A UNIFIED APPROACH TO JUSTICIABILITY

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Legal doctrines often take on a life of their own and become detached from the underlying policies that inspired them. Sometimes legal principles that are announced to explain particular decisions are applied to far different situations than initially contemplated. Sometimes rules in an area proliferate as courts develop new legal tests rather than try to use the old ones. As doctrinal complexities multiply, the law becomes increasingly confused, with overlapping and inconsistent principles abounding. At some point, it is the role of the legal scholar to step back and ask, "How did it ever get to be so crazy?"

That is exactly what I would like to do in considering the topic of justiciability. Many commentators have focused on specific justiciability doctrines, most often standing, and have lamented about their incoherence.¹ But the problems transcend a single rule or doctrinal category. The entire area of justiciability is a morass that confuses more than it clarifies. Many of the legal tests have lost all sight of the underlying objectives that they were intended to serve.

Familiar and well-settled law requires that, in order for a federal court to hear a case, several justiciability doctrines must be met: the case must not present an advisory opinion; there must be standing; the case must be ripe; it must not be moot; and it must not present a political question.² But these are only the major categories. For standing,

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1. See, e.g., J. Vinson, Legal Identity 1 (1978) (It is impossible to read the standing decisions "without coming away with a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate."); Fletcher, The Structure of Standing, 98 Yale L.J. 221, 221 (1988) ("The structure of standing law in the federal courts has long been criticized as incoherent."); Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1372 (1988) ("One of the traditional criticisms of standing law is that it is confusing and seemingly incoherent."); see also Bandes, The Idea of a Case, 42 Stan. L. Rev. 227, 228 (1990) (analysis of justiciability has focused on individual doctrines).

2. For a description of each of these doctrines, see E. Chemerinsky, Federal Jurisdiction

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there is a host of requirements: the plaintiff must have suffered or imminently be in danger of suffering an injury; the injury must be caused by the defendant's conduct and be likely to be redressed by a favorable court decision; and the plaintiff must not be representing the interests of third parties and must not present a generalized grievance. Plus there are specialized standing tests when the plaintiff is an organization or a legislator or a government entity. For mootness, there are four major exceptions where the court can hear the case despite the fact that the plaintiff no longer presents a live controversy. For the political question doctrine, there are a half dozen criteria that are not terribly useful in deciding what cases are nonjusticiable and another half dozen areas where the courts have applied the criteria.

The cumulative effect is a daunting body of legal doctrines. I contend that this large set of justiciability rules is undesirable and unnecessary. It is undesirable because the multiplicity of rules distorts analysis and engenders confusion. It is unnecessary because ultimately all of the doctrines are animated by a few basic policy questions; the doctrinal categories and rules can be eliminated and replaced by directly focusing on these underlying normative considerations.

Thus, this paper is divided into two major parts. The first describes the problems that result from the current approach to justiciability. The second explains how the whole body of justiciability doctrines can be scrapped and supplanted by an open and direct evaluation of the underlying policies as they apply to particular cases.

I. The Problem

The concepts of standing, ripeness, mootness, and the political question doctrine are entrenched in American law. To a large extent, these are separate, albeit complementary, requirements. Also, for the most part, the doctrines in each area have developed entirely apart from whatever requirements exist for the others. Specifically, I can identify five major problems with the current proliferation of justiciability doctrines.

A. Arbitrary Choices Among Doctrines

A great deal turns on relatively arbitrary characterization of the issue and the choice of which doctrine to use. If the issue is described in one way, but not another, the case is justiciable.
The Supreme Court's decision in *City of Los Angeles v. Lyons* is illustrative. Adolph Lyons was a young black man stopped by the police for having a burned out taillight on his car. When the police shoved his hands above his head, his keys cut into his hand and he complained. The police then used a chokehold that rendered him unconscious. When he awoke, he was spitting blood and hurt; he had urinated and defecated. He was issued a traffic citation and released. He later learned that sixteen individuals, mostly black men, had died from the use of the chokehold by Los Angeles police officers. Lyons sued both for money damages and injunctive relief to prevent the use of the chokehold except where necessary to protect the officers' safety. The Supreme Court dismissed his claim for an injunction on standing grounds, holding that he was not entitled to seek an injunction because he could not demonstrate that he was likely to be choked again in the future. Justice White, writing for the majority, explained, "Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers." The Court concluded that,

[absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional.]

But imagine that, instead of characterizing this as a standing case, the Court treated it as presenting a mootness problem: Lyons suffered an injury, but now it is moot because it is over. There are four excep-

5. Lyons, 461 U.S. at 105.
6. *Id.* at 111. The Court also indicated that, even if standing requirements were met, Lyons would still be denied the ability to sue based on equitable principles limiting federal court oversight of local police departments. *Id.* at 112.


7. A different mootness issue was presented to the Supreme Court in *Lyons*. By the time the case was before the Court, the Los Angeles Police Department had adopted new policies concerning use of the chokeholds. 461 U.S. at 100. In fact, Lyons himself asked the Supreme Court to dismiss the case as moot. *Id.* at 101. The Court held that the case was not moot because the city
tions to the mootness doctrine. Because Lyons's claim fits within virtually all of these exceptions, his case would have been regarded as justiciable.

