which can fairly be traced to the defendant's allegedly illegal action and (4) is likely to be redressed by a favorable decision.[13] To understand the analytical repercussions of the current interpretation of standing, it is necessary to trace its recent development in historical context.

In two cases decided the same day, *Association of Data Processing Service Organizations, Inc. v. Camp,*[14] and *Barlow v. Collins,*[15] the United States Supreme Court established a two-part test for standing. In order to maintain a suit, the Court held, a plaintiff must (1) allege that the challenged conduct has caused him injury in fact and (2) establish that the allegedly injured interest is arguably within the zone of interests sought to be protected by the relevant law.[16] Concurring in the outcome but dissenting from the treatment of the question of standing in both cases, Justice Brennan, joined by Justice White, argued that only the first part of the majority's standing test (i.e., injury in fact) was necessary to ensure "concrete adverseness." They contended that adding a second requirement deprived the litigants of a "focused and careful decision on the merits."[17]

Justice Brennan's opinion is well reasoned. The test of standing is designed to determine whether the plaintiff has such a "personal stake in the outcome of the controversy" that he is a "proper party to request an adjudication of a particular issue."[18] However, the second part of the test articulated by the Court in *Association of Data Processing* and *Barlow* has little to do with the question of standing in its strict sense. The test does not focus on the relationship between the plaintiff and the claim asserted. Rather, the "zone of interest" test analyzes the nexus between the alleged injury and the law in question. Admittedly, the requirement that the interest sought to be protected be within the zone of interests covered by the particular statute or

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13. Harrington v. Bush, 553 F.2d 190, 205 n.68 (D.C. Cir. 1977).
14. 397 U.S. 150 (1970).
15. 397 U.S. 159 (1970).
16. *Association of Data Processing,* 397 U.S. at 152-53.
17. *Barlow,* 397 U.S. at 168 (Brennan, J., concurring).
18. Flast v. Cohen, 392 U.S. 83, 99-100 (1968).

constitutional guarantee involved is legitimate; without this connection, the claimant has failed to state a claim upon which relief may be granted. However, the reason for the subsequent dismissal of the case should not be want of standing. The plaintiff is no less injured because the law under which he elected to bring his claim provided him no means for redress.

Justice Brennan warned of the deleterious results of combining various inquiries under the rubric of *standing*:

> [A]lleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk obscuring what is at issue in a given case, and thus to risk uninformed, poorly reasoned decisions that may result in injustice. Too often these various questions have been merged into one confused inquiry, lumped under the general rubric of "standing."
>
> The risk of ambiguity and injustice can be minimized by cleanly severing, so far as possible, the inquiries into reviewability and the merits from the determination of standing.[19]

In *Warth v. Seldin*,[20] the Court added a third requirement: the plaintiff must establish that the threatened or actual injury he has suffered resulted from the putatively illegal action.[21] The Court reiterated that requirement the next term in *Simon v. Eastern Kentucky Welfare Rights Organization*.[22] "[T]he 'case or controversy' limitation of Art[icle] III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."[23]

Justice Brennan, dissenting in *Warth* and concurring in the result in *Simon*, chastised the Court for adding requirements to the analysis of standing that were neither constitutionally mandated nor analytically correct.[24] Justice Brennan was not alone in his criticism.[25] Admittedly, failure to establish a causal con-

19. *Barlow*, 397 U.S. at 176 (Brennan, J., concurring).

20. 422 U.S. 490 (1975).

21. *Id.* at 499; *accord* Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

22. 426 U.S. 26 (1976).

23. *Id.* at 41-42.

24. *Id.* at 56-57 (Brennan, J., concurring); 422 U.S. at 520 (Brennan, J., dissenting).

25. *See* L. TRIBE, *supra* note 12, at 93-97; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 212 (1976).

nection between the plaintiff's injury and the defendant's allegedly improper conduct would be grounds for summary judgment. However, the correct ground for dismissal would be failure to establish the prima facie elements of the claim, not want of standing.

