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STANDING ON THE CONSTITUTION: THE SUPREME COURT AND *VALLEY FORGE*

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Article III of the Constitution limits the judicial power of the United States to the resolution of "cases" and "controversies." As a component of this limitation, the Supreme Court has developed the doctrine of standing. A blend of constitutional and prudential considerations, standing requires the plaintiff to demonstrate actual or threatened injury caused by the defendant that can be redressed by a favorable court decision. The necessity for a litigant to suffer "injury-in-fact" has often prevented plaintiffs who bring taxpayer or other public actions from meeting standing requirements, thus rendering their claims unreviewable. In this article, Professor Nichol examines the propriety of actions based directly upon broad-based constitutional guarantees. This review reveals a confusing and inconsistent set of standing requirements often precluding review of generalized constitutional claims. Noting that the injury-in-fact standing requirement renders shared constitutional claims unenforceable merely because they are shared, Professor Nichol suggests a method of article III jurisprudence that would preserve the rights flowing from collective constitutional guarantees.

John Marshall's classic opinion in *Marbury v. Madison*[1] is, no doubt, "vulnerable."[2] The power to review legislative and executive action is asserted rather than deduced. Despite question begging by the great Chief Justice on the ultimate issue of judicial supremacy in constitutional interpretation, *Marbury* still teaches much concerning the appropriate role of the federal judiciary in our system of government. The sources of authority set forth in the opinion purportedly mark the outer boundaries of our present judicial framework.

Yet, at times, the opinion's strains appear at odds and its modern-day messages collide. Marshall, of course, based the power of judicial review on the judiciary's duty to decide cases. The Constitution is law, and statutes are law; but if the two conflict, the "courts must decide on the operation of each."[3] "Those who apply the rule *to particular cases*, must of necessity expound and interpret that rule."[4] By tying judicial review to the Court's obligation to apply all of the law—including the Constitution—when deciding traditionally recognized cases,[5] *Marbury* foreshadowed a huge and inordinately complex

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

2. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 2-12 (1962); Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1.

3. 5 U.S. (1 Cranch) at 177.

4. *Id.*

5. Professor Bickel argued that the "case" limitation is not inherent in judicial review.

body of jurisprudence under the rubric of the article III "case or controversy"[6] requirement. Accordingly, we now accept that a plaintiff must have "standing"[7] to seek judicial relief. Related doctrines demand that the litigant's dispute be "ripe"[8] and that his injury not be "moot."[9] Federal courts are also understood to be without power to issue "advisory opinions"[10] on the constitutionality of government action. These limitations flow readily from the "power to which Marshall laid claim."[11]

Marbury, however, suggests other bases for judicial authority as well. Echoing Alexander Hamilton's claim that judicial review would keep the legislature "within the limits assigned to their authority,"[12] Marshall characterized the Supreme Court as the guardian of the written Constitution. "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?"[13] The opinion also reflects a belief in special judicial competence to interpret the Constitution: "It is emphatically the province and duty of the *judicial* department to say what the law is."[14]

The growth in the availability of consititutional rights and remedies that has occurred over the past twenty years, however, has demonstrated that the judicial roles of "bulwark"[15] against usurpation and "supreme"[16] expositor of the Constitution cannot always be easily confined within the traditional concrete "case." Repeatedly, actions in which no cognizable injury distinct from violation of the Constitution has been alleged have been presented to the Supreme Court. Some of these cases eventually have been determined on the merits,[17] while others have been dismissed for lack of standing.[18] These pub-

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Rather, it merely constitutes a necessary support for Marshall's argument for establishing such review. A. BICKEL, *supra* note 2, at 114-15.

6. Article III provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . ." U.S. CONST. art. III, § 2.

7. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 156 (1951) (Frankfurter, J., concurring).

8. Poe v. Ullman, 367 U.S. 497 (1961).

9. Defunis v. Odegaard, 416 U.S. 312 (1974).

10. Muskrat v. United States, 219 U.S. 346, 362 (1911). *See also* Frankfurter, *Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

11. A. BICKEL, *supra* note 2, at 188. Professor Bickel's full quotation reads, however: "The power to which Marshall laid claim is not the full measure of the Court's authority in our day." *Id.* The expansion of the role of the judiciary beyond the private rights model contemplated in *Marbury* is explored more fully in section II B-2, *infra*.

12. THE FEDERALIST No. 78, at 492 (A. Hamilton) (B. F. Wright ed. 1961).

13. 5 U.S. (1 Cranch) at 176.

14. *Id.* at 177 (emphasis added).

15. 1 ANNALS OF CONG. 457 (Gales & Seaton eds. 1789).

16. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

17. *See, e.g.*, 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); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Everson v. Board of Educ., 330 U.S. 1 (1947); Hawke v. Smith, 253 U.S. 221 (1920); Coyle v. Smith, 221 U. S. 559 (1911); Wilson v. Shaw, 204 U.S. 24 (1907); Bradfield v. Roberts, 175 U.S. 291 (1899).

18. Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974);

lic actions, through which plaintiffs effectively seek to force their government to toe the constitutional mark, have been characterized variously as "citizen" suits,[19] "taxpayer" suits,[20] and actions by "private attorneys general."[21] In such cases, plaintiffs cannot typically point to particularized harm that separates them from the populace at large. As a result, the Supreme Court has often labeled the claims mere "generalized grievances"[22] and therefore beyond the private rights theory of judicial review set forth in *Marbury*.

In reality, however, the law of standing to litigate does not represent the bright line between private and public rights that a *Marbury* model might suggest. Citizen standing to compel compliance with a variety of "minor" constitutional mandates has been rejected.[23] Yet more "important" clauses have been held to provide a basis for standing despite the "plainly undifferentiated"[24] nature of the plaintiff's claims.[25]

These divergent results can hardly be explained by the litigant's "personal stake" in the controversy—the alleged measuring rod of standing to sue.[26] Rather, they seem to reflect the influence of *Marbury*'s alternative bases for judicial authority. The prospect that some first and fourteenth amendment limitations might be "passed by those intended to be restrained"[27] has, on occasion, proven to be too much for the judicial mind to countenance—despite

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Doremus v. Board of Educ., 342 U.S. 429 (1952); *Ex parte* Lévitt, 302 U.S. 633 (1937) (per curiam); Massachusetts v. Mellon, 262 U.S. 447 (1923).

19. The citizen suit, used here in the constitutional context, refers to an action in which the plaintiff claims no traditionally recognized injury-in-fact. Rather, standing is asserted on the basis of a citizen's interest in assuring that his government complies with the Constitution. Professor Jaffe has used both the term "citizen suit" and "public action" to refer to such cases. *See* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

20. Taxpayer standing similiarly is based upon less than traditional injury in fact. The taxpayer, as a financial supporter of the government, asserts an interest in assuring that governmental expenditures comply with the Constitution. Since even a successful challenge to a governmental expenditure in this age is extremely unlikely to affect the taxpayer's bill, any previously perceived difference between citizen and taxpayer status has blurred. *See* Flast v. Cohen, 392 U.S. 83 (1968); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968).

21. The term was coined by Judge Jerome Frank in Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943), and has been used primarily to describe statutory causes of action in which the plaintiff represents the public rather than private interests. *See also* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942). For further discussion, see *infra* section II-C-1.

22. United States v. Richardson, 418 U.S. 166, 176-77 (1974). *See also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974); *Ex parte* Lévitt, 302 U.S. 633, 634 (1937) (per curiam).

23. In *Ex parte* Lévitt, 302 U.S. 633 (1937) (per curiam), citizen standing was denied to enforce article I, § 6, clause 2. A similiar result under a different provision of the same clause was achieved in Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). In United States v. Richardson, 418 U.S. 166 (1974), plaintiffs were denied standing to enforce the article I, § 9 requirement that a "regular Statement and Account of the Receipts and Expenditures of all Public Money shall be published from time to time."

24. United States v. Richardson, 418 U.S. 166, 177 (1974).

25. *See* Flast v. Cohen, 392 U.S. 83 (1968) (establishment clause); Norwood v. Harrison, 413 U.S. 455 (1973) (equal protection clause); Baker v. Carr, 369 U.S. 186 (1962) (equal protection clause).

26. Baker v. Carr, 369 U.S. 186, 204 (1962).

27. 5 U.S. (1 Cranch) at 176.

the absence of particularized harm.[28] Further, the perceived special competence of the judiciary "to say what the law is,"[29] especially when combined with the "settled expectations"[30] of the citizenry to look to the federal courts for final resolution of constitutional disputes, has encouraged the Supreme Court to reach the merits of certain claims even when a traditional plaintiff has been lacking.[31]

One result of these conflicting interests has been the development of an inconsistent patchwork of standing rules to govern the presentation of public actions. Taxpayer cases and citizen cases are measured by different standards. Statutory citizen suits and constitutional citizen suits are gauged by rules that are entirely dissimilar. The standards used to distinguish between various types of plaintiffs have little, if anything, to do with the litigant's interest in the dispute. It is thus apparent that the standing doctrine, which purports to examine whether the plaintiff is the proper party to bring the lawsuit,[32] is a particularly poor vehicle by which to decide what sorts of public actions will be given judicial cognizance.

