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Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint

BY GENE R. NICHOL, JR.*

INTRODUCTION

Through a series of cases decided early in the last decade, the United States Supreme Court significantly modernized the law of standing in the federal courts.1 While these decisions have led to a welcome increase in judicial access, the cases have necessarily raised article III concerns. One of the most controversial methods employed by the Burger Court to temper the expansion of standing under the broad injury-in-fact test has been the development of an autonomous doctrine of causation.2 Primarily under the leadership of Justice Powell, the Court has fashioned guidelines to limit the availability of federal relief for indirectly caused injuries. More specifi-

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In other areas the retrenchment of standing principles has been more direct. See, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); and Laird v. Tatum, 408 U.S. 1 (1972) (decisions that cast serious doubts on the future viability of citizen suits).
cally, recent decisions have demanded, in construing article III, the specific pleading of the chain of causation and a substantial showing of the likelihood of redressability.

This article will provide a general analysis of the causation requirement with a primary focus on the Court’s relatively recent emphasis on redressability. The Court’s foray into causation, although properly rooted in concern for the appropriate role of the federal judiciary under article III, essentially has been misguided. The causation decisions, on the whole, have been characterized by a harsh inconsistency. The tests employed are too easily manipulated to coincide with the desire, or lack thereof, to reach the merits of particular cases. Further, the causation doctrine once again embroils the threshold standing determination too heavily in the merits and works to undermine the Court’s role in protecting individuals from harm resulting from illegal government activity. Accordingly, this article will suggest an approach to the causation standard that maintains a proper concern for the separation of powers demanded under our constitutional system while being more reflective of the Supreme Court’s tradition as the ultimate arbiter of federal law.

I. Setting the Stage—The Expansion of the Injury-In-Fact Test

Certainly one of the most profound strides in the modernization of standing law occurred in the 1970 decision, Association of Data Processing Service Organizations, Inc. v. Camp. Rejecting the somewhat circular legal interest test as

5 The legal interest test, which was the precursor to the injury-in-fact standard, was rejected because it necessarily involved consideration of the merits. See Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 154 (1970).
7 The legal interest test required the plaintiff to establish injury to a legally protected interest in order to overcome the standing hurdle. Tennessee Elec. Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 137 (1938); Alabama Power Co. v. Ickes,
too strongly implicative of the merits, the Court in *Data Processing* established a two-pronged standing inquiry.\(^8\) To achieve access to federal court, a plaintiff must demonstrate that the challenged action has caused him injury in fact and must show that the interest to be protected is arguably within the zone of interests safeguarded by the statutory or constitutional provision under which relief is sought.\(^9\)

The liberalized standard\(^10\) of *Data Processing* was quickly interpreted to encompass a wide variety of grievances under the injury-in-fact formulation. Threat of criminal prosecution,\(^11\) economic loss,\(^12\) aesthetic or environmental injury,\(^13\) and the abrogation of a variety of social and political rights\(^14\) were found to be appropriate bases for standing.

The most expansive implementation of the injury-in-fact test, however, occurred in a 1973 case, *United States v. SCRAP*,\(^15\) in which the Court recognized the standing of an ad hoc student group to challenge an Interstate Commerce Commission (ICC) railroad rate increase. The plaintiffs in *SCRAP* claimed that the tariff increase at issue would cause additional use of nonrecyclable goods and, therefore, eventually would divert natural resources out of the locale. Further, the group claimed that the rate structure would discourage the use of recyclable materials and consequently would result in "economic, recreational and aesthetic harm."\(^16\)

Writing for the majority, Justice Stewart acknowledged that the Court had been asked to follow an "attenuated line of causation to the eventual injury"\(^17\) but concluded that

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302 U.S. 464, 479 (1938).
\(^8\) 397 U.S. at 152-53.
\(^9\) Id.
\(^14\) See, e.g., *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). In *Trafficante*, the Supreme Court recognized the loss of "important benefits from interracial associations" as an adequate demonstration of injury in fact. Id. at 210.
\(^16\) Id. at 675-76.
\(^17\) Id. at 688.
"neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing." In a telling footnote, the Court cited with approval Professor Davis' claim that an "identifiable trifle" is sufficient to meet the injury-in-fact standard.

Accordingly, within the short span of three years, the Supreme Court had rejected the legal interest test, had interpreted injury-in-fact to include a wide variety of harms, and had characterized the requisite degree of injury as an "identifiable trifle." Further, in SCRAP, the Court recognized an injury of such an indirect nature that a chain of questionable inferences was required to link the claimed illegality with the perceived harm. It was against this background of expansion that the United States Supreme Court began to seriously examine causation.

II. The Linda-Warth-Eastern Kentucky Trilogy: A Causation Doctrine Emerges

In a series of cases that began with its 1973 decision in Linda R.S. v. Richard D., the Supreme Court outlined a broad causation requirement that reflects an attempt to curb the expansion of standing under the injury-in-fact test described above. Linda presented a challenge by the mother of an illegitimate child to the allegedly discriminatory applica-

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18 Id. at 687.
19 Id. at 689 n.14 (quoting Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613 (1968)).
20 The SCRAP plaintiffs sought to challenge an ICC ruling that allowed a 2.5% surcharge on freight rates. The plaintiffs alleged the following line of causation: the surcharge would discourage the use of recyclable goods and would promote the use of new raw materials in competition with scrap; the discouraged use of scrap would increase unwarranted mining, lumbering and other similar efforts, thereby adversely affecting the environment; and the plaintiffs would suffer the consequences of these effects through the use of Washington area parks and other local recreational areas. Curiously, the rate increase was general and may not have affected recyclable goods differently than nonrecyclable ones. Further, the injury alleged would seem to be more dependent upon the individual practice of manufacturers than upon the ICC ruling. 412 U.S. 669 (1973).
tion of a Texas child support statute subjecting to criminal prosecution any parent who failed to provide support for his or her children. The statute had been construed by the Texas courts to apply to married parents only.

Denying standing to pursue an equal protection challenge, the Court ruled that the requested nondiscriminatory enforcement would not ensure payment of support. Accordingly, the plaintiff failed to meet the requirement, stemming from Massachusetts v. Mellon, that she sustain direct injury as the result of nonenforcement. The Court concluded that the claimed injury would not be redressed adequately by a favorable verdict.

For a variety of reasons, the decision in Linda was not seen as the herald of a substantial retreat in judicial access. First, the opinion was authored by Justice Marshall, generally a proponent of broad standing principles. Second, Linda was presented in the "unique context of a challenge to a criminal statute," thus implicating prosecutorial discretion. Third, and most telling, the decision was handed down approximately three months before United States v. SCRAP, the Court's most liberal standing decision.

Two years later, however, in Warth v. Seldin, Justice Powell used the directness of injury and redressability strains present in Linda to fashion an autonomous causation requirement and created a formidable obstacle to standing for cases in which activities of third parties play a significant part in the accomplishment of effective relief.

In Warth, several groups of plaintiffs were denied stand-

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22 Id. at 618-19.
24 410 U.S. at 618.
25 The Court stated: "Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." Id.
27 410 U.S. at 617.
29 422 U.S. 490 (1975).
ing to challenge allegedly exclusionary zoning ordinances enforced by the town of Penfield, New York. The petitioners claimed that the ordinances purposefully rendered them unable to locate suitable housing in Penfield. While assuming the truth of such allegations, the Court characterized the standing question as whether the plaintiff had alleged such a personal stake in the action "as to warrant his invocation of federal court jurisdiction and to justify exercise of the Court's remedial powers on his behalf." Expanding these remedial concerns to mandate specific pleading of both causation and redressability, the majority demanded:

Petitioners must allege facts from which it reasonably could be inferred that, absent the respondent's restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.

In Warth, the Court reasoned that since the plaintiffs' ability to live in Penfield was necessarily dependent upon the willingness of third parties to build low-cost housing, and since the plaintiffs' exclusion was considered likely to be attributable to the economics of the housing market, affirmative relief would not "benefit" the petitioners. Accordingly, no sufficient causal relationship existed between the contested zoning practices and the asserted injury.

Justice Powell wrote again for the Court in Simon v. Eastern Kentucky Welfare Rights Organization. In Eastern Kentucky, several indigents sued the Secretary of the Treasury and the Commissioner of the Internal Revenue Service, asserting the illegality of a Revenue Ruling according favorable tax treatment to non-profit hospitals that offered indigents emergency room service only. The plaintiffs claimed that the ruling, reversing prior IRS decisions that had required hospitals to treat indigents to the full extent of the

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30 422 U.S. at 498-99.
31 Id. at 504 (emphasis added).
32 Id. at 505-06.
33 Id. at 507.
hospitals' financial capability, resulted in the denial of hospital access to the poor.