One exception to the mootness doctrine is for wrongs capable of repetition yet evading review. Some injuries occur and are over so quickly that they always will be moot before the federal court litigation process is completed. When such injuries are likely to recur, the federal court may continue to exercise jurisdiction over the plaintiff's claim notwithstanding the fact that it has become moot. Roe v. Wade is a paradigm example of this. The plaintiff was pregnant when she filed her complaint challenging the constitutionality of a state law prohibiting abortion. Obviously, however, by the time the case reached the Supreme Court, her pregnancy was completed and she no longer sought an abortion. Although her claim was moot, the Supreme Court nonetheless decided the constitutional question presented. The Court reasoned that laws prohibiting abortion would inflict wrongs in the future and that they would escape review because the time period of human gestation is invariably shorter than that for human litigation.

But by this reasoning, Adolph Lyons's complaint also presents a wrong capable of repetition yet evading review. The allegedly unconstitutional use of the chokehold will continue, and it will always be ended before the court can rule on the request for an injunction. As such, Lyons's claim should have been heard and decided by the Supreme Court.

There are two possible answers to applying this exception to Lyons's situation. One is that the "wrong capable of repetition yet evading review" exception requires that there be a live controversy when the complaint is filed. Lyons's injury obviously was over long before the lawsuit was initiated. But why does it make sense to require that the injury still be ongoing when the suit begins? The exception exists to facilitate judicial review of claims that will avoid scrutiny because of their inherently short duration. Indeed, it is situations like Lyons that always will evade review because they will be completed before a lawsuit can be brought. Also, the application of this exception to the mootness doctrine can be challenged because Lyons still could obtain judi-
cial review of the constitutionality of the chokehold as part of his suit for damages. But his request for an injunction nonetheless always would evade review; by the time any case came to court, the chokehold would have ended and the case would be dismissed under the mandate of Lyons.

A second exception to the mootness doctrine is often termed collateral injuries—even if the primary injury is over, if a secondary injury remains, the case is not moot. For example, a convicted criminal can continue to appeal his or her conviction even once released from prison because of the other injuries inherent to a felony conviction, such as loss of voting privileges and occupational licenses.11 Lyons fits within this exception as well. Even though the primary injury, choking, is over, a secondary injury—fear of being choked again—remained. As Dean Gene Nichol remarked, “Any person having suffered Lyons’ trauma would no doubt live in considerable fear of a repeat performance so long as the contested practices remained in operation.”12

A third exception to the mootness doctrine is termed voluntary cessation. If the defendant voluntarily halts the offending practice but is free to resume it at any time, the case should not be dismissed as moot.13 Although it is stretching a bit, it is possible to say that the defendant police department voluntarily halted its choking of Adolph Lyons but was free to resume it at any time under the city policy alleged in Lyons’s complaint.

The final mootness exception is for class action suits. In fact, in liberalizing mootness for class actions, the Supreme Court spoke of “the flexible character of the Article III mootness doctrine.”14 The Court, however, does not speak of the flexible nature of the article III standing requirement. But if class action suits can meet article III for mootness when the plaintiff no longer personally presents a live controversy, there is no reason why such suits do not meet the standing requirements as well. Lower federal courts are divided as to whether class action suits are an exception to the Lyons doctrine.15 Logically, a

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13. United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.").
15. Decisions recognizing a class action exception to Lyons include: Nicacio v. INS, 768 F.2d
class action exception that fulfills article III for mootness should do the
same for standing, and Lyons should not bar class actions where some
member of the class is likely to suffer an injury in the future.

The central point is that, if Lyons was characterized as presenting
a mootness problem, the case would have been justiciable. But the
Court viewed it as a standing issue and dismissed the claim on justi-
ciability grounds. Everything seems to turn on the doctrinal category
used for analysis. Of course, the Court very well might have chosen to
describe the case as involving standing and not mootness precisely to
avoid ruling on the merits. But this just further establishes the point
that the result is likely to turn on how the Court chooses to charac-
terize the issue. Moreover, I believe that it is undesirable for federal
courts to be able to manipulate justiciability doctrines to avoid cases or
to make decisions about the merits of disputes under the guise of rul-
ings about justiciability. 

B. Overlapping Tests

The current multiplicity of justiciability doctrines contains many
overlapping tests that serve little independent purpose. Confusion is in-
evitable. One example of this emerges from a comparison of the ripe-
ness doctrine and the injury requirement for standing. The standing
determination demands that the plaintiff demonstrate that he or she
has been or imminently will be injured. Ripeness focuses primarily on
whether the matter is premature for review and asks whether the plainti-
iff has suffered or imminently will suffer an injury. In light of this
overlap, little seems to be gained by having a distinct ripeness doctrine.

