University of North Carolina School of Law
Carolina Law Scholarship Repository

Faculty Publications | Faculty Scholarship

1984

Rethinking Standing

Gene R. Nichol Jr.
University of North Carolina School of Law, gnichol@email.unc.edu

Follow this and additional works at: https://scholarship.law.unc.edu/faculty_publications

 Part of the Law Commons

Publication: *California Law Review*

This Article is brought to you for free and open access by the Faculty Scholarship at Carolina Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Rethinking Standing

Gene R. Nichol, Jr.†

We need not mince words when we say that the concept of "Art. III standing" has not been defined with complete consistency . . . .
—Valley Forge Christian College v. Americans United for Separation of Church & State, Inc. [1]

When Justice Rehnquist penned this quotation, he employed no false sense of modesty. To the contrary, describing the law of standing merely as less than consistent reflects a talent for understatement not often associated with the controversial Justice.[2] In perhaps no other area of constitutional law has scholarly commentary been so uniformly critical.[3] Observers, with just cause, regularly accuse the Supreme Court of applying standing principles in a fashion that is not only erratic, but also eminently frustrating in view of the supposed threshold[4]

---

† Associate Professor of Law, West Virginia University College of Law. B.A. 1973, Oklahoma State University; J.D. 1976, University of Texas.

1. 454 U.S. 464, 475 (1982).

2. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 219-55 (1979) (Rehnquist, J., dissenting).

3. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22.00-.20 (Supp. 1982); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-17 to -29, 326-70 (1978); J. VINING, LEGAL IDENTITY: THE COMING OF AGE IN PUBLIC LAW (1978); Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139 (1977); Broderick, *The* Warth *Optional Standing Doctrine: Return to Judicial Supremacy?*, 25 CATH. U.L. REV. 467 (1976); Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; Davis, *Standing, 1976*, 72 NW. U.L. REV. 69 (1977); LeBel, *Standing After* Havens Realty: *A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013; Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545, 551-55 (1977); Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185 (1981) [hereinafter cited as Nichol, *Causation*]; Nichol, *Standing on the Constitution: The Supreme Court and* Valley Forge, 61 N.C.L. REV. 798 (1983) [hereinafter cited as Nichol, *Standing*]; Parker & Stone, *Standing and Public Law Remedies*, 78 COLUM. L. REV. 771 (1978); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863 (1977); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

For more charitable reviews, see Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Leedes, *Mr. Justice Powell's Standing*, 11 RICHMOND L. REV. 269 (1977).

4. In Warth v. Seldin, 422 U.S. 490, 498 (1974), the Court characterized the standing issue as a "threshold question in every federal case." Consider, for example, the frustration of the litigants in *Simon*. There the case was litigated to a decision on the merits, and appealed to the circuit court. Eastern Ky. Welfare Rights Org. v. Shultz, 370 F. Supp. 325 (D.D.C. 1973), *rev'd sub nom.* Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974); *see* Davis, *supra*

nature of the standing inquiry. The judicial eye appears to be peering beyond preliminary access issues to take into account a variety of interests traditionally considered irrelevant to the standing determination. As a result, the Court's existing body of law reflects a state of "intellectual crisis."[5]

Nor will the "crisis" soon subside. Current judicial opinions make little effort to recognize—let alone to ameliorate—the vagaries of the law of standing. The Court has been more articulate—or at least more energetic—in describing what it will not do than what it will.[6] To an extent, commentators have followed suit. With a few notable exceptions,[7] academics have challenged the results in a particular case or line of cases, without questioning the standing framework as a whole or offering alternative methods with which to measure judicial power.

The standing principle can no longer appropriately be written off as merely a "complicated specialty of federal jurisdiction."[8] It has become, rather, a burgeoning, constitutionally grounded doctrine,[9] with a significant impact upon federal litigation. Standing law provides, in essence, the law of "judicial control of public officers."[10] Given the tremendous growth of public law in the United States over the past three decades, access decisions influence in a major way our constitutional structure. If such decisions are unprincipled, the entire process of constitutional adjudication suffers.[11]

This Article will examine the standing doctrine in its broadest contours. Specifically, in Part I the analytical foundations of the Burger Court's standing jurisprudence will be criticized. My principal claim is

---

note 3. In the United States Supreme Court the standing issue was not raised. Yet some four years after the litigation began, the case was dismissed for failure to meet "threshold" standing requirements. *Simon*, 426 U.S. 26, 37 (1976).

5. J. VINING, *supra* note 3, at 1.

6. Compare, for example, the vigor of Justice Rehnquist's opinion denying standing in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), with the belabored analysis set forth in Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978).

7. *See* J. VINING, *supra* note 3; Albert, *supra* note 3; Davis, *supra* note 3; Scott, *supra* note 3.

8. United States *ex rel.* Chapman v. Federal Power Comm'n, 345 U.S. 153, 156 (1953).

9. In Warth v. Seldin, 422 U.S. 490 (1975), and Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), and their progeny, the Court went out of its way to constitutionalize its standing rulings.

10. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459 (1965).

11. *Compare, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), *with* Flast v. Cohen, 392 U.S. 83 (1968). As simple standing cases, the comparison would indicate that taxpayers may successfully challenge congressional expenditures designed to benefit religious groups, but not executive determinations to grant valuable property interests to the same entities. Yet *Valley Forge* (or *Flast* for that matter) serves to muddy first amendment law as well. It is difficult to avoid the conclusion, having examined the two cases, that the establishment clause is somehow less enforceable against the executive branch than the legislative branch. But why?

that the Court has applied one aspect of standing analysis—namely, the demand for concrete, particularized injury—to areas of article III investigation for which the requirement is ill suited. The results of judicial preoccupation with injury in fact have been numerous. First, the Court has so severely manipulated the injury standard that the foundation of standing law is essentially incomprehensible. Second, by treating the injury standard as if it were an objective measure of interest, the Court has refused to initiate a much-needed dialogue on the appropriate boundaries of constitutional harm. Third, the decisions reflect the influence of issues extraneous to the standing inquiry. The result is a schizophrenic body of law in which the Court announces that one set of interests are dispositive (the plaintiff's stake in the litigation), while in the bulk of the major cases other factors appear to prevail (separation of powers, federalism concerns, the desirability of the claim on the merits, etc.). Finally, by dwelling on concrete injury and ignoring the distinct concerns posed by harms to legally cognizable interests, standing analysis denigrates less tangible values created by law.

It is my position, therefore, that the Supreme Court should reconsider its present use of the particularized injury standard. The demonstration of distinct, concrete harm is one appropriate method of invoking federal jurisdiction. It is not, however, the only manner of showing legally cognizable interest. Statutory and constitutionally created interests often provide independent bases for judicial access. By attempting to fit all of standing analysis within the injury rubric, decisions confuse not only what is required to achieve standing but also what it means to be injured.

A second, and perhaps less controversial claim made here, is that standing law has been made to serve too many masters. Decisions examining the plaintiff's interests in the litigation, the breadth of various protections of substantive law, and the appropriate scope of judicial authority in our system of government have all passed for standing analysis. Even with such divergent goals, however, the Court typically explains its decisions only by conclusory declarations about the presence or absence of injury. If such factors are to be introduced into the standing calculus they should be addressed both openly and individually. To that end, in Part II, I will suggest a method of standing review designed to segregate the various interests that are brought to bear on the modern standing decision. I propose that the Court develop distinctions between (a) access standing—measuring the plaintiff's interest in the litigation to determine whether he is a proper party to invoke federal jurisdiction; (b) issue standing—asking whether the plaintiff is a proper party to assert the particular legal rights he claims; and (c) decision standing—considering whether the issue to be litigated is a polit-

ical one, entrusted to another branch of state or federal government. So analyzed, it is hoped that scrutiny of the case or controversy requirement can be made both more focused and more finely attuned to the protections afforded by substantive law.

I

PARTICULARIZED INJURY—AN ELUSIVE FOUNDATION

The law of standing is dominated by slogans and litanies. For over a decade, it appeared mandatory to begin standing decisions with the *Baker v. Carr* refrain that the gist of the standing determination is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy"[12] as to warrant the invocation of federal jurisdiction. In recent years, however, the shibboleth has become both longer and more specific. The Supreme Court now regularly indicates that "at an irreducible minimum,"[13] the Constitution requires a litigant to show that he has suffered personally some actual or threatened injury.[14] In addition, the injury must be shown to be fairly traceable to the allegedly illegal conduct of the defendant.[15] As a third, quite distinct,[16] requirement, the injury must be likely to be redressed by a favorable decision.[17] In capsule form, article III imposes requirements of particularized injury, causation, and redressability.

To complete the picture, it is said that the federal judiciary adheres to a set of prudential considerations that bear on the question of standing.[18] Claimants must, in the usual course, assert their own rights rather than those of third parties.[19] The Court will not consider "ab-

12. 369 U.S. 186, 204 (1962). *See, e.g.*, City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1665 (1983); Warth v. Seldin, 422 U.S. 490, 498 (1975); Barlow v. Collins, 397 U.S. 159, 170 (1970) (Brennan, J., concurring); Flast v. Cohen, 392 U.S. 83, 99 (1968).

13. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

14. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975).

15. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).

16. I have argued elsewhere that despite statements to the contrary in Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 (1978), the causation and redressability requirements are distinct. *See* Nichol, *Causation*, *supra* note 3, at 198-201; *see also* Larson v. Valente, 456 U.S. 228, 269-70 (1982) (Rehnquist, J., dissenting); Community Nutrition Inst. v. Block, 698 F.2d 1239, 1245 n.28 (D.C. Cir. 1983); C. WRIGHT, THE LAW OF FEDERAL COURTS 68-69 & n.43 (4th ed. 1983).

17. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. 490, 508 (1975); *see also* Director, Office of Workers' Compensation Programs v. Perini N. River Assocs., 103 S. Ct. 634, 641 (1983); Blum v. Yaretsky, 457 U.S. 991 (1982); Larson v. Valente, 456 U.S. 228, 242-43 & n.15 (1982).

18. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982).

19. Warth v. Seldin, 422 U.S. 490, 499 (1975).

stract questions of wide public significance" or mere "generalized grievance[s],"[20] since they are more appropriately addressed to the other branches of government. Finally, standing law purportedly requires that the plaintiff's claim fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[21] These judicial incantations, however, provide neither a reliable tool to predict the outcome of standing cases nor an accurate description of the law regulating access to the federal courts.