Even after assuming that some of the petitioners had been denied services, the Court determined that it was purely speculative whether the exercise of the Court's remedial powers would result in the availability of such treatment. Anchoring firmly in article III Warth's mandate that the plaintiff be able to demonstrate that prospective relief will "remove the harm," the Court stated:

> In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its powers by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.

In other words, the "case or controversy" limitation of Art. III still requires that a federal court act only to redress injury that can be fairly traced to the challenged action of the defendant, and not injury that results from the independent actions of some third party.

Concluding that it was just as plausible that the hospitals in question would elect to forego favorable tax treatment rather than shoulder the costs of expanded treatment of indigents, the Court ruled that the plaintiffs had failed to show that their injuries were likely to be redressed by a favorable verdict.

An examination of the Linda-Warth-Eastern Kentucky trilogy, as well as its more recent progeny, reveals the Court's present theory of the article III requisites for standing. Although much more easily stated than applied, the injury-in-fact causation requirement, in capsule form, seems to demand the following: 1) the plaintiff must demonstrate a dis-

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35 Id. at 43.
36 Id. at 45 (quoting Warth v. Seldin, 422 U.S. 490, 505 (1975)).
37 Id. at 38, 41-42.
38 Id. at 43, 45.
distinct and palpable injury to himself;\textsuperscript{40} 2) although the injury may be indirect,\textsuperscript{41} the complaint must indicate that the injury is fairly traceable to the defendant's acts or omissions;\textsuperscript{42} and 3) the plaintiff's stake in the controversy must ensure that injuries claimed will be effectively redressed by a decision favorable to the plaintiff.\textsuperscript{43}

III. THE INJURY-IN-FACT CAUSATION REQUIREMENTS

A. The "Distinct and Palpable" Injury

The "distinct and palpable injury" requirement is primarily a rephrasing of the injury-in-fact test. The nature of the injury upon which standing may be based remains broad. For example, in both Duke Power Co. v. Carolina Environmental Study Group\textsuperscript{44} and Andrus v. Sierra Club,\textsuperscript{45} the Court reiterated its commitment to entertain actions based upon aesthetic and environmental harms. Further, in Gladstone Realtors v. Village of Bellwood,\textsuperscript{46} standing was granted based on the social injuries resulting from racial steering.\textsuperscript{47} It is clear that for article III purposes, the "distinct and palpable" language does not constitute an automatic bar to an action based upon an injury shared substantially in equal measure by all or a large class of citizens.\textsuperscript{48} If an injury is shared by all or a large class of persons, however, it appears certain that pru-


\textsuperscript{41} See United States v. SCRAP, 412 U.S. 669, 688 (1973).


\textsuperscript{44} 438 U.S. 59 (1978).

\textsuperscript{45} 442 U.S. 347 (1979).

\textsuperscript{46} 441 U.S. 91 (1979).

\textsuperscript{47} Racial steering refers to a real estate sales practice wherein real estate sales personnel allegedly "steer" prospective home buyers to particular residential areas according to their race. This practice perpetuates racially segregated neighborhoods.

\textsuperscript{48} See Gladstone Realtors v. Village of Bellwood, 441 U.S. at 109-15. Thus, the language in SCRAP, 412 U.S. at 686, indicating that the fact that "many persons shared the same injury . . . [does not constitute] sufficient reason," to deny standing would appear to survive, at least under article III.
dential limits will weigh heavily against a grant of standing. Fortunately, this article III prudential concerns dichotomy leaves room for Congressional action to permit access to federal courts based upon an otherwise generalized injury.

The "distinct and palpable injury" requirement, therefore, engenders no serious causation problems in its own right. The remaining standing guidelines that can be gleaned from Warth and Eastern Kentucky, however, threaten to substantially limit judicial access when the injury alleged has been sustained indirectly. The mandate that a plaintiff's injury be fairly traceable to the defendant's actions and the requirement that the injury alleged be adequately redressable by an affirmative decree merit more extensive consideration.

B. Injury Fairly Traceable To Defendant

The requirement that the plaintiff's injury be the result of the allegedly illegal or wrongful conduct of the defendant directly injects the causation element into standing analysis. Chief Justice Burger has characterized the recent causation cases which require not only demonstration of injury but that demand also a "fairly traceable causal connection between the claimed injury and the challenged conduct" as a "subsequent reformulation" of the Baker v. Carr "personal stake" as a "subsequent reformulation" of the Baker v. Carr "personal stake"
standard.

On its face, the "fairly traceable" standard is both predictable and sound. The requirement of injury inherently implies the necessity that the harm in some way be attributable to the defendant. Accordingly, in *Duke Power Co. v. Carolina Environmental Study Group*, the Court correctly demanded a showing that the Price-Anderson Act was a substantial contributing cause of the injuries asserted by the plaintiffs before allowing the environmental group to contest the constitutionality of the Act. Implementation of this aspect of causality, however, has led to a curious intermingling of article III analysis and newly-announced rules of specified factual pleading, an association that has been almost universally criticized by legal scholars.

The most striking example of the implementation of the "fairly traceable" analysis, and certainly the most controversial application of the doctrine, occurred in *Warth v. Seldin*.

Ruling that the plaintiffs lacked the requisite standing to attack the allegedly exclusionary zoning scheme of the town of Penfield, the Court specifically held that "a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him." Since the plaintiffs had failed to identify specific housing that they would either construct or occupy but for the zoning practices, the Court granted a motion to dismiss for lack of standing.

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* Id. at 204.
* 438 U.S. at 77-78.
* 422 U.S. 490 (1975).
* Id. at 508.
This aspect of the Warth decision is troubling for two reasons. First, as Professor Tribe has demonstrated, the rule confronts the victims of exclusionary practices with an ironic Catch 22: the more "successfully exclusionary" the zoning scheme, the less likely that developers will incur the time and expense necessary to design particular projects and thus achieve the essential specificity.\textsuperscript{61} Warth, however, seems to indicate that if an individual chooses not to undertake a construction project prohibited by a zoning ordinance, he will have no standing to challenge the ordinance.\textsuperscript{62} Second, Warth demands, unexplainedly, specificity in pleading that is inconsistent with the liberal standards appropriate to the interpretation of pleadings under the Federal Rules of Civil Procedure.\textsuperscript{63}

The Court's foray in Warth into the field of constitutionally-mandated pleading standards was extended in Eastern Kentucky.\textsuperscript{64} The indigent plaintiffs in Eastern Kentucky had alleged generally that various hospitals were sufficiently dependent upon favorable tax treatment to force an offering of services to indigents if the Revenue Ruling in question were reversed.\textsuperscript{65} Notwithstanding the Court's assumption that the government action encouraged hospitals to provide fewer indigent services, the Court determined that the complaint was insufficient to survive a motion to dismiss because it failed to allege an injury that could be fairly traced to the defendants.\textsuperscript{66}

\textsuperscript{61} L. Tribe, American Constitutional Law § 3-21 (1978).

\textsuperscript{62} See Davis, Standing, 1976, 72 Nw. L. Rev. 69, 74 (1977).

\textsuperscript{63} See Fed. R. Civ. P. 8(f) ("all pleadings shall be so construed as to do substantial justice"); Fed. R. Civ. P. 8(e)(1) ("each averment of a pleading shall be simple, concise and direct, [and] no technical forms of pleading or motions are required").


\textsuperscript{65} Id. at 42-43 (1976).

\textsuperscript{66} Id. at 43, 45. It is noteworthy that the Eastern Ky. district court case proceeded to the summary judgment stage. Accordingly, Justices Brennan and Marshall, concurring in the judgment but disagreeing with the majority's standing analysis, indicated that dismissal on the basis of summary judgment was appropriate since the plaintiffs had made no factual showing that the hospitals in question were being affected by the ruling. Id. at 54 (Brennan, J., concurring). On the other hand, Justice Powell, writing for the majority, was willing to assume that government action encouraged the hospitals to provide fewer services to indigents. Id. at 42-43 n.23. He nonetheless concluded specifically that the complaint was insufficient to withstand a motion to dismiss. Id. at 46.
Whether the hospitals' failure to offer the desired medical treatment was due to the changed Revenue Ruling was termed, at best, a speculative inference.\(^67\)

*Warth* and *Eastern Kentucky*, therefore, seem to reflect both a preoccupation with specific pleading and a potential hostility toward inferences of indirect causation of injury. Under current pleading rules, plaintiffs generally are given the benefit of every conceivable reading of their complaint, plus the benefit of the inferences arising from it, before the complaint is defeated by a motion to dismiss.\(^68\) Yet, in the words of the late Justice Douglas,\(^69\) the *Warth* and *Eastern Kentucky* majorities appeared to read the complaint and the record with "antagonistic eyes." Certainly the detailed allegations demanded in *Warth* had not been required in earlier land use decisions.\(^70\)

Contrary to Justice Brennan's gloomy prediction,\(^71\) however, *Warth* has not resulted in a permanently closed federal door to exclusionary zoning challenges. In *Village of Arlington Heights v. Metro Housing Development Corp.*,\(^72\) the Court entertained a challenge to an allegedly exclusionary zoning scheme; in *Arlington Heights*, the plaintiff could point to a specific project it intended to construct, thereby lending the "essential dimension of specificity" supposedly served by the pleading requirement.\(^73\)

Additionally, the demanded specificity in pleading has not been uniformly applied in subsequent cases. In *Gladstone Realtors v. Village of Bellwood*,\(^74\) for example, various plaintiffs were allowed to contest the steering practices of the defendants, based upon claimed economic and social harms to

\(^{67}\) Id. at 42-43.