1133 (9th Cir. 1985); Perez-Funez v. District Director, INS, 619 F. Supp. 656 (C.D. Cal. 1985);
Lewis v. Tully, 99 F.R.D. 632 (N.D. Ill. 1983). Decisions refusing to recognize a class action
exception to Lyons include: Howard v. City of Greenwood, 783 F.2d 1311 (5th Cir. 1986); John
16. There has been a long debate on whether justiciability doctrines should be flexible to allow
the Court to duck issues and cases that it wants to avoid. See, e.g., Bickel, Foreword: The Passive
Virtues, 75 HARV. L. REV. 40 (1961); Gunther, The Subtle Vices of the "Passive Virtues"—A
17. For a fuller development of the position that it is undesirable for justiciability doctrines to
be used to avoid decisions, see Nichol, supra note 12; Tushnet, The Sociology of Article III: A
Response to Professor Brilmayer, 93 HARV. L. REV. 1698 (1980). But see Shapiro, Jurisdiction
law prohibiting sale or use of contraceptives because no one was hurt by the law in light of the
challenge to Hatch Act of 1940, preventing participation by federal employees in partisan political
campaigns, because injury was only a "hypothetical threat").
As Dean Nichol noted, “In measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing.”

Perhaps the distinction between ripeness and standing is that standing focuses on whether the type of injury is qualitatively sufficient to fulfill the requirements of article III and whether the plaintiff has personally suffered the harm, whereas ripeness centers on whether the injury has occurred yet. But nothing seems to be gained from fragmenting these inquiries. In fact, the injury requirement for standing demands that plaintiff have suffered or imminently be in danger of suffering a harm.

Ripeness cases usually pose the question of whether the plaintiff should be able to obtain a declaratory judgment—whether the plaintiff is entitled to pre-enforcement review of a statute or regulation. But this, too, can be accomplished by applying the injury requirement. There is no identifiable benefit to having a distinct test termed ripeness.

Another example of the overlapping, confusing tests concerns legislative standing and the political question doctrine. The United States Court of Appeals for the District of Columbia Circuit has ruled that, for a member of Congress to have standing, he or she must demonstrate a nullification of a vote and that the court should use its equitable discretion to hear the case. Equitable discretion, or as it now is often labeled “remedial discretion,” is the court’s power to refuse to adjudicate a matter when it decides that it is desirable to avoid review. The doctrine appears to be based on separation of powers considerations and especially the court’s desire to avoid interfering with the operations of the other branches of the federal government.

19. Nichol, *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 172 (1987). Dean Nichol identifies other functions of the ripeness doctrine: implementing the substantive law, *id.* at 164, and as a tool for judicial decisionmaking. *Id.* at 176. But these goals, too, can be served without a specific ripeness doctrine. The content of the substantive law can be defined without regard to ripeness. Likewise, as Dean Nichol observes, the use of ripeness as a tool for judicial decisionmaking (such as assuring that cases are presented in a manner fit for judicial review) “is largely indistinguishable from the courts’ employment of the panoply of other tools to assure the adequacy of the record and the requisite breadth of representation by the parties.” *Id.* at 177.


22. See United Presbyterian Church v. Reagan, 738 F.2d 1375, 1381 n.5 (D.C. Cir. 1984) (using the phrase “remedial discretion” rather than equitable discretion).
In the past several years, the District of Columbia Circuit has dismissed many cases based on the equitable or remedial discretion requirement of the congressional standing test. For example, in *Vander Jagt v. O'Neill*, the court refused to allow a Republican congressman to challenge the distribution of committee assignments in the House of Representatives. Although the court agreed that the plaintiffs met the requirements for standing, the case was dismissed as an exercise of the court's equitable discretion. In *Moore v. United States House of Representatives*, the court of appeals used equitable discretion to dismiss a suit challenging the constitutionality of a bill to raise taxes on the ground that the bill had not originated in the House of Representatives as required by the Constitution. In *Crockett v. Reagan*, the court of appeals relied on the equitable discretion doctrine to dismiss a suit brought by twenty-nine members of Congress contending that the federal government's aid to El Salvador violated the Foreign Assistance Act of 1961.

But the equitable discretion requirement for legislative standing is indistinguishable from the political question doctrine. The political question doctrine, of course, refers to types of constitutional claims that the federal courts will not adjudicate. Although there is an allegation of a constitutional violation and all of the jurisdictional requirements are met, the court rules that it is for the political branches of government to interpret and enforce that part of the Constitution. The political question doctrine is largely based on judicial refusal to interfere with the conduct of the other branches of government. In the classic formulation of the political question doctrine in *Baker v. Carr*, the Court referred to such areas as where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and situations where the court would be "expressing lack of the respect due coordinate branches of government." For example, challenges to presidential conduct of foreign policy often have been declared political questions based on a judicial desire to leave that area to the president.

27. 369 U.S. 186 (1962).
28. Id. at 217.
29. See, e.g., Goldwater v. Carter, 444 U.S. 996 (1979) (plurality opinion); see also Champlin
In other words, both the equitable discretion doctrine and the political question doctrine are about subject matter that the federal courts decide not to adjudicate but leave to the other branches of government. I cannot identify the slightest conceptual difference between them. Indeed, it appears that, if a challenge to foreign policy is brought by a legislator, it will be dismissed on the basis of equitable discretion, but, if the suit is initiated by any other citizen, it will be dismissed as a political question.\textsuperscript{30}

A final example of overlapping tests also arises from the area of standing and the question of when plaintiffs should be allowed to represent the interests of others. The most prominent doctrine concerning such representation is the bar against third party standing and the exceptions where it is permissible.\textsuperscript{31} But in addition to the basic rule of third party standing, there are specific rules as to when organizations can sue on behalf of their members and when government entities can sue on behalf of their citizens. For an association to assert its members' interests in a lawsuit, it must meet the three-part test announced in \textit{Hunt v. Washington State Apple Advertising Commission}.\textsuperscript{32} The Supreme Court said:

\begin{quote}
In association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.\textsuperscript{33}
\end{quote}

