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NOTES

ABUSING STANDING: FURTHERING THE CONSERVATIVE AGENDA

Article III of the United States Constitution grants the judicial branch the broad power to decide all “Cases and Controversies.”¹ This broad grant of authority, however, is unaccompanied by any specific definition of what constitutes a case or controversy. As a result, the United States Supreme Court has developed several judicial doctrines that define the scope of the cases and controversies clause. A federal court will not grant jurisdiction to hear a case if the suit involves a political question,² requires an advisory opinion,³ is moot,⁴ or is brought by a litigant who lacks standing to sue. In each of these areas, the federal court’s refusal to grant jurisdiction rests on the belief that no article III case or controversy exists.

1. The Constitution states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority:—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction,—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

2. *E.g.*, *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (dismissing Senator Goldwater’s challenge to President Carter’s termination of the United States-Taiwan mutual defense treaty because it concerned a nonjusticiable political question).

3. *See, e.g.*, *Muskrat v. United States*, 219 U.S. 346 (1911) (dismissing constitutional challenge to division of Cherokee Indian land because of absence of actual controversy).

4. *See, e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (dismissing as moot petitioner’s constitutional challenge to law school admissions policy as discriminatory because petitioner would have completed school by the time decision was rendered).

During the course of Chief Justice Warren Burger's tenure on the Supreme Court,⁵ the Court's application of the standing doctrine was a continual source of controversy. In the 1970s, the Court developed a three-prong standing analysis. First, the litigant must show that he has suffered an actual or threatened injury.⁶ Second, the injury must be traceable to the alleged conduct of the defendant.⁷ Third, the injury must be redressable by a favorable decision on the merits.⁸

A number of major standing cases⁹ decided by the Burger Court attracted a great deal of criticism. Most commentators criticized the Court's inconsistent application of the same standard from one case to the next.¹⁰ A harsher measure of criticism, however, charged that the Burger Court's standing decisions were little more than a thinly disguised method of deciding cases on the merits.¹¹

5. Chief Justice Warren E. Burger was confirmed by the United States Senate on June 9, 1969, and served as Chief Justice until he resigned at the end of the October 1985 Term.

6. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

7. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

8. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Warth*, 422 U.S. at 508 (1975). For a thorough discussion of the history and current view of standing, see Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984).

9. E.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Heckler v. Mathews*, 465 U.S. 728 (1984); *Lyons*, 461 U.S. 95; *Valley Forge Christian College*, 454 U.S. 464; *Duke Power Co.*, 438 U.S. 59; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26; *Warth*, 422 U.S. 490; *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974).

10. E.g., Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862 (1985); Nichol, *supra* note 8; Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185 (1981); Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863 (1977).

11. See Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 637, 658-59 (1985) [hereinafter Nichol, *Abusing Standing*]; Nichol, *Backing Into the Future: The Burger Court and the Federal Forum*, 30 U. KAN. L. REV. 341 (1982) [hereinafter Nichol, *Backing Into the Future*]; Nichol, *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C.L. REV. 798 (1983) [hereinafter Nichol, *Valley Forge*]; Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273 (1980). See also *Allen*, 468 U.S. at 782 (Brennan, J., dissenting); *Valley Forge Christian College*, 454 U.S. at 493 (Brennan, J., dissenting); *Schlesinger*, 418 U.S. at 239-40 (Brennan, J., dissenting).

This Note offers an explanation for the tangled web of Burger Court standing decisions. First, this Note examines the core themes of American conservatism over the past two decades. Second, the Note demonstrates that Presidents Richard Nixon¹² and Ronald Reagan¹³ have nominated Supreme Court Justices based largely on the Justices' ideological and political compatibility with the conservative policy agenda. After reviewing a number of standing cases, this Note concludes that the standing doctrine has been abused to further the conservative agenda.

DEFINING THE CONSERVATIVE AGENDA

Certainly, no singular definition can precisely capture the meaning of the word "conservative" in the context of American political thought. Recourse to historical sources, however, demonstrates that four recurrent themes form the foundation of American conservatism. The "conservative agenda" is a shorthand way of referring to these four themes, which guide the conservative policy-making process.¹⁴

The first premise of American conservatism is the belief in a small, less intrusive federal government. Conservatism favors local and state governments that are closer to the people and hence more responsive.¹⁵ Conservatism's second core belief is a strong commitment to the free market system.¹⁶ Conservatives regard free market capitalism, unimpeded by government intrusion, as the best remedy for economic and social ills.

As a counterpart to a belief in the free market, the third theme of conservatism centers on government-sponsored social welfare programs. Conservatives harbor grave suspicions about the wisdom of such programs and therefore exhibit a distaste for them.¹⁷ Fi-

12. Richard Nixon was elected to his first term as President on November 5, 1968, and his second term on November 7, 1972. He resigned from office on August 9, 1974.

13. Ronald Reagan was elected to his first term as President on November 4, 1980, and his second term on November 6, 1984.

14. See Kristol, *What is a Neo-Conservative?*, NEWSWEEK, Jan. 19, 1976, at 17. Professor Kristol outlines the five tenets of an oversimplified but not distorted profile of the neo-conservative political tendency. This Note identifies three of Kristol's tenets as recurrent themes at the foundation of American conservatism.

15. See *infra* notes 19-25 and accompanying text.

16. See Kristol, *supra* note 14, at 17. See also *infra* notes 26-31 and accompanying text.

17. See *infra* notes 32-42 and accompanying text.

nally, conservatism manifests a deep concern for "traditional" and "family" values. Such values are viewed as necessary for the proper functioning of the social order.¹⁸

Decentralization of Federal Government Power

An overriding theme in conservative thought is the desire to decentralize the federal government and return power to the state and local level. This desire is accompanied by a belief that the centralized federal government has usurped power and drained resources away from the level of government at which they are best used. Conservatives therefore seek to reduce the federal role by shifting the responsibility for program development, management, and funding to the states.

In 1969, President Richard Nixon unveiled his "New Federalism" program.¹⁹ The cornerstone of Nixon's New Federalism was revenue sharing.²⁰ After the revenue-sharing proposal was not adopted in his first term, Nixon stated that revenue sharing "can help reverse what has been the flow of power and resources toward Washington by sending power and resources back to the States, to the communities, and to the people."²¹ Nixon believed that resources could be used more effectively at the local level.²²

Ronald Reagan pursued this same "New Federalism" theme. A key objective of the Reagan Administration has been to curb the size and growth of the federal government.²³

18. See *infra* notes 44-55 and accompanying text.

19. See *Nixon Urges Support for "New Federalism," "New Realism,"* 25 CONG. Q. ALMANAC 101A (1969) (complete text of President Nixon's Sept. 1, 1969, speech to the National Governors' Conference).

20. See *id.* See also *Nixon's State of the Union Text II*, 28 CONG. Q. ALMANAC 5A, 9A (1972) (detailed version of message delivered to Congress on Jan. 20, 1972); *Manpower Revenue Sharing*, 28 CONG. Q. ALMANAC 35A (1972).

21. *Nixon's State of the Union Text II*, *supra* note 20, at 9A.

22. See *Manpower Revenue Sharing*, *supra* note 20, at 35A. Nixon described revenue sharing as an effort to move necessary funds and decision-making power to the level of government best able to deal with a particular problem. "They [revenue sharing programs] require us in Washington to give up some of our power, so that more power can be returned to the States, to the localities, and to the people, where it will be better used." *Id.*

23. *Reagan's RX for a Sick Economy*, U.S. NEWS & WORLD REP., Jan. 19, 1981, at 23, 26. See *President Reagan's Inaugural Address*, 37 CONG. Q. ALMANAC 11E, 12E (1981).