In the case of *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[26] the Supreme Court seemed to step closer to the view of standing argued by Justice Brennan. The previously articulated requirement of a nexus between the injuries claimed and the statutory or constitutional rights asserted was limited to the context of taxpayer suits.[27] The Court held that the "case or controversy" requirement of article III, in nontaxpayer suits, is satisfied when a plaintiff establishes a "distinct and palpable injury" with a " 'fairly traceable' causal connection" to the challenged conduct.[28]

III. Standing as Applied to Congressional Plaintiffs

Even if it were conceded that the question of standing may legitimately concern itself with more than mere injury in fact and the relationship between the complainant and the claim, the application of standing to congressional plaintiffs is fraught with problems and contradictions. The courts[29] have established the rule that "no special standards" or "technique[s] for analyzing" are to be employed in congressional standing cases; the court is to decide the standing question as if the case were brought by a private plaintiff.[30] Although this rule was articulated in the context of holding that congressmen were not to be given special advantages in the determination of the standing issue, it has consistently been violated by the imposition of stricter requirements on congressional plaintiffs. The courts have consistently held that congressional complainants suffer no injury in fact if

26. 438 U.S. 59 (1978).

27. *Id.* at 78-79.

28. *Id.* 72. The causal connection requirement may be met either by establishing that the alleged injury was the consequence of the defendant's actions or by showing that the prospective judicial relief will remove the harm. *See* Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 879 (D.C. Cir.), *cert. denied*, 102 S. Ct. 636 (1981).

29. For obvious reasons, cases involving congressional plaintiffs have arisen almost exclusively in the United States Court of Appeals for the District of Columbia Circuit. But when such cases have arisen elsewhere, the other circuits seem to have taken the same approach. *See, e.g.*, Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973).

30. Harrington v. Bush, 553 F.2d 190, 204 (D.C. Cir. 1977).

they have available to them a collegial or political remedy.[31] This reasoning contradicts the principle of equality between congressional and private plaintiffs. Private plaintiifs are not required to pursue self-help or other alternative remedies before seeking a judicial remedy. The same political remedy available to congressmen is, theoretically, available to every private plaintiff. The foundation of a democratic form of governmant is the ability of the governed to control the government and influence the implementation of desired laws and policies. A private plaintiff who believes that some governmental action has unjustifiably impinged on his constitutional rights if able to amass a significant coalition of his fellow citizens, could exert sufficient influence on the legislative branch to procure a change in the law. Yet, he is not required to pursue this political remedy before bringing suit.

The preceding argument concededly stretches the matter, but it is sufficient to demonstrate the analytical defects encountered when the doctrine of standing is used to make the necessary distinctions between private and congressional plaintiffs. There are rational reasons why the courts should refrain from adjudicating certain cases brought by congressmen. The reason most often given by the courts is the hesitancy of the judiciary to interfere in the legislative process because of the serious separation of powers repercussions.[32] The inability of the standing doctrine to deal with these separation of powers concerns is abundantly clear. The concerns arise because of the fundamental differences between congressional and private plaintiffs; yet, the articulated bases of standing in suits by congressmen is that congressmen should be treated like any other litigant. This principle of equality under standing analysis for congressional and private plaintiffs is justified.

> [T]he reasons for restricting suits by legislators against the executive have little to do with the standing doctrine. Standing, although reflecting a desire for judicial restraint, does not address the separation-of-powers concerns inherent in any suit by a legislator against the executive branch. Nor should this be surprising, for standing has always been thought of as turning

31. *See, e.g., id.;* Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Public Citizen v. Sampson, 379 F. Supp. 662 (D.D.C. 1974), *aff'd mem.*, 515 F.2d 1018 (D.C. Cir. 1975).

32. *See, e.g.*, Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 877 (D.C. Cir.), *cert. denied*, 102 S. Ct. 636 (1981).

upon the relationship of plaintiff to claim, not upon the relationship of plaintiff to defendant that is so troublesome here.[33]

The inconsistencies inherent in standing analysis have not been limited to the different approaches applied to legislative and nonlegislative plaintiffs. The results among cases involving congressional plaintiffs are divergent, and the differences are not explainable through the standing doctrine. This Comment does not claim that any particular court decision was incorrect; it merely notes that the theory applied to decide the various cases is not suited to explain their divergent results.