The rules are even more restrictive as to when the government can initiate suit on behalf of its citizens.\textsuperscript{34} The Supreme Court has identi-
fied two situations where such "parents patriae" standing is allowed. One is where the government is suing based on its interest "in the health and well-being—both physical and economic—of its residents in general." For example, the Court allowed state governments parents patriae standing to halt pollution and to enforce federal antitrust laws on behalf of citizens. Second, the Court said that parents patriae standing exists to ensure that "the State and its residents are not excluded from the benefits that are to flow from participation in the federal system." Under this rationale, the Court accorded Puerto Rico standing to challenge alleged employment discrimination against its citizens by interstate apple companies.

The separate tests for associational and parents patriae standing are unnecessary. Both involve situations where an entity is attempting to assert the interests of third parties not before the court. As such, both can be analyzed under the rules concerning third party standing, and nothing seems to be gained by formulating distinct tests when groups or governments present the claims of their members or citizens. Current law allows third party standing in two situations: where there is a sufficiently close relationship between the plaintiff and the injured third party that the former can be trusted to adequately represent the interests of the latter, and where the third party is unlikely to be able to protect his or her own rights.

Associational and parents patriae standing should be allowed in each of these instances. For example, where the interests of the association and its members are sufficiently similar, the group should be allowed to raise the individual's claims. Similarly, a government should be able to sue on behalf of its citizens when the individuals are unlikely

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39. *Id.* at 609.
41. See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 446 (1972) (allowing distributor of contraceptives to assert the interests of unmarried individuals who were "not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights"); Barrows v. Jackson, 346 U.S. 249 (1953).
to be able to sue on their own. In the 1970s, two federal courts of appeals denied the United States Attorney General standing to sue to protect the rights of institutionalized mentally handicapped persons.\textsuperscript{42} These rulings are an undesirable result of the separate test for parens patriae standing because the individuals were unlikely to be able to protect their own rights. More generally, in a society in which litigation costs are enormous and the protection of constitutional rights is imperative, allowing the government to sue on behalf of its citizens can provide essential safeguards that might otherwise be lacking.

These three examples—ripeness, the equitable discretion standing requirement, and the tests for associational and parens patriae standing—demonstrate the existence of overlapping and unnecessary tests. Analysis could be simplified and clarified by consolidating these inquiries into other already existing justiciability doctrines.

C. \textit{Doctrines Detached from Their Underlying Policies}

The justiciability rules often do not serve the underlying policies that initially inspired them. Although originally a requirement that had a limited and sensible meaning, subsequent cases give the requirement separate content that is quite different from its initial purpose. The effect is to foreclose litigants from the federal courts without serving the underlying policies of the justiciability doctrines.

A telling example is the development of causation as a separate standing requirement. In a series of decisions in the 1970s, the Supreme Court held that, in order for a plaintiff to have standing, he or she must demonstrate redressability—that a favorable court decision is likely to remedy the plaintiff’s injury.\textsuperscript{43} The Court reasoned that the core of article III was a prohibition against federal courts issuing advisory opinions. If a federal court ruling for the plaintiff would not have some beneficial effect, then it would be an impermissible advisory opinion.\textsuperscript{44} In articulating the redressability requirement, the Court said


\textsuperscript{44} The redressability requirement has been strongly criticized. See, e.g., Fletcher, supra note 1, at 239-43; Nichol, \textit{Causation as a Standing Requirement: The Unprincipled Use of Judicial
that, to meet this hurdle, the plaintiff would need to show that the defendant was the cause of the problem so that it could be assured that a favorable court decision was likely to remedy it.46

As initially developed, causation and redressability were presented as a single test designed to determine whether a federal court decision would have some effect. Causation was deemed relevant as a way of assessing redressability; if the defendant is the cause of the injury, then it is likely that halting the defendant's behavior will stop the harm. Thus, in Warth v. Seldin,48 the Court said that, in order to have standing, a plaintiff must allege that "the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm."49 Likewise, in Duke Power Co. v. Carolina Environmental Study Group, Inc.,48 the Court declared that "[t]he more difficult step in the standing inquiry is establishing that these injuries 'fairly can be traced to the challenged action of the defendant,' or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries."50 Simply put, causation was used as a way of determining redressability, which was required to assure that the federal court was not issuing an advisory opinion.

But in its more recent decision in Allen v. Wright,50 the Court stated that causation and redressability are independent requirements that must both be met in order for a plaintiff to have standing.51 In Allen, parents of black public school children brought a class action suit challenging the failure of the Internal Revenue Service to carry out its statutory obligation to deny tax-exempt status to racially discriminatory private schools. The plaintiffs claimed two injuries. One was that they and their children were stigmatized by government financial aid to schools that discriminate. The Court held that this injury was too abstract to confer standing.52

The plaintiffs also claimed that their children's chances to receive an integrated education were diminished by the continued tax breaks to

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45. See, e.g., Warth, 422 U.S. at 505.
46. 422 U.S. 490 (1975).
47. Id. at 505 (emphasis added).
49. Id. at 74 (citation omitted) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 42 (1976)).
51. Id. at 753 n.19.
52. Id. at 755-56.
discriminatory schools. The parents argued that, if the IRS enforced the law prohibiting tax breaks to racist schools, the schools either would stop discriminating or would have to charge more money because of the loss of the indirect government subsidy. Either way, more white children likely would attend the public schools.