My administration seeks to limit the size, intrusiveness, and cost of Federal activities as much as possible [without neglecting federal responsibilities]. . . . Instead, ways are being found to streamline Federal activity, to limit it to those areas and responsibilities that are truly Federal in nature. . . .²⁴

Reagan blames current problems on government intrusion, stating that "[i]t is no coincidence that our present troubles parallel and are proportionate [to] the intervention and intrusion in our lives that have resulted from unnecessary and excessive growth of government."²⁵ Reagan has continued his assault on big government throughout his administration.

Promoting the Free Market System

Conservatives consistently have viewed the free enterprise system as the most effective vehicle for producing domestic tranquility.²⁶ Unshackled by government intrusion, conservatives feel that the free market system can provide for Americans much more effectively than government programs. Richard Nixon believed that "[p]rivate enterprise—far more effectively than government—can provide the jobs, train the unemployed, build the homes, offer the new opportunities that will produce progress—not promises—in solving the problems of America."²⁷

Although Nixon possessed a deep belief in the ability of the free market system to provide economic solutions,²⁸ no recent President has maintained as steadfast an allegiance to the free market ideal as Ronald Reagan. When Reagan took office in 1981, his administration's overriding goal was the restoration of America through the revival of free market economic power.²⁹ The Reagan economic

24. *President's Budget Message*, 40 CONG. Q. ALMANAC, 8E, 10E (1984).

25. *President Reagan's Inaugural Address*, *supra* note 23, at 12E.

26. See Kristol, *supra* note 14, at 17.

27. *The Promises That Nixon Has Made*, U.S. NEWS & WORLD REP. Mar. 3, 1969, at 50, 51 (review of Richard Nixon's 1968 campaign promises).

28. See *Nixon's State of Union Text II*, *supra* note 20, at 8A-9A; *Welfare Reform*, 28 CONG. Q. ALMANAC 48A (1972).

29. A key issue in both Reagan campaigns was the state of the American economy. Reagan has continually advocated decreased taxation, reduced government regulation, and government spending cuts. The main purpose of this three-point program was the revival of American free market economic power. In his 1981 inaugural address, he stated: "It is time to reawaken this industrial giant, to get government back within its means, and to lighten

plan embodies a belief that "businessmen freed of heavy-handed regulation will invest more; workers, released from oppressive taxation will labor harder and save more; the economy will grow, producing more jobs and less inflation."³⁰ Reagan believes that the plan he envisions is essential to the nation's continued health and vitality.³¹

Reducing Government-Sponsored Social Welfare Programs

The third theme at the core of American conservatism concerns the proper role of government in the area of social welfare. This theme manifests itself in three ways. First, conservatives generally do not believe that social welfare programs are the proper province of government. Second, they maintain that social welfare programs hamper the efficient functioning of the free market system. Third, conservatives believe that many if not most individuals do not need government assistance.

On one level, conservatives do not feel that government should be in the business of delivering large-scale social welfare programs. In 1968, Richard Nixon stated that "America is a great nation today—not because of what Government did for people, but because of what people did for themselves over 190 years in this country."³²

our punitive tax burden. And these will be our first priorities, and on these principles, there will be no compromise." *President Reagan's Inaugural Address*, *supra* note 23, at 12E. In his February 5, 1981, presidential broadcast to the nation, he stated:

We invented the assembly line and mass production, but punitive tax policies and excessive and unnecessary regulations plus government borrowing have stifled our ability to update plant and equipment. When capital investment is made it's too often for some unproductive alterations demanded by government to meet various of its regulations.

President Reagan's Economic Policy Address, 37 CONG. Q. ALMANAC 13E, 14E (1981). See *President Reagan's Economic Proposals Text*, *id.* at 15E.

30. Church, *Conservative Conservatism*, TIME, Sept. 22, 1980, at 10, 11.

31. See *President Reagan's 2nd Inaugural Address*, 41 CONG. Q. ALMANAC 3D (1985); *President's Budget Message*, *supra* note 24, at 13E ("Bold, vigorous fiscal policy action to break the momentum of entrenched spending programs, together with responsible and restrained monetary policy, is essential to keep the recovery on track; essential to the Nation's future economic health and vitality").

32. Nixon: "The Long Dark Night for America is About to End, U.S. NEWS AND WORLD REP., Aug. 19, 1968, at 54, 76 (quoting Nixon's 1968 nomination acceptance speech delivered to the Republican Party Convention, Aug. 8, 1968).

The Nixon Administration justified budget cuts as the elimination of programs outside the proper scope of government responsibility.³³ Ronald Reagan has echoed this sentiment. "Spending by Government must be limited to those functions which are the proper province of Government. We can no longer afford things simply because we think of them."³⁴

By the late 1960s and early 1970s, conservatives were exasperated by the increase in social welfare spending. On one level, conservatives argued that such programs were not proper exercises of government power, but they also began to hammer away at the negative effects of welfare programs. Richard Nixon maintained that federal intervention in social problems had adversely affected the private sector³⁵ and that the welfare system was destroying the value of hard work. He stated: "Our states and cities find themselves sinking in a welfare quagmire as caseloads increase, as costs escalate and as the welfare system stagnates enterprise and perpetuates dependency."³⁶

Neoconservative theory maintains that although the truly needy deserve some measure of government assistance, the bulk of social welfare programs help those who can help themselves.³⁷ "The

33. *1975 Spending Path Lies Between Inflation, Recession*, 30 CONG. Q. WEEKLY REP. 269 (1974). Health, Education and Welfare Secretary Caspar Weinberger stated, "Some of HEW's programs are in areas where the federal government just does not belong. . . ."

Id.

34. *President's Economic Message*, 37 CONG. Q. ALMANAC 15E, 18E (1981).

35. See *Human Resources*, 29 CONG. Q. ALMANAC 21A-22A (1973). Nixon stated: During the middle and late 1960's, under the pressure of this impatient idealism, Federal intervention to help meet human needs increased sharply. Provision of services from Federal programs directly to individuals began to be regarded as the rule in human resource policy, rather than the rare exception it had been in the past.

The Government in those years undertook sweeping, sometimes almost utopian, commitments in one area of social concern after another. The State and local governments and the private sector were elbowed aside with little regard for the dislocations that might result. Literally hundreds of new programs were established on the assumption that even the most complex problems could be quickly solved by throwing enough Federal dollars at them.

Id. at 21A.

36. *Text of President's Welfare, "Workfare" Speech*, 25 CONG. Q. ALMANAC 75A (1969).

37. See Kristol, *supra* note 14, at 17 (neoconservatives approve of programs that provide needed security and comfort but do so with a minimum of government intrusion). In Reagan's words: "This Government will meet its responsibility to help those in need. But policies that increase dependency, break up families and destroy self-respect are not progres-

choice before the American worker is clear: The work ethic builds character and self-reliance; the welfare ethic destroys character and leads to a vicious cycle of dependency. The work ethic builds strong people; the welfare ethic breeds weak people."³⁸

Ronald Reagan believes that social programs are outside the legitimate realm of federal government power.³⁹ Indeed, part of Reagan's economic program has been the reduction of federal spending for social welfare, forcing the private sector to meet the economic and social challenges of America.⁴⁰

Like Nixon, Reagan maintains that the truly needy will be protected, but that funding levels can be reduced substantially by eliminating waste, fraud, and abuse.⁴¹ Conservatives predictably will attempt to eliminate or at least scale back government assistance programs.⁴² If a program cannot be eliminated, program eligibility is limited as much as practicable to insure that only the truly needy receive government assistance.⁴³

Promoting and Protecting Traditional Values and Institutions

The final theme in American conservatism centers on the values that conservatives promote. "Neo-conservatism tends to be respectful of traditional values and institutions: religion, the family,

sive, they are reactionary." *State of the Union Address*, 41 CONG. Q. ALMANAC 8D, 9D (1985). Nixon stated: "To put it bluntly and simply—any system which makes it more profitable for a man not to work than to work, and which encourages a man to desert his family rather than stay with his family, is wrong and indefensible." 25 CONG. Q. ALMANAC 75A (1969).