That the Court often ignores these requirements of standing is obvious. Despite the particularized injury requirement, for example, the Court does, on occasion, hear cases in which there is either no injury or at least no particularized injury.[22] Nor is the injury requirement a genuine hurdle to standing granted by statute[23]—a fact not easily understood if standing is not a separation of powers doctrine.[24] The Court has converted the second requirement, causation, into a demand for specific pleading.[25] Just as inexplicably, specific pleading has sometimes been treated as if it were a modern aberration.[26] The redressability requirement, so easily described in judicial opinions, has been applied with such a determined inconsistency that it can likely be explained only by the Court's view of the merits of the cases.[27] The

20. *Id.* at 499-500. *See also* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80 (1978).

21. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

22. *See, e.g.*, Mueller v. Allen, 103 S. Ct. 3062 (1983); Meek v. Pittenger, 421 U.S. 349 (1975); Norwood v. Harrison, 413 U.S. 455 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Flast v. Cohen, 392 U.S. 83 (1968).

23. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 n.22 (1976); Warth v. Seldin, 422 U.S. 490, 501 (1975).

24. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968).

25. The causation requirement, in its present form, was announced in Warth v. Seldin, 422 U.S. 490 (1975). Requiring that injury be "fairly traceable" to the challenged acts of the defendant, the Court denied standing because "a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*." *Id.* at 508 (emphasis in original). *See also* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 45 (1976). Accordingly, in both *Warth* and *Simon*, the Court inverted normal pleading presumptions by refusing to allow normal inferences to be drawn from general allegations, and dismissed for lack of standing.

26. In a 1980 case, plaintiffs were allowed to contest a ruling concerning irrigation rights under the theory that they would be better able to purchase land, despite the absence of specific pleadings concerning their financial ability to buy property. Bryant v. Yellen, 447 U.S. 352, 367-68 (1980). More significantly, in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), the Court refused to dismiss a claim based upon harm to the "benefits of interracial associations" even though it did not appear from the complaint that the defendants' conduct had anything to do with the neighborhoods in which the plaintiffs lived. *Id.* at 376-77. Pointing to the "liberal federal pleading standards," the Court ruled dismissal on the pleadings "inappropriate" absent further factual development. *Id.* at 377-78.

27. The article III requirement that a plaintiff demonstrate that his injury is redressable has

Court has fashioned a rule for standing in taxpayer cases that bears no relationship to the plaintiff's interest in litigation,[28] and then has interpreted the rule in a nonsensical fashion.[29] The Court also ignores the "zone of interest" mandate[30]—especially when it would appear to be dispositive of the standing issue.[31] Worst of all, occasionally the Court has skipped over difficult standing issues entirely in order to proceed directly to the merits of attractive cases.[32]

The record, in short, is not good. In fact the law of standing has become so disjointed that the danger now exists that the Court will come to accept it as a manipulable doctrine whose primary value lies in its ability to serve nonjurisdictional ends. Standing law is unsatisfactory in part, of course, because of unprincipled decisionmaking. More importantly, however, its shortcomings can also be traced to the weakness of its claimed foundation—injury in fact.

A. Tracking Injury

The entire body of modern standing law has its roots in the concept of injury in fact. When the Supreme Court adopted the injury-in-fact test in the 1970 decision *Association of Data Processing Service Or-*

---

fluctuated as well. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 75 n.20 (1978) (plaintiff must show a "substantial likelihood"); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 262 (1977) (plaintiff must show that injury is "likely to be redressed"); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 45 (1976) ("prospective relief *will* remove the harm") (emphasis added). Accordingly, there seems to be a general consensus that the Court has downplayed redressability problems when it was anxious to render a decision on the merits while it has raised insurmountable hurdles in cases considered less desirable. *Compare* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (denying standing because the injuries were not redressable), *and* Warth v. Seldin, 422 U.S. 490 (1975) (same), *and* Linda R.S. v. Richard D., 410 U.S. 614 (1973) (same), *with* South Dakota v. Neville, 103 S. Ct. 916 (1983) (allowing standing even though it was quite uncertain that the injuries would be redressed by a favorable decision), *and* Bryant v. Yellen, 447 U.S. 352 (1980) (same), *and* Orr v. Orr, 440 U.S. 268 (1979) (same), *and* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81 n.14 (1978) (same), *and* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). *See also* K. DAVIS, *supra* note 3, § 22.02-12, at 352-55; Nichol, *Causation*, *supra* note 3, at 206-13; Sedler, *supra* note 3; Tushnet, *supra* note 3.

28. *See* Flast v. Cohen, 392 U.S. 83, 102-04 (1968) (describing nexus test for taxpayer standing).

29. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 480 & n.17 (1982) (distinguishing between government gifts of money and real estate in measuring the requisites of article III); *see also* Nichol, *Standing*, *supra* note 3, at 813-15.

30. Professor Davis claims that between 1970 and 1982 the zone of interest test went unmentioned in twenty-five Supreme Court cases in which it appears to have been relevant. K. DAVIS, *supra* note 3, § 22.00, at 327.

31. *See, e.g.*, Bryant v. Yellen, 447 U.S. 352 (1980); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). *See also* K. DAVIS, *supra* note 3, § 22.02-11, at 347-49.

32. *See, e.g.*, Mueller v. Allen, 103 S. Ct. 3062 (1983); Orr v. Orr, 440 U.S. 268 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Norwood v. Harrison, 413 U.S. 455 (1973); Adler v. Board of Educ., 342 U.S. 485 (1952).

ganizations, Inc. v. Camp,[33] it apparently sought to accomplish two important objectives. First, it sought to liberalize access to the federal courts.[34] Second, the Court attempted to give content to the Administrative Procedure Act's grant of standing to a person "aggrieved by agency action within the meaning of a relevant statute."[35]

More important for analytical purposes, however, is the Court's search in *Data Processing* for an overriding principle, removed from the likelihood of ultimate recovery, the desirability of the claim on the merits, or principles of separation of powers, to instruct the threshold standing inquiry.[36] In theory, therefore, the injury-in-fact principle seeks to establish a minimum quantum of constitutionally required harm—hopefully to be measured in something akin to an objective fashion—necessary to invoke the federal judicial power. The injury-in-fact standard sought to broaden judicial access by diverting attention from the legal interests asserted—which, under pre-*Data Processing* standards, easily folded the standing inquiry into a decision on the merits—to objective, concrete harm. Consider the appellation itself—injury *in fact*—as distinguished, one supposes, from injury protected by law. The monetary loss that arises from the competition of national banks, for example, is objective and indisputable without regard for any "legal" interest. Thus, as a standing principle, injury in fact seemed ideal since it ensured a personal stake by hinging itself to harm and separating itself from the claim on the merits because it was not dependent upon interests created or protected by law.[37]

This concept of standing performed well initially. In the years immediately following *Data Processing*, the Court interpreted its liberal-

33. 397 U.S. 150 (1970).

34. "[T]he trend is toward enlargement of the class of people who may protest administrative action." *Id.* at 154.

35. *Id.* at 153 (quoting 5 U.S.C. § 702 (1982)).

36. The injury-in-fact test replaced the much criticized legal interest test. The legal interest test, in a somewhat circular fashion, 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 Auth., 306 U.S. 118, 137 (1939). I will argue in the final sections of this Article that a rational standing doctrine cannot be completely separated from consideration of the issues involved in the litigation, since standing analysis often requires an examination of the protective intent reflected in both statutes and constitutional provisions.

37. One could argue, of conrse, that the zone of interest test, which also had its origins in *Data Processing*, is evidence that the Court still sought to cling to the merits. Justice Brennan accused the Court of such in his opinion in Barlow v. Collins, 397 U.S. 159, 168-78 (1970) (Brennan, J., concurring in the result and dissenting). Yet the zone of interest test has been more conspicuous in its absence than in its employment. *See* K. DAVIS, *supra* note 3, § 22.02-11. Moreover, the injury standard, as employed by the Burger Court throughout the mid-1970's, has evidenced the Court's clear yearning to tie the standard to concrete, nonlegal injury, whether or not that was the intent of Justice Douglas in *Data Processing*. Nichol, *Backing into the Future: the Burger Court and the Federal Forum*, 30 KAN. L. REV. 341, 345-50 (1982).

ized standard to encompass various forms of economic loss,[38] the threat of criminal prosecution,[39] and even esthetic or environmental injuries.[40] Each of these harms, quite distinct from any interest established by statute or constitutional provision, created standing where it would have been questionable before.

The injury-in-fact test, however, soon began to break away from its moorings. The Court, in giving standing to environmental claims, relied on injuries that were not only intangible, but also subjective in the sense that they necessarily depended upon the psychological makeup of the plaintiff. In its prior decisions concerning legislative reapportionment[41] and the establishment clause,[42] the Court found sufficient injuries such as vote dilution and the degradation resulting from the "union of government and religion."[43] Such harms could not be separated from legal interests as easily as the Court might have hoped when it created the *Data Processing* standard. As a final complication, Congress began to grant statutory standing[44] even when the interests to be asserted were relatively abstract and widely shared.[45]

The Burger Court responded to this recognition of intangible, subjective, shared, or legally related injuries by attempting to tighten the injury-in-fact standard. Article III now requires "distinct" and "palpable" injury.[46] No judicial definition of the new term has been offered, but I assume it requires that a litigant suffer tangible injury that distinguishes him from the populace at large. The cases reveal, however, that despite valiant attempts the Court has been unable to maintain such a line. The difficulty has arisen because the injury standard is being asked to do much more than it was designed to accomplish, and much more than it can reasonably be expected to achieve.

A brief review of the Court's injury cases indicates that even under the new test, intangible injuries have been used to establish standing. A few examples are instructive. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[47] a group of law students feared that higher Interstate Commerce Commission rates would raise the cost of recycled products, discourage their use, and thereby eventu-

38. Barlow v. Collins, 397 U.S. 159 (1970).

39. Wisconsin v. Yoder, 406 U.S. 205 (1972).

40. United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

41. Baker v. Carr, 369 U.S. 186 (1962).

42. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

43. Engel v. Vitale, 370 U.S. 421, 431 (1962).

44. *See infra* text accompanying notes 93-97.

45. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1982) (granting standing to "any person"). *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

46. Warth v. Seldin, 422 U.S. 490, 501 (1975).

47. United States v. SCRAP, 412 U.S. 669 (1973).

ally degrade environmental quality. The Court held that these facts satisfied the injury requirement. Similarly, in *Havens Realty Corp. v. Coleman*, the Court permitted a pro-integration group to litigate based on an alleged impairment to its "ability to provide counseling and referral services" resulting from the racial steering practices of a realtor.[48] Although the establishment clause has been said not to be enforceable in its own right,[49] in *School District v. Schempp*[50] the Court granted children standing to contest optional school prayer. Taxpayers have successfully mounted challenges to loans and transfers to parochial schools if accomplished by local government;[51] and last term in *Mueller v. Allen,*[52] the Court held that taxpayers had standing to object to state tax credits granted to parents of children enrolled in parochial schools.

Curiously, however, litigants asserting other intangible constitutional interests have often been turned away. The Court has repeatedly claimed that a litigant suffers no constitutional injury when he complains merely of government irregularity. Accordingly, the citizens' claims in *United States v. Richardson* that the failure to publish the budget of the CIA violated article I, section 9,[53] and in *Schlesinger v. Reservists Committee to Stop the War* that the incompatibility clause prevented a member of Congress from holding a commission in the Armed Forces Reserve,[54] could not provide appropriate bases for standing. Nor, in *Valley Forge*, did the federal government's transfer of public property to a religious organization in apparent violation of the establishment clause "injure" the plaintiff.[55] *Flast v. Cohen*, however, apparently lives, as do the reapportionment cases.[56] Therefore, here too, the Court has been unable to maintain a clear line; the injury suffered from "mere government illegality" is a fluctuating one.

48. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982). Unlike the other plaintiffs in *Havens*, the HOME organization could not claim standing under the Fair Housing Act alone. The majority opinion, however, treated the impairment of counseling opportunity, without more, as injury in fact.

49. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

50. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). *Schempp* and *Vitale*, of course, were decided prior to the adoption of the "distinct and palpable" language. The Burger Court, however, has shown no willingness to abandon the analysis used in these cases. The Court's recent affirmance of the *Schempp* and *Vitale* decisions on the merits indicates implicit approval of the standing grants in those cases. *See* Stone v. Graham, 449 U.S. 39 (1980) (per curiam).

51. Meek v. Pittenger, 421 U.S. 349 (1975).

52. Mueller v. Allen, 103 S. Ct. 3062 (1983).

53. United States v. Richardson, 418 U.S. 166 (1974).

54. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

55. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

56. *See* Marsh v. Chambers, 103 S. Ct. 3330 (1983); Mueller v. Allen, 103 S. Ct. 3062 (1983); Tilton v. Richardson, 403 U.S. 672 (1971); *see also* Gaffney v. Cummings, 412 U.S. 735 (1973).

In addition, the Court has inconsistently applied the threat of future harm as a measure of injury. The Court recently ruled that the threatened imposition of a state registration and reporting requirement on religious organizations "surely amounts to a distinct and palpable injury."[57] Yet, the employment of a government surveillance program[58] and a claimed pattern of police brutality[59] provided insufficient demonstration of existing harm. As recently as its last Term, the Court ruled in *City of Los Angeles v. Lyons*,[60] that a plaintiff who had been the victim of a near-fatal police chokehold had no stake in contesting the future use of the practice.

A recent court of appeals decision illustrates the thinness and artificiality of the injury line that the Court is apparently attempting to draw. In *American Civil Liberties Union v. Rabun County Chamber of Commerce*[61] the plaintiffs challenged the existence of a large illuminated cross privately erected in a state park. Under Supreme Court decisions, it would have been difficult for the plaintiffs to challenge the religious display merely as separationists.[62] The American Civil Liberties Union, therefore, claimed that several of its members were injured as environmentalists—the presence of the cross harming their camping pleasures.[63] Using that theory, the plaintiffs were able to achieve standing. In fact, the standing issue was complicated only because the plaintiffs complained of a cross rather than a pile of trash—a fact that one would think would enhance rather than weaken the access claim in our system of government.

How then is the constitutionally mandated injury requirement to be measured? The objective magnitude of the harm cannot be the standard. In *Roe v. Wade*,[64] for example, the Court denied standing to a married couple who had been warned by doctors that abortion would be safer for the wife's health than either pregnancy or the use of contraceptives. The couple had sought to obtain standing based upon a claimed injury to "marital happiness" resulting from an abortion ban. Surely those plaintiffs, or the past chokehold victim in *City of Los Angeles v. Lyons*[65] suffered greater present harms at the hands of the defendants than did the law students in *SCRAP* or the counseling group

57. Larson v. Valente, 456 U.S. 228, 241 (1982).

58. Laird v. Tatum, 408 U.S. 1 (1972).

59. Rizzo v. Goode, 423 U.S. 362 (1976).

60. City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983).

61. 678 F.2d 1379 (11th Cir. 1982).

62. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. at 486 n.22.

63. 678 F.2d at 1384.

64. 410 U.S. 113 (1973).

65. 103 S. Ct. 1660 (1983).

in *Havens Realty*. Nor can the perceived quantity of injury explain the different results in *Schlesinger*, *Baker v. Carr*, *Valley Forge*, or last Term's decision in *Mueller v. Allen*.[66]

Despite the fact that neither the quantum of harm nor the explanations of the Court reveal the boundaries of constitutional injury, patterns in the decisions are ascertainable—if one pays attention to what the Court does rather than what it says. Most intangible interests that have been presented by litigants can provide the basis for injury—unless the interests were considered so important by the Framers that they were written into the constitutional text. In that event, the Court usually characterizes the interest as "generalized." It also appears that "preferred" constitutional claims provide a greater likelihood of federal access than do "insignificant" provisions.[67] Further, when standing is not granted by statute, it is more readily achieved when the cause of action is grounded in statutory rather than constitutional protections.[68] These factors, along with the language employed in a few decisions, suggest that the definition of constitutional injury is greatly affected by separation of powers considerations[69] and federalism interests.[70] Perhaps most often, the standing inquiry is a veiled reflection of the Court's view of the attractiveness of the litigant's case on the merits.[71] Unfortunately for the students of article III jurisprudence, however, every one of these considerations is supposed to be irrelevant to the standing determination.[72]

The distinct and palpable injury standard has failed to provide a

66. 103 S. Ct. 3062 (1983).

67. *Compare* Norwood v. Harrison, 413 U.S. 455 (1973) (equal protection), *and* Flast v. Cohen, 392 U.S. 83 (1968) (establishment clause), *and* Baker v. Carr, 369 U.S. 186 (1962) (equal protection), *with* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (incompatibility clause), *and* United States v. Richardson, 418 U.S. 166 (1974) (art. I, § 9, cl. 7). *But see* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

68. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (HOME plaintiffs); Watt v. Energy Action Educ. Found., 454 U.S. 151 (1981); Bryant v. Yellen, 447 U.S. 352 (1980); United States v. SCRAP, 412 U.S. 669 (1973); *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 239-40 (1974) (Marshall, J., dissenting).

69. *See, e.g.*, United States v. Richardson, 418 U.S. 166 (1974); Laird v. Tatum, 408 U.S. 1 (1972).

70. *See* City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

71. *Compare* Rizzo v. Goode, 423 U.S. 362 (1976) (allegations of police brutality), *with* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (allegations of environmental harm from nuclear power plants).

72. Recall, for example, the statement in Flast v. Cohen, 392 U.S. 83, 100 (1968), that the "question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems." In addition, the Supreme Court also indicated in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982), that there can be no preferred list or "hierarchy" of constitutional rights.

neutral and objectively ascertainable method of measuring access to the federal courts. As standing jurisprudence began to embrace subjective and intangible interests, the term "injury in fact" offered little guidance in measuring the scope of the case or controversy requirement. At the same time, when faced with shared constitutional claims, the Court began to sense that liberal standing rules posed a threat to the appropriate separation of powers. The Court's response, rather than tying constitutional harm to comprehensible standards, has been to taint its analysis of harm by including extraneous considerations. If the particularized injury standard was designed to supply an overarching measurement of judicial authority, removed from the merits of the claim or concern for separation of powers, it no longer performs that task.

B. Injury and Redressability

The injury concept has suffered from judicial manipulation by its use in redressability analysis as well. For more than a decade, standing doctrine has required that the injury asserted by the plaintiff be likely to be redressed by a favorable decision.[73] The nature of the interplay between redressability and injury, however, has apparently escaped the Burger Court.

Consider a few examples. In *Linda R.S. v. Richard D.*[74] the mother of an illegitimate child challenged the discriminatory enforcement of a Texas child support statute. The statute had been construed to apply to married parents only. The Court ruled that the plaintiff failed to meet the redressability hurdle since the requested relief—nondiscriminatory enforcement—would not ensure the payment of support.[75] Two years later, in *Warth v. Seldin*,[76] the Court held that plaintiffs seeking to challenge the exclusionary zoning practices of Penfield, New York failed to satisfy the redressability standard because they could not prove that they would actually be able to obtain housing if the ordinance were invalidated. Finally, in *Simon v. Eastern Kentucky Welfare Rights Organization*,[77] several indigents attempted to challenge a revenue ruling that allowed hospitals to qualify for favorable tax treatment even if they reduced service to indigents. The plaintiffs claimed that the allegedly illegal ruling resulted in the denial of hospital access to the poor. Concluding that even if the challengers prevailed, it was just as plausible that hospitals would elect to forgo

73. *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614 (1973).
74. *Id.*
75. *Id.* at 618-19.
76. 422 U.S. 490, 504 (1975).
77. 426 U.S. 26 (1976).

favorable tax treatment rather than shoulder the costs of expanded treatment of indigents, the Court ruled that the redressability requirement had not been met.[78]

Such cases demonstrate the ease with which the Court, by toying with the scope of the injury at issue, can raise or lower the redressability hurdle. In *Linda R.S.*, *Warth*, and *Simon*, the Court overstated the injuries that the plaintiffs sought to have redressed. In *Linda R.S.*, the Court refused jurisdiction because even a decree requiring nondiscriminatory enforcement would not ensure support. But why was obtaining the payment of child support considered the relevant injury? The mother in *Linda R.S.* sought to be treated on an equal basis with married mothers. Her injury—denial of equal treatment—would undoubtedly have been redressed by an affirmative decree requiring enforcement of child support obligations against unmarried fathers. Similarly, the *Warth* plaintiffs sought not only to obtain housing in Penfield. They also asserted their interest in equal participation in a housing market not distorted by unconstitutional zoning practices. The denial of a meaningful opportunity to persuade others to construct low cost housing in Penfield, for example, would have been redressed by a determination that the ordinance was unconstitutional. The indigents in *Simon* had no objection to receiving hospital access, but the interest they asserted would more appropriately be described as having hospital decisions concerning the services offered to indigents accurately reflect an earlier incentive structure implicitly approved by the Congress.[79] Again, that injury would have been redressed by the claim presented.

