ARTICLES

BASIC JUSTICIABILITY ANALYSIS

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I. INTRODUCTION

Justiciability is a standard preliminary requirement in constitutional cases and nonconstitutional cases as well. If claimant fails to survive the gauntlet of justiciability requirements, the claim should be dismissed without reaching the merits. Judges are usually experts on justiciability rules, since they must apply them in all cases. Attorneys, in contrast, are often not prepared to deal with justiciability issues and should pay much more attention to these crucial requirements.

Justiciability rules are often applied in an unprincipled, ad hoc, result-oriented manner. If the Justices want to reach the merits of an issue, they apply justiciability requirements loosely and overlook facts that might ordinarily lead to dismissal. If the Justices want to duck a case without reaching the merits, they tighten up the justiciability requirements. Consequently, the cases are not reconcilable, and any attempt to synthesize the Court's decisions is doomed, but it is possible at least to analyze justiciability issues in an orderly way.

This article describes the structure of justiciability analysis as set forth in United States Supreme Court cases. The purpose is to help law students and lawyers understand and apply the several strands of Supreme Court law in this important, but often confusing field.

Justiciability law involves a constellation of related rules. ²

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2. Some commentators have asked whether the rules might be "merely illus-
There is no generally accepted outline of justiciability rules, but one that seems convenient and complete focuses separately on "the who, when and what of constitutional adjudication." The following outline summarizes the basic principles of justiciability law based on this three-part analysis.

**Justiciability: Basic Analysis**

**A. The What**

1. The actual case requirement
   a. The adversity requirement and the rule against collusive cases
   b. The rule against advisory opinions

2. The justiciable issue requirement
   a. The political question doctrine
   b. The rule against extra-judicial review

**B. The When**

1. Ripeness
2. Mootness
3. The rule of necessity

**C. The Who (Standing)**

1. General standing
2. Taxpayer standing
3. Organizational standing

This article will not discuss the cases in detail or go into the subtleties of justiciability analysis. Instead, it will merely describe in a general way the rules that the Court has announced and that should normally be used to structure analysis, briefs, and court opinions.4

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4. State courts are not bound by federal justiciability requirements. If a state court decision comes before a federal court for review, however, the federal court must dismiss if federal justiciability requirements are not met. E.g., Doremus v. Board of Educ., 342 U.S. 429 (1952); Tileston v. Ullman, 318 U.S. 44 (1943).
II. DISCUSSION

A. The What of Constitutional Litigation

Justiciability requirements apply, first, to the subject matter of the constitutional claim. The claim must arise in the context of an actual "case or controversy" between adverse parties, and the constitutional issue must itself be justiciable.

1. The Actual Case Requirement

The "judicial Power" vested in the federal courts by article III of the United States Constitution extends only to nine categories of "Cases" and "Controversies." As the Supreme Court has put it, "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."5

a. The Adversity Requirement and the Rule Against Collusive Cases

Federal courts are only permitted to decide actual disputes between parties whose interests are adverse. "[C]onstitutional issues ... will not be determined in friendly, nonadversary proceedings ...."6 Put another way, "The controversy must be definite and concrete, touching legal relations of parties having adverse legal interests .... It must be a real and substantial controversy ...."7 Like other justiciability rules, this rule has not always been applied rigorously; many famous Supreme Court cases have been feigned.8

b. The Rule Against Advisory Opinions

"[T]he most prominent, most continuously articulated boundary of justiciability ... [is that] federal courts will not
give ‘advisory opinions.’ The rule goes back at least to 1793, when the Justices of the Supreme Court declined a request from President Washington and Secretary of State Jefferson to answer a series of abstract questions concerning America’s role as a neutral toward a war between England and France. “Ever since, it has been accepted that federal courts cannot give advisory opinions.”

A corollary of the rule against advisory opinions is the rule that federal courts should not decide federal issues in a case whose outcome is determined by an independent and adequate state ground. In such cases, the decision on the federal issue would not affect the outcome and would therefore be purely advisory. “We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.”