38. *Work v. Welfare: Where Nixon Stands*, U.S. NEWS & WORLD REP., Sept. 18, 1972, at 76, 77.

39. See *supra* text accompanying note 34.

40. See *Reagan's Budget Cuts*, 41 CONG. Q. ALMANAC 434 (1985); *President Reagan's Inaugural Address*, *supra* note 23.

41. *Text of President Reagan's Address to the Nation*, 37 CONG. Q. ALMANAC 30E, 31E (1981) (delivered Sept. 24, 1981). "When I talk waste and fraud, I'm talking about a lot of things that we discovered in California—that there are people who are in programs who should not be there." *Reagan's RX for a Sick Economy*, *supra* note 23, at 24.

42. Some may argue that the following statement, made by Reagan in response to media human interest stories during the 1982 recession, demonstrates conservative insensitivity to the plight of the lower classes. "Is it news that some fellow out in South Succotash someplace has just been laid off, that he should be interviewed nationwide . . . ?" *News from South Succotash*, AMERICA, April 3, 1982, at 252, 252.

43. See, e.g., *Lyng v. Castillo*, 106 S. Ct. 2727 (1986) (restricting food stamp eligibility).

the 'high culture' of Western civilization."⁴⁴ Conservatives see these values as essential to the proper functioning of the social order.⁴⁵

During the 1980s the Reagan Administration has placed primary emphasis on religious and family values. Reagan has consistently supported efforts to legalize school prayer and ban legalized abortion,⁴⁶ expressing "shock" over his perception that the first amendment has been used "as a reason to keep traditional moral values away from policymaking."⁴⁷

Nonetheless, Reagan does believe that the acceptance of traditional values is on the upswing. "Of all the changes that have swept America the past four years, none brings greater promise than our rediscovery of the values of faith, freedom, family, work and neighborhood."⁴⁸

While Richard Nixon lamented a perceived decline in religious faith and family values,⁴⁹ conservatives in the late 1960s and early 1970s were preoccupied with crime and student unrest. As the

44. Kristol, *supra* note 14, at 17.

45. *Id.* Kristol also states:

They [neoconservatives] believe that the individual who is abruptly 'liberated' from the sovereignty of traditional values will soon find himself experiencing the vertigo and despair of nihilism. Nor do they put much credence in the notion that individuals can "create" their own values and then incorporate them into a satisfying "lifestyle."

Id.

46. See *State of the Union Address*, *supra* note 37, at 10D (1985); *State of the Union Address*, 40 CONG. Q. ALMANAC 5E, 7E (1984).

47. *President Reagan and the Bible*, CHRISTIANITY TODAY, Mar. 4, 1983, at 46, 47 (excerpts from address of Jan. 31, 1983). Reagan goes on to state, "The First Amendment was not written to protect people and their laws from religious values. It was written to protect those values from government tyranny." *Id.*

48. *State of the Union Address*, *supra* note 37, at 10D.

49. See *Old Values Being Torn Away*, U.S. NEWS & WORLD REP., Mar. 29, 1971, at 37 (excerpts from a television interview of President Nixon by reporter Barbara Walters on NBC's "Today" show, Mar. 15, 1971). Expressing his perceptions of the "value" issue, Nixon stated:

My guess is that, as we see the religious faith of people being lost, as we see family ties being less and less meaningful to people, as we see, frankly, life becoming perhaps less demanding, less demanding in the sense that it is possible now for most people to get a job and not have to have that compulsion of having to do better in order to make a living — as we see all of these things, I believe that the tendency there is to affect young people in a way that they move away from principle, from values, and are at somewhat loose ends.

Id.

Vietnam War continued and antiwar protest intensified, conservatives perceived that the traditional value of patriotism was under attack. The protests and their accompanying violence were viewed as the work of a small group of people who were bent on uprooting traditional values and promoting communism.⁵⁰ In 1968, the late J. Edgar Hoover, Director of the Federal Bureau of Investigation, warned of the goals of the antiwar protesters: "The protest activity of the New Left and the SDS [Students for a Democratic Society], under the guise of legitimate expression of dissent, has created an insurrectionary climate which has conditioned a number of young Americans—especially college students—to resort to civil disobedience and violence."⁵¹

Hoover believed that the student protest movement was a communist-inspired front that possessed "an almost passionate desire to destroy the traditional values of our democratic society and the existing social order."⁵² Journalists condemned the activities of student demonstrators as treasonous.⁵³ Melvin R. Laird, then Secretary of Defense, stated, "Hanoi's strategy is clear: The leaders in Hanoi expect to achieve victory by waiting for us to abandon the conflict as a result of antiwar protests in this country."⁵⁴ Other White House officials warned that "[t]here is no doubt that each and every speech [in Congress against the administration], and

50. See Hoover, *The Story of Crime in U.S.*, U.S. NEWS & WORLD REP., Oct 7, 1968, at 61, 64 (text of speech delivered by J. Edgar Hoover to the National Commission on Causes and Prevention of Violence, Sept. 18, 1968).

51. *Id.* at 64.

52. *Id.* at 63-64.

53. See Lawrence, *Is Treason Permissible as Merely "Free Speech"?*, U.S. NEWS & WORLD REP., Mar. 10, 1969, at 108. Criticizing the Supreme Court's decision in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), which held that Iowa high school students had a right to wear black arm bands to protest United States participation in the Vietnam War, Lawrence said:

How, in the face of the High Court's new decision, can the schools effectively teach patriotism and a love of country? . . . There certainly is no justification for a ruling by the highest court in the land which takes away the right of school authorities in a government supported institution to bar "symbolic" treason. We are telling the world that we permit students in our public schools to indicate, in effect, that they are "adhering to the enemies" of the United States and "giving them aid and comfort."

Id.

54. *Vietnam Debate — Will it Help or Hinder Peace?*, U.S. NEWS & WORLD REP., Oct. 20, 1969, at 29.

each and every demonstration helps the Communist cause [in North Vietnam]."⁵⁵

THE NOMINATION OF CONSERVATIVE JUSTICES

Many factors are considered in the nomination of an individual to a seat on the United States Supreme Court,⁵⁶ but a President's demonstrated preference for candidates whose political ideologies are similar to his own is not surprising.⁵⁷ Two prominent factors considered by a President in making his nomination are "whether the nominee favors Presidential policies and programs" and whether the nominee's judicial record meets the President's "criteria of constitutional construction."⁵⁸ Richard Nixon and Ronald Reagan both adhered to this practice of giving ideological factors a prominent role in their nominations of individuals to the Supreme Court.⁵⁹

Richard Nixon quite bluntly delineated his criteria for a Supreme Court Justice. He sought an individual who

leans to the conservative side . . . conservative in respect of his attitude toward the Constitution. It is the judge's responsibility and the Supreme Court's responsibility, to interpret the Constitution and not to go beyond that in putting his own socio-economic

55. *Id.*

56. See H. ABRAHAM, *JUSTICES AND PRESIDENTS* 49-70 (2d ed. 1985).

57. See *id.* at 65-72. "Political and ideological compatibility often go hand in hand in influencing Presidential choices for the Supreme Court." *Id.* at 65.