\(^{71}\) 422 U.S. at 528 (Brennan, J., dissenting).


\(^{73}\) Id. at 263 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974)).

\(^{74}\) 441 U.S. 91 (1979).
the community. No showing was made, nor was one required, that either specific persons or groups of persons would have located in the community but for the alleged practices.

Therefore, one hopes the emphasis on specific pleading so prevalent in *Warth* and *Eastern Kentucky* will be given limited use. Possibly the analysis of these two cases will be limited primarily to examination of land use restrictions, which by their nature generate a broad range of consequences and indirect results. To require plaintiffs, as in *Eastern Kentucky*, to plead with specificity the effects of a tax ruling on particular hospitals in order to withstand a motion to dismiss, effectively sounds a death knell to such actions. Further, such a skeptical analysis of the allegations of a complaint is unnecessary in any event. The Court previously has indicated in response to a standing claim based upon allegations of indirect injury\(^7\) that "if these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact."\(^8\)

Only an optimist will assume, however, that injuries as indirect in nature as those recognized by the Court in *SCRAP*\(^7\) will provide a basis for standing after *Warth* and *Eastern Kentucky*. Although in the *Eastern Kentucky* opinion Justice Powell was careful to distinguish rather than to overrule *SCRAP*,\(^8\) the inferences necessary to move from the defendants' action to the plaintiffs' injury in both *Warth* and *Eastern Kentucky* were considerably less attenuated than were those accepted in *SCRAP*. Admittedly, some limit on properly cognizable indirect injury may indeed be appropriate under article III if the injury-in-fact test is to remain viable. Demands for such concrete allegations of fact at the pleading stage, however, serve no similar article III interest.

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\(^8\) 412 U.S. 669, 689 (1973).

\(^7\) See notes 15-18 supra and accompanying text for a discussion of the claims presented by the plaintiffs in *SCRAP*.

\(^8\) 426 U.S. 26, 45 n.25 (1976).
C. The Redressability Requirement

The third and potentially most troubling aspect of standing analysis under article III is the Court's requirement that the plaintiff demonstrate that his claimed injury is adequately redressable. The redressability standard has been described in a variety of ways. Most commonly, the Court employs a somewhat relaxed standard, demanding that the plaintiff demonstrate injury that is likely to be redressed if the requested relief is granted.\(^7\) Similarly, Chief Justice Burger has described the causation cases as demanding no more than a "substantial likelihood that the relief requested will redress the injury."\(^8\) Yet in both Warth and Eastern Kentucky, the Court indicated that the plaintiff must "establish that, in fact...prospective relief will remove the harm."\(^9\) Even these variations in the language describing the requirement hint at the inconsistency of the standard's application.\(^8\)

The redressability requirement is firmly rooted in the case or controversy requirement of article III. If there were no redressability hurdle, federal courts could become embroiled in purely advisory opinions, effectuating no change in the plaintiff's status whatsoever. Accordingly, if a plaintiff can make no showing that an affirmative decision will improve his position, "exercise of its power by a federal court would be gratuitous and thus inconsistent with the article III limitation."\(^10\) Redressability analysis is, therefore, keyed to the "proper—and properly limited—role of the courts in a democratic society."\(^11\)


\(^8\) 438 U.S. 59, 75 (1978).

\(^9\) Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 45 (1976); Warth v. Seldin, 422 U.S. 490, 505 (1975). Additionally, in Singleton v. Wulff, 428 U.S. 106, 124 n.3 (1976) (Powell, J., concurring in part, dissenting in part), the redressability doctrine was characterized as a tool to insure that the plaintiff had a sufficient stake in the controversy to guarantee that the "exercise of the court's remedial powers is both necessary and sufficient to give him relief." Id.

\(^10\) See notes 92-134 infra and accompanying text for a discussion of the Court's inconsistent application of the redressability standard.


\(^12\) Warth v. Seldin, 422 U.S. 490, 498 (1975).
Consequently, consideration of the potential for effective relief caused the Court to deny standing to the plaintiffs in *Linda, Warth* and *Eastern Kentucky*. The mother of the illegitimate child in *Linda* was considered unable to demonstrate that her injury, the lack of child support, would be removed by nondiscriminatory enforcement of the statute and by concomitant criminal action pursued against the child's father. Similarly, the majority in *Warth* was unconvinced that a declaration that Penfield's zoning scheme was unconstitutional would result in available housing for the plaintiffs, since the existence of such low cost housing would be dependent upon both third parties and housing market conditions. Finally, in *Eastern Kentucky*, the Court was unwilling to assume that a judicially ordered change in the requirements for tax-exempt hospital status would result in actual medical care for the indigent plaintiffs.

The requirements that the plaintiff's injury be fairly traceable to the defendant's action and that the injury sustained be likely to be redressed by a favorable decision constitute the two tests by which the Supreme Court determines whether a sufficient causal connection exists between the plaintiff's injury and the alleged illegal activity of the defendant. Certainly a substantial correlation exists between the concerns for directness of injury and redressability; the less an injury is traceable to the defendant, the more likely it is that a decree against him will fail to provide effective relief. Despite an occasional confusion of the two doctrines in judicial opinions,85 both their aims and modes of analysis are distinct.

The interests served by the two tests are divergent. Requiring that an injury be "fairly traceable" to the defendant, at least as that term has been applied in the specific pleading analysis of *Warth* and its progeny, serves not only to examine whether the defendant caused the injury but also appears to

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85 See, e.g., Chief Justice Burger's statement in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978): "The 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." It is certainly arguable that the confusion evidenced by the above statement pervaded the standing analysis in *Duke Power*. 
be primarily aimed at providing that "essential dimension of specificity" that informs judicial decision-making.\textsuperscript{6}

The redressability standard, however, is solely attributable to concern for the appropriate role of the judiciary in a democratic society. It presents the flip side of \textit{Marbury v. Madison}.\textsuperscript{7} the federal judiciary is empowered to pass on the constitutionality of legislation only when necessary to decide an active controversy before it, and no such power exists if judicial action will not affect the controversy.

The divergence between the methods of analysis under the two standards can best be seen by examining the facts of \textit{Duke Power Co. v. Carolina Environmental Study Group}.\textsuperscript{8} The plaintiffs in \textit{Duke Power} contested the constitutionality of the Price-Anderson Act,\textsuperscript{9} the statute limiting the potential liability of private nuclear power companies. To demonstrate injury in fact, the environmental group alleged a full panoply of presently existing harms that had resulted from the operation of a neighboring nuclear power plant, including low-level radiation and altered water temperatures.\textsuperscript{10} Whether these injuries were "fairly traceable" to the federal government depended upon a showing that the Price-Anderson Act was a substantial cause of the construction of the nuclear plant in question. Determining that the legislation was a significant factor in the development of the private nuclear power industry, the Court ruled that the injuries resulting from operation of the plant were fairly traceable to the Nuclear Regulatory Commission.\textsuperscript{11}

Whether the plaintiffs' injuries in \textit{Duke Power} would have been effectively redressed by a determination that the Price-Anderson Act was unconstitutional is quite a different matter. Assuming, for example, that the nuclear plant in ques-

\textsuperscript{7} 5 U.S. (1 Cranch) 137 (1803). See notes 135-39 infra and accompanying text for a discussion of the theory of judicial review espoused in \textit{Marbury}.
\textsuperscript{8} 438 U.S. 59 (1978).
\textsuperscript{10} 438 U.S. at 73.
\textsuperscript{11} Id. at 74-78.
tion was substantially constructed or even operational, it is not at all clear that the injuries sustained through the operation of the plant would cease upon the invalidation of the Price-Anderson Act. Rather than examining whether the statute was a contributing cause of the plant's construction, redressability analysis entails considering the probability that the private power company would shut down an operational nuclear plant, thereby absorbing the economic loss entailed by such a closure, if the limitation of liability imposed in the Price-Anderson Act were removed.