The Court, however, has not always construed "injury" so broadly. In *Larson v. Valente*,[80] the Unification Church challenged the registration and reporting requirements of Minnesota's charitable solicitations act. These requirements did not apply to religious organizations that received more than half of their contributions from their own members. Claiming that the Unification Church failed the fifty percent test, Minnesota threatened to enforce the requirements against the Church. The Church responded by seeking injunctive relief. During the course of the litigation Minnesota asserted in addition that the Church failed to come within the terms of the reporting exemption because it was not a religious organization. Under this second theory a redressability question arose since even if the Unification Church succeeded in its challenge to the fifty percent donation rule, it would not be assured exemption if the state prevailed on the religion issue.[81] The

78. *Id.* at 43-46.

79. *See* Chayes, *supra* note 3, at 18-19.

80. 456 U.S. 228 (1982).

81. *Id.* at 268-71 (Rehnquist, J., dissenting).

majority, however, rejected this characterization and granted standing based on the threatened application of the fifty percent rule, without more, as the relevant injury for redressability purposes.[82] That injury could be redressed by a favorable decision even if the Church later lost on the religion issue.

Equal protection cases provide the clearest examples of the Court's inability to maintain a principled line. In the *Regents of the University of California v. Bakke*,[83] a substantial question arose concerning Alan Bakke's ability to prove that he would have been admitted to medical school absent the contested affirmative action program. The Court skirted the standing issue, however, by declaring that the university's "decision not to permit Bakke to compete for all 100 places"[84] was the relevant injury. That harm would, of course, be redressed by a favorable ruling. If, however, the *Warth* plaintiffs could redress their injuries only by showing that they would actually obtain housing, and if the mother in *Linda R.S.* was required to show that she would actually receive support payments, Bakke should have been made to prove that he would have gotten into medical school. The interest in equal opportunity was insufficient to provide standing in *Linda R.S.* and *Warth*, but it eventually got Alan Bakke into medical school.[85]

A hypothetical brings the issue into better focus. Suppose that an exclusive suburb, separately incorporated, passed a statute prohibiting blacks from purchasing housing in the locale. Assume further that the suburb is composed entirely of ten-acre privately owned parcels, each valued in excess of $500,000. The facts, as developed, indicate that no one in the suburb has present plans to sell. How would plaintiffs achieve standing in such a case? Must they not only be black, but also be able to prove capacity and willingness to buy a $500,000 home? Even if the plaintiffs make that showing, is their injury nonredressable without proof of a willing seller? Under *Warth*, standing would be denied unless the plaintiffs were black, rich, and had a seller in tow. Under *Bakke* they could obtain standing merely by showing that the statute denied them the opportunity to seek housing at that locale. My

82. 456 U.S. at 242-44.

83. 438 U.S. 265 (1978).

84. *Id.* at 280 n.14.

85. Orr v. Orr, 440 U.S. 268 (1979), presents the same problem. There, a successful equal protection challenge was mounted to an Alabama statutory scheme that allowed alimony recovery against husbands but not wives. Particularly troubling for redressability purposes, however, was the fact that the alimony obligation was fixed by a prior agreement between the parties, which appeared to be enforceable under state law. The majority opinion ignored the standing problem, but the dissenting Justices claimed that the injury was nonredressable. *Id.* at 296-98 (Rehnquist, J., dissenting). It was nonredressable, of course, if the harm was being forced to pay alimony. That would not be the case, however, if the injury were deemed to be disparate treatment under the alimony statute.

guess is that if such a case arose, the Court would be even more lenient, and ask no more of a plaintiff than that he be black.[86] That, however, is because of the attractiveness of the claim on the merits.

Which injury *should* be the focus of the inquiry? Under the Court's standing jargon, an apparent dilemma exists. If *Bakke* and *Larson* are the rule, that is, if redressability of the governmental discrimination is sufficient and it is unnecessary for the plaintiffs to show that they will achieve the "ultimate" goal of their efforts—the purchase of a $500,000 home—do not the litigants assert mere generalized claims to good government? Does not the concrete harm, sought so eagerly by the particularized injury standard, become constitutionally irrelevant? But if *Warth* and *Simon* state the correct principle, will not the Court be forced to say that black plaintiffs who have less than $500,000 have no standing because even if the suburb discriminates, that in no way changes the plaintiffs' lives?

Cases like *Linda R.S.*, *Warth*, and *Bakke*, therefore, have presented major standing problems. The "particularized harm" asserted by the plaintiffs was actually exclusion from participation. Since the litigants could not demonstrate with certainty that they would be successful in their ultimate pursuits even if allowed to participate, their claims collapsed to mere allegations of equality denied. Under a strict injury-in-fact standard, it is not enough to claim that the Government has treated you unfairly. The standard also requires plaintiffs to show that they lost something tangible in the process (e.g., money, a house, a seat in a medical school class, etc.). *Bakke* and *Larson* demonstrate, of course, that such a harsh line has, on occasion, proven too much for the Supreme Court to countenance. I will argue below, however, that the dilemma,[87] like the difficulties that have arisen from defining injury generally, surfaces only because the particularized harm standard has been applied in areas of standing analysis beyond its relevance and beyond its utility.

C. *The Relevance of Injury*

Over thirty years ago in *Joint Anti-Fascist Refugee Committee v. McGrath*, Justice Frankfurter made the following observation:[88] "A

86. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). I will argue that in a case like the posed hypothetical, standing should be considered directly under the equal protection clause. *See infra* text accompanying notes 98-113 and 137-40. Conceding a "stake" reflected in interests created by the equal protection clause, however, a federal court might well demand that a plaintiff demonstrate that his dispute with the hypothetical suburb is not purely abstract. Accordingly, a showing that the plaintiff actually seeks the opportunity to obtain housing in the suburb would be appropriate.

87. *See infra* text accompanying note 113.

88. 341 U.S. 123, 152 (1950) (Frankfurter, J., concurring).

litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. . . . Or standing may be based on an interest created by the Constitution or a statute." Thus, legally cognizable interests, Frankfurter claimed, could arise from three sources: (a) analogous common law rights, (b) statutory and (c) constitutional guarantees. Even under the restrictive views of the time, there was no doubt that legal interests, capable of sustaining standing, could be directly created either by legislation or by the Constitution.[89] But the analysis of statutorily and constitutionally based standing claims has been hampered by the relatively recent adoption of the injury-in-fact standard as an overriding standing requirement. While the injury standard has proven to be an effective tool in the liberalization of judicial access in general, to my mind it has a place in our standing jurisprudence, if at all, only as a means of ascertaining which interests qualify for judicial recognition under (a) above. That claim is, no doubt, a bit strange on its face. None—or indeed very few—of the myriad interests that are the subjects of controversial modern standing decisions had analogous counterparts at common law. But, of the three categories of legal interests listed by Frankfurter, rights based upon comparable common law determinations are the only ones having their source in judge-made law.[90]

With the Warren Court's tremendous expansion of public law, the standing framework described by Justice Frankfurter proved too cramped. As the progeny of *Ex parte Young*[91] multiplied, standing based upon express statutory grants or analogies to a relatively closed set of common law protections fell out of step with the development of substantive federal law. As a result, of course, the Court scrapped the legal interest test in favor of the injury-in-fact standard. The injury standard of *Data Processing* sought to ascertain, given the breakdown of the legal interest test, which values the judiciary would recognize as sufficient to invoke federal jurisdiction. The Court's answer, of course, was that only those persons actually harmed by the defendant had a sufficient constitutional stake in the litigation. Nothing in the historical progression of standing analysis, however, should indicate that the concrete injury requirement should limit plaintiffs seeking to protect statutory or constitutionally based interests.

The determination of which injuries may properly trigger the fed-

89. *See, e.g.*, Bell v. Hood, 327 U.S. 678 (1946).

90. That is not to deny, of course, that judges "make" constitutional law. Even so, such judicial analysis rightly claims the Constitution as its source. *See* Nichol, *Giving Substance Its Due*, 93 YALE L.J. 171 (1983).

91. 209 U.S. 123 (1908). *See* Scott, *supra* note 3.

eral judicial power is, as the two previous Sections demonstrate, hardly a neutral, value-free process. It probably cannot be. I think that Professor Vining has correctly characterized it as an exercise in defining "public values."[92] Yet the judiciary is not the only entity that plays the game. Congress certainly defines public values through legislation, and the Constitution can be understood to reflect consensus values ratified by the people as a whole. The concrete injury requirement should be no limit to those efforts.

The effort to keep statutory standing within the framework of the "distinct and palpable" standard has led to amusing results. First, the Court has announced that injury in fact is required by the Constitution but that federal statutes conferring standing automatically meet this mandate.[93] Second, the Court, employing this circular reasoning, has accepted interests which are obviously not "distinct and palpable" as appropriate bases for standing.[94] Actually, the Court has little room, at least under existing constitutional law, to overturn any congressional grant of standing. Given the confused state of article III jurisprudence, if Congress chooses to implement federal policies through the employment of the judiciary in actual lawsuits the Supreme Court would be hard pressed to deny that such efforts are necessary and proper exercises of congressional authority. Of more direct relevance, however, is the ability of Congress to "create legally enforceable rights where none before existed."[95] When such rights are invaded, standing exists.[96] Accordingly, the Congress could most likely create rights of the most ethereal sort, for example, rights to honest government, an efficient bureaucracy, or an integrated society, and grant standing to "any person" to enforce them. Under such a scenario, the Supreme Court could, one assumes, maintain the facade that the plaintiffs suffered

92. J. VINING, *supra* note 3, at 171.

93. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 500-01, 509-10 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973); L. TRIBE, *supra* note 3, § 3-18, at 80; Monaghan, *supra* note 3, at 1381.