2. The Justiciable Issue Requirement

To be justiciable, a constitutional claim must not only arise in the context of an actual case but the specific issue must also be justiciable. To be justiciable, the issue must not be a political question and the court’s decision on the issue must not be subject to extra-judicial review.

a. The Political Question Doctrine

“[T]he concept that some constitutional issues are nonjusticiable because they are ‘political’ is well established . . . .” “Political” is a word of art in this context; it does not refer to “politics,” but to a collection of rules which Justice Brennan summarized in his landmark majority opinion in Baker v. Carr. 14

9. G. GUNTHER, supra note 2, at 1535.
10. G. GUNTHER, supra note 2, at 1536.
13. G. GUNTHER, supra note 2, at 1608.
14. 369 U.S. 186 (1962). Justice Brennan wrote:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of
The discussion in this article follows Professor Gunther's three-part analysis of the political question doctrine:

There are at least three strands to the "political question" doctrine. The first, most confined, most clearly legitimate one is the "constitutional commitment" strand . . . "[The second] strand of the political questions doctrine finds some issues nonjusticiable because they cannot be resolved by 'judicially manageable standards,' or on the basis of data available to the courts. Still another, even more open-ended strand of the doctrine, suggests that the political questions notion is essentially a problem of judicial discretion, of prudential judgments that some issues ought not to be decided by the courts because they are too controversial or could produce enforcement problems or other institutional difficulties."¹⁵

1) Demonstrable Textual Commitment

An issue is a nonjusticiable political question if the text of the Constitution demonstrably commits the resolution of the issue to another branch of the federal government.¹⁶ Coleman v. Miller¹⁷ is often viewed as a classic application of this rule, although the commitment to Congress of the issue whether constitutional amendments have been properly ratified is not all that textually demonstrable. Powell v. McCormack,¹⁸ which held that decisions concerning exclusion of duly elected persons from membership in the House of Representatives are not demonstrably committed to the House, suggests that not much is left of this strand other

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¹⁵. G. GUNTHER, supra note 2, at 1608-09.
¹⁶. Baker, 369 U.S. at 217, which refers to "a textually demonstrable constitutional commitment of the issue to a coordinate political department."
¹⁷. 307 U.S. 433 (1939) (ratification of proposed Child Labor Amendment is a political question).
than perhaps decisions concerning impeachments and certain minor, in-house legislative and executive matters.

2) Not Apt for Judicial Resolution

The Court will deem an issue to be a nonjusticiable political question if the courts are unable to decide it because of "a lack of judicially discoverable and manageable standards for resolving it." The same may be true if the courts' evidentiary procedures do not provide sufficient information to permit sound judgment on the issue. As the Court put it in *Coleman v. Miller*, 20

Where are to be found the criteria for such a judicial determination? . . . In short, the question of a reasonable time [for ratifying proposed constitutional amendments] in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice . . . . 21

The question of malapportionment of legislative districts was long considered not apt for judicial resolution. 22 *Baker v. Carr*, the landmark decision holding claims of legislative malapportionment to be justiciable stressed, "Judicial standards under the Equal Protection Clause are well developed and familiar . . . ." 23 *Luther v. Borden*, the landmark case holding that the guaranty clause 25 is nonjusticiable, also stressed "the lack of criteria by which a court could determine which form of government was republican." 26

3) Too Hot To Handle

The last and most controversial strand of the political question doctrine is based on the concept that courts should duck issues if deciding them will cause too much harm to

21. Id. at 453-54.
the judiciary. This "prudential" strand is illustrated by the Court's refusal to decide the constitutionality of the Vietnam War despite several opportunities to do so. As Justice Frankfurter put it in his Colegrove opinion declining to reach the merits of legislative reapportionment, "Courts ought not to enter this political thicket."27

b. The Rule Against Extra-Judicial Review

From its earliest days, the Supreme Court has held "that it was essential to judicial decisions that they be final rather than tentative, and not subject to revision by the executive and legislative branches."28 In other words, if the court's decision in a case is subject to extra-judicial review, the case should be dismissed for lack of justiciability.