Redressability as an autonomous standing requirement, therefore, determines those instances in which (assuming that the plaintiff has sustained a distinct injury that is fairly traceable to the defendant) standing should be denied because the alleged harms may not be removed by a favorable decree. The remainder of this article will consider the propriety of the Court's recent applications of the redressability doctrine and will address the article III interests affected by such decisions.

1. The Application of the Redressability Requirement—Generally

The description of the redressability requirement is certainly simple enough. As previously indicated, article III demands that a plaintiff demonstrate injury which is "likely to be redressed," "substantially likely to be redressed," or which "will be removed" if the requested relief is forthcoming. Similarly, the rationale of the requirement, an appropriate concern for the role of the federal judiciary in a democratic society, is easily understood. The actual application of the redressability standard by the Burger Court in the last five years, however, has been neither sound nor readily com-

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92 See notes 79-81 supra and accompanying text for a discussion of the different redressability formulas employed by the Court.


prehensible. Rather than reflecting a studied delineation of article III principles, the decisions applying the redressability requirement appear to be explainable only by the Courts' ultimate desire, or lack thereof, to address the merits of particular cases.

Concern for redressability as a valid aspect of causation-analysis necessarily involves the consideration of two polar interests: minimizing friction with other branches of government and providing remedies for injuries sustained by plaintiffs. To the extent that injury can be only indirectly traced to the defendant, the possibility that judicial relief will not remedy the alleged harm increases, thereby implicating core article III interests. By exercising its power in a gratuitous fashion, a federal court not only wastes its time and assets, but far more importantly, it runs the risk of declaring void the activities of other branches of state and federal government, without the necessity engendered by an active case or controversy. The countermajoritarian friction inherent in a constitutional democracy is, thereby, needlessly increased.

Weighed against this mandatory concern in applying the redressability standard, however, is the assumption, necessitated by the threshold standing inquiry, that the plaintiff has been harmed and that the harm is in some manner traceable to the defendant. Further, because of the state action requirement and the nature of federal question indirect injury claims, the harm-causing defendant will almost certainly be some branch of government.96 For this reason, redressability has been cast in terms of the likelihood that judicial relief will be effective rather than defined in absolute fashion.

In examining the likelihood of adequate relief, however, the Court has been far from consistent.97 Not only is it questionable whether the redressability standards announced in Linda, Warth and Eastern Kentucky justify the results in those cases, but those very standards have been applied dif-

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96 Litigation between private parties presents very little difficulty in standing analysis. The main body of "case or controversy" law comes from cases considering the constitutionality of statutes or the legality of administrative actions.

97 See notes 91-132 supra and accompanying text for a discussion of the Court's inconsistency in its application of the redressability standard.
ferently and have even been conveniently ignored in subsequent decisions.

The Court found redressability lacking in *Linda*, for example, because the mother of the illegitimate child was not considered "likely" to have her claimed injury redressed; she was not "likely" to obtain the desired child support. By enacting a statute calling for child support by married parents, however, Texas apparently thought that such criminal sanctions would "likely" result in payment. Nonetheless, the Court in *Linda* concluded that a ruling declaring discriminatory enforcement of the Texas child support statute unconstitutional would result only in the jailing of the delinquent father. Payment of child support in lieu of jail was deemed "speculative." Justice White's point in dissent that he had "always thought our civilization has assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct" was ignored by the majority.

Similarly, the plaintiffs in *Eastern Kentucky* presented injuries which were deemed unlikely to be redressed. Again, it was considered "purely speculative" whether the denial of medical services to indigents was attributable to the amended Revenue Ruling that accorded favorable tax treatment to hospitals whether or not medical services were provided to indigents. The underlying assumption of the opinion appears to be that whether individuals and corporations will conform their activities so as to take advantage of tax incentives is speculative. Rather, in the Court's language, "it is just as plausible that the hospitals . . . would elect to forego favorable tax treatment to avoid the . . . financial drain of an increase in the level of uncompensated services."

The Court's conclusion would appear to contradict the Congressional rationale behind allowing tax advantages only to charitable hospitals. No doubt the theory for allowing tax deductions for charitable contributions is that individuals, by acting to take advantage of such opportunities, ultimately will

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99 Id. at 621.
101 Id. at 43.
relieve the government of a portion of the burden of meeting public need. Indeed, one might appropriately wonder what Justice Powell believes to be the reason for Congress' frequent use of favorable tax treatment, if not the belief that conduct can effectively be encouraged or discouraged by such legislation.

The curious aspect of both the *Linda* and *Eastern Kentucky* decisions is that the Court's redressability decisions were in direct contradiction to the legislative intent to encourage the desired conduct through changed legal status. Congress obviously believed that hospitals would alter their behavior in order to maintain the favored tax status. Texas, just as obviously, believed that delinquent parents would be likely to support their children if legal sanctions are imposed. The plaintiffs in *Linda* and *Eastern Kentucky* were denied standing not because effective relief was not likely, but because effective relief was not absolutely certain. Yet the relevant legislative declarations and the record in each case clearly demonstrated that adequate relief was probable. Thus the Supreme Court appears to have misapplied the redressability requirement even in the primary cases in which it was

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102 Judge Bazelon discussed the rationale for charitable contribution deductions in *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972), stating that “[t]he rationale for allowing the deduction of charitable contributions has historically been that by doing so, the Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government.” *Id.* at 456.

103 See Davis, *Standing*, 1976, 72 Nw. L. Rev. 69 (1977). Professor Davis strongly disagrees with the results in *Linda*, *Warth* and *Eastern Kentucky*:

The reasons for disagreeing with all three cases—*Linda*, *Warth* and *Eastern Kentucky*—are very strong. In each case the plaintiffs were probably hurt by the governmental action they sought to challenge, but in each case proving the causal relation was difficult or impossible. Linda's child was discriminated against but Linda was denied standing to challenge the discrimination. The *Warth* plaintiffs wanted low cost housing and the ordinance prohibited such housing; the builders were denied standing even though they wanted to build the housing the ordinance prohibited. The indigents in *Eastern Kentucky* were denied hospital service but could not prove that the amended ruling helped influence the denial. In each of the three cases, the probability that the governmental action caused the harm was held insufficient for standing. The burden of proving the causation was too much for any of the plaintiffs.

*Id.* at 74.
formulated.

The *Warth* decision can be similarly criticized for demanding certainty, rather than probability, of effective relief. Not only did a group of plaintiffs actively seek the low-cost housing prohibited by the ordinance, but also a group of plaintiff builders wanted to construct the type of housing that was barred. Since the plaintiffs failed to identify specific housing that would be constructed if the ordinance were struck down, however, redressability was considered speculative.

*Warth* is also troubling on another front. When viewed in the threshold standing posture, *Warth* necessarily assumes that the Penfield ordinance is exclusionary in violation of the equal protection clause. Standing is denied, however, because the plaintiffs did not demonstrate that they would be able to obtain housing in Penfield absent the ordinance. Yet even if that assumption is correct, it takes little cognizance of the fact that the Penfield ordinance poses a complete bar to any resident who desires to seek low-cost housing or to anyone who seeks to persuade others to construct it in the future. If exclusionary, the Penfield ordinance poses a legal impediment to the opportunity to obtain housing which is an injury in its own right. Certainly, in *Regents of the University of California v. Bakke* (discussed extensively below), the Court considered a legally sanctioned denial of opportunity to be injury in fact.

If the *Warth* demand for certainty of concrete relief were carried to extremes, much of equal protection analysis would be put in jeopardy. Consider, for example, *Craig v. Boren*,

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104 422 U.S. 490, 515 (1975).
in which the Court struck down, as contrary to the equal protection of the law, an Oklahoma statute that allowed eighteen year-old females to drink intoxicants, while males were required to be twenty-one years old before being considered of legal drinking age. Commensurate with Craig's equal protection analysis, Oklahoma was free to "return to the drawing board" and require that all drinkers be twenty-one. Such being the case, were the injuries of the eighteen to twenty year-old male plaintiffs adequately redressable? One can conclude that standing is appropriate because the injury is the discrimination, not the unavailability of alcohol, and clearly the discrimination would be redressed by a favorable decision. Yet, assuming that Penfield's ordinance is discriminatory and, therefore, deprives low income families of the opportunity to reside in Penfield, would not an affirmative decree clearly remove that injury of discrimination, even if not ensuring the availability of housing?

Warth's preoccupation with redressability, therefore, is misplaced. Denial of opportunity is itself a recognizably "distinct and palpable injury" that would be redressed by an affirmative decree. Accordingly, the Court's only inquiry should have been whether the plaintiffs demonstrated a sufficient personal stake to escape classification of their claim as a generalized grievance. No doubt the plaintiffs in Warth carried that burden.