94. The Endangered Species Act provides that "any person" may commence an action to enforce the provision's dictates. 16 U.S.C. § 1540(g) (1982). My subjective concern over the possible extinction of the snail-darter, for example, is intangible and shared. Yet the standing issue was not even addressed in Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978). In Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), and in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), the Court allowed standing based upon new statutorily created rights to the "benefits of living in an integrated community," *Havens Realty*, 455 U.S. at 375; *Trafficante*, 409 U.S. at 208, and the right to "truthful housing information," *Havens Realty*, 455 U.S. at 375. Consider, also, the broad standing provisions reflected in the Federal Surface Mining and Reclamation Act, 30 U.S.C. § 1270 (Supp. V 1981), the Clean Air Act, 42 U.S.C. § 7604 (Supp. V 1981), and the Freedom of Information Act, 5 U.S.C. § 552 (1982).

95. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 136 (1947). *See* Warth v. Seldin, 422 U.S. 490, 514 (1975).

96. *See* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

"distinct and palpable" injuries. What must be acknowledged realistically, however, is that the Court's concrete injury requirement does not apply to standing granted by statute.[97]

What about a plaintiff who seeks standing on the basis of injury to a constitutionally based interest? Stripped of the fiction of standing grounded in the plaintiff's status as, for example, a taxpayer or citizen, *Schempp*,[98] *Flast*,[99] *Richardson*,[100] *Reservists*,[101] and *Valley Forge*[102] are all cases in which the plaintiffs sought standing merely on the basis of harm to constitutionally created interests. Only in *Valley Forge*, however, did the Court directly address the general question of whether standing could be founded upon a bare allegation of constitutional irregularity. In that case, the Court rejected the Third Circuit's grant of standing based on an alleged injury to the plaintiffs' "personal constitutional right"[103] to separation of church and state because the injury was not distinct and palpable. Writing for the Court, Justice Rehnquist, stating that actions based directly on the Bill of Rights have "no place in our constitutional scheme,"[104] characterized the claim as a mere assertion of the right to a particular kind of government conduct—the sort of generalized grievance prohibited by article III.[105]

Justice Rehnquist's claim, however, does not ring entirely true. The Constitution does create affirmative, judicially enforceable rights.[106] In cases recognizing implied causes of action springing from the Constitution, such as *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[107] and *Davis v. Passman*,[108] the Court settled at least that much. Actions based directly on the Bill of Rights *do* have a place in our "constitutional scheme." By what principle, however, can the Court hold as it did in *Davis v. Passman*, that the due process clause confers a right to be free from sex discrimination and still assert,

97. *See* L. TRIBE, *supra* note 3, § 3-18, at 80.

98. School Dist. v. Schempp, 374 U.S. 203 (1963).

99. Flast v. Cohen, 392 U.S. 83 (1968).

100. United States v. Richardson, 418 U.S. 166 (1974).

101. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

102. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

103. Americans United for Separation of Church & State, Inc. v. HEW, 619 F.2d 252, 265 (3rd Cir. 1980), *rev'd sub nom.* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

104. 454 U.S. at 489.

105. *Id.* at 483.

106. *See also* Carlson v. Green, 446 U.S. 14 (1980) (eighth amendment); Butz v. Economou, 438 U.S. 478 (1978).

107. 403 U.S. 388 (1971) (recognizing a cause of action based directly on the fourth amendment).

108. 442 U.S. 228 (1979). The Court held specifically that "[t]he equal protection component of the Due Process Clause . . . confers on [the] petitioner a federal constitutional right to be free from gender discrimination." *Id.* at 235 (footnote omitted).

as in *Valley Forge*, that the establishment clause does not confer a right to be free from the intermingling of church and state? To the Court's way of thinking, the difference between the two is that gender discrimination is a "personal" harm while concern for religious separation is generalized. The former, therefore, represents distinct and palpable injury and appropriately supports standing, while the latter does not.[109]

It is difficult to understand how the Constitution can be read to authorize the Court to draw this line. Since *Marbury v. Madison*[110] the judiciary has invoked its power to redress injuries to legally protected interests. Since the Constitution, as fundamental law, creates legally protected interests, it would seem that the *entire* Constitution creates such interests. How then and under what theory can the Court decide that the rights set forth in the fourth amendment are legally cognizable while those contained in the establishment clause are not? To my mind, the only "theory" is the Court's *ipse dixit* that the only constitutional rights enforceable in the federal courts are those that the Court considers capable of "distinct and palpable" violation. But if Chief Justice Marshall was right in *Marbury* that judicial enforcement of the Constitution represents the difference between true limitation of government powers and a meaningless scrap of paper,[111] and if, as seems likely, the Framers viewed the entire Bill of Rights as constructed on an equal footing, it is incumbent on the Court to justify its enshrinement of a hierarchy of constitutional rights which it claims to eschew.

The Supreme Court's creation of a constitutionally required prerequisite of distinct and palpable injury analytically "puts the cart before the horse." As Professor Currie has recently written: "No one can sue, I should have thought, unless authorized by law to do so . . . ."[112] Apparently, however, the Court no longer asks that question to determine standing. Instead, the Court premises the entire standing inquiry upon a particularized injury standard which, in the context of difficult modern decisions, is essentially incomprehensible.

The injury cases discussed earlier point up the shortcomings of the

109. Apparently, School Dist. v. Schempp, 374 U.S. 203 (1963), Flast v. Cohen, 392 U.S. 83 (1968), Davis v. Passman, 442 U.S. 228 (1979), Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), Baker v. Carr, 369 U.S. 186 (1962), Norwood v. Harrison, 413 U.S. 455 (1973), and Tilton v. Richardson, 403 U.S. 672 (1971), fall on the "bright side" of the particularized harm requirement, and Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), United States v. Richardson, 418 U.S. 166 (1974), and Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), do not. *See* Nichol, *Standing*, *supra* note 3, at 832-36.

110. 5 U.S. (1 Cranch) 137 (1803).

111. "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Id.* at 176.

112. Currie, *supra* note 3, at 42.

present method of analysis. In cases like *Richardson*, *Reservists*, and *Valley Forge*, the Court manipulated its standing guidelines—claiming, for example, to hear only cases based upon individual, tangible harm—so as to serve interests (e.g., separation of powers) extraneous to the standing determination. Rather than asking if the litigant's injuries were concrete, the standing question should have turned on whether the constitutional provisions on which the plaintiffs relied create legal interests arguably violated by the acts of the defendants.

Under this analysis, many of the redressability cases would have received different treatment as well. In *Linda R.S.*, *Warth*, and *Bakke*, for example, the plaintiffs could have asserted two sets of interests to achieve standing. Under *Data Processing*, they could attempt to obtain standing based upon potential concrete injuries—the loss of child support, housing, and a seat in medical school. The plaintiffs' standing claims could also have been considered directly under the equal protection clause. *Davis v. Passman*[113] would appear to be good authority to support their arguments, and no redressability problems would have been presented.

This discussion has pointed to three major shortcomings of present standing doctrine. First, in turning to particularized injury as an overriding standing requirement, the Court has failed to recognize that legally cognizable interests—both tangible and intangible—can be created by sources of law other than judicial pronouncements. Second, injury in fact, when employed as a standing requirement, is not self-defining. Therefore, standing law should begin to include a dialogue concerning the contours of legally cognizable injury. Third, if case or controversy decisions are to be comprehensible, the Court should segregate and examine the various factors that influence the employment of judicial power. The next Part proposes the outlines of a method with which to remedy these problems.

II
DISSECTING STANDING

The major source of confusion in standing law is that too many judicial activities take place under one heading. In name, standing focuses solely "on the party seeking to get his complaint before a federal court and not on the issue he wishes to have adjudicated."[114] Yet decisions, purporting to measure the plaintiff's personal stake in the litigation, have repeatedly considered separation of powers concerns, federalism interests, the relationship between the injury suffered and

113. 442 U.S. 228 (1979).
114. Flast v. Cohen, 392 U.S. 83, 99 (1968).

the legal claim asserted, and a variety of other factors. Since the Court rarely discusses the impact of such extraneous issues on standing determinations, it has substantially muddied the doctrine.

In general terms, the judiciary must address three different sorts of problems in standing decisions. First, at the core of the standing question, as reflected in the constant references to "personal stake," is the question of whether the plaintiff has sufficient interest in the case to merit the Court's attention. This inquiry requires an examination of the nature and extent of the harm sustained. Borrowing a term from Professor Scott, I refer to this aspect of standing as "access standing."[115] Second, standing law concerns itself with the determination of whether, in addition to having requisite personal stake, the litigant is a proper party to raise the legal issues presented. Third-party standing and the "standing" of defendants are obvious examples of what I will call "issue standing." Finally, standing cases often consider whether the government decision contested is better left in the hands of some other branch of government. To distinguish such analysis from other standing inquiries, I will refer to it as "decision standing."[116] Decision standing, however, as will be seen, is more appropriately subsumed under the political question doctrine.[117] Since it relates to the subject matter of the dispute rather than the parties to the litigation, it is, in reality, not standing analysis at all.

A. Access Standing

Access standing analyzes whether the plaintiff has made a showing adequate to satisfy article III, and thereby to open the doors of the federal courts. It turns on "whether the litigant has a sufficient personal interest in getting the relief he seeks . . . to warrant recognizing him as entitled to invoke the court's decision on the issue of illegal-

115. Scott, *supra* note 3, at 670. Professor Scott has argued persuasively that "access standing" should be considered quite independently from "decision standing"—the aspect of the doctrine aiming at a proper allocation of governmental policymaking responsibility. Like the arguments reflected here, Professor Scott suggests a dissection of the standing inquiry in accordance with the various functions the requirement has been forced to serve. Primarily, however, he argues that "access standing" should abandon its traditional concentration on legally recognized interests and injuries in favor of an explicit rationing of scarce judicial resources. However, he readily admits, that decision is one courts are "ill-suited" to make. *Id.* at 682.

116. Again, I borrow another term from Professor Scott, which he used to refer to the allocation of policymaking responsibility. *Id.* at 683-85.