58. *Id.* Abraham lists several other factors that a President almost certainly will consider:

(1) whether his choice will render him more popular among influential interest groups; (2) whether the nominee has been a loyal member of the President's party; (3) whether the nominee favors Presidential programs and policies; (4) whether the nominee is acceptable (or at least not 'personally obnoxious') to the home-state Senators; (5) whether the nominee's judicial record, if any, meets the Presidential criteria of constitutional construction; (6) whether the President is indebted to the nominee for past political services; and (7) whether he feels 'good' or 'comfortable' about his choice.

Id. at 65.

59. See *infra* notes 60-63 and accompanying text.

Ideological considerations have been a factor in Reagan's judicial selection process since his days as governor of California. "Reagan's staff, which handled the selection process right up to the congratulatory phone calls, did possess an ideological agenda. 'They didn't have to be Republicans,' says the governor's first legal-affairs secretary, Paul Haerle, 'but we made sure they weren't liberals.'" *Governor Reagan and the Courts*, *NEWSWEEK*, Sept. 8, 1980, at 78.

conomic philosophy into decisions in a way that goes beyond . . . the Constitution.⁶⁰

Nixon was looking for nominees who believed in a strict construction of the Constitution⁶¹ and who would not impose their own social and economic views on the nation⁶² but would leave such choices to the legislative branch.⁶³

The four men Nixon appointed to the Supreme Court—Warren E. Burger,⁶⁴ Harry A. Blackmun,⁶⁵ William H. Rehnquist,⁶⁶ and

60. *Nixon Fights Back*, 21 NAT'L REV. 1102, 1102 (1969) (explaining Nixon's reasons for nominating Judge Clement Haynsworth to the Supreme Court).

61. *Changes Nixon May Make in Federal Courts*, U.S. NEWS & WORLD REP., Dec. 2, 1968, at 42. Nixon stated: "We need more strict constructionists on the highest court of the United States. In my view, the duty of a Justice of the Supreme Court is to interpret the law, not to make law, and the men I appoint will share that view." *Id.* See also *The Nixon Court*, NEWSWEEK, Oct. 4, 1971, at 18.

62. See *Role of the Supreme Court—Nixon Gives His Criteria*, U.S. NEWS & WORLD REP., Nov. 1, 1971, at 62 (full text of speech given Oct. 21, 1971, announcing the nominations of Lewis Powell and William Rehnquist to the Supreme Court). Nixon described his judicial philosophy in the following terms: "[I]t is my belief that it is the duty of a judge to interpret the Constitution and not to place himself above the Constitution or outside the Constitution. He should not twist or bend the Constitution in order to perpetuate his personal political and social views." *Id.*

One conservative commentator capsulized the task ahead for the Nixon Court:

The problem of abuse of power by the Supreme Court will not be solved even if President Nixon has the opportunity to appoint three or four new Justices in the next year or two. It will be solved when the American people insist that the Supreme Court has the authority only to "interpret" the Constitution. If it is to be revised or rewritten, this must be done by the American people—by amending the Constitution itself.

Lawrence, *A "New" Supreme Court?*, U.S. NEWS & WORLD REP., June 2, 1969, at 96, 96.

63. See *The Promises That Nixon Made*, *supra* note 27. Nixon was looking for men who would employ a strict interpretation of the Constitution "rather than . . . breaking through into new areas that are really the prerogative of the Congress." *Id.* at 51.

64. Warren E. Burger was confirmed as Chief Justice by the United States Senate on June 9, 1969, by a vote of 74 to 3. Burger replaced retiring Chief Justice Earl Warren.

65. Harry A. Blackmun was confirmed by the Senate on May 12, 1970, by a vote of 94 to 0. Blackmun was Nixon's third choice for the vacancy created by the departure of Associate Justice Abe Fortas. The Senate rejected two Southern "strict constructionists" nominated by Nixon: Chief Judge Clement F. Haynsworth of the United States Court of Appeals for the Fourth Circuit and Judge G. Harrold Carswell, then a judge with six months' experience on the United States Court of Appeals for the Fifth Circuit. See H. ABRAHAM, *supra* note 56, at 15-18.

66. William H. Rehnquist was confirmed by the Senate on December 15, 1971, as an Associate Justice, replacing John Marshall Harlan. Justice Rehnquist was confirmed by the Senate as Chief Justice on Sept. 17, 1986, replacing retiring Chief Justice Warren Burger.

Lewis F. Powell⁶⁷—have for the most part fulfilled Nixon's expectations. Although the Supreme Court did not veer sharply to the right as many had expected,⁶⁸ Chief Justice Burger and Justices Rehnquist and Powell played major roles in intensifying the standing inquiry, thereby restricting access to federal court.⁶⁹

The conservatives' goal in the 1980s is much the same as it was in the 1960s—to appoint judges who exercise judicial restraint. Conservatives continue to abhor the judicial activism of the Warren Court.⁷⁰ To conservatives, judicial restraint means withdrawing from areas of economic and social controversy.⁷¹

Judicial restraint is more consistent with the idea of self-government. It enables the American people to express their moral and

67. Lewis F. Powell was confirmed by the Senate on December 9, 1971, by a vote of 89 to 1. He replaced Hugo L. Black.

68. See *The "Burger Court": A Trend Toward Conservatism, but—*, U.S. NEWS & WORLD REP., July 16, 1973, at 29. "What is emerging, experts say, is a pattern of judicial restraint—narrower interpretation of the Constitution, in line with Mr. Nixon's 'strict constructionist' philosophy, though not always in keeping with his legislative objectives." *Id.*

President Nixon rated his own role in reformulating the Court, stating, "I feel at the present time that the Court is as balanced as I have had an opportunity to make it." *First Nixon Court*, 24 NAT'L REV. 785, 785 (1971).

69. See *Allen v. Wright*, 468 U.S. 737 (1984) (Justice O'Connor wrote for the majority, joined by Justices White, Rehnquist, Powell, and Chief Justice Burger); *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (Justice Rehnquist wrote for the majority, joined by Justices White, O'Connor, Powell, and Chief Justice Burger); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978) (Chief Justice Burger wrote for the majority); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (plurality); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (Justice Powell wrote for the majority); *Warth v. Seldin*, 422 U.S. 490 (1975) (Justice Powell wrote for the majority, joined by Justices Stewart, Blackmun, Rehnquist, and Chief Justice Burger); *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208 (1974) (Chief Justice Burger wrote for the majority, joined by Justices Stewart, White, Blackmun, Powell, and Rehnquist); *United States v. Richardson*, 418 U.S. 166 (1974) (Chief Justice Burger wrote for the majority, joined by Justices White, Powell, Rehnquist, and Blackmun).

70. See *Courts, Presidents and Precedents*, 38 NAT'L REV. 4817, 4818 (1986); Kilpatrick, *Conservatism at the High Court*, 33 NAT'L REV. 893, 893 (1981) (pointing out that as to the transgressions of the Warren Court, "[t]he activism that marked the days of Earl Warren, when the Court plunged into seas of political and social controversy, has been replaced by a cautious and respectful conservatism"); Thomas, *Reagan's Mr. Right*, TIME, June 30, 1986, at 24 ("This is the beginning of a new [era in which] judicial restraint is going to be fashionable").