An early illustration of this rule is Hayburn's Case,29 in which the Justices refused to decide veterans' pension claims because the decisions would have been subject to reversal by the Secretary of War. The Court confirmed the rule in Chicago & S. Air Lines v. Waterman Corp.,30 which stated:

Judgments within the powers vested in courts . . . may not lawfully be revised, overturned or refused faith and credit by another Department of Government.

. . . It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.31

This completes the discussion of rules concerning the "what" of constitutional litigation. The next section discusses the "when."

B. The When of Constitutional Litigation

Requirements concerning when constitutional issues should be decided on the merits include ripeness, mootness, and the rule of necessity.

28. G. GUNTER, supra note 2, at 1536.
29. 2 U.S. (2 Dall.) 409 (1792).
30. 333 U.S. 103 (1948).
31. Id. at 113-14.
1. **Ripeness**

Courts should adjudicate only constitutional claims that are ripe. The question here is “whether the harm asserted has matured sufficiently to warrant judicial intervention.” There is no analytical “test” for determining when a claim is ripe. The Justices simply inquire whether sufficient contingencies remain concerning the conduct of either the claimant or the respondent so as to negate the conclusion that the dispute has become real and concrete.

In *United Public Workers v. Michell*, for example, all but one of the federal employees seeking to challenge the Hatch Act had unripe claims because they had not yet engaged in political activities barred by the Act; the Court dismissed the claims, refusing to speculate about possible future acts. Similarly, one of the home builders associations in *Warth* did not present a ripe controversy because it did not have any application for a specific project currently pending before the Penfield zoning board.

2. **Mootness**

As a general rule, moot claims are not justiciable and should be dismissed. However, this general rule is subject to exceptions.

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32. The ripeness requirement overlaps substantially with the rule against advisory opinions.

33. *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975). *Warth* is a landmark case that raises many justiciability issues and will be cited repeatedly in this article. The case involved a claim by numerous plaintiffs - including indigent and minority individuals, taxpayers, community action groups, building contractors, and home builders associations - that Penfield, New York's restrictive zoning ordinance violated the equal protection rights of indigents and racial minorities by preventing the construction of low-income housing in the town and therefore preventing plaintiffs from living there. In a 5-4 decision, the Burger Court invoked standing, ripeness, and mootness doctrines and threw out all claims without reaching the merits. *Warth* classically illustrates the Burger Court's strict attitude toward justiciability requirements.

34. 330 U.S. 75 (1947).

35. 422 U.S. 490 (1975).
a. The General Rule

The general rule is that courts should adjudicate only constitutional claims that are not moot.\textsuperscript{36} This is a constitutional requirement stemming from the article III restriction of judicial power to "cases" and "controversies." The question here is "whether the occasion for judicial intervention persists."\textsuperscript{37} Again, there is no specific analytical test for determining when a dispute has become moot. The Justices simply inquire whether facts have occurred that resolved the dispute and eliminated the need for a judicial determination.

Here are some examples. In \textit{Webster v. Reproductive Health Services},\textsuperscript{38} a challenge to Missouri's statutory ban on use of public funds for abortion counseling was dismissed as moot after Missouri conceded that the rule did not apply to claimants. The law school affirmative action case, \textit{DeFunis v. Odegaard},\textsuperscript{39} was dismissed as moot, because DeFunis was already in his final quarter at another law school. One of the home builders associations in \textit{Warth} presented a moot controversy because it did not allege that its proposal to build homes in Penfield "remained viable."\textsuperscript{40} And a claim that the fourth amendment exclusionary rule applies in a liquor license revocation proceeding was dismissed as moot, because the applicant for the liquor license had gone out of business.\textsuperscript{41}

b. Exceptions

Exceptions to the mootness requirement include claims "capable of repetition, yet evading review," claims by a certified class representative, and claims mooted by respondent's voluntary cessation of the challenged conduct.