The Supreme Court acknowledged that this claim stated an injury but denied standing based on the failure to meet the "causation" requirement. The Court stated that

respondents' second claim of injury cannot support standing because the injury alleged is not fairly traceable to the Government conduct respondents challenge as unlawful.

... From the perspective of the IRS, the injury to respondents is highly indirect and "results from the independent action of some third party not before the court."53

In an extremely important footnote, the Court stated that, even though a change in IRS policy might redress the injury, standing still should be denied because the IRS did not cause the segregation. Justice O'Connor, writing for the Court, stated:

The "fairly traceable" and "redressability" components of the constitutional standing inquiry were initially articulated by this Court as "two facets of a single causation requirement." ... Cases such as this, in which the relief requested goes well beyond the violation of law alleged, illustrate why it is important to keep the inquiries separate if the "redressability" component is to focus on the requested relief. Even if the relief respondents request might have a substantial effect on the desegregation of public schools, whatever deficiencies exist in the opportunities for desegregated education for respondents' children might not be traceable to IRS violations of law ...54

Causation, which began as a requirement to assure that the federal court was not issuing an advisory opinion, now is an independent barrier to standing even in cases where the court's ruling may remedy the injury. But why should standing be denied if the defendant acted

53. Id. at 757 (footnote omitted) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 42 (1976)).
54. Id. at 753 n.19 (citation omitted) (quoting C. WRIGHT, LAW OF FEDERAL COURTS § 13, at 68 n.43 (4th ed. 1983)).
illegally and restraining the defendant's behavior could cure the plaintiff's injury. Indeed, in *Allen v. Wright*, causation and redressability seem identical: declaring federal tax breaks for discriminatory schools unconstitutional will encourage these students to shift to public schools to the extent that the indirect subsidy facilitates their attendance at the private schools.

In *Allen v. Wright*, the Court emphasized that standing requirements, such as causation, are primarily designed to further the separation of powers among the branches of the federal government. The Court declared that standing is "built on a single basic idea—the idea of separation of powers." But it is not at all clear why the causation requirement is needed to divide authority properly. More importantly, it must be remembered that overly restricting the federal judicial power threatens separation of powers as much as undue expansion of the court's role. Separation of powers is about the proper allocation of authority; there is no basis for the implicit assumption in *Allen v. Wright* that less judicial review necessarily enhances separation of powers.

Thus, the causation requirement was detached from its normative basis and became a powerful independent barrier to standing. Another example of this phenomenon can be found in the taxpayer standing cases. In *Flast v. Cohen*, the Supreme Court held that taxpayers had standing to challenge federal government expenditures of funds as violating the establishment clause of the first amendment. By contrast, in subsequent cases, the Court refused to allow taxpayer standing in suits alleging violations of constitutional provisions requiring a statement and account of all federal expenditures and prohibiting members of Congress from serving in the executive branch of government. The underlying distinction appeared to be that, if an individual asserted a violation of a personal constitutional right, the case was not a generalized grievance no matter how many people shared the injury. But standing would be denied if the person objected as a citizen or a

57. 392 U.S. 83 (1968).
58. *Id.* at 103.
taxpayer to the government's violation of constitutional provisions related to the structure of government. *Flast v. Cohen* implicitly treated the establishment clause as a provision that conferred a right on all citizens to be free from government subsidies of religious institutions.

But in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, the Court denied taxpayer standing to challenge a federal government grant of $500 million worth of surplus property to a religious institution. The Court distinguished *Flast* on two grounds. First, the plaintiffs in *Valley Forge* were challenging a decision by the Department of Health, Education and Welfare to transfer property, not a congressional statute. One wonders why this distinction matters. Both Congress and the executive are bound to obey the first amendment. Second, the Court said that *Flast* was a challenge to congressional expenditures pursuant to article I, section 8 of the Constitution, whereas *Valley Forge* was an objection to an exercise of Congress's power to dispose of property pursuant to article IV, section 3. But this distinction seems senseless: Congress is limited by the establishment clause whether it acts pursuant to article I or article IV.

The policy underlying *Flast*—that the establishment clause confers a personal right on citizens to be free from government aid to parochial schools that can be enforced by taxpayer suits—was abandoned. Rather, the Court adhered to the rule prohibiting taxpayer standing by drawing arbitrary and meaningless distinctions.

D. *The Distinction Between the Constitutional and the Prudential*

The Supreme Court has said that some of the justiciability doctrines are constitutionally required in that they are derived from the Court's interpretation of article III, but others are prudential in that they are based on the Court's sense of prudent judicial administration. For example, the Court held that the injury, causation, and redressability standing requirements are constitutional, whereas the prohibitions against third party standing and generalized grievances are

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62. Id. at 482.
63. Id. at 479.
64. Id. at 480.
prudential. 66

The distinction between constitutional and prudential limits on federal judicial power is important because Congress, by statute, may override prudential, but not constitutional, limits. 67 Because Congress may not expand federal judicial power beyond what is authorized in article III of the Constitution, a constitutional limit on federal judicial review may not be changed by federal law. But since prudential requirements are not derived from the Constitution, Congress may instruct the federal courts to disregard such a restriction.