2. The Inconsistent Application—Subsequently

Unfortunately, a questionable internal logic has not been the only shortcoming of the Burger Court's causation analysis. The redressability standard announced in Linda, Warth and Eastern Kentucky appears to have been applied in a substantially different fashion in subsequent cases in which the Court may have been more anxious to address the merits of the plaintiffs' claims.

The next major case in which the Court gave extensive consideration to the redressability issue was Duke Power Co. v. Carolina Environmental Study Group. As previously in-
CAUSATION AS A STANDING REQUIREMENT

1980-81] Causation as a Standing Requirement

109 the plaintiffs in *Duke Power* contested the constitutionality of the Price-Anderson Act, which limits the potential liability of private nuclear power companies in the event of catastrophe. In order to establish injury in fact, the plaintiffs alleged a variety of present injuries resulting from the operation of a neighboring nuclear plant, including the emission of low-level radiation and other environmental harms.

Speaking for the majority, Chief Justice Burger expressly determined that the injuries claimed were fairly traceable to the Price-Anderson Act. The trial court had made extensive findings based upon both expert testimony and the legislative history of the Act which demonstrated that a but for causal relationship existed between the limitation and the construction of private nuclear facilities. The trial court also had found that the nuclear plant in question was substantially likely to be neither completed nor operated absent the limitation. The Supreme Court concluded that such findings were not clearly erroneous and determined that the injuries claimed were substantially likely to be redressed by a favorable decision.

The trial court findings upon which the Supreme Court relied, however, primarily outlined a causal connection between the Price-Anderson limitation and the original decision by the private sector in general, and Duke Power Company in particular, to enter the nuclear power industry. Further, in sustaining the trial court’s determination, the Supreme Court focused on the industry’s general unwillingness to commit itself to nuclear power absent the limitation. The analysis set forth in *Linda, Warth* and *Eastern Kentucky*, however, demands not only a showing that the governmental activity helped cause the injury but also requires a demonstration that the requested relief will redress the claimed injury.

In *Duke Power*, the Supreme Court conveniently ignored

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109 See notes 89-90 supra and accompanying text for a discussion of the plaintiffs' allegations in *Duke Power*.
111 *Id.* at 220.
113 *Id.* at 75-77.
the fact that the two nuclear plants that were the sources of the plaintiffs' injuries were already substantially constructed. No consideration was given by the Court to the more difficult question of whether, assuming the removal of the Price-Anderson limitation, Duke Power Company would decide to let two substantially developed nuclear power plants sit idle. Only if such a decision were made would the plaintiffs' injuries be remedied.

Whether or not the plaintiffs' injuries would be adequately redressed by a favorable decree ultimately would depend solely upon the decision of a third party, Duke Power Company. Moreover, unlike the third parties upon whom relief was dependent in Linda and Eastern Kentucky, Duke Power Company apparently would serve its financial interests by operating the plants even without the limitation and thereby would perpetuate the injuries to the plaintiffs. In short, the record and common sense clearly indicated a lack of redressability.

The result is that the plaintiffs in Linda and Eastern Kentucky, who were quite likely to have had their injuries adequately redressed, were denied standing, while the Duke Power plaintiffs, who apparently would have been unaffected by a favorable decree, were granted standing. The result can be explained only by the Court's obvious desire to reach the merits of the Price-Anderson claim and by its equally obvious hesitancy to entertain the actions in Linda, Warth and Eastern Kentucky.

The 1979 decision in Orr v. Orr is no easier to reconcile

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115 The record revealed direct testimony by Duke Power officials that they would attempt to proceed with the plants even in the absence of Price-Anderson. 438 U.S. at 77 n.22. Interestingly, the majority in Duke Power made no attempt to rebut the following statement made by Justice Rehnquist in his concurring opinion:

If Duke decided to proceed with construction despite a declaration of the statute's unconstitutionality, there would be nothing that the Commission could do to aid the appellees. Where the prospect of effective relief against a defendant depends on the actions of a third party, no justiciable controversy exists against that defendant.

Id. at 101.

with the Court’s earlier declarations on redressability. *Orr* presented a successful equal protection challenge to an Alabama statutory scheme that allowed the recovery of alimony against husbands but not against wives. Particularly troubling for purposes of redressability analysis was the fact that the alimony obligation at issue was fixed by a prior agreement between the parties, which appeared to be enforceable under state law.\(^\text{117}\)

Thus, the majority was forced to acknowledge that “despite the unconstitutionality of the alimony statutes, Mr. Orr may have a continuing obligation to his former wife based upon that agreement.”\(^\text{118}\) The Court in *Orr*, however, never addressed the redressability issue. Rather, the contractual obligation was examined and rejected as an “independent and adequate” state ground for the decision since the state tribunal had elected to reach the federal constitutional claim.\(^\text{119}\) The fact that the Alabama court addressed only the constitutional issue, and not the contractual agreement, obligated the Supreme Court to assume jurisdiction despite the existence of an independent state ground.\(^\text{120}\) But no state court determination can create article III jurisdiction where it does not exist. If redressability is required under article III as *Eastern Kentucky* indicates, and if Mr. Orr would sustain an alimony obligation regardless of the outcome of his constitutional claim, the behavior of the Alabama courts would appear irrelevant.

Curiously, *Orr* presented an injury that, as reflected by the record, was unlikely to be redressed. Since the plaintiff’s alimony obligation was enforceable in contract even if the statute were ruled unconstitutional, the plaintiff probably would not benefit from an affirmative decree, as required by *Linda, Warth* and *Eastern Kentucky*. Yet the Court apparently purposely chose to ignore the redressability analysis.\(^\text{121}\)

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\(^{117}\) *Id.* at 275.

\(^{118}\) *Id.*

\(^{119}\) *Id.* at 276.


\(^{121}\) Justice Rehnquist raised the redressability issue in dissent, but his remarks went unanswered by the majority, consisting of Justices Brennan, Marshall, White, Stewart, Blackmun and Stevens.
Certainly such diametrically-opposed decisions as *Eastern Kentucky* (where the Court strained to apply redressability analysis despite the fact that the standing issues had not been pressed by either the parties or the courts below)\(^{122}\) and *Orr*, where the record demonstrated a lack of redressability that the Court chose to ignore, contribute little guidance to federal district judges and also inspire little confidence in the "neutral principles"\(^{123}\) of the Supreme Court's case or controversy analysis. Moreover, the primary architect of the causation doctrine, Justice Powell, has not consistently applied its principles. Not only did Justice Powell join the majority opinion in *Duke Power*, but he specifically rejected a redressability challenge to standing in *University of California Regents v. Bakke*.\(^{124}\)

Alan Bakke, in his now famous challenge to the affirmative action program of the University of California at Davis Medical School, was unable to demonstrate that he would have been accepted to medical school absent the special admissions program for minority students. Accordingly, several amici suggested, reasonably under *Warth* and *Eastern Kentucky*, that Bakke lacked standing because he failed to show that his injury would be redressed by a favorable decision. The California Supreme Court had avoided the redressability hurdle by ruling that since the University had discriminated against Bakke on the basis of race, the burden of proof shifted to the University to demonstrate that Bakke would not have been admitted even if there were no affirmative action program.\(^{125}\)

Cognizant of his declaration in *Warth* that a plaintiff must "establish that, in fact, . . . prospective relief will remove the harm,"\(^{126}\) Justice Powell was unwilling to base Bakke's standing on a shifted burden of proof. Justice Powell took the position that:

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\(^{125}\) Bakke v. Regents of the Univ. of Cal., 553 P.2d 1152, 1172 (Cal. 1977).

\(^{126}\) 422 U.S. at 505.
[E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. 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. . . . [T]he trial court found such an injury, apart from failure to be admitted, in the University’s decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. . . . Hence the constitutional requirements of Art. III were met. The question of Bakke’s admission vel non is merely one of relief.¹²⁷

Accordingly, Justice Powell’s opinion in Bakke is simply irreconcilable with his opinion in Warth. The plaintiffs in Warth challenged an ordinance that was assumed to be exclusionary in purpose. They were denied the opportunity to live in Penfield in the same way Bakke was denied the opportunity to compete for all 100 places at Cal-Davis. Yet the Warth plaintiffs were denied standing because they were unable to demonstrate that they would have been successful in obtaining housing in Penfield even if there were no exclusionary ordinances.