In *Kennedy v. Sampson*,[34] a United States Senator sought a declaratory judgment that a certain bill had become law without the signature of the President because of an allegedly invalid pocket veto. Both the district court and the court of appeals held that Senator Kennedy had standing to challenge the President's action because his vote in favor of the legislation had, in essence, been nullified by the pocket veto and his participatory rights as a senator injured in fact.[35] Although it used some expansive language in the *Kennedy* decision,[36] the District of Columbia Circuit has subsequently limited the holding of the case to its specific facts—the nullification of a prior vote on a specific piece of legislation.

For example, in *Harrington v. Bush*,[37] Congressman Harrington from Massachusetts brought suit seeking a declaratory judgment that certain domestic and foreign activities of the CIA were illegal. The Congressman asserted that, because the CIA was exempt from the general appropriations and reporting of expenditures requirements, his ability to vote intelligently on prospective appropriations measures was impaired. The court held that the plaintiff had not alleged a sufficiently concrete injury[38] and distinguished the specific vote nullification in *Kennedy* from the subjective decrease in overall effectiveness as a legislator alleged in *Harrington*.[39] There is concededly a difference be-

33. McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 255 (1981).

34. 511 F.2d 430 (D.C. Cir. 1974).

35. *Id.* at 433.

36. The court indicated that "an individual legislator has standing to protect the effectiveness of his vote." *Id.* at 435.

37. 553 F.2d 190 (D.C. Cir. 1977).

38. *Id.* at 210.

39. *Id.* at 211-13.

tween the types of injuries alleged in the two cases, but that does not mean that the alleged impairment of voting ability resulting from lack of knowledge is not a sufficient injury to satisfy the constitutional requirement of standing.[40] Other justifications for the court's decision may be found in the obvious national security concerns and in the fact that Congressman Harrington's real dispute was with his legislator colleagues who had adopted the rule exempting the CIA from the full disclosure requirements and not with the Director of the CIA.

In *Reuss v. Balles,*[41] Congressman Reuss brought suit seeking to have the composition of the Federal Open Market Committee (FOMC) declared unconstitutional. The Congressman alleged that his power to institute impeachment proceedings and to regulate the money supply had been usurped because five of the members of the FOMC were not appointed pursuant to the appointments clause of the Constitution. The court again limited *Kennedy* to its specific facts and held that the plaintiff lacked standing because requiring the advice and consent of the Senate would not redress the plaintiff's alleged injury of having his power to control monetary policy usurped.[42] Chief Judge Wright, in his dissenting opinion,[43] noted that in past cases the mere "fact that an individual's rights [were] being determined by an allegedly unconstitutionally composed body [was], in itself, sufficient to meet the injury requirement" even without establishing that the relief prayed for would redress any specific injury.[44] Whatever the justification for disallowing a suit by a congressman against the FOMC, it is evident that no analytically justifiable reason can be found in traditional standing analysis.

In *Goldwater v. Carter,*[45] various members of Congress sought declaratory and injunctive relief to prevent the President

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40. The court in *Harrington* noted that "*the basic concern* of the standing doctrine is that *the individual complaining party have such a strong connection to the controversy that its outcome will demonstrably cause him to win or lose in some measure.*" *Id.* at 206 (emphasis in original). That requirement would appear to have been met in this case since a favorable decision would have declared CIA operations illegal until Congressman Harrington was supplied the requested information.

41. 584 F.2d 461 (D.C. Cir.), *cert. denied,* 439 U.S. 997 (1978).

42. 584 F.2d at 467.

43. Chief Judge Wright's dissent related to the plaintiff's alleged standing as a bondholder rather than as a congressman.

44. *Id.* at 472-73 (Wright, C.J., dissenting).

45. 617 F.2d 697 (D.C. Cir.), *vacated,* 444 U.S. 996 (1979).

from unilaterally terminating a mutual defense treaty with the Republic of China. The United States Court of Appeals for the District of Columbia Circuit noted that its previous decisions on congressional standing had drawn a careful distinction between cases alleging the nullification of a specific vote or the withdrawal of a specific opportunity to vote and cases alleging the diminution of the legislator's overall effectiveness. In the former, the plaintiff is deemed to have alleged a sufficient injury in fact, while in the latter, the plaintiff is denied standing.[46] In a *per curiam* decision the court held that the congressional plaintiffs had alleged the requisite complete disenfranchisement because, if, as the President contended, he were entitled to unilaterally terminate the treaty, the plaintiffs would be left no "legislative means to vote in the way they claim[ed] [was] their right."[47] After determining that the plaintiffs had standing, the court went on to decide against them on the merits of their claim.