But what makes some requirements constitutional and the others prudential? For example, why are injury, causation, and redressability deemed constitutionally mandated, but the rules against third party standing and generalized grievance merely prudential? None are mentioned in the Constitution. All are created by the Court because they are viewed as prudent limits on federal judicial power. Each is of quite recent origin. So what makes some constitutional and the others prudential? The only apparent answer sounds terribly cynical: a requirement is constitutional if the Court says it is, and it is prudential if the Court says it is not. Nothing in the content of the doctrines explains their constitutional or prudential status.

In fact, the Court’s explanation of the prudential doctrines frequently sounds indistinguishable from its exposition of the constitutional ones. For instance, the constitutional injury requirement demands that the plaintiff allege that he or she personally have suffered an injury. The prohibition against third party standing forbids litigants from asserting rights of others not before the federal court. In dismissing taxpayer and citizen suits under the generalized grievance doctrine, the Court labels the injuries as too “abstract” to justify standing. 68

Moreover, the constitutional/prudential distinction poses analytical problems for the Court. If mootness is an article III requirement, then how can the Court create broad exceptions based on the desire to facilitate judicial review—such as for wrongs capable of repetition yet evading review or for class actions suits? 69 It is for this reason that

67. Id. at 501 (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”).
69. See supra text accompanying notes 8-10 & 14-15.
Chief Justice Rehnquist argued that mootness should be reconceptualized as a prudential doctrine. He wrote:

If it were indeed Article III which—by reason of its requirement of a case or controversy for the exercise of federal judicial power—underlies the mootness doctrine, the "capable of repetition, yet evading review" exception relied upon by the Court in this case would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are "capable of repetition, yet evading review." If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are "moot" but which also raise questions which are capable of repetition but evading review than we would to decide cases which are "moot" but raise no such questions.

Chief Justice Rehnquist's argument illuminates the arbitrariness of the constitutional/prudential distinction. He reasons that there is a well-entrenched exception to the mootness doctrine that would make little sense if the doctrine were viewed, as it has been, as constitutional. Therefore, he says the doctrine should be relabeled as prudential. There is no independent content to the categories; there are no underlying principles helping to determine when a justiciability doctrine is constitutional and when one is prudential.

Finally, in some areas, the Court has not specified whether the doctrine is constitutional or prudential. For example, is the political question doctrine based on the Court's interpretation of the Constitution or its sense of prudent judicial administration? Could Congress direct the federal courts to adjudicate a matter that the Supreme Court deemed to be a political question? Although the political question doctrine—unlike other justiciability requirements—is not derived from article III's requirement for cases and controversies, it might be thought to implement separation of powers considerations. Alternatively, it might be regarded as prudential in that it reflects the Court's desire to limit the role of the unelected judiciary and to minimize oversight of


71. Honig, 484 U.S. at 330.
the other branches of government.\textsuperscript{72} The constitutional/prudential distinction undoubtedly is quite important in the law of justiciability. Yet, it seems to be little more than arbitrary labeling based on unarticulated judicial judgments.

E. Masking Normative Questions

The development and use of specific legal tests can divert attention from the crucial underlying questions. For example, both the generalized grievance standing requirement and the political question doctrine turn on the same basic issue: are there constitutional provisions that should not be enforced by the courts, but instead left to the political process? The effect of a court finding that a matter is a generalized grievance or a political question is that an allegation of a constitutional violation goes unheard. Is this proper?

At the very least, the relationship between the generalized grievance standing requirement and the political question doctrine is seldom noted. Perhaps this is because the label “generalized grievance” is misleading. It connotes that, if a large number of people are injured, no plaintiff has standing. But surely this is not true. If the federal government enacted a law outlawing all religious worship, any person in society could sue even though all in the country would be suffering a similar injury. In fact, the Supreme Court noted:

Nor . . . could the fact that many persons shared the same injury be sufficient reason to disqualify from seeking review . . . any person who had in fact suffered an injury . . .

. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.\textsuperscript{73}

Generalized grievances refer to a specific type of claim: one raised by a taxpayer or citizen whose sole claim is a right to have the government follow the law. In response to the claim that the denial of standing to these plaintiffs means that no one will be able to sue, the Court declares that this leaves the issue to the political process. For example,

\textsuperscript{72} See, e.g., A. BICKEL, THE LEAST DANGEROUS BRANCH 183-98 (1962) (political question doctrine as a prudential limit).

in *United States v. Richardson*,74 the Court stated:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.75

But this argument confuses a descriptive statement about the legal effect of a doctrine with a normative claim about the proper allocation of power. The Court is correct that its ruling likely will preclude any judicial determination of the constitutional claim. This, however, does not establish that the judiciary ought to refrain from ever resolving the matter or that it is properly allocated to other branches of government. The underlying question remains unanswered: are there some constitutional provisions—such as the statements and accounts clause of article I that was the concern in *Richardson*—that should be immune from judicial enforcement?