In Bakke, however, the Court found that the plaintiff sustained injury merely from the act of exclusion, irrespective of whether he could have achieved entry in his own right. Denial of opportunity, therefore, constituted injury in fact in Bakke, but it did not in Warth. One wonders why the question of the plaintiffs’ potential inability to actually obtain adequate housing in Penfield was not also “merely one of relief.”¹²¹²⁸

Bakke and Warth demonstrate the complicated relationship between redressability and equal protection analysis.¹²⁹

¹²⁷ 438 U.S. at 280-81 n.14.
¹²⁸ Id.
¹²⁹ The interplay between redressability and equal protection analysis is complex. If injury is based solely upon the fact of discriminatory state action, the plaintiff’s claim comes dangerously close to being a generalized grievance against abstract government illegality. Yet if injury is measured solely by the successful concrete attainment of the desired result (payment for alimony in Linda, for example, or the location of housing in Warth), underinclusive equal protection analysis is jeopardized. Need a plaintiff like the husband in Orr show that if the alimony statute is struck down, the legislature will not remedy the equal protection violation by imposing alimony obligations on both males and females? Arguably, at least some consideration
In the equal protection context, not only the redressability issue but also the nature of the injury itself is subject to judicial manipulation. In Warth, the Court held the injury to be redressed was the actual inability to obtain housing in Penfield, not the denial of opportunity to live in Penfield. Bakke, however, had to demonstrate only that his denial of opportunity was redressable, not that he would have been admitted to medical school absent the affirmative action program. Accordingly, the potential for abuse, obviously present in the Court's redressability analysis, is compounded.

The actual application of the redressability standard demonstrates in concrete terms the distressing inconsistency in the Court's causation analysis. If, indeed, the Court is merely examining whether a claimed injury is "likely to be redressed," a strong case can be made that Duke Power, Orr and Bakke presented more substantial redressability concerns than did Linda, Warth and Eastern Kentucky. The differing results in the causation cases, therefore, are not explainable by the likelihood of redressability, but rather by the desire to reach the merits in particular cases. Having already produced one false start in affirmative action, the Court obviously desired to reach the issues presented in Bakke. Similarly, the import of the Price-Anderson Act to the private nuclear power industry necessitated a ruling on its constitutionality, thereby resulting in standing in Duke Power. Additionally, redressability problems in Orr most likely were ignored because the case presented a seemingly appropriate vehicle for the Court to continue to fashion a body of law on gender-based discrimination.

must be given to discrimination, or the denial of opportunity, as an injury in its own right. Further, the interplay suggests the undesirability of a rigid redressability standard.

130 In Duke Power, the record demonstrated the clear likelihood that the plants would continue in operation, thus perpetuating the plaintiffs' injuries. The majority in Orr effectively admitted that the plaintiff's injury was non-redressable and yet proceeded to the merits. Alan Bakke clearly failed to carry the burden of demonstrating that he would be admitted to Cal-Davis but for the special admissions program, yet he was granted standing.

131 A challenge to a preferred admissions program of the University of Washington Law School was declared moot in Dufunis v. Odegaard, 416 U.S. 312 (1974).

132 Sex discrimination analysis has certainly been one of the most active areas of
The undesirability of such ad hoc standing analysis is readily apparent. Standing analysis is a threshold inquiry in which clear guidelines are particularly necessary. Eastern Kentucky reached the Supreme Court before the standing issue was raised seriously. At that point, after two carefully considered lower court opinions on the merits and approximately five years of litigation, the entire suit was dismissed. In Duke Power, the trial judge held a four-day trial on the causation issue. And yet the Supreme Court appears to have applied, or refused to apply, causation analysis almost at its whim. Case or controversy requirements can hardly be characterized as "passive virtues" when they are applied only if they coincide with the Court's emotional reaction to the merits.

IV. REDRESSABILITY — A RECONSIDERATION

The introduction of a redressability requirement is motivated by an appropriate aversion to "gratuitous" exercises of judicial authority. A purely gratuitous or advisory decision is inherently inconsistent with the theory of judicial review espoused in Marbury v. Madison. Chief Justice Marshall argued that the power to consider the constitutionality of legislative enactments flows from the ability, indeed the duty, of the Court to apply the entire existing body of law (including interest for the Burger Court. See Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); Califano v. Westcott, 443 U.S. 76 (1979); Califano v. Webster, 430 U.S. 313 (1977); Craig v. Boren, 429 U.S. 190 (1976).


The principal cornerstones of the debate concerning the propriety of the use of avoidance techniques are the exchanges between Professors Bickel and Gunther. See Bickel, The Least Dangerous Branch (1962); Gunther, The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expendiency in Judicial Review, 64 COLUM. L. REV. 1 (1964).

Certainly noteworthy is Justice Rehnquist's comment made in dissent in Orr v. Orr:

Much as Caesar had his Brutus, and Charles The First his Cromwell, Congress and the States have this Court to ensure their legislative acts do not run afoul of the limitations imposed by the United States Constitution. But this Court has neither a Brutus nor a Cromwell to impose a similar discipline on it.

440 U.S. at 300 (Rehnquist, J., dissenting).

5 U.S. (1 Cranch) 137 (1803).
the Constitution) to active controversies affecting the vital interests of litigants. Conversely, if the injuries of a plaintiff will remain unaffected by judicial intervention, the power to review the validity of legislation vanishes. To remain consistent with the founding fathers' repeated rejection of the "Virginia Plan" embodying a general Counsel of Revision, some redressability analysis is mandated.

Even apart from strict analysis of judicial power, the avoidance of gratuitous opinions reflects a healthy concern for judicial deference in a tripartite system of government. The tensions necessarily resulting from judicial decisions voiding the acts of co-equal, and more democratic, branches of government obviously should not be encountered needlessly. The "practical wisdom" of avoiding unnecessary conflict was perhaps voiced most forcefully by Justice Frankfurter:

Courts do not review issues, especially constitutional issues, until they have to. . . . In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary. In part, it is founded on the practical wisdom of not coming prematurely or needlessly in conflict with the executive or legislature.137

It is to the "proper—and properly limited—role of the courts in a democratic society" that redressability analysis is directed.

The appropriate concern for judicial restraint, however, is but a part of the necessary article III analysis in cases such as Linda, Warth and Eastern Kentucky. To reach the redres-

136 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring). See also Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-48 (1935) (Brandeis, J., concurring). In Ashwander, Justice Brandeis outlined the methods which are used regularly to avoid unnecessary decisions of constitutional issues. He remarked:
It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.
Id. at 345.
sability issue, a plaintiff must first have demonstrated the existence of distinct and palpable injury that is in some manner traceable to government action assumed to be illegal. Further, the redressability cases tend to present complex interrelationships between private and government activity that make difficult absolute proof that the harm will be removed. Accordingly, the Court must analyze the dangers that a decision will be merely gratuitous in a context of admitted injury that may or may not be redressable. Consequently, a number of factors other than judicial restraint enter the redressability equation.

Certainly one of the primary functions of the federal judiciary is to provide remedies for cognizable injuries sustained at the hands of the state. Accordingly, when the Court refuses judicial review because of redressability concerns, it does so at the peril of abdicating one of its foremost responsibilities to the American populace. Since the inception of the republic, it has been a fundamental tenet of American jurisprudence that no substantial right should exist without a corresponding remedy. Consequently, a strong public perception exists that legal wrongs ultimately will be corrected by the courts.

Denials of standing based upon a perceived lack of

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139 Indeed, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), itself suggests the conflicting interests presented by the redressability cases: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." Id. at 58.

140 Consider, for example, the remarks Senator Kennedy made before the Senate Judiciary Committee during the hearings on proposed Senate Bill 3005:

Legal rights—whether conferred by the Constitution, by statute, or by judicial interpretation—are meaningless without some means of judicial enforcement. Yet, the recent resurgence of standing as a barrier to the maintenance of important litigation has created precisely this anomalous situation: there are indeed rights which the courts have [sic] effectively said there can be no remedy.


141 In Warth, Justice Douglas wrote in dissent that "the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need." 422 U.S. at 519 (Douglas, J., dissenting in part).
redressability assume a legal right that is in some way being violated by government action. Concern solely with the need for restraint, therefore, takes too little cognizance of the judiciary's traditional role as mediator between the other branches of government and the citizenry. The Court should be as concerned that all government-imposed injuries actually receive protection as it is with minimizing friction with other branches of government. The judicial responsibility to afford relief to injuries sustained as the result of illegal government activity argues strongly against the standard of virtual certainty of effective relief employed in *Linda, Warth* and *Eastern Kentucky*.

Further, the Court's institutional role as a check on the legislative and executive branches is diminished when the Court refuses to hear claims based on distinct injury resulting from government illegality.\textsuperscript{142} Consistent refusals to review alleged government illegality serve to reduce the effectiveness of the federal judiciary as a tool in our system of checks and balances. Institutional factors, therefore, similarly weigh against the adoption of a strict redressability standard.