71. McLaughlin, *Making Reaganism Last*, 35 NAT'L REV. 1594, 1594 (1983) ("the Court should accommodate the wishes of the people as they are expressed by their elected representatives"); see Rees, *The Constitution, the Court and the President-Elect*, 32 NAT'L REV. 1595, 1597 (1980).

religious views in a manner consistent with basic liberty and our constitutional design. Much of the law from the Supreme Court has impeded the ability of communities to decide moral questions for themselves.⁷²

Conservatives may couch their argument in terms of an abstract belief in "judicial restraint," but their underlying rationale is more concrete. Judicial restraint comports with their core beliefs in smaller government, less social welfare, and a free market system. Conservatives in the 1980s have sought to further conservative goals by bringing to the bench federal judges and Supreme Court Justices who share these conservative beliefs.⁷³

LIBERALIZED STANDING BEFORE THE BURGER COURT

The Court in *Baker v. Carr*⁷⁴ laid the foundation for modern standing analysis. The petitioners in *Baker* challenged a Tennessee statute fixing the apportionment of the Tennessee state legislature on the basis of population figures from the 1900 federal census.⁷⁵ The petitioners claimed that the apportionment scheme denied them equal protection of the law because population shifts after 1900 effectively diluted their votes.⁷⁶

In determining whether it could properly hear the case, the Court in *Baker* characterized the standing inquiry as whether "the appellants [have] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."⁷⁷ The Court concluded that the plaintiffs had standing to sue because they asserted "'a plain, direct, and adequate interest in

72. *The Separation of Church and State: Should the U.S. Supreme Court Play an Activist Role?*, CHRISTIANITY TODAY, Mar. 21, 1986, at 52, 53.

73. The 1980 Republican Party platform stated: "We will work for the appointment of judges . . . who respect traditional family values and the sanctity of innocent human life." *Governor Reagan and the Courts*, *supra* note 59, at 78. See *supra* notes 70-72 and accompanying text.

74. 369 U.S. 186 (1962).

75. *Id.* at 191-92.

76. *Id.* at 187-88.

77. *Id.* at 204. The "personal stake" and "concrete adverseness" requirements were necessary to ensure that the appellant would vigorously protect the rights of all those affected by the statute. *Id.* at 204-08.

maintaining the effectiveness of their votes' ”⁷⁸ and not merely a claim of “ ‘the right, possessed by every citizen, to require that the Government be administered according to law.’ ”⁷⁹

In *Flast v. Cohen*,⁸⁰ the Court built on the *Baker* decision to open the courthouse door a bit wider. The appellants in *Flast* claimed that the expenditure of federal funds to finance textbooks and instruction in religious schools violated the establishment clause of the first amendment.⁸¹ They claimed standing to sue based on their status as taxpayers of the United States.⁸² Chief Justice Warren, writing for the majority, stated that “[a] taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case. Therefore, we find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs.”⁸³ The Court used a two-part “nexus test” to determine whether a plaintiff had a justiciable claim.⁸⁴

Under the first prong of the test, the plaintiff was required to “allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8.”⁸⁵ The second prong required the plaintiff to “establish a nexus between the status and the precise nature of the constitutional infringement alleged.”⁸⁶ In sum, the *Flast* test required a party to demonstrate that the “challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.”⁸⁷ The Court held that the appellants had standing to sue as

78. *Id.* at 208 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)).

79. *Id.* (quoting *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

80. 392 U.S. 83 (1968).

81. *Id.* at 85-86. The first amendment states, in relevant part: “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend I.

82. *Flast*, 392 U.S. at 85.

83. *Id.* at 101.

84. *Id.* at 102-03.

85. *Id.* at 102.

86. *Id.*

87. *Id.* at 102-03.

taxpayers because the challenged expenditures exceeded the limitations of the establishment clause of the first amendment.⁸⁸

The final case to liberalize standing, *Association of Data Processing Organizations, Inc. v. Camp*,⁸⁹ provided the first contours of the "injury-in-fact test."⁹⁰ The injury-in-fact test marked the Court's retreat from the legal interest test, which required a litigant to allege an injury to a legally protected interest.⁹¹ The new standard introduced a threshold standing inquiry that focused instead on the quantity of harm suffered by the plaintiff.⁹² Commentators heralded *Data Processing* as a modernization of standing law outside the taxpayer context that was "quickly interpreted to encompass a wide variety of grievances."⁹³

STANDING AND THE BURGER COURT

The liberalization of the standing doctrine was short lived, however. Once the four Nixon appointees took their seats on the Court, standing inquiry became more rigorous. *Schlesinger v. Reservists Committee To Stop the War*⁹⁴ and *United States v. Richardson*⁹⁵ signaled the beginning of an intensified standing analysis.

The respondents in *Schlesinger* challenged the reserve military status of certain members of Congress as violative of the incompatibility clause of the Constitution.⁹⁶ Respondents claimed that four classes of individuals were adversely affected by the members' status as reserve military officers: all those opposed to the Vietnam war, all officers and members of the Reserves who were not mem-

88. *Id.* at 103.

89. 397 U.S. 150 (1970).

90. *Id.* at 152. See Nichol, *supra*, note 8, at 74-75.

91. See Nichol, *supra* note 8, at 74.

92. *Id.*

93. Nichol, *Backing Into the Future*, *supra* note 11, at 346.

94. 418 U.S. 208 (1974).

95. 418 U.S. 166 (1974).

96. *Id.* at 210-11. The incompatibility clause states:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. CONST. art 1, § 6, cl. 2.

bers of Congress, all United States taxpayers, and all United States citizens.⁹⁷

The United States Court of Appeals for the District of Columbia Circuit denied standing to the first three groups,⁹⁸ and the Supreme Court refused to grant standing to the respondents by virtue of their status as citizens.⁹⁹ The Court maintained that "standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public."¹⁰⁰ The Court distinguished *Schlesinger* from *Baker v. Carr* on the ground that the injury to the right to vote in *Baker* was concrete, whereas the injury in *Schlesinger* was an "abstract injury in nonobservance of the Constitution."¹⁰¹

In *Richardson*, the respondent challenged provisions of the Central Intelligence Agency Act of 1949¹⁰² concerning the public reporting of expenditures by the Central Intelligence Agency (CIA). The respondent claimed that the Act violated the Constitution, which required a regular statement and account of receipts and expenditures.¹⁰³ The Court denied standing because the respondent's challenge was addressed not to the taxing and spending power, but to statutes regulating the CIA.¹⁰⁴ The respondent did not have a personal stake in the outcome, as required by *Baker*, nor did he meet the *Flast* nexus test for purposes of taxpayer standing.¹⁰⁵

Schlesinger and *Richardson* in effect foreclosed the ability of citizens and taxpayers to sue the government for allegedly unconstitutional activity.¹⁰⁶ Chief Justice Burger recognized this result,

97. See *Schlesinger*, 418 U.S. at 211.

98. *Id.* at 213.

99. See *id.* at 226-27.

100. *Id.* at 220.

101. *Id.* at 223 n.13.

102. Central Intelligence Act, 50 U.S.C. § 403 (1982).

103. *United States v. Richardson*, 418 U.S. 166, 167-68 (1974). The accounts clause states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all Money shall be published from time to time." U.S. CONST. art I, § 9, cl. 7.

104. *Richardson*, 418 U.S. at 175.

105. *Id.* at 175-76.