Similarly, the political question doctrine is most frequently described by quoting Justice Brennan's opinion in *Baker v. Carr*,76 where he described the types of cases that pose nonjusticiable political questions. Justice Brennan's formulation includes instances where there is a textual commitment to another branch of government and a lack of judicially discoverable and manageable standards.77 But these criteria are not useful in determining which cases present nonjusticiable political questions. After all, the Constitution contains no textual commitments of issues to other branches of government and the Constitution's open-textured language means that there rarely are "discoverable" legal standards in cases before the Supreme Court.

The effect of the political question doctrine is that certain constitutional provisions are not interpreted or enforced by the federal courts. Thus, as with the generalized grievance doctrine, the underlying issue is whether there should be such parts of the Constitution that the federal judiciary cannot protect.

Rather than present the arguments on both sides that have been

74. 418 U.S. 166 (1974).
75. Id. at 179. For an excellent criticism of the generalized grievance doctrine from the perspective of political theory, see Doernenberg, 'We the People': John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 CALIF. L. REV. 52 (1985).
76. 369 U.S. 186 (1962).
77. Id. at 217.
developed elsewhere, it is sufficient here to note that both the generalized grievance standing requirement and the political question doctrine rest on the same assumptions. Both must assume that the other branches of the government will adequately interpret and enforce the Constitution without judicial review. Alternatively, both must rest on the assumption that there are certain constitutional provisions that should not be enforced or, at least, that the costs of judicial action outweigh the benefits in these areas. Although each assumption might be justified, both are obviously problematic, and the Court certainly has made no attempt to establish either. Well-established legal tests implement the political question doctrine and the bar to generalized grievances; the basic normative question is obscured under the weight of legal rules.

II. THE SOLUTION

The law in the area of justiciability is a mess. I tried to use an example from every doctrine to demonstrate that the problem is not confined to a single category or individual requirement. The difficulties are inherent in the approach itself. Thus, I suggest that there is only one solution: start over. The time has arrived to persuade the courts to scrap all of the doctrines and sub-doctrines and sub-sub-doctrines, to get rid of categories like standing, ripeness, mootness, and the political question doctrine. The new approach should identify the policies that underlie these doctrines and attempt to apply the policies directly.

If one examines the entire set of justiciability requirements, it is apparent that each can be seen as serving one or more of four basic goals. First, many of the requirements seek to insure that the plaintiff is actually entitled to relief under the appropriate constitutional or statutory provision. For example, the injury requirement and the ripeness test are used to assess whether the plaintiff is legally entitled to relief.


80. For a criticism of this assumption, see E. CHEMERINSKY, INTERPRETING THE CONSTITUTION 99-100 (1987).

81. For an excellent analysis placing justiciability doctrines in the broader context of procedural issues, see Bandes, supra note 1.
Second, several of the requirements attempt to determine whether the federal court decision is likely to have an effect. If a federal court ruling in favor of the plaintiff would have no effect—if the world will remain the same—then the court likely is wasting its time and is just rendering an advisory opinion. Most obviously, the standing requirements of redressability and causation are designed to assess the likely impact of a federal court ruling. But other doctrines, too, facilitate this determination. For example, if a case is moot, then a federal court decision will not have any effect and will be just an advisory opinion.

Third, many of the doctrines seek to determine when a litigant may assert the rights of third parties not before the court. As discussed earlier, in addition to the third party standing doctrine, rules concerning associational standing and parens patriae standing are best understood as involving an entity representing the interests of those not before the court.

Finally, as discussed above, there is the question of whether certain constitutional provisions should not be judicially interpreted and enforced. Assuming such provisions to exist, the questions arise as to what are such provisions and when should judicial review be refused.

Thus, the place to start in reconstructing justiciability is by focusing analysis on four questions: (1) Is the plaintiff legally entitled to relief under the appropriate constitutional, statutory, or treaty provision, regulation, or common law rule? (2) Is there a sufficient likelihood that a federal court ruling for the claimant will have some effect? (3) Should the litigant be allowed to raise the claims of others not before the court? and (4) Is the claim based on a constitutional provision that the judiciary should not enforce (assuming such provisions should exist)? Undoubtedly, applying these questions will necessitate normative analysis about the role of the federal courts. Ultimately, the federal judiciary should enforce federal law—especially the Constitution—and the justiciability doctrines should be developed to facilitate this function.

A great deal of the complexity of justiciability doctrines and much of the terminology can be discarded by focusing on these four questions. Consider each individually. First, is the plaintiff legally entitled to relief under the appropriate constitutional, treaty, or statutory provision, regulation, or common law rule? In a recent article, Professor William Fletcher persuasively argued that much of the standing inquiry can be replaced by focusing instead on the plaintiff's legal entitle-
ment to relief.\textsuperscript{82} Professor Fletcher explains:

A true standing decision determines whether a plaintiff has a right to judicial relief in any federal court, not just the Supreme Court. The essence of a true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty? This question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked.\textsuperscript{83}

In other words, if the constitutional or statutory provision creates a legal right in the individual, then he or she should be able to sue to vindicate that right. Of course, there is no simple test to determine when an individual possesses a legal right. If the court finds standing, however, inevitably it will be forced to face the merits and the scope of the asserted right. There is no reason why courts cannot determine whether such a right is asserted at the outset of the lawsuit. A plaintiff who asserts an infringement of such a right should be allowed to sue; implicitly, the injury requirement is met, though there is no need to even keep labels such as injury and ripeness. The "legal right" terminology should not be seen as a return to a private rights model for justiciability determinations. Quite the contrary, the scholarship and experiences of the past decades have established the desirability of a public rights model that sees the federal courts' central mission as enforcing the Constitution and federal laws.