\textsuperscript{36} If a claim becomes moot at any stage of the controversy, whether in the trial court or on appeal, the lawyers have a duty to advise the court promptly. \textit{E.g.}, Board of License Comm’rs v. Pastore, 469 U.S. 238 (1985).
\textsuperscript{37} \textit{Warth}, 422 U.S. at 499 n.10.
\textsuperscript{38} 109 S. Ct. 3040 (1989).
\textsuperscript{39} 416 U.S. 312 (1974).
\textsuperscript{40} \textit{Board of License Comm’n}, 469 U.S. 238 (1985).
\textsuperscript{41} \textit{Warth}, 422 U.S. at 517.
1) Claims Capable of Repetition, Yet Evading Review

A claimant whose own claim has become moot is permitted to adjudicate the claim if it is "capable of repetition, yet evading review."42 A classic example of this exception is Roe v. Wade,43 the landmark abortion case. The problem was that pregnancy lasts only nine months, too short a period to allow a constitutional challenge to reach the Supreme Court. Holding that the claim remained justiciable despite the end of the pregnancy, the Court stated:

[When, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied . . . . Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review."44

Apparently, the claim must be capable of repetition vis-a-vis the particular claimant. Thus, the Court has indicated that a case is not moot when "(1) for the particular claimant the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."45

2) Claims of Class Representatives

An individual whose claim has become moot may be permitted to adjudicate the claim when he or she has been certified as a representative of a class of claimants.46 As the

42. "The 'capable of repetition, yet evading review' exception stems from Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911)." G. GUNther, supra note 2, at 1579.
43. 410 U.S. 113 (1973).
44. Id. at 125.
46. E.g., Richardson v. Ramirez, 418 U.S. 24 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972). "Mootness challenges have been rejected in a number of cases even though the plaintiff's controversy was no longer live, because the litigant had sued on behalf of a class." G. GUNther, supra note 2, at 1579.
Court put it, "[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff’s substantive claim . . . ." 47

3) Voluntary Cessation by Respondent

Claims for injunctive relief are not automatically subject to dismissal merely because respondent has stopped committing the conduct giving rise to the claim. Injunctions were traditionally considered appropriate in such cases, in part because of the danger that respondent would resume the conduct after dismissal of the case. The current Court may be shifting toward the view that injunction actions should be dismissed after voluntary cessation unless claimant can show a likelihood of future recurrence. 48

3. The Rule of Necessity

Courts should not decide constitutional issues in advance of the necessity of doing so. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." 49 Thus, for example, if an alternative statutory basis for the decision exists, the court should not reach the constitutional issue. Similarly, courts should seek a reasonable "saving interpretation" of a statute in order to avoid deciding constitutional questions. 50

This completes the discussion of the "when" of constitutional litigation. The next section discusses the "who."

C. The Who of Constitutional Litigation

Courts will not reach the merits of constitutional issues unless claimant is a proper party to present the claim. Here the main questions concern standing. "The fundamental aspect of standing is that it focuses on the party . . . and not

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48. See J. BARRON & C. DIENES, supra note 3, at 97.
on the issues he wishes to have adjudicated."^51 "[T]he gist of the question of standing" is whether the litigant alleges "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."^52

Standing rules may be divided into three categories: general rules of standing, rules concerning taxpayer standing, and rules concerning organizational standing.

1. **General Rules of Standing**

In the last fifteen years, the Supreme Court has repeatedly stressed that the general rules of standing involve both constitutional and prudential components. As the Court put it in the leading case, *Warth v. Seldin*,^53 "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise."^54

a. **Constitutional Requirements**

The Constitution requires that claimant has suffered an "injury in fact" that was caused by the allegedly unconstitutional government action and that will be redressed by the relief requested. These requirements are constitutional minima that may not be waived by Congress or the courts.^55

1) **Injury in Fact**

Article III requires that claimant have suffered "injury in

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53. 422 U.S. 490 (1975).
54. Id. at 498.
55. "[A]n irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' . . . and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision." Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464, 472 (1982).
fact,"$^{56}$ i.e, "actual or threatened injury."$^{57}$ A phrase commonly used to describe this requirement is "a distinct and palpable injury."$^{58}$