The unique character of the federal judiciary "to say what the law is"\textsuperscript{143} argues against a stringent redressability requirement. No doubt, the Supreme Court has moved away from the pure legal rights model of *Marbury* in modern constitutional adjudication. Decisions demanding the busing of school children, the reapportionment of legislatures and the overhauling of prisons are only loosely analogous to ordinary litigation.\textsuperscript{144} This increase in the scope of Supreme Court de-

\textsuperscript{142} Alexander Hamilton described the role of the federal judiciary as a counterbalance to the illegal activity of other branches of government by stating: "[T]he firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such [unjust and partial] laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them..." *The Federalist* No. 78 at 470 (New Am. ed. 1961).

James Madison expressed a similar sentiment: "In framing a government which is to be administered by men over men the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." *The Federalist* No. 51 at 322 (New Am. ed. 1961).

\textsuperscript{143} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 158 (1803).

\textsuperscript{144} See Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE
sion-making has led to an increased expectation on the part of the public that the highest court will provide the final answer on the legality of government action.\textsuperscript{146} The Court's causation cases threaten to unduly dampen this healthy public expectation.

Along with such institutional concerns, the possibility exists that a strict redressability standard gives insufficient consideration to the fact that standing is being denied because the claimed government action is merely a contributing, rather than a necessary, cause of injury. However, at least in the context of discrimination, the Court has been very intolerant of state contribution to private harm. \textit{Reitman v. Mulkey,}\textsuperscript{146} for example, represents a successful constitutional challenge to state action encouraging private racial discrimination. Similarly, in \textit{Peterson v. City of Greenville,}\textsuperscript{147} one of the sit-in cases, the Court overturned a variety of trespass convictions because the state had contributed to the private decision to discriminate. Chief Justice Warren specifically determined that the convictions could not stand "even assuming ... that the manager would have acted as he did independently."\textsuperscript{148}

These opinions can be criticized for stretching the concept of state action to the limit. If, however, the states' "encouragement" activities had been challenged in actions for declaratory judgments, would standing have been denied because private individuals might choose to discriminate anyway? Presumably, the cases demonstrate that at least with regard to racial discrimination, the injury most repugnant to a free society, even contributing causation by the state is intolerable.

Additionally, a strict application of the redressability standard tends to insulate government action from judicial review in a manner inconsistent with our framework of checks and balances and the Supreme Court's role as the ultimate

\textsuperscript{146} See A. Bickel, \textit{The Least Dangerous Branch} 14 (1962).
\textsuperscript{146} 387 U.S. 369 (1967).
\textsuperscript{147} 373 U.S. 244 (1963).
\textsuperscript{148} Id. at 248.
arbiter of federal law. Who will challenge the allegedly discriminatory enforcement of a child support statute, if not the victims of the discrimination? What hospital will challenge the Revenue Ruling relaxing requirements for treating indigents? The redressability analysis employed in Linda, Warth and Eastern Kentucky, demanding a showing that a favorable decree would "remove the harm," is an undesirably rigid formulation of article III principles.

These factors do not indicate that redressability analysis should cease. Rather, they demonstrate that concern for gratuitous decision-making cannot be viewed in a vacuum. Possibly, such factors as the role of the judiciary and the understandable aversion to governmental contribution to injury have provoked the inconsistent application of the redressability standard by the Burger Court.

A demand for a strict showing of redressability leaves little room for the consideration of other vital interests in judicial decision-making. Undoubtedly, the certainty of relief demanded in Linda, Warth and Eastern Kentucky forecloses examination of any competing interests. The decisions in all three cases arguably left significant federal claims unexamined and, possibly, significant federal rights unremedied. Nonetheless, the results were believed to be compelled because of the possibility of ineffective relief.

A. A Suggested Standard of Redressability

Redressability analysis shares few of the concerns presented by other areas of justiciability analysis. Redressability in no way examines whether a grievance is generalized, whether issues are presented in an adversarial context, or whether the dispute is capable of resolution through the judicial, as opposed to the political, process. Nor do the causation cases lack the "impact of actuality" presented by

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149 The Revenue Ruling questioned in Eastern Kentucky, for example, appeared to encourage hospitals to offer fewer services to indigents.
153 Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1005.
advisory opinions, or the timeless concerns characteristic of ripeness\textsuperscript{154} and mootness\textsuperscript{155} decisions. The only interest weighing against a grant of standing in the redressability cases is the article III aversion to gratuitous decisions.

The branch of justiciability analysis most directly analogous to redressability is mootness. Mootness cases typically present injuries that were once sufficiently concrete to merit standing. Further, the full factual development required by ripeness standards continues to be available to guide a potentially moot decision. Finally, the existence of past injury, plus the fact that at least one party remains willing to litigate, provides evidence of the likelihood of effective advocacy in cases which are potentially moot. Consequently, the sole factor leading to dismissal of cases determined to be moot is judicial aversion to gratuitous decision-making. Despite the absence of a timeliness issue, the redressability standard, therefore, is designed to serve the same justiciability interests addressed by the mootness doctrine.

The standards traditionally applied by the Court in mootness cases, however, evidence a significantly more liberal approach to access than do the redressability cases described above.\textsuperscript{156} The mootness doctrine encompasses the circumstances that destroy the justiciability of claims previously suitable for judicial review;\textsuperscript{157} article III demands that a suit

\textsuperscript{156} Under the mootness doctrine, the timeliness of an alleged controversy is considered. Obviously, subsequent intervening factors can render a once active controversy moot. Once the matter has been resolved, no case or controversy exists. See, e.g., A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961); California v. San Pablo & T.R. Co., 149 U.S. 308 (1893) The "collateral sources" exception to the mootness doctrine is designed to take cognizance of the "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." Sibron v. New York, 392 U.S. 40, 55 (1968).
\textsuperscript{157} The Court has also recognized an exception to the doctrine if a case is "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). The application of the exception, however, has been far from consistent. Compare Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) with DeFunis v. Odegaard, 416 U.S. 312 (1974).
stay alive throughout the course of the litigation. The broad exception to mootness for cases “capable of repetition, yet evading review” is obviously keyed to the timeliness factor inherent in mootness analysis and, therefore has no relevance to redressability. In a long line of cases, however, the Supreme Court has recognized that cases carrying potential collateral legal effects are not moot, and the collateral consequences doctrine is directly analogous to the redressability analysis.

In *Sibron v. State of New York,* for example, the Court refused to declare a case moot merely because the defendant had completed his jail sentence. Finding the possibility of future impeachment for prior crimes a continuing collateral effect, Chief Justice Warren indicated that “a criminal case is moot only if it is shown that there is no possibility that any collateral consequences will be imposed on the basis of the challenged conviction.” Similarly, in *Benton v. Maryland* the Court reviewed a criminal conviction despite the existence of concurrent sentences, noting that the “mere possibility of . . . collateral consequences” renders a controversy justiciable. Conceding that the “possibility may well be remote,” the Court found a collateral effect in the possibility that the defendant might one day be convicted of another offense in a state with an habitual criminal statute.

These cases involved criminal trials where article III hurdles should obviously be at their lowest. The collateral consequences doctrine, however, has been applied in the civil context as well. *Super Tire Engineering Co. v. McCorkle,* for example, involved a challenge by a group of New Jersey employers to a state welfare program allowing benefits to workers engaged in an economic strike. Before the case was tried, however, the labor dispute was settled and the strike ended. Find-

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*Journal of Jurisdiction § 3533 (1975).*

111 *Id.* at 57.
113 *Id.* at 790.
114 *Id.* at 790-91.
ing a viable controversy, Justice Blackmun wrote: "[T]he challenged governmental activity . . . by its continuing and brooding presence, casts what may well be substantial adverse effect on the interests of the petitioning parties." Additionally, the Court recently ruled that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim even though class certification was denied by the trial court. Summarizing the flexibility of the mootness/article III requirement, the Court stated: "These cases demonstrate the flexible character of the Art. III mootness doctrine. As has been noted in the past, Art. III justiciability is not a legal concept with a fixed content or susceptible of scientific verification. . . . The justiciability doctrine [is] one of uncertain and shifting contours." The approach in these mootness cases clearly reveals a willingness to overcome article III barriers if any possibility exists that the government action in question will have a potential effect on the litigant. Such a flexible approach to case or controversy analysis in mootness cases, however, is obviously at odds with the rigid view of the redressability/article III standards in Linda, Warth and Eastern Kentucky. Yet both doctrines would appear to turn on an evaluation of "the appropriateness of the issues for decision . . . and the hardship of denying judicial relief." The Court's causation cases, therefore, are not only internally inconsistent but also are incompatible with other areas of case or controversy analysis.