The second question is whether there is a sufficient likelihood that a federal court decision could have some effect. So long as a ruling could have some effect—altering someone's behavior, changing somebody's rights or duties—then the federal court is not issuing an advisory opinion. For example, all of the exceptions to the mootness doctrine discussed earlier\textsuperscript{84} are best understood as situations where the federal court can hear the case because its decision will still have some impact. Federal courts can decide wrongs capable of repetition because there is the knowledge that others, including the plaintiff, are likely to be hurt in the future without a federal court ruling. The collateral consequences exception to the mootness doctrine is based on the existence

\begin{footnotesize}
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\item 82. Fletcher, supra note 1, at 250; see also Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432 (1988).
\item 83. Fletcher, supra note 1, at 229 (footnote omitted).
\item 84. See supra text accompanying notes 8-15.
\end{itemize}
\end{footnotesize}
of other secondary injuries that remain until there is a federal court decision. A case is not moot if the defendant voluntarily ceases the offending behavior because a federal court decision in favor of the plaintiff will have the effect of preventing the defendant from reestablishing the challenged practice. The class action exception exists precisely because members of the class will benefit, even if the named plaintiff’s claim is moot.

In other words, the impact of a federal court decision should be assessed not only from the perspective of the named plaintiff, but more broadly, as it has been in developing the exceptions to the mootness doctrine. The timing of the determination is the primary difficulty in implementing this requirement that a federal court decision have some probable effect. Often plaintiffs cannot demonstrate the likely impact of a ruling until they have had the opportunity for discovery. To deny someone access to the federal courts because they cannot demonstrate the ultimate effect of a ruling is to improperly require proof prior to discovery. Federal courts should have the discretion—indeed, be encouraged—to postpone this question pending discovery. This would accord the plaintiff the necessary time to show that a favorable court decision would make a difference.

The third question is whether the plaintiff should be allowed to represent the interests of others. As explained earlier, a litigant should be able to assert the claims of parties not before the court in either of two situations. One is if the plaintiff has a sufficiently close relationship to the third party so that the litigant can be trusted to represent the interests of the absent party adequately. The other is the situation where the injured third party is unlikely to be able to assert his or her own rights.

A wide variety of situations can be dealt with by application of these rules. For example, class action suits can represent the interests of their members because the certification process assures that the named plaintiff will adequately represent the interests of the class members. Likewise, as described above, this approach can be used for

86. See supra text accompanying notes 40-41.
87. See Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) ("members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present"); see also Kramer, Consent Decrees and the Rights of Third Parties, 87 Mich. L. Rev. 321, 350 (1988) ("Due process permits the preclusion of other litigants if their interests are sufficiently close to the interests of the parties. This, for instance, is what makes class actions possible." (footnote omitted)).
areas such as third party standing, standing of associations to represent their members, and parens patriae standing of governments.

Finally, there is the question of what, if any, constitutional provisions should be judicially unenforceable. The terminology of the political question doctrine and the generalized grievance standing requirement should be replaced by directly focusing on this question. Those who believe that there should be such nonjudicially enforceable provisions must explain this directly and not hide their value choice behind the doctrinal labels.

Although a full development of this argument is beyond the scope of this paper, briefly I would argue that there should be no provisions that are beyond the scope of judicial interpretation and enforcement. 88

The Constitution exists primarily to shield some matters from the political process. The primary difference between a statutory and a constitutional provision is the difficulty of changing the latter. All parts of the Constitution are protected from easy change through the political process by the complex amendment process and from violation by the existence of judicial review. But denying some judicial review of alleged violations of a constitutional provision leaves it entirely to the political process. This is inconsistent with the very existence of the Constitution.

In sum, these four inquiries should be the focus of justiciability analysis. The law can be greatly simplified by focusing directly on these underlying four questions. The layers of encrusted doctrine can be discarded, and a functional appraisal and application of these questions can become the core of analysis.

CONCLUSION

Two responses to this position are particularly troublesome. One is, why bother with this article? Surely it is not very likely that categories that have been around for decades will be eliminated. True enough, but even if the labels remain, the hope is that the Court will focus less on doctrinal pigeonholes and much more on the underlying policy questions. At a minimum, categories might be consolidated and the development of new tests limited.

The other objection is to ask what difference it would make. After all, much of the current analysis will be maintained, albeit under the revised framework and structure. Is it just a matter of changing the

88. I developed this argument in much more detail in E. CHEMERINSKY, supra note 80, at 80-105; see also Redish, The Passive Virtues, supra note 78.
labels? I believe that it is more than this, but at minimum, the way in which legal tests are formulated affects legal analysis. Doctrines can serve their underlying policies or frustrate them. An approach that is conscientiously driven by its objectives seems far more likely to succeed and be regarded as satisfactory.

For years, the justiciability doctrines have confounded students, challenged courts, and produced countless law review articles by professors. This is especially frustrating because it is so unnecessary. A unified system of justiciability is possible and, indeed, imperative.