106. See Nichol, *Valley Forge*, *supra* note 11, at 809 (*Schlesinger* and *Richardson* "teach quite clearly that standing cannot be predicated merely upon the harm a citizen sustains as the result of the government's failure to comply with the Constitution"); Sedler, *supra* note 10, at 870-71 ("except in very narrowly defined circumstances, citizens and taxpayers as

stating in *Schlesinger* that "[o]ur system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is no reason to find standing."¹⁰⁷ This statement, coupled with the fact that in both *Schlesinger* and *Richardson* the majority was composed of the curious alignment of Justices White, Powell, Blackmun, and Rehnquist, with Chief Justice Burger writing the majority opinions,¹⁰⁸ suggests that larger forces were at work in these two cases.

Schlesinger and *Richardson* reflect a desire to protect a traditional conservative value—patriotism. Conservatives in the late 1960s and early 1970s were exasperated by the antiwar demonstrations.¹⁰⁹ Justice Powell, a conservative himself, believed that the protests were communist inspired.¹¹⁰ Conservatives believed that the demonstrations were hamstringing American foreign policy¹¹¹ and viewed the antiwar protest as treasonous.¹¹²

Schlesinger and *Richardson* should be viewed as attempts to take the protest against involvement in Vietnam to a higher level via the American judicial system. Because the antiwar movement carried on in the streets had been summarily condemned by conservatives, however, the movement was unlikely to find a warmer reception in the Supreme Court. By denying standing to these litigants and thus refusing to legitimize the antiwar movement, the conservatives on the Court were able to protect and promote a basic conservative value—an unquestioning patriotism.

The next case to mark a shift in standing analysis was *Warth v. Seldin*.¹¹³ The petitioners in *Warth* claimed that zoning ordinances

such do not suffer 'injury in fact' from the government's alleged violation of the Constitution").

107. *Schlesinger*, 418 U.S. at 227.

108. *Id.* at 208-09; *Richardson*, 418 U.S. at 167.

109. See *supra* notes 50-55 and accompanying text.

110. See Powell, *Civil Disobedience: Prelude to Revolution*, U.S. NEWS & WORLD REP., Oct. 30, 1967, at 66. Powell offered his views on the plan and purpose of Vietnam Week, an organized nationwide protest: "The initial planning for Vietnam Week took place at a Chicago conference, instigated and dominated by Communists and fellow travelers. The Communist-line objectives of Vietnam Week were to undermine United States opposition to Communism in Vietnam and to ferment racial discord." *Id.* at 66-67.

111. See *supra* notes 52-55 and accompanying text.

112. See Lawrence, *supra* note 53, at 108.

113. 422 U.S. 490 (1975).

imposed by the Rochester, New York, suburb of Penfield had the purpose and effect of excluding low and moderate income people from residing in Penfield.¹¹⁴ One of the groups of petitioners¹¹⁵ claimed that the Penfield zoning practices prevented them from acquiring property in Penfield, thereby requiring them to live in less attractive communities.¹¹⁶

The Court in *Warth* denied the petitioners standing on two premises. First, the Court found that the petitioners failed to allege specific, concrete facts demonstrating that they had suffered an injury as a consequence of the defendant's actions.¹¹⁷ Petitioners claimed that the enforcement of the ordinance precluded third parties—builders and developers—from constructing housing suitable for the petitioners.¹¹⁸ The Court found, however, that this injury was indirect because at the time of the suit, none of the petitioners had “a present interest in any Penfield property; . . . none [had] ever been denied a variance or permit by respondent officials.”¹¹⁹

Second, the Court reasoned that even if the petitioners could have alleged an injury, a decision in their favor would not have redressed that injury.¹²⁰ As a result, the Court still would have denied standing because the lack of “redressability”¹²¹ would have given the Court's holding the more legislative flavor of traditionally disfavored advisory opinions. The Court in *Warth* reasoned that redressability was not assured because the petitioners “rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had re-

114. *Id.* at 495.

115. The petitioners were listed as:

[a]ll taxpayers of the City of Rochester, all low and moderate income persons residing in the City of Rochester, all black and/or Puerto Rican/Spanish citizens residing in the City of Rochester and all persons employed but excluded from living in the Town of Penfield who are affected or may in the future be affected by the defendants' policies and practices. . . .

Id. at 493-94 n.1.

116. *See id.* at 496.

117. *See id.* at 503-08.

118. *Id.* at 504.

119. *Id.*

120. *Id.* at 507.

121. Redressability refers to whether a favorable decision on the merits will remove the injury.

spondents acted otherwise, and might improve were the court to afford relief."¹²²

Despite attacks that the Court in *Warth* erected artificially high injury and redressability requirements,¹²³ the decision is quite consistent with conservative policy at the time. Prior to *Warth*, conservatives were on record as being opposed to granting relief in *Warth*-type situations. Richard Nixon had stated that "[w]e [the government] will not seek to impose economic integration upon an existing local jurisdiction. . . ."¹²⁴ Nixon believed that "the law does not now require or, in my opinion, allow the Federal Government to have forced integration of suburbs."¹²⁵

The *Warth* decision is consistent not only with the particular conservative position on the housing issue, but also with the philosophy behind the issue—New Federalism. The conservative's refusal to seek "economic integration" by invalidating a zoning ordinance that had effectively excluded minorities and low income individuals is consistent with the conservative philosophy of decreased federal control and more voice at the local level.¹²⁶

*Simon v. Eastern Kentucky Welfare Rights Organization*¹²⁷ followed *Warth* in 1976. The respondents in *Eastern Kentucky Welfare Rights Organization* were several indigent individuals and organizations representing indigents. They alleged that an Internal

122. *Warth*, 422 U.S. at 507.

123. The *Warth* decision has been criticized as inconsistent with later decisions, especially *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978). See Nichol, *Backing Into the Future*, *supra* note 11, at 368-70. Nichol states that "[a]n examination of the causation cases arising after *Warth* and *Eastern Kentucky* reveals that the standard appears to be sufficiently 'flexible' to allow the Court to hear those cases it may be anxious to reach on the merits, and yet the standard remains a hurdle in 'less desirable' cases." *Id.* at 368-69.

124. *Nixon Statement*, 30 CONG. Q. WEEKLY REP. 55 (1972).

125. *Nixon Sizes up the Future*, U.S. NEWS & WORLD REP., Jan. 18, 1971, at 64. See also *Color Zoning White*, TIME, Sept. 7, 1970, at 51. ("The Nixon Administration is reluctant to intervene vigorously in local housing disputes, even where federal subsidies are involved"); *Nixon Housing Policy*, 27 CONG. Q. ALMANAC 651, 658 (1971) (Nixon Administration would oppose housing segregation based on race, but would not interfere with zoning laws excluding individuals for economic reasons).

126. See *supra* notes 21, 23, 25 and accompanying text, discussing the conservative New Federalism policies. *Id.*

127. 426 U.S. 26 (1976) (Powell, J., wrote for the majority, joined by Justices Stewart, White, Blackmun, Rehnquist, and Chief Justice Burger).

Revenue Service (IRS) revenue ruling¹²⁸ discriminated against indigents because it allowed hospitals to maintain their tax-exempt status without providing services to indigent patients.¹²⁹ The indigent respondents alleged specific occasions on which they had been denied hospital services because of their indigency.¹³⁰ The Court admitted that “some [individuals] have been denied services” and that these services were unavailable elsewhere.¹³¹

The Court cast the injury in terms of a denial of “access to hospital services”¹³² and held that this injury was insufficient to establish standing because no hospital had been named as a defendant.¹³³ The respondents argued that the government action—the IRS revenue ruling—“encouraged” hospitals to deny services to indigents, but the Court held that such injury was not traceable directly to the government.