117. For a brief discussion of the scope of the political question doctrine, see C. WRIGHT, *supra* note 16, § 14. The term "decision standing" as employed here, however, has a potentially broader sweep than the political question doctrine. Political question analysis examines separation of powers issues at the federal level. Cases like City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983), Rizzo v. Goode, 423 U.S. 362 (1976), and O'Shea v. Littleton, 414 U.S. 488 (1974), demonstrate that the Court applies "decision standing" to oust plaintiffs on the basis of federalism interests as well.

ity."[118] If standing is to be a legal doctrine at all, "sufficient personal interest" must suggest some objective measurement over and above the plaintiff's subjective concern for the outcome of the case. Restating the requirement, then, access standing demands simply that a litigant demonstrate harm to an interest cognizable by law. Such interests can, I think, be created in three ways. First, the judiciary can interpret article III to develop a body of law that seeks to define cognizable injury. Second, congressional enactments can create interests sufficient to provide the basis of federal jurisdiction. Finally, the Constitution itself sets forth legally cognizable interests.

1. Judicially Recognized Interest

As indicated, the Supreme Court has characterized those interests to which it will give jurisdictional recognition as distinct and palpable injuries. The determination of what is an appropriately concrete injury has proven to be both mysterious and erratic—dominated by factors not always central to the standing issue. Yet even if the Court were to remove such extraneous pressures from the injury calculus, the concept of cognizable harm would not be self-defining. Nor would the process of determining harm be value free.

It is reasonably simple to understand why monetary loss constitutes injury while my personal dissatisfaction with President Reagan's appointment of James Watt as Secretary of the Interior does not. The former is objective and even quantitatively measurable. The latter is subjective, intangible, and not easily distinguished from the myriad personal disappointments encountered in life. And indeed, law does not cure all evils.

But what of the distinction between my concern for the preservation of the grizzly bear and my fear of military surveillance of domestic political activities? No objective yardstick provides the answer. Rather, as Professor Vining has argued in his perceptive book *Legal Identity*,[119] recognition of judicially cognizable interests is an exercise in defining public values: "[I]n the very recognition of a 'person' who is 'harmed' courts formally cap the formulation of a value . . ., confirm it in our language and our thought, and permit a full and continuous search for its realization to begin."[120]

Consider the process. One can recall when the courts would have called a plaintiff claiming harm because of the acidification of a stream in a nearby national forest an interloper asserting no injury whatsoever.

118. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 156 (2d ed. 1973).

119. J. VINING, *supra* note 3.

120. *Id.* at 171.

As *Sierra Club v. Morton*[121] and *SCRAP* teach, however, our society, and in turn, the judiciary, eventually recognized concern for the environment as a protectible interest in its own right. In defining those private, subjective injuries that will be given public recognition through judicial protection, the clock can run the other way as well. During substantial periods of our history, for example, whites might well have considered themselves injured by a governmental decision that forced them to ride in the same railroad car with blacks. Public acceptance of such sentiment as a harm, however, no longer exists.

In large part, therefore, the Court's recognition of injury—the characterization of loss as "personal"—depends on its sympathy for and understanding of the loss. This aspect of defining injury is evident in cases like *City of Los Angeles v. Lyons*, where the Court called the fear of future "choke-holds" by the police "far short of the allegations . . . necessary to establish a case or controversy."[122] The tenor of the opinion indicates that the Court refused to take the injury claim seriously since the plaintiff would run the risk of similar harm in the future only if he violated the law. One senses in a variety of cases that the Court carries little empathy for a litigant who bases future harm on the possibility of repeated encounters with the criminal justice system.[123] It is possible, one supposes, that the refusal to recognize harm to "sexual play"[124] or "marital happiness" in *Roe v. Wade*[125] can be explained by the same lack of empathy.

To say that values are inextricably tied to the standing process and that the decisions are not easy is not to argue that the federal judiciary should remove itself from the process of defining injury. Unless it chooses to trap the law of article III in outdated forms, it cannot do so. It is to say, however, two things. First, the Court should no longer pretend to its constituents or to itself that the determination of injury is an obvious, value-free, and nonmanipulable method of measuring jurisdiction. The second point flows readily from the first. Decisions accepting or rejecting claims of injury should be accompanied by explanation. Even case or controversy analysis should make an attempt at principled adjudication.

2. *Statutory Interest*

Congress can create legally enforceable interests even where none

121. 405 U.S. 727 (1972).

122. 103 S. Ct. 1660, 1667 (1983).

123. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

124. *See* J. VINING, *supra* note 3, at 175.

125. 410 U.S. 113 (1973).

before existed.[126] Such interests may be both intangible[127] and widely shared.[128] In fact, Congress may even create legal interests in the mere enforcement of its statutory provisions.[129] Accordingly, if a statute expressly gives standing to a plaintiff, legally cognizable interest is clear.[130] Statutes which fail to address standing, or which are unclear in the breadth of standing granted, may create enforceable interests by implication. Thus, in *Trafficante v. Metropolitan Life Insurance Co.*, the Court interpreted the Civil Rights Act of 1968, which granted standing to "persons aggrieved," to create a legally enforceable interest in the "benefits from interracial associations."[131] In *Havens Realty* the Court read the same statute to confer on "all 'persons' a legal right to truthful information about available housing."[132]

The question that access standing demands be asked in such cases is whether the Congress intended this legislation to create a legally enforceable interest. If so, it has effectively announced a public value to be given recognition in the courts. Determining whether a statute creates a legally enforceable interest bears substantial similarity to analysis that now occasionally occurs under the zone of interest test, which is considered below as an appropriate example of issue standing.[133] Yet the aims of the two inquiries are distinct. The zone of interest test, as described in *Data Processing* and its progeny, assumes the existence of a litigant's personal stake as the result of the independent requirement of injury in fact. Once interest has been demonstrated, therefore, it asks whether the litigant is among the group of beneficiaries contemplated by the statutory or constitutional protection claimed. In a case like *Havens Realty*, however, the basis for access standing itself is the claimed violation of a right created by the statute—the right to receive accurate information about housing. Such rights or interests provide an appropriate basis for access to the federal judiciary regardless of whether or not the Court terms them sources of concrete injury.

There are limits to the ability of Congress to confer federal jurisdiction. Congress could not, for example, authorize the federal courts

126. Warth v. Seldin, 422 U.S. 490, 514 (1975).

127. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

128. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1982)).

129. In Havens Realty Corp. v. Coleman, 455 U.S. 363 (1978), and in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), the Court essentially recognized the plaintiffs' standing as private attorneys general to enforce the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1976).

130. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1982) (granting standing to "any person" to enforce its provisions). Such broad-based standing was not even questioned in Tennessee Valley Auth. v. Hill, 437 U.S. 153, 164 n.15 (1978).

131. 409 U.S. at 210.

132. 455 U.S. at 373.

133. *See infra* text accompanying notes 155-61.

to issue advisory opinions.[134] *Muskrat v. United States*,[135] if still good law, indicates that Congress cannot decide the "adverseness of parties prospectively; such determinations must be left to the courts."[136] The power of Congress to create interests sufficient to confer the personal stake demanded by access standing, however, is undisputed.

3. Constitutional Interests

Although the claim is somewhat more controversial, there should be no doubt that the Constitution, of its own force, creates legally protected interests. I believe that Justice Brennan stated the principle correctly in his dissent in *Valley Forge*:

> When the Constitution makes it clear that a particular person is to be protected from a particular form of government action, then that person has a "right" to be free of that action; when that right is infringed, then there is injury, and a personal stake, within the meaning of Article III.[137]

The Court, however, has chosen not to take this approach. Instead, it views some constitutional provisions as enforceable and others not. In addition to creating a hierarchy of constitutional rights, the Court's approach has a more serious shortcoming. I have argued that the judicial recognition of injury is a process whereby public values are given cognizance in law. Thus the Court is necessarily cast in the position of deciding, for example, that environmental harms are now sufficiently important to trigger jurisdiction while vague fears of government surveillance are not. It is difficult to understand, then, how the Justices can decide that the interest in separation of church and state, for example, is not a public value. That option would seem to have been foreclosed by the adoption of the Bill of Rights. As Hamilton argued in *The Federalist* No. 80, it is "obvious" that "there ought always be a constitutional method of giving efficacy to constitutional provisions."[138] Under present standing principles, therefore, the Court has put itself in an untenable position. Subjective and widely shared interests, such as esthetic concerns—tied to neither constitutional nor statutory guarantees—have been recognized as appropriate bases for standing. Similarly, intangible and generalized statutory rights, such as concern over the fate of endangered species,[139] have sustained jurisdiction. A deter-

134. *See* Aetna Life Ins. Co. v. Haworth, 330 U.S. 227, 240-41 (1937); Frankfurter, *Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

135. 219 U.S. 346 (1911).

136. Tushnet, *supra* note 3, at 678.

137. 454 U.S. at 493 n.5 (Brennan, J., dissenting).

138. THE FEDERALIST No. 80, at 534, 535 (A. Hamilton) (J. Cooke ed. 1961).

139. *See, e.g.*, Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

mination that generalized constitutional claims cannot similarly support standing appears to be pure judicial fiat.

It is certainly possible that challenges to government decisions based upon claimed infringements of constitutionally created interests will, in various instances, run contrary to the political question doctrine. A plaintiff's access standing, his personal stake in the litigation, can be created, however, by the transgression of a constitutionally protected interest. Cases like *Valley Forge*, *Flast*, *Reservists*, and *Richardson*, therefore, turned upon the wrong question. The Court asked whether injuries to the rights created by the establishment clause, the incompatibility clause, and the accounts clause respectively were distinct and palpable. It should have asked whether those clauses created interests which could be asserted by the plaintiffs. If it had, the standing issue would have been decided differently in all three cases.

a. The Council of Revision

The claim has appeared repeatedly in decisions denying standing based upon generalized constitutional claims that if the judiciary were to accept such cases it would be converted into a Council of Revision, a forum rejected by the Framers. Justice Harlan made the argument in his dissent in *Flast*,[140] and it has been repeated by Justices Powell[141] and Rehnquist.[142] The analogy, however, is inapt.