Such actual injury need not be physical or economic. It may involve environmental and aesthetic consequences such as thermal pollution of lakes in the vicinity$^{59}$ and elimination of wilderness lands.$^{60}$ Indeed, the injury in fact "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . '."$^{61}$

2) Nexus

In order to satisfy constitutional standing requirements, claimant must "allege a sufficient nexus between her injury and the government action which she attacks . . . ."$^{62}$ This requirement that there be a nexus between the precise government action alleged to be unconstitutional and the precise harm of which claimant complains has two components, a causation requirement and a redressability requirement.

a) The Causation Requirement

To satisfy the nexus requirement, claimant must show that his or her injury-in-fact was caused by the precise action claimed to be unconstitutional. As Chief Justice Burger put it in *Duke Power Co. v. Carolina Env. Study Group, Inc.*,$^{63}$ plaintiff must show "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct."$^{64}$ The test is whether claimant shows a "substantial probability" that the challenged action caused the alleged harm.$^{65}$ The fact that the harm is caused indirectly through the intervening act of a third-party does not necessary negate standing, "[b]ut it

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$^{56}$ *Id.* ("The exercise of judicial power . . . is therefore restricted to litigants who can show 'injury in fact' . . . .").

$^{57}$ *Id.* at 500.

$^{58}$ *Id.* at 501.


$^{60}$ United States v. SCRAP, 412 U.S. 669 (1973).


$^{63}$ 438 U.S. 59 (1978).

$^{64}$ *Id.* at 72.

$^{65}$ *Warth*, 422 U.S. at 504.
may make it substantially more difficult to meet . . . [the standing requirement].”

Here are some examples. In *Linda R.S.*, claimant lacked standing to challenge the government’s failure to enforce child support duties because she could not show that the father’s failure to pay was caused by the government’s failure to enforce. In *Warth*, the individual claimants lacked standing because they could not show that defendants’ refusal to rezone, rather than claimants’ own poverty, was the cause of their inability to reside in Penfield. In *Simon v. Eastern Kentucky Welfare Rights Org.*, claimants who sought to compel the IRS to deny favorable tax treatment to hospitals that failed to provide free medical services to indigents did not have standing because “[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to . . . [IRS] ‘encouragement’ or instead result from decisions made by the hospitals without regard to the tax implications.”

In contrast, claimants seeking to overturn the $560 million statutory ceiling on damage claims arising from a single nuclear accident had standing because “there is a substantial likelihood that Duke [Power Co.] would not be able to complete the construction and maintain the operation of . . . [the nuclear plants here] but for the protection provided by the Price-Anderson Act.”

b) *The Redressability Requirement*

To satisfy the nexus requirement, claimant must also allege that the relief requested will effectively remedy the harm that allegedly resulted from the claimed constitutional violation. As the Court put it in *Simon*, plaintiff must show “an injury to himself that is likely to be redressed by a favorable decision.” Again, the test is whether claimant

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66. *Id.* at 505.
68. 422 U.S. 490 (1975).
70. *Id.* at 42-43.
73. *Id.* at 38.
shows a "substantial probability" that the relief requested "will remove the harm." 74

Here are some examples. In *Linda R.S.*, 75 claimant lacked standing because she could not show that the relief requested, initiation of child support enforcement proceedings against the father of her child, would eliminate her injury by producing support payments. Since the father might choose to go to jail instead, it could "at best, be termed only speculative" whether the injury would be redressed. 76 In *Warth*, 77 individual claimants lacked standing because they failed to show that they could have afforded to live in the housing projects they sought to have built. In *Simon*, 78 claimants lacked standing because the relief requested, an order requiring the IRS to deny tax benefits to hospitals not providing free services to indigents, would not assure that the desired medical services would be offered. The hospitals might choose to forego the favorable tax treatment and continue refusing to serve indigents.

b. *Prudential Requirements*

The Supreme Court has also required that claimant's injury be "more than a generalized grievance" and that claimant assert his or her own constitutional rights rather than the rights of a third party. These requirements are not constitutional. They are Court-created and may be waived by Congress or the Court.