In other words, the “case or controversy” limitation of art. 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.¹³⁴

The Court also employed the high-threshold “redressability” factor developed in *Warth*,¹³⁵ reasoning that even if respondents were granted standing and obtained a favorable decision on the merits, the hospital would not necessarily offer more services to indi-

128. *Id.* at 30-32. The challenged ruling in effect established a new IRS position on the meaning of the term “charitable” for federal income tax purposes. To gain tax exempt status as a charitable organization under the old ruling, a hospital had to satisfy four general requirements. The requirement at issue in *Eastern Ky. Welfare Rights Org.* had mandated that a hospital “not, however, refuse to accept patients in need of hospital care who cannot pay for such services.” *Id.* at 30 (citation omitted). The new ruling provided that hospitals could maintain their tax exempt status if they furnished full-time emergency room care and referred patients unable to meet financial requirements to other hospitals providing indigent care. *See id.* at 31-32.

129. *Id.* at 32-33.

130. *See id.*

131. *See id.* at 41.

132. *Id.* at 40.

133. *Id.* at 41.

134. *Id.*

135. *Id.* at 42-43. For a discussion of the redressability analysis in *Warth*, see *supra* notes 120-122 and accompanying text.

gents.¹³⁶ "[I]t is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services"¹³⁷

Eastern Kentucky Welfare Rights Organization presents a mixture of two core conservative themes: government decentralization¹³⁸ and restrictive social welfare policy.¹³⁹ Justice Powell's redressability analysis focused on the hospital's potential decision to "forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services."¹⁴⁰ This statement reflects the conservative policy of reducing federal involvement in matters regarded as essentially local in nature. Conservatives favor a reduced federal role,¹⁴¹ especially if the interests of the private sector are involved. Under this view, regulation of the level of care a hospital provided to indigents simply would not be the proper province of the federal government.

Justice Powell's opinion also mirrors conservative social welfare policy. Conservatives continually express a desire to remove the federal government from social welfare delivery and reduce the overall levels of social welfare spending.¹⁴² Requiring hospitals to provide services for indigents in exchange for receiving tax exempt status is not "social welfare" in the classic sense of the term. The effect, however, is the same whether the government funds social services directly or merely requires another entity to provide social services in exchange for favorable government treatment.

136. *Id.* at 42-43.

137. *Id.*

138. See *supra* notes 21-24 and accompanying text, discussing the conservative viewpoint over the past two decades on the proper role of the federal government in American society.

139. See *supra* notes 33-36 and accompanying text, discussing conservative social welfare policy.

140. *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 43.

141. In general, a recurrent conservative battle cry over the past two decades has been one of "cutting big government." The crux of this policy is a deeply held belief that government intervention is the problem, rather than the solution. Furthermore, if government must perform a function, such responsibility should be handled at the state and local, rather than the federal, level. See *Nixon Urges Support For "New Federalism," "New Realism,"* *supra* note 19; *President Reagan's Inaugural Address*, *supra* note 23.

142. See *supra* notes 33-43 and accompanying text, discussing the conservative position on government-sponsored social welfare policy.

Given conservative disillusionment with the "mainstream" social welfare programs, conservatives cannot be expected to support provisions that furnish social services and employ government coercion to accomplish the objective. By denying standing in *Eastern Kentucky Welfare Rights Organization*, the Court removed the federal government from an area of primarily local concern and also reduced the level of available social services.

The decisions in *Eastern Kentucky Welfare Rights Organization* and *Warth* are similar in several respects. First, the Court denied standing to a group of disadvantaged litigants. Second, both denials rested on the premise that the injuries were both indirect and not redressable. Third, each case has been criticized for its rigorous standing requirements.¹⁴³ Fourth, each case was substantively consistent with the conservative agenda.

After *Warth* and *Eastern Kentucky Welfare Rights Organization*, the high injury and redressability barriers were expected to keep many litigants out of federal court. The litigants in *Duke Power Company v. Carolina Environmental Study Group*¹⁴⁴ and *Regents of the University of California v. Bakke*,¹⁴⁵ however, managed to overcome these barriers.

Duke Power Company involved a claim that the Price-Anderson Act¹⁴⁶ was unconstitutional because it set a ceiling of \$560 million on the liability insurance required to operate a nuclear power plant.¹⁴⁷ Congress passed the Act to enable producers of nuclear energy to afford liability insurance, thereby fostering the growth of nuclear power.¹⁴⁸ The respondents alleged that they were injured by radioactive discharges into the air and water as well as from the

143. See Sedler, *supra* note 10, at 873. "The standing bars that the Court imposed in *Warth* and *Eastern Kentucky* are artificial ones; they deny access to the courts to interested groups of persons whose interests are adversely affected by the actions they are challenging." *Id.* For a thorough discussion of the barriers erected in *Warth* and *Eastern Ky. Welfare Rights Org.*, see Nichol, *supra* note 10.

144. 438 U.S. 59 (1978).

145. 438 U.S. 265 (1978) (plurality).

146. Price-Anderson Act, 42 U.S.C. § 2210 (1982); *Duke Power Co.*, 438 U.S. at 69.

147. *Duke Power Co.*, 438 U.S. at 67.

148. *Id.* at 64-65.

fear of being inadequately compensated in the event of a nuclear accident.¹⁴⁹

The Court granted standing, holding that the petitioners had alleged injury in fact and had established that their injury was traceable to respondent's actions.¹⁵⁰ Finally, the Court held that the claims were capable of being redressed by a favorable decision on the merits, stating that "[o]ur cases have required no more than a showing [of] a 'substantial likelihood' that the relief requested will redress the injury claimed."¹⁵¹

The seemingly lenient redressability threshold of *Duke Power Company* generated a great deal of criticism concerning the inconsistent application of the redressability factor.¹⁵² The decision is, however, quite consistent with the conservative goal of promoting the uninhibited workings of the private sector.¹⁵³ *Duke Power Company* is a classic example of a court stepping in to promote this agenda.

149. *Id.* at 73. The respondents alleged the following specific injuries: the production of small quantities of radiation in the air and water, a sharp increase in the temperature of lake water resulting from its use to produce steam and cool the reactors, interference with use of the Catawba River, threatened reduction in property values of land near the water, present fear and apprehension of radioactivity, and the continual threat of a nuclear accident without compensation. *Id.*

150. *Id.* at 73-74.

151. *Id.* at 75 n.20. After granting standing, the Court upheld the constitutionality of the Price-Anderson Act, rejecting the respondents' due process claim. *Id.* at 86-87.

152. Nichol, *Backing Into the Future*, *supra* note 11, at 370.

The Court gave no consideration to the much more difficult causation question of whether the removal of the Price-Anderson Act limitation would cause Duke Power Company to let two substantially developed nuclear plants stand idle. Accordingly, standing was granted even though the redressability of the injuries was solely dependent on the decision of a third party, Duke Power Company.

The disparity between the cases can perhaps best be explained by the desire of the Court to hear the merits in *Duke Power*, thereby making clear the constitutional propriety of the Price-Anderson Act. Unfortunately for the low income plaintiffs in both *Warth* and *Eastern Kentucky*, the Court had no similar interest in the merits of their disputes.