A provision of the Virginia Plan, aggressively supported by James Madison at the Constitutional Convention, called for the creation of a "revisionary council" composed of the President and several members of the Supreme Court.[143] The Council would participate in the enacting process by way of the exercise of a veto power. Should the Council reject proposed legislation, it could become law only by means of a legislative override.[144] One of several measures proposed to check legislative prerogatives, the Council of Revision was rejected by the Framers on three separate occasions.[145]

Yet the proposed Council would have been markedly different from even the broadest judicial review imaginable. The proponents of revisionary power intended it to be part of the enacting process, rather than a post-enactment review.[146] Even more importantly, revision was

140. Flast v. Cohen, 392 U.S. 83, 130 (1968) (Harlan, J., dissenting).

141. United States v. Richardson, 418 U.S. 166, 189-91 (1974) (Powell, J., concurring).

142. Orr v. Orr, 440 U.S. 268, 290 n.1 (1979) (Rehnquist, J., dissenting).

143. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (May 29) (M. Farrand ed. 1911).

144. *Id.* at 21 (May 29), 108 (June 4), 110 (June 4), 138-39 (June 6).

145. 2 *id.* at 71 (July 21), 80 (July 21), 298 (Aug. 15).

146. *See* Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 829 n.68 (1969).

to address itself primarily to the wisdom of legislation—not merely to its constitutionality.[147] Opponents objected to the plan not only because it was antidemocratic but also because judges had no greater claim to expertise on matters of general public policy than did legislators.[148] Thus, the goals of the two processes are quite distinct—even given the breadth of modern constitutional analysis.

Finally, even when considering the propriety of such a Council, the Framers assumed the continuing validity of judicial review. One of the strongest objections voiced to the Council was that, having considered legislation at the revision stage, the judges would be biased in their later, more important function of judicial review. Having participated in the formulation of the law would "give a previous tincture to their opinions."[149] Raoul Berger has concluded that the constitutional debates, rather than casting doubt on broad judicial review, lead one to the conclusion "that the founders must have welcomed *any* traditional mechanism that could aid in keeping Congress within bounds."[150] Thus, arguments for a narrowed judicial authority that are based on the rejection of the Council of Revision should be allowed a quiet death.

Access standing requires the demonstration of a sufficient personal stake by the plaintiff to warrant the invocation of federal judicial power. A plaintiff shows a personal stake, in turn, by demonstrating harm to a legally cognizable interest. Such interests may be created or recognized through the judicial interpretation of article III, legislative enactments, and constitutional guarantees. Once a plaintiff shows a personal stake, however, access standing demands no more. In a recent strongly worded dissent, Justice Marshall claimed that once "a plaintiff establishes a personal stake in a dispute, he has done all that is necessary to 'invok[e] the court's authority . . . to challenge the action sought to be adjudicated.' "[151] Justice Marshall is correct, if special emphasis is given to the phrase "to invoke the Court's authority." Harm to cognizable interest is the sole measure of access to the federal judicial power. As the following sections indicate, however, plaintiffs can also face standing hurdles once inside the courthouse.

147. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 143, at 73-74 (July 21).

148. *Id.*

149. *Id.* at 298 (Aug. 15) (remarks of Charles Pinckney). *See also* WILLS, EXPLAINING AMERICA 151-53 (1981).

150. Berger, *supra* note 146, at 834 (emphasis in original).

151. City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1679 (1983) (Marshall, J., dissenting) (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471-72 (1982).

B. Issue Standing

In many instances, the right to judicial access is not the end of the standing inquiry. Standing law also demands that the plaintiff be an appropriate party to present the legal claims upon which he relies. A simple example demonstrates the difference between access standing and issue standing. Suppose the state institutes a criminal prosecution against a doctor for distributing contraceptives. He claims that the prosecution is unconstitutional because it violates the privacy rights of his patients. The question arises, therefore, whether the doctor may assert as his defense the constitutional protections of third parties. Access standing is, of course, clear. The doctor's liberty is at stake—thereby satisfying article III. Issue standing, however, asks not whether a litigant may invoke federal jurisdiction, but whether he is an appropriate party to present the constitutional claim. Emphasis is no longer on the plaintiff's personal stake in the controversy, but on the litigant's relationship to the legal claims he presents. Another example is *City of Los Angeles v. Lyons*. In this case the Court assumed the plaintiff had standing to present a damages claim arising from allegations of police brutality, but denied him standing to seek injunctive relief.[152] I think the *Lyons* outcome was wrong.[153] Still, it correctly states the principle that a plaintiff must have standing to present the particular legal issues raised.

Issue standing asks, in short, whether the plaintiff's legal claims are his to raise. Still, the inquiry into the legal issues raised centers on protective intent, not only the likelihood of recovery or the suitability of the issues for judicial determination.[154] Of all analysis that takes place under the rubric "standing," issue standing is the least related to the measurement of judicial power. It does not ask whether the claim is justiciable or whether the plaintiff may properly invoke federal jurisdiction. Rather than measuring article III powers, it focuses instead on the breadth and intent of substantive law. Accordingly, its principles are appropriately malleable so as to meet the ends of various substantive legal protections.

1. Zones of Interest

Since announced in *Data Processing*,[155] the zone of interest test

152. City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983).

153. *See infra* text accompanying notes 182-86.

154. *See* Scott, *supra* note 3, at 684.

155. 397 U.S. 150, 153 (1970). The test demands that the "interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

has been virtually ignored.[156] Yet the test serves several useful functions. Statutes and even constitutional provisions[157] are sometimes designed to benefit a particular class.[158] By demanding that the plaintiff be from the protected class, standing law helps to measure the appropriate contours of the protections afforded. It also places control of the legal situation in the hands of those whom Congress considered most immediately concerned.[159]

The zone of interest test can also supply a necessary bridge between the interests asserted to achieve standing and the claim on the merits. In this context, it could be recast as a demand for a nexus[160]

156. *See, e.g.*, K. DAVIS, *supra* note 3, § 22.02-11.

157. In Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978), for example, a substantial question was presented as to whether the constitutional claim upon which the plaintiffs relied (the due process clause) was designed to protect against the injuries asserted (environmental harms). The Court, however, ignored the issue. *See infra* note 160.

158. The zone of interest test has meaningful application only when access standing is based upon injury in fact as opposed to harm to constitutional or statutorily-created interests. If access standing is premised upon the denial of a statutory or constitutional interest, zone of interest analysis is essentially redundant.

For cases recognizing that statutes and regulations are often designed to protect a limited class, see, for example, Moore v. Tangipahoa Parish School Bd., 625 F.2d 33 (5th Cir. 1980); Committee for Auto Responsibility (C.A.R.) v. Solomon, 603 F.2d 992 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); *In re* Swearingen Aviation Corp., 605 F.2d 125 (4th Cir. 1979); Circle Lounge & Grille, Inc. v. Board of Appeal, 324 Mass. 427, 86 N.E.2d 920 (1949).

159. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 637 (1971) ("If the interests which the law chooses to protect are satisfied with the status quo though it may involve an alleged violation, why should a stranger have a right to insist on enforcement?").

160. *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614 (1973). Such a nexus requirement was rejected by the Supreme Court in Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). There, environmentalists challenged the Atomic Energy Damages Act of 1957, which limits liability in the event of nuclear plant disaster. Pub. L. No. 85-256, § 4, 71 Stat. 576, 576-79 (1957) (codified as amended at 42 U.S.C. § 2210 (1976)). The plaintiffs claimed the limitation violated the due process clause by unreasonably limiting recovery. They claimed two sets of damages: (1) the existing environmental harms associated with the mere operation of the plant; and (2) the injuries related to the claim—potential lost recovery if a disaster occurred. Because the Court considered the latter damages speculative, standing was granted only on the basis of the existing environmental harms. The defendants thus claimed that there was no relationship between the injuries asserted for purposes of standing, and the claim on the merits.

Chief Justice Burger's opinion for the Court refused to "extend" the nexus requirement out of the taxpayer context. 438 U.S. at 79; *see* Flast v. Cohen, 392 U.S. 83 (1968). The Court also ignored the zone of interest test which, I think, the plaintiffs would have failed if standing had been based only on the existing harms. Certainly, however, Justice Stewart was correct when he declared in his concurring opinion in *Duke Power*: "Surely there must be *some* direct relationship between the plaintiff's federal claim and the injuries relied on for standing." 438 U.S. at 95 (Stewart, J., concurring in the result) (emphasis in original).

Duke Power is so riddled with holes that it should perhaps simply be totally ignored as a standing case. *See* Nichol, *Causation*, *supra* note 3, at 207-08. By refusing to apply a nexus or zone of interest analysis the Court successfully avoided the tough issue in the case—whether the potential losses over and above the limitation of liability were too speculative to support judicial review.

The language, if not the analysis, of the nexus requirement reappeared in Leeke v. Timmerman, 454 U.S. 83 (1981). There a suit against state prison officials was dismissed because there

between the injuries alleged and the substantive claims presented. A nexus requirement, however, is merely another way of asking whether the legal provision on which the plaintiff bases a claim is intended to protect one in the plaintiff's position. Absent some demonstrable link between the injury sustained and the cause of action, the standing requirement becomes artificial. Injury, which is dispositive of a party's access to the federal courthouse, becomes irrelevant to the determination of the claim on the merits. Thus, the zone of interest test can be used both to define the scope of substantive protections and to ensure an appropriate relation between the federal cause of action and the basis for access standing.

2. *Third Party Standing*

It has been held that a plaintiff must assert his own legal interests rather than those of third parties.[161] Yet the third party standing rule is not grounded in article III. The plaintiff still must independently demonstrate injury in fact,[162] redressability, and causation. Rather, the standard seeks "to limit access to the federal courts to those litigants best suited to assert a particular claim."[163]

In reality, therefore, the Court, rather than attempting to measure judicial authority, designs third party rules to improve decisionmaking by ensuring the best plaintiffs and promoting the "liberal value of self-determination."[164] Consider, for example, *Gilmore v. Utah*.[165] There, Gary Gilmore's mother was effectively denied standing to mount a challenge to the execution of her son. Gilmore himself had refused to appeal. Clearly the rationale for the decision could not have been that she had no "stake" in the dispute. The injuries she sustained as the result of her son's death would more than meet the dictates of article III. Principles of third party standing prevented the dispute from being litigated by a "stranger" to the transaction and left the decision concerning appeal in Gilmore's hands.

Exceptions to the third party bar serve essentially substantive concerns. Courts have often allowed the presentation of the rights of others where it would be difficult for the persons whose rights were

---

was a "questionable nexus between respondent's injury . . . and the challenged actions of the state officials."

161. C. WRIGHT, *supra* note 16, § 13, at 71-72. *See* Tileston v. Ullman, 318 U.S. 44 (1943); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

162. Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1210-11 (6th Cir. 1981), *rev'd in part on other grounds*, 103 S. Ct. 2481 (1983).

163. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979).

164. Brilmayer, *supra* note 3, at 310.

165. 429 U.S. 1012 (1976).

asserted to present those grievances before any court.[166] In such circumstances, there are few reasons for deferring to the silence of the right-holder. Nor, obviously, is the Court apt to obtain a "better plaintiff." In addition, the Court has allowed plaintiffs to assert the rights of third parties in challenges for overbreadth and vagueness in order to ensure more stringent protection of various constitutional guarantees.[167]

My goal here has obviously been something less than providing a full examination and critique of zone of interest and third party standing analysis. Rather, this brief discussion of the two standards has been designed to demonstrate that the methods and goals of issue standing are quite distinct from the core of standing analysis discussed previously as access standing. The two share common ground in that both question whether the litigant is a proper party. Access standing demands that the plaintiff be an appropriate party to invoke the judicial power. Issue standing, on the other hand, demands that a litigant be a proper party to raise particular legal claims. In a substantial sense, therefore, issue standing more closely approximates a decision on the merits—even if ultimately only a decision that a particular constitutional or statutory provision does not protect the plaintiff. It provides, in essence, an adjudication of the scope and severability of a legal guarantee.[168] Unlike a denial of access standing, it is not simply a refusal to decide. And unlike access standing, issue standing does not involve questions of the appropriate scope of judicial authority. More accurately, issue standing governs the judiciary's principled disposition of its business.

C. Decision Standing—The Political Question Doctrine

Chief Justice Warren wrote in *Flast* that "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."[169] The group of cases that I will discuss as examples of "decision standing" violate this

166. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953). The rule has been relaxed over the past decade. *See* Craig v. Boren, 429 U.S. 190 (1976); Singleton v. Wulff, 428 U.S. 106 (1976).

167. The Court will, for example, entertain overbreadth challenges to a statute if the statute regulates pure speech. Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981). Such challenges have been rejected, however, if the statute primarily regulates conduct, even if the first amendment may protect some actions regulated by the statute. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973). The distinction is obviously one of substantive free expression law, not case or controversy analysis.

168. *See* Scott, *supra* note 3, at 686 n.160.

169. 392 U.S. at 99-100.

"fundamental aspect"[170] of standing analysis. The Court has, on occasion, denied standing because resolving the controversy or providing the remedy in question is the responsibility of another branch of government. Thus, the standing determination turns on the justiciability of the claim rather than on whether the plaintiff is a proper party.

Examples of such blending of standing and political question analyses abound. In *Laird v. Tatum*[171] the Court dismissed a challenge to the operation of a domestic Army intelligence gathering system for want of concrete harm. The refusal to acknowledge injury was due in part to the Court's fear that such cases "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action."[172] The Court refused to recognize injury based on constitutional interests in *Reservists*[173] and *Richardson*[174] because to do so would purportedly have led to " 'government by injunction' "[175] or transformed our governmental structure into "an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts."[176] To have recognized standing based upon the establishment clause, the *Valley Forge* Court asserted, would have altered "relationships between the coequal arms of the National Government."[177]

The Supreme Court has not limited decision standing to those situations raising separation of powers concerns at the national level. In *Rizzo v. Goode*[178] past victims of alleged widespread unconstitutional police conduct aimed at minority citizens could not obtain prospective relief because they lacked "the requisite 'personal stake in the outcome.' " The Court's negative ruling on injury, however, apparently reflected its broader belief that the plaintiffs sought an "unwarranted intrusion by the federal judiciary into the discretionary authority" committed to local and state officials.[179] *O'Shea v. Littleton* reflects a similar theory.[180]

The use of decision standing is troubling on a number of fronts. It introduces factors into the standing calculus beyond the scope of the doctrine. Further, decision standing employs particularized injury as a

170. *Id.* at 99.
171. 408 U.S. 1 (1972).
172. *Id.* at 15.
173. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).
174. United States v. Richardson, 418 U.S. 166 (1974).
175. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974).
176. United States v. Richardson, 418 U.S. 166, 179 (1974).
177. 454 U.S. at 473.
178. 423 U.S. 362, 372-73 (1976) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
179. *Id.* at 366.
180. 414 U.S. 488, 500 (1974) (characterizing the suit as a request for "an ongoing federal audit of state criminal proceedings").

surrogate for direct examination of the appropriate role of the judiciary in our system of government. The injury standard, however, performs that function quite poorly. As a result, the Court has not only failed to face federalism and separation of powers concerns head on, it has manipulated the injury standard in the process.

Constitutionally based actions can indeed threaten undue judicial intrusion into the workings of other branches of government. Intrusive cases, however, fall on either side of the particularized harm standard. *Valley Forge* and *Reservists*, in which there was no particularized injury, posed no separation of powers problems. Both cases called for interpretation of constitutional guarantees, but neither would have resulted in judicial intrusion into the workings of another branch of government. On the other hand, cases such as *Davis v. Passman* indicate that separation of powers problems can be as readily presented by claims in which particularized injury is clear.[181] *City of Los Angeles v. Lyons*[182] is a striking example of how the Court distorts the injury requirement in order to serve the ends of decision standing—in this instance the pursuit of federalism. The *Lyons* plaintiff, the choke-hold victim, sought not only damages but also an injunction against the future use of the hold except in response to deadly force. The Court denied the victim standing to seek injunctive relief since it deemed the possibility that Lyons would again be the victim of a choke hold speculative. Writing for the Court, Justice White declared that in order to establish injury "Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion . . . that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter."[183]

Lyons reflects an extraordinary treatment of injury. Under the Court's analysis, standing law effectively demands certain proof that an actual strangling will occur in order to invoke federal jurisdiction. It is inconceivable, however, given the interests recognized under the injury standard in past decisions, that Lyons asserted no particularized harm. The record reflected that the police after stopping Lyons for a burned out taillight, rendered him unconscious by a choke hold. He awoke lying "on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated."[184] Any person having survived Lyons' trauma would no doubt live in considerable fear of a repeat performance so long as the contested practices remained in

181. 442 U.S. 228 (1979). In *Davis* an administrative assistant was allowed to sue her employer, a United States Congressman, for sex discrimination. *Davis* certainly presents a greater threat to the workings of another branch of government than did *Valley Forge*.

182. 103 S. Ct. 1660 (1983).

183. *Id.* at 1667.

184. *Id.* at 1672 (Marshall, J., dissenting).

operation. That fear, even if Lyons was never spoken to by another policeman, is more concrete, more particularized and more substantial than the bulk of injuries recognized in modern standing decisions.

The key to understanding *Lyons* lies in the Court's declaration that such grievances are addressed more appropriately to "local authorities."[185] Consider, however, the results of infusing federalism concerns into the standing calculus. If deference to local government is the basis for *Lyons*, the Court failed to explain the rationale for such deference. Instead, the Court purportedly dismissed the claim for injunctive relief because of an absence of injury. If, on the other hand, we are to take the treatment of injury at face value, how are "liberal" injury cases like *SCRAP* and *Havens Realty* to be understood?

This tendency to skew the standing inquiry with justiciability concerns—which I have called decision standing—should be abandoned. In such cases, principled analysis would be served better by addressing federalism and separation of powers concerns directly instead of continuing to manipulate the injury standard.[186] The political question doctrine should, therefore, be given more teeth and, if necessary, be expanded to include federalism analysis. Concern for the justiciability of the issue presented by the plaintiff, however, should be removed from the standing calculus.

CONCLUSION

Standing law, like the proverbial politician, speaks out of both sides of its mouth. On the one hand, in order to segregate the standing inquiry from consideration of the claim on the merits and general justiciability concerns, the entire doctrine has been founded upon an overarching principle—particularized harm. In the years since the adoption of the injury standard, however, the Supreme Court has used the standing doctrine to accomplish far more than the mere determination that the plaintiff is an appropriate party to invoke federal jurisdiction. The Court has also employed standing law to measure the appropriate scope of judicial authority and to mitigate federal judicial interference with local concerns. As a result, in the process of defining actionable injury, the Court has reinserted the very factors into the standing calculus which the particularized harm standard was designed to remove. Further, federalism and separation of powers issues have generally been concealed behind a standing discussion concerning the directness of injury or the generalized nature of the claim. The result

185. *Id.* at 1670.

186. *See* Scott, *supra* note 3, at 686; Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1726 (1980).

has not been beneficial to either standing law or the analysis of the appropriate role of the judiciary in our system of government.

I have argued that standing analysis would be better served if the Court were to separate the various issues reflected in its case or controversy decisions and address them openly and independently. The core of standing is, of course, whether the plaintiff has shown sufficient interest to obtain access to federal judicial power. Yet access standing should require no more than that a litigant assert injury to an interest arguably cognizable by law. Issue standing, on the other hand, should be focused primarily on the breadth of protections offered by various substantive guarantees. As a result, its standards may be tailored appropriately to meet the ends of various substantive principles—extending, for example, overbreadth analysis when free expression rights are at stake but contracting the doctrine in privacy cases.[187] Finally, decision standing, pursuant to which the Court has denied standing based upon the justiciability of the claim, should be abandoned. Measuring the proper expanse of judicial authority vis-a-vis other institutions of government should be accomplished under the political question doctrine. So envisioned, the standing doctrine would likely prove a less formidable obstacle to the acquisition of federal jurisdiction. If it is true, as I have argued, that the standing principle has been made to carry the baggage of other concerns, it should not be surprising that a "cleaning" of the doctrine would result in a lowered access threshold.

Standing law, as presently constructed, is so unfocused that it seems to serve no useful or at least no ascertainable ends. That will likely remain the case so long as standing determinations appear to take into account first one set of interests and then another, but all the while employ conclusory declarations concerning the nature of injury as the basis for decision. As Lincoln argued, "[I]f we could first know *where* we are and *whither* we are tending, we could better judge *what* to do, and *how* to do it."[188] Recognizing the complexity of the injury determination and segregating the numerous interests that have affected past standing decisions are essential first steps in learning where we are, and even perhaps "whither we are tending" in case or controversy analysis. Without such preliminaries, however, we stand little chance of knowing what to do, and how to do it.

187. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398, 405-06 (1981).

188. A. Lincoln, Acceptance Speech to the Republican Convention (June 16, 1858), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 372 (R. Bosler ed. 1946).