1) *More Than a Generalized Grievance*

If the sole harm of which a party complains is a "generalized grievance" shared by all or many others, standing is barred by the first of the Court's prudential rules. "[W]hen the asserted harm is a 'generalized grievance' shared in sub-

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74. *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975). As the Court put it in *Simon*, "Moreover, the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire." 426 U.S. at 45-46. In *Duke Power Co.*, the Court said, "[A] litigant must demonstrate . . . a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury . . . ." 438 U.S. at 79.
75. 410 U.S. 614 (1972).
76. *Id.* at 618.
77. 422 U.S. 490 (1975).
stantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."  

Here are some examples. A citizen's interest in preventing the erroneous execution of a death row inmate is too generalized to provide standing for a cruel and unusual punishment claim. Similarly, the general interest in constitutional governance is insufficient to provide citizens with standing to raise an incompatibility clause challenge against simultaneous membership in the military reserves and the House of Representatives. For the same reason, federal taxpayers normally do not have standing to challenge federal expenditures. Nor do such taxpayers have standing to challenge the federal government's failure to publish information concerning CIA expenditures. In all these cases, claimants' interest was too generalized to provide standing.  

2) The Rule Against Vicarious Standing  
The second prudential standing rule is that parties must assert their own constitutional rights and may not assert the constitutional rights of third parties. However, this general rule is subject to some exceptions.  

a) The General Rule: No Vicarious Standing  
The general rule is that vicarious standing is not permitted. "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal

79. Warth, 422 U.S. at 499. The rule against "generalized grievances" is similar to the "injury in fact" requirement. It is often difficult to determine the boundaries between these two rules and why the Court invokes one rather than the other.  
81. U.S. Const. art. I, § 6, which provides, "no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office."  
83. Frothingham v. Mellon, 262 U.S. 447 (1923); see infra note 101 and accompanying text.  
85. "The general rule, as frequently stated by the Court, is that 'one may not claim standing [to] vindicate the constitutional rights of some third party'; but 'the Court has created numerous exceptions which lack a coherent pattern and leave the significance of the rule in doubt.'" G. GUNTER, supra note 2, at 1574.
rights or interests of third parties." Thus, for example, the Rochester taxpayers in *Warth* lacked standing, because they were attempting to assert the constitutional rights of other persons with regard to housing in Penfield.

b) *The Exceptions*

(1) *Special Factors*

In numerous cases, the Court has allowed parties to assert the rights of others not before the Court based on the presence of one or more of three special factors. Professor Gunther’s summary is helpful:

> [T]he Court has identified three factors as important in justifying the wide-ranging exceptions to the barrier against raising the rights of third parties: “the presence of some substantial relationship between the claimant, and the third parties”; the impossibility of the third party rightholders “asserting their own constitutional rights”; and “the risk that the rights of third parties will be diluted” unless the party is allowed to assert their rights.

*Barrows v. Jackson* illustrates this three-factor analysis. A white sold his home to a black. Other whites sued the seller for breach of a restrictive covenant. The seller defended by asserting the equal protection rights of the black purchaser. The Court held that the assertion of third-party rights was permissible, mentioning all three factors. First, there was a relation between the party and the third party, namely seller and buyer. Second, it would be “difficult if not impossible” for the black purchaser to assert his rights. Third, the prudential rule against vicarious standing was “outweighed by the need to protect the fundamental rights . . . ”

It is not necessary to show that all three factors are present in order to invoke this exception to the rule against vicarious standing, but the more the merrier. Cases stressing the relationship between the party and the third party in-

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88. G. GUNTHER, supra note 2, at 1574.
89. 346 U.S. 249 (1953).
90. *Id.* at 257.
91. *Id.*
clude those involving the standing of associations to represent their members, the standing of doctors to represent their patients, next-friend standing, and the shareholder standing rule. Cases stressing the “impossibility” factor include Singleton v. Wulff, in which the majority suggested that claimant need not prove that it is actually impossible for the third party to assert the right but only that the third party confronts “some genuine obstacle.”