Id. See also Nichol, *supra* note 8, at 72-73 n.27 (examining the fluctuating quality of the redressability factor); Varat, *supra* note 11, at 278. "The artificial application of the [standing] doctrine [in *Duke Power Co.*] . . . leads one to believe that the Court in fact varied its general view of justiciability on this occasion in order to place a constitutional stamp of approval on an important federal policy." *Id.*

153. See *supra* notes 27, 29, 31 and accompanying text.

Prior to the decision in *Duke Power Company*, the nuclear industry was weathering a storm of protest.¹⁵⁴ Supporters of nuclear power felt that the Price-Anderson ceiling had to remain in place to protect the nuclear industry from otherwise prohibitive insurance costs that could have precluded future power plant construction.¹⁵⁵ A denial of standing in *Duke Power Company* would have produced the same result as the decision on the merits, but it would have left the constitutionality of the Price-Anderson Act shrouded in doubt and the nuclear industry in a vulnerable position of instability. The industry would not have been assured that in the future a proper plaintiff would not be granted standing to challenge the Act's constitutionality. By granting standing to reach the merits of the constitutionality challenge, the Court was able to protect the nuclear industry by placing it on a surer economic footing.

As in *Duke Power Company*, the Court in *Regents of the University of California v. Bakke*¹⁵⁶ employed a comparably lenient standing analysis to enable it to reach the merits of the case. Bakke, a white male, had been denied admission to the medical school at the University of California at Davis. He alleged that the admissions policy at Davis discriminated against him by not allowing him to compete for the spaces that were set aside exclusively for members of certain disadvantaged groups.¹⁵⁷

154. See Alpern, *Anti-Atom Alliance*, NEWSWEEK, June 5, 1978, at 27-28 (reviewing the then-growing alliance of environmentalists opposed to nuclear energy and groups opposing the proliferation of nuclear weapons); King, *Nuclear Power in Crisis*, 41 VITAL SPEECHES 713 (1977-1978).

155. See *Testing the Liability of Nuclear Operators*, BUS. WEEK, Oct. 10, 1977, at 38-39. In briefs to the Supreme Court, two members of the nuclear industry warned of the likely fallout if Price-Anderson was struck down as unconstitutional. The Atomic Industrial Forum, Inc., an industry trade group, stated that "[r]emoving the limitation on liability . . . could cause utilities to refrain from completing pending projects or undertaking new projects and, conceivably, lead to the shutdown of existing reactors." *Id.* at 39. Babcock & Wilcox, a corporation engaged in the construction of nuclear plants, stated that the demise of Price-Anderson could have "a chilling effect on the further development of nuclear energy in the U.S." *Id.* Even without the issue of the liability ceiling, the nuclear industry was beleaguered by the overall decreased demand for energy, by safety concerns, and by tighter and costlier government regulation. See *Nuclear Dilemma*, BUS. WEEK, Dec. 25, 1978, at 54.

156. 438 U.S. 265 (1978).

157. *Id.* at 272-77.

The perfunctory standing analysis in *Bakke* is contained in a single footnote.¹⁵⁸ In granting standing, the Court stated: "The constitutional element of standing is plaintiff's demonstration of any injury to himself that is *likely* to be redressed by a favorable decision of his claim."¹⁵⁹ Regarding the standing analysis, the fact patterns in *Duke Power Company* and *Bakke* appear indistinguishable from those in earlier cases in which the Court denied standing.¹⁶⁰ Once again, however, untangling the inconsistencies is best accomplished with reference to the conservative agenda. The *Bakke* case is an expression of conservative New Federalism. Conservatives believe that it is not the proper province of government—including a state university system—to establish quotas. Moreover, quotas are inconsistent with the ideals of a free enterprise system.

In 1972, Richard Nixon described fixed-quota systems as "unfair" and "anti-ability."¹⁶¹ Ronald Reagan has also voiced his opposition to affirmative action programs as "reverse discrimination."¹⁶² Generally, conservatives view quota systems as another form of government intrusion that impedes the proper functioning of the free market system. Reward based on merit is consistent with a "free market" approach to problem solving. By finding the Davis admissions policy unconstitutional, the Court succeeded in furthering the conservative policy of disfavoring quotas. This pol-

158. *Id.* at 280-81 n.14.

159. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)) (emphasis added).

160. See Nichol, *Backing Into the Future*, *supra* note 11, at 371.

161. Nixon stated:

In employment and in politics, we are confronted with the rise of the fixed-quota system — as artificial and unfair a yardstick as has ever been used to deny opportunity to anyone. Again, as in many attacks on basic values, the reasons are often well intentioned. Quotas are intended to be a short cut to equal opportunity, but in reality are a dangerous detour away from the traditional value of measuring a person on the basis of ability.

Work v. Welfare: Where Nixon Stands, *supra* note 38, at 78.

162. See *Head to Head on the Issues*, U.S. NEWS AND WORLD REP., Oct. 6, 1980, at 59. Ronald Reagan summed up his thoughts on the issue of affirmative action as follows:

I recognize the need to offer opportunity to those people to whom opportunity has been denied for a long time. . . . I see affirmative action becoming a kind of quota system. And I just believe that when that happens you have established the precedent for new discrimination to take place. . . . We have turned affirmative action into a kind of reverse discrimination.

Id. at 61.

icy reflects the conservative belief in a decentralized federal government and the ability of the free market system to regulate society's resources.

Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.,¹⁶³ marked a return to a heightened level of standing analysis. The respondents in *Valley Forge* challenged the gratuitous transfer of federal government property to a religious college that planned to use the property to train ministers.¹⁶⁴ The respondents attempted to construct a *Flast* argument by alleging that the transfer was an exercise of Congress's taxing and spending power¹⁶⁵ and that it violated the establishment clause of the first amendment.¹⁶⁶

The Court ruled that the respondents had not met the *Flast* test because the source of their complaint was not a congressional action but a decision by the Department of Health, Education and Welfare to transfer federal property.¹⁶⁷ This narrow holding as to what constitutes congressional action under the taxing and spending clause has generated considerable debate.¹⁶⁸ The seemingly hypertechnical argument made by Justice Rehnquist essentially limited *Flast* to its facts and signaled the demise of taxpayer standing.¹⁶⁹ The decision in *Valley Forge* is comprehensible only with reference to the Burger Court's promotion of the conservative agenda.

Religious faith is one of the traditional values consistently championed by conservatives. Although the school prayer and abortion issues have been the most visible in the area of "traditional values,"¹⁷⁰ conservatives have advocated an overall rediscovery of religious values.¹⁷¹ Conservatives have expressed their belief that a

163. 454 U.S. 464 (1982).

164. *Id.* at 469.

165. *Id.* at 482.

166. *See id.* They asserted that their right to a government that "shall make no law respecting an establishment of religion" had been violated. *Id.*

167. *Id.* at 479.

168. *See* Floyd, *supra* note 10, at 872-73 ("no 'principled basis' exists on which rights asserted in *Schlesinger* and *Richardson* could be distinguished from *Valley Forge*"); Nichol, *Valley Forge*, *supra* note 11.

169. *See* Nichol, *Valley Forge*, *supra* note 11.

170. *See* *President Reagan and the Bible*, *supra* note 47.

171. *See supra* notes 46-47 and accompanying text.

rigid dividing line between church and state is illegitimate and that religious values should play a role in everyday American life. They regard the fear of a church-state overlap as unwarranted. The decision in *Valley Forge* supports this view by disposing of an alleged violation of the establishment clause on justiciability grounds. The Court's message is clear: the need to maintain a clear separation between church and state is not important enough to warrant relaxing the standing analysis to decide the merits.

CONCLUSION

The Burger Court's standing decisions are incapable of reconciliation using a coherent and consistent analytical standard. These decisions are better explained by probing the deeper issues at stake in each case. Each decision is consistent with underlying conservative goals. The Court's flexible standing analysis alternately erected high barriers to restrict access to the courts and lowered the threshold to allow ready access. The analytical framework established by the Burger Court has abused the standing doctrine and made it little more than a convenient vehicle to promote the conservative agenda.

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