Chief Judge Wright, joined by Judge Tamm, concurred in the result but would have held that the plaintiffs lacked standing. In concluding that the plaintiffs lacked standing the concurring opinion stated, "However many 'prongs' comprise the test, the question is specific and factual: Has the plaintiff identified the proper defendant, the adversary who has dealt him distinct injury?"[48] Although reflecting a legitimate concern of justiciability, the question identified is not standing in its traditional sense. Standing, as noted above, focuses on the relationship between the plaintiff and the alleged injury, where as the question posed by the concurring judges focuses on the interrelationship of the plaintiff and the defendant. By lumping the various questions of justiciability under the general heading of standing, the concurring opinion is analytically confusing to one thinking of standing in its nongeneric, traditional sense.

Suits by congressional plaintiffs against the executive branch raise legitimate separation of powers concerns. The courts have attempted to deal with these concerns by denying standing when the risks of intruding into the domains of the other branches were particularly acute.[49] However, the standing

46. 617 F.2d at 702.

47. *Id.* at 702-03.

48. *Id.* at 710 (Wright, C.J., concurring).

49. It is understandable that the courts would fall back upon the standing doctrine to deal with these problems for it is the identity of the litigants that raises the separation of powers problems. Standing deals with the identity of one of the litigants—the claim-

doctrine is ill-suited to deal with these concerns. Chief Justice Earl Warren noted:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.[50]

IV. Alternative Approaches: The *Goldwater* and *Riegle* Decisions

Upon reaching the United States Supreme Court, the judgment of the D.C. Circuit in *Goldwater* was vacated and the case was remanded to the district court with directions to dismiss the complaint.[51] However, the court was unable to reach a consensus on the grounds for the dismissal. Interestingly, none of the justices mentioned standing as a potential justification. This omission was deemed important by at least one court[52] and one scholar.

> The use of the standing doctrine to address the separation-of-powers concerns arising when federal legislators sue the executive branch in federal court is fraught with difficulties both in theory and in application. Although it has been the most popular method of judicial self-restraint in these cases, the recent Supreme Court decision in *Goldwater*, which made no use of the term, suggests that its day may have passed insofar as these lawsuits are concerned. It remains to be seen whether the doctrines that the Court has used in its stead are either more elegant in their conception or more satisfying in their execution.[53]

Justice Rehnquist's concurring opinion in *Goldwater*, which

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ant. Unfortunately, the doctrine falls short because it deals with the relationship between the claimant and the claim, not the relationship between the plaintiff and the defendant. *See* McGowan, *supra* note 33, at 255.

50. 392 U.S. at 100-01.

51. Goldwater v. Carter, 444 U.S. 996 (1979).

52. Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 880 (D.C. Cir.), *cert. denied*, 102 S. Ct. 636 (1981).

53. McGowan, *supra* note 33, at 256.

would have directed dismissal on the grounds that the case involved a nonjusticiable political question, fell one vote short of gaining a majority. The justices determined that the case was nonjusticiable because "it involve[d] the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."[54] Justice Brennan, in his dissenting opinion, argued that application of the political question doctrine was inappropriate.

> Properly understood, the political question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." . . . But the doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power. . . . The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.[55]

Justice Powell, in a separate concurring opinion, added that "the suggestion that this case presents a political question is incompatible with this Court's willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another."[56]

Although it is arguable whether application of the political question doctrine was appropriate under the specific facts of *Goldwater*, it is evident that the doctrine is too narrow in its potential application to resolve the problems inherent in the majority of cases involving congressional plaintiffs. The political question doctrine focuses on the plaintiff's claim[57] and whether the Constitution delegates that particular subject matter exclusively to one branch of government, not on the identity or status

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54. 444 U.S. at 1002 (Rehnquist, J., concurring).

55. *Id.* at 1006-07 (Brennan, J., dissenting) (citations omitted).

56. *Id.* at 1001 (Powell, J., concurring).