(2) First Amendment Overbreadth

A second exception to the rule against vicarious standing is that free speech claimants challenging a substantially overbroad statute are permitted to assert the rights of third parties not before the court. Thus, if a statute could constitutionally be applied to the claimant but the language of the statute is capable of being applied unconstitutionally to a substantial number of others, claimant may assert the rights of those other persons and have the statute struck down on its face. Thus, United States v. Robel struck down a statute making it a crime for any member of a communist-action organization to “engage in any employment in any defense facility,” because the language of the statute applied to members who were not active, did not know of the group’s illegal aims, and had no specific intent to further those illegal aims.

The reason for allowing third-party standing in this context is that overbroad statutes may chill the exercise of free speech by third parties who are not willing to risk prosecu-

97. Id. at 116. The four dissenters argued that claimant should be required to show impossibility rather than merely some obstacle.
100. Cf. Scales v. United States, 367 U.S. 203 (1961), which held that membership in the Communist Party may only be punished when the membership is active, knowing, and with specific intent to further the Party’s illegal aims.
Challenges by persons whose activities are not protected are needed to eliminate the statute's chilling effect on persons whose activities are protected.

The foregoing rules concern standing in traditional private actions. The next section discusses the separate set of rules that govern so-called taxpayer suits.

2. Taxpayer Standing

Cases involving claimants who assert standing by virtue of their status as taxpayers must be divided into those involving federal and state taxpayers and those involving local taxpayers. As a general rule, federal and state taxpayers do not have standing, but there are exceptions. Local taxpayers are more likely to have standing than federal and state taxpayers.

a. Federal Taxpayer Standing

1) General Rule: No Taxpayer Standing

As a general rule, individuals do not have standing solely by virtue of their status as federal taxpayers to challenge allegedly unconstitutional conduct by officers of the federal government. The leading case on this point is *Frothingham v. Mellon*,101 which held that a federal taxpayer did not have standing to raise a tenth amendment challenge to expenditures by the Secretary of the Treasury pursuant to the Maternity Act of 1921. This rule was confirmed by *Valley Forge Christian College v. Americans United for Separation of Church and State*,102 where the Court stated, "Following the decision in *Frothingham*, the Court confirmed that the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer."103 Reasons for this rule include the minute financial interest of the individual taxpayer in any particular federal expenditure, the unlikelihood that enjoining a federal expenditure will result in any reduction of tax liability, and the generalized nature of the taxpayer's grievance.104

103. Id. at 477.
104. "His [the federal taxpayer's] interest in the moneys of the Treasury..."
2) Exception: The Flast Double-Nexus Test

*Flast v. Cohen*105 established an exception to the general rule that federal taxpayers do not have standing to challenge unconstitutional federal conduct. The *Flast* exception has two requirements: 1) the challenged action must be a congres- sional exercise of the taxing-spending power and 2) the constitutional limit invoked must be an express limit on the taxing-spending power.106 The Court has made it quite clear that the *Flast* exception is to be kept within carefully confined bounds.107

The first case that demonstrated the Court's intent to confine *Flast* was *United States v. Richardson*,108 which held that federal taxpayers have no standing to sue for an injunction requiring publication of CIA expenditures pursuant to the expenditures clause.109 As Justice Powell pointed out in his concurring opinion, both prongs of the *Flast* test were arguably met: the government's refusal to publish CIA expenditures was closely related to the spending power and the publication requirement could certainly be viewed as a limit on the spending power. Nevertheless, Chief Justice Burger's
opinion for the five-vote majority held that neither of the required connections was present.

Valley Forge Christian College\textsuperscript{110} is the case that most clearly reveals the Court's determination to restrict the \textit{Flast} exception. The federal government gave the college 77 acres of land with a hospital on it. The value of the land was $1.3 million. Federal taxpayers challenged the gift under the establishment clause. The gift was made pursuant to a federal statute and it certainly involved valuable property purchased by taxes, so the first nexus seemed present. \textit{Flast} had already held that the establishment clause is a limit on the taxing and spending powers, so the second nexus was plainly present. Yet the Court held that the taxpayers did not have standing. The first nexus was not present, according to Justice Rehnquist's majority opinion, because the gift was made by an executive agency rather than Congress and the gift was made pursuant to the property power rather than the taxing and spending powers.