For a variety of reasons, a flexible article III standard, akin to that employed in the mootness cases, is a more appropriate tool for examining redressability problems than is the strict standard applied by the Court in the causation cases. A relaxed standard provides more room for consideration of the Court's role as a provider of remedies for government-caused injury and its position as a check on the illegal acts of other

166 Id. at 122. See also Carroll v. Princess Anne, 393 U.S. 175 (1968); Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463 (1968); St. Pierre v. United States, 319 U.S. 41 (1943).
168 Id.
169 Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 156 (1951) (Frankfurter, J., concurring).
branches of government. Equally important, a lowered redres-
sability threshold requirement reduces the potential that the
standing issue will turn on the Court's view of the merits of
the claim. Accordingly, the distressing inconsistencies appar-
ent in the Court's present causation analysis could be miti-
gated. Further, if redressability demands are lowered, the
problems inherent in defining injury in the equal protection
context, demonstrated by Warth and Bakke, become less im-
portant and, therefore, less subject to abuse.

Instead of seeking to determine whether a plaintiff's in-
jury is "likely to be redressed" or "will be removed," the
mootness cases teach that standing is appropriate if the alleg-
edly illegal government action has any substantial effect on
the plaintiff and if such effect is likely to be remedied by a
favorable decision. As a result, standing should be granted if
a favorable decision would contribute in any significant man-
ner to remedying or preventing the plaintiff's injury.170

170 Such a standard is similar to the statutory guideline suggested by Senators
Metzenbaum, Kennedy and Ribicoff in the proposed (not enacted) Citizens Right to
Standing Act of 1978, which provides in pertinent part:
§ 3000(1) A court of the United States shall not dismiss an action brought
against the United States or any officer or any agency thereof or against
any State or local governmental entity or officer or agency thereof . . .
based in whole or part upon an act or omission alleged to be in violation of
the laws or Constitution of the United States, on the ground that the plain-
tiff lacks standing to sue because . . . .

. . .

(c) the injury which plaintiff alleges to have suffered as a result of the
defendant's conduct is not substantially likely to be remedied or prevented
by a determination on the merits in the plaintiff's favor, if such determina-
tion may contribute in significant part to remedying or preventing such
injury.

Apr. 27, 1978) (emphasis added).

If such a statute, or a similar version, were to achieve passage in the Congress,
serious constitutional questions would be presented under the Burger Court's present
redressability analysis. In Eastern Kentucky and Duke Power, the Court made clear
its conclusion that article III requires a plaintiff to demonstrate in fact that his injury
is likely to be remedied by a favorable judgment. If the enactment were passed under
section five of the fourteenth amendment as well as under the Necessary and Proper
Clause, complex questions would be presented under Katzenbach v. Morgan, 384 U.S.
641 (1966). See Nichol, An Examination of Congressional Power Under § 5 of the
14th Amendment, 52 Notre Dame Law. 175 (1976). This article suggests, of course,
that the Court reformulate the article III standard.
CAUSATION AS A STANDING REQUIREMENT

Under such a standard, the plaintiff would more readily be able to prevent government contribution to injury that may be sustained primarily at the hands of third parties. If a plaintiff sustains an injury and any aspect of that injury can be redressed by a favorable decree, the "personal stake" requirement of article III is clearly met. Yet even this relaxed standard maintains article III's aversion to purely gratuitous exercises of judicial power. If a plaintiff is unable to demonstrate that an affirmative decree would have any effect on the injuries asserted, standing would be properly denied.

Under such a "contribution" standard, the plaintiffs in Linda, Warth and Eastern Kentucky clearly would have achieved standing. No doubt a decision requiring non-discriminatory enforcement of Texas child support statutes would have contributed in a significant manner to remedying the injury sustained by the plaintiff in Linda. Similarly, favorable decrees in Warth and Eastern Kentucky would have contributed significantly to removal of the plaintiffs' injuries in those cases.

In Bakke, Alan Bakke likely could have survived a standing challenge absent clear proof that he had no chance to gain admission to medical school even in the absence of the affirmative action program. Moreover, if Bakke lacked standing on the basis of such proof, he would have been airing only a generalized grievance; other plaintiffs with valid standing would have been available to prosecute the claim.

The plaintiffs in the Duke Power and Orr cases, granted standing by the Court, would face a significant redressability hurdle even under a relaxed standard. In Duke Power, whether a declaration of the unconstitutionality of the Price-Anderson Act would contribute significantly to the removal of the plaintiffs' presently existing environmental injuries is a complex factual question not addressed by the Court. Given the magnitude of potential injuries from a nuclear disaster presented by the Duke Power plaintiffs, however, standing arguably could be appropriately based on the contingent injuries made noncompensable by the Act. Certainly those injuries would have been redressable. The husband in Orr v. Orr would have been able to achieve standing under a relaxed
standard only if the Court were to find that a decision declaring the Alabama alimony statute unconstitutional would contribute substantially to relieving the husband's existing contractual obligations. This determination would appear to turn on Alabama contract law.

B. Professor Tribe's Standard

Professor Tribe has suggested that an autonomous causation requirement is neither necessary nor desirable. Rather, in cases presenting causation or redressability problems, he proposes a repeated application of the injury-in-fact requirement. More specifically, Professor Tribe submits that:

[W]here plaintiff claims that defendant's unlawful conduct has caused a third party to do plaintiff injury, a federal court need only inquire:

1) whether the third party's conduct would have provided plaintiff with the basis for a claim of injury in fact if plaintiff had directly sued the third party; and
2) whether, if defendant had required the third party to abstain from the conduct to which plaintiff objects, the third party would be able to show a sufficient injury in fact to justify an action against defendant.

Professor Tribe's proposed method of causation analysis, written without the benefit of Duke Power, takes insufficient cognizance of the case or controversy requirement. Consider, for example, a factual situation similar to that presented in the Duke Power case but cast in its most gratuitous fashion. Assume that the plaintiffs could prove their injuries were fairly traceable to the Price-Anderson Act but that the defendants could demonstrate conclusively that the nuclear plants would continue in operation even if the Price-Anderson Act were struck down. Such a case clearly would meet Professor Tribe's standard since: 1) the environmentalists could show injury in fact; and 2) the nuclear power company obviously would be harmed if the government ordered closure of the plant. Despite meeting the Tribe standard, however, any exer-

172 Id.
cise of judicial power in such a case would be purely gratuitous and in conflict with article III.

Any viable standard of redressability must consider both sides of the equation. Article III demands an adequate concern for avoiding judicial decrees that have no effect in the real world. Such concerns for restraint, however, should not work to abrogate totally the Court's responsibility to remedy governmentally imposed harms. A redressability standard that allows standing if a favorable decree would contribute in any significant manner to remedying the plaintiff's injury adequately serves these competing judicial interests.

**Conclusion**

Standing principles were greatly expanded by a series of Supreme Court decisions handed down in the early 1970's. Those cases not only recognized a wide variety of harms under the injury-in-fact rubric, but also allowed standing to be based on injuries only indirectly caused by the defendant. Hoping to square article III concerns with the possible ramifications of such rulings, the Court fashioned an autonomous causation requirement in the *Linda, Warth and Eastern Kentucky* decisions.

The Burger Court's causation analysis demands, apart from demonstrable injury, that the harms alleged be fairly traceable to the actions of the defendant. The "fairly traceable" standard has been applied to require the specific pleading of causation and to limit the range of permissible inferences rising from the allegations of the complaint. Given the availability of the motion for summary judgment to test the validity of allegations of causation, the selectively-imposed pleading requirement poses an unnecessary hurdle to standing.

The causation cases also require a demonstration that the plaintiff's injuries are likely to be redressed by a favorable decree. The redressability requirement, however, has been applied in a distressingly inconsistent fashion. Decisions are more accurately explained by the Court's view of the merits of particular actions than by the likelihood of an effective remedy. Further, the redressability standard, as enunciated, de-
mands too great a demonstration of effective relief, resulting in the denial of standing to plaintiffs who probably were injured by government action.

This article suggests a reconsideration of the causation doctrine. To obtain standing under article III, a plaintiff should be required to demonstrate injury in fact. If the injury is not directly caused by the defendant, it should be "fairly traceable" to the defendant's actions. The "fairly traceable" standard, however, should be given a broad reading similar to the Court's analysis in United States v. SCRAP; plaintiffs should be allowed the opportunity to prove causation, yet the pleading should be "something more than an ingenious academic exercise in the conceivable." If allegations of causation are indeed untrue, they can be tested on summary judgment.

Further, to assure compliance with the case or controversy requirement, a plaintiff should be required to demonstrate that a favorable decision would contribute in a significant manner to remedying or preventing the injury alleged. A relaxed redressability standard would limit the potential for ad hoc standing analysis by the Court and would offer judicial relief for plaintiffs who have been injured by allegedly illegal government activity.

174 Id. at 688.