57. Professor Louis Henkin has argued that the political question doctrine does not analyze the question of justiciability at all. He contends that judicial decisions based on the political question doctrine are almost always decisions on the merits rather than determinations that the merits are not justiciable. *See* Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); *see also* McGowan, *supra* note 33, at 257-58 (discussing Professor Henkin's argument).

of the litigants.[58] In this respect the political question doctrine suffers from the same structural defect as standing analysis—and is, thereby, just as analytically ill suited. In addition, the requirement that discretionary judgment be "constitutionally committed" to a particular branch of government renders the doctrine impotent in the majority of cases. "[A] clear constitutional or statutory prohibition of judicial review will surely not be present in many cases where prudential concerns nevertheless warrant a court in finding it improper for a congressional plaintiff to invoke the judicial power."[59]

Justice Powell's concurring opinion in *Goldwater* urged that the case be dismissed for want of ripeness. He cited "[p]rudential considerations" resulting from "issues affecting the allocation of power between the President and Congress" to justify postponing judicial review "until each branch ha[d] taken action asserting its constitutional authority."[60] Justice Powell recognized the potential separation of powers problems and applied an appropriate remedy given the factual context of the *Goldwater* case.[61] Unfortunately, like the political question and standing doctrines, ripeness is too limited in its breadth of potential application to provide an adequate analytical tool for resolution of the majority of cases involving legislator plaintiffs.[62] For example, cases involving allegations by congressmen that their overall effectiveness as legislators has been impaired by denials of the executive branch to reveal requested information, which have been typically disfavored by the courts because of the separation of powers repercussions,[63] are no less ripe than those alleging complete disenfranchisement.

The narrowness of the potential application of the political question and ripeness doctrines to suits containing legitimate separation of powers concerns, brought by congressional plaintiffs, led the United States Court of Appeals for the District of Columbia Circuit to state that "[n]either the ripeness nor political question doctrine . . . is sufficiently catholic in formulation

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58. McGowan, *supra* note 33, at 259.

59. *Riegle*, 656 F.2d at 881.

60. 444 U.S. at 997.

61. Neither Justice Powell nor Justice Rehnquist may legitimately be criticized for their analysis in *Goldwater*. This Comment merely contends that the analytical tools employed by the Justices are not well suited for use outside the factual context of *Goldwater*.

62. *See* McGowan, *supra* note 33, at 261.

63. 617 F.2d at 702. *See, e.g.*, Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977).

or flexible in application to resolve the prudential issues arising in congressional plaintiff cases."[64]

In *Riegle v. Federal Open Market Committee*,[65] the District of Columbia Circuit was faced with a case factually analogous to *Reuss v. Balles*,[66] which the court had dismissed just three years earlier for lack of standing. In *Riegle*, a Senator sought injunctive relief in the form of an absolute prohibition on voting by the five Reserve Bank members of the Federal Open Market Committee. The Senator alleged that he had been deprived of his right to vote purusant to the constitutional requirement that the appointments be subject to the advice and consent of the Senate.[67] The court initially examined the case to determine whether Senator Riegle satisfied what the court termed the "traditional standing tests" of (1) injury in fact (2) to an interest protected by the relevant law (3) where the injury is caused by defendants' actions or is capable of judicial redress.[68]

The court determined that Senator Riegle had standing but recognized that the plaintiff's status as senator raised separation of powers concerns which were "best addressed independently of the standing issue."[69] Relying heavily on an article[70] written by its former Chief Judge, the United States Court of Appeals for the District of Columbia Circuit implemented what it termed the "doctrine of circumscribed equitable discretion" to withhold injunctive or declaratory relief, concluding that "rendering a decision on the merits in [the *Riegle*] case would pose a greater threat to the constitutional system than would the principled exercise of judicial restraint."[71]

In exercising its equitable discretion to refrain from adjudicating the merits of the case, the D.C. Circuit did not create a new doctrine; it merely used an established one in a new context."[T]he Supreme Court has employed the doctrine of equita-

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64. *Riegle*, 656 F.2d at 881.

65. 656 F.2d 873 (D.C. Cir.), *cert. denied*, 102 S. Ct. 636 (1981).

66. 584 F.2d 461 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978).