\textbf{b. State and Local Taxpayer Standing}

The rule against federal taxpayer standing applies to state taxpayers as well,\textsuperscript{111} but it does not apply to suits by taxpayers of local government. While the interests of federal and state taxpayers are minute, indeterminable, and remote,\textsuperscript{112} "The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate."\textsuperscript{113}

\textbf{3. Organizational Standing}

The requirements for organizational standing - that is, the standing of an organization to represent its members - are three-fold.\textsuperscript{114} First, the organization's members must have standing in their own right. Second, the interests at

\begin{itemize}
\item \textsuperscript{110} 454 U.S. 464 (1982).
\item \textsuperscript{112} See supra note 104 and accompanying text.
\item \textsuperscript{113} Frothingham v. Mellon, 262 U.S. 447, 486 (1923).
\end{itemize}
stake must be germane to the organization's purpose. Third, the participation of individual members must not be necessary.

III. CONCLUSION

The justiciability requirement is a fundamental and critically important preliminary requirement in American constitutional law. Justiciability rules must be satisfied in every constitutional case and indeed in every nonconstitutional case as well. If even a single requirement is not met, the court should dismiss the claim without reaching the merits.

Justiciability law presents the law student and lawyer with a complex and formidable set of interrelated requirements concerning the what, the when, and the who of constitutional litigation. The problem is compounded by the courts' tendency to apply the rules in an inconsistent, ad hoc, result-oriented manner. Courts often loosen the requirements when they want to decide the merits of a controversy and tighten the requirements when they want to duck a case. Decisions concerning justiciability - including those of the Supreme Court - are therefore often unprincipled and irreconcilable.

Nevertheless it is possible to set forth a structural analysis of justiciability requirements and articulate the formal tests for at least some of these requirements. This article has attempted to present a coherent outline of justiciability law. Hopefully it will help law students, lawyers, and perhaps even judges perform justiciability analyses in an orderly manner.
On the basis of the foregoing discussion, it is possible to set forth the following, more detailed outline of basic justiciability analysis.

*Justiciability: Basic Analysis*

**A. The What**

1. **The actual case requirement**
   a. The adversity requirement and the rule against collusive cases
   b. The rule against advisory opinions

2. **The justiciable issue requirement**
   a. The political question doctrine
      1) Demonstrable textual commitment,
      2) Not apt for judicial resolution, or
      3) Too hot to handle
   b. The rule against extra-judicial review

**B. The When**

1. **Ripeness**

2. **Mootness**
   a. General rule: if moot, must dismiss
   b. Exceptions
      1) Capable of repetition yet evading review,
      2) Class actions, or
      3) Voluntary cessation by respondent

3. **The rule of necessity**

**C. The Who (Standing)**

1. **General standing**
   a. Constitutional requirements
      1) Injury in fact and
      2) Nexus
         a) Causation and
         b) Redressability
   b. Prudential requirements
      1) More than a generalized grievance and
      2) No vicarious standing
         a) General rule: claimant may not assert the rights of third parties
         b) Exceptions
            (1) One or more of the following factors present:
(a) Relationship between claimant and third party
(b) Substantial obstacle that prevents third party from asserting right
(c) Risk of diluting third party's rights, or

(2) First amendment overbreadth

2. Taxpayer standing
   a. Federal taxpayers
      1) General rule: no federal taxpayer standing
      2) Exception (Flast double-nexus test)
         a) Congressional exercise of taxing and spending power
            (1) Exercise of taxing and spending power
            (2) By Congress and
         b) Constitutional limit on taxing and spending power
   b. State taxpayers
      General rule: no state taxpayer standing
   c. Local taxpayers
      Local taxpayers may have standing if they have sufficient actual injury

3. Organizational standing, only if:
   a. Members have standing in their own right,
   b. The claim is germane to the organization's interests, and
   c. Participation by individual members is not required.