67. Pursuant to 12 U.S.C. § 263(a), five members of the FOMC are elected by the boards of directors of the Federal Reserve Banks and are not appointed with the advice and consent of the Senate under the appointments clause. U.S. CONST. art. II, § 2, cl. 2.

68. 656 F.2d at 878-79. The approach taken by the D.C. Circuit in *Riegle* is narrower than that suggested by this Comment in that the analysis presented herein would mandate limiting the standing question to injury in fact.

69. *Id.* at 879.

70. McGowan, *supra* note 33.

71. 656 F.2d at 881-82.

ble discretion to turn away many plaintiffs seeking injunctions against pending or imminent state criminal proceedings."[72] In addition, Justice Rutledge, in his concurring opinion in *Colegrove v. Green,*[73] and Professor Louis Henkin[74] have endorsed dismissal for want of equity as a substitute for the political question doctrine.

The *Riegle* court identified two determinative factors to aid judges in the exercise of their equitable discretion: (1) the availability of a collegial remedy and (2) the likelihood that a private plaintiff would have standing to raise the same issue.[75] It is arguable that the approach taken by the D.C. Circuit vests too much discretion in the hands of unelected judges. However, as noted in this Comment, an analysis of previous court decisions involving congressional plaintiffs reveals that the courts have already been exercising their discretion to dismiss cases when the separation of powers concerns outweight the necessity of a judicial remedy. They have merely been doing it via ill-suited doctrines. Analytical integrity mandates the use of a doctrine that requires the court to consider explicitly the separation of powers problems involved in suits by legislator plaintiffs and to articulate the real basis for their decisions.

V. Conclusion

The application of the ill-suited doctrine of standing to deal with the legitimate separation of powers concerns inherent in an action by a member of the legislative branch against the executive branch has resulted in varied and contradictory results. The courts have held that the standing of congressional plaintiffs is to be determined under the same rules as would be applied to any other plaintiff; yet, the divergent results of the court decisions on standing can only be explained by conceding some inherent difference between congressional and noncongressional plaintiffs. This confusion arises from the dual use of the term *standing*. Standing, in its strict sense, focuses on the connection between the plaintiff and the claim and attempts to determine whether the plaintiff has "a sufficient stake" in an "otherwise

72. McGowan, *supra* note 33, at 262. *See, e.g.,* Younger v. Harris, 401 U.S. 37, 54 (1971).

73. 328 U.S. 549, 564-66 (1946).

74. Henkin, *supra* note 57, at 598-601.

75. 656 F.2d at 881.

justiciable controversy" to invoke the jurisdiction of the courts.[76] The key phrase is that the controversy must be "otherwise justiciable." Unfortunately, *standing* has also been used as a generic term encompassing all aspects of justiciability. The result has been analytical chaos. Recently, some courts have begun to take steps to eliminate this confusion in the connext of suits involving legislator plaintiffs. The approach taken by the D.C. Circuit in *Riegle* looks particularly promising because of the breadth of its potential application. Through the exercise of its "equitable discretion," a court is able to deal explicitly with the separation of powers concerns involved in participatory suits brought by congressional plaintiffs.

However, as noted in part II above, the generic use of the term *standing* has caused confusion outside of the context of suits by legislator plaintiffs. This Comment suggests that analytical integrity would be better preserved if an approch similar to that taken by the D.C. Circuit in *Riegle*—separating the analysis of the strict question of standing from the analysis of the other questions of justiciability and dealing with each on its own terms—were applied in all cases combining the various issues of justiciability.

> So long as standing serves, on occasion, as a shorthand expression for all the various elements of justiciability, and serves interchangeably wth other terms, such as ripeness, to sum up a judicious exercise of discretion in the use of the reviewing power, its convenience alone likely will preclude the Court's adoption of greater precision in the use of the concept. By the same token, discovering what the Court intends to convey when it relies on the concept will become increasingly difficult. Clarity, at least, would be gained if the Court would abandon the use of the word "standing" to dispose of a case in which the concept in its pure sense is not available.[77]

Perhaps Justice Brennan was right; the inquiry into injury in fact is "the only one that need be made to determine standing."[78]

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76. Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972).
77. Lewis, *supra* note 5, at 453.
78. Barlow v. Collins, 397 U.S. 159, 168 (1970) (Brennan, J., concurring).