It was against this already unsatisfactory background that the United States Supreme Court decided *Valley Forge Christian College v. Americans United for Separation of Church and State*.[33] In *Valley Forge* a group of taxpayer/citizens was denied standing to mount an establishment clause challenge to the transfer of surplus government property to a religious organization.[34] By reading its prior taxpayer cases in an unduly literal fashion and by claiming to eschew constitutional citizen standing entirely,[35] the Court managed to render the law of standing even more arbitrary and incomprehensible than it had been prior to the decision.

If nothing more, the *Valley Forge* decision should serve to reopen the once vigorous debate[36] over the propriety of taxpayer and citizen standing in

28. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973); Baker v. Carr, 369 U.S. 186 (1962).

29. 5 U.S. (1 Cranch) at 177.

30. A. BICKEL, *supra* note 2, at 14.

31. *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968).

32. *Id.* at 99.

33. 454 U.S. 464 (1982).

34. *Id.* at 468-70.

35. *See id.* at 477-86.

36. The high point of scholarly debate on the issue of standing to pursue "public actions" occurred almost concurrently with the Court's decision in *Flast*. The contributions of Professors Jaffe and Davis, no doubt, represent a benchmark in legal scholarship on case or controversy requirements. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22.01-.18 (1958 & Supp. 1970); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-500 (1965); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

Of more recent vintage, see J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW (1978); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531 (1975); Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139 (1977); Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U.L. REV. 807 (1977); Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Parker & Stone, *Standing and*

public actions. For well over a decade, the standing doctrine has been tied to a purported constitutional requirement of injury-in-fact.[37] More recently, article III has been described as requiring harm that is particularized, an injury that separates the plaintiff from the populace as a whole.[38]

Therefore, when a litigant seeks to sue on the basis of a constitutional injury that may well be shared with every other person in the United States, the standing inquiry becomes complex. If, for example, the government lends support to a religious organization or fails to comply with constitutionally mandated disclosure requirements, plaintiffs sustaining traditional "injury" may be lacking. *Marbury*'s primary theory of review, based purely upon the assertion of private rights, provides little support for judicial review in these contexts. Accordingly, the Supreme Court has been reluctant to countenance such suits, whether under the rubric of taxpayer or citizen standing.

Yet, in a variety of circumstances, the Supreme Court has recognized that "rights" can be created either by statutes or by the Constitution. The judiciary regularly allows standing to assert the public interest when granted by statute—even without the existence of a traditionally recognized private injury.[39] The Court has also readily recognized actions based directly upon the Constitution when the particularized harm is clear, such as individualized violations of the fourth amendment right to be free from unreasonable searches and seizures or violations of the fourteenth amendment guarantee of equal protection of the laws.[40] If standing is to be denied because of the absence of particularized harm, shared constitutional rights become unenforceable merely because they are shared. This result runs contrary to the Court's often repeated refrain that "standing is not to be denied merely because many people suffer the same injury."[41] Thus, it is clear that the constitutional validity of citizen and taxpayer actions implicates troubling contradictions in the jurisprudence of article III. Those contradictions go to the very essence of the role of the federal judiciary.

With the *Valley Forge* decision as a backdrop, this article examines the propriety of citizen, taxpayer, and other public actions grounded directly upon broad-based constitutional guarantees. Part I will review the work of the

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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); Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980).

37. *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

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

39. *See, e.g.*, TVA v. Hill, 437 U.S. 153 (1978); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

40. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971); Bell v. Hood, 327 U.S. 678 (1946); Pierce v. Society of Sisters, 268 U.S. 510 (1925). *See also* Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979).

41. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973). *Accord* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976); Warth v. Seldin, 422 U.S. 490, 501 (1975).

Supreme Court dating from its first major taxpayer decision in *Frothingham v. Mellon*,[42] to its most recent effort in *Valley Forge*. The cases reveal no coherent theory of judicial review, but instead a confusing and inconsistent set of standards that generally result in the conclusory ouster of federal plaintiffs.

Although the judicial reaction to generalized constitutional claims has been a studied hesitancy to grant standing, the door has not been completely closed. The current state of the law countenances standing to present some generalized challenges, but not others. The result is the existence of a hierarchy of constitutional values that the Court has not only failed to explain, but which, if we are to take the Justices at their word, has no place in article III jurisprudence.[43] Accordingly, it would seem that a reconsideration, even if not soon to be expected by the Court, is in order.[44]

In Part II, the private rights theory upon which *Valley Forge* is apparently based will be examined. A number of alternative approaches suggested by individual Justices and commentators will be reviewed in Part III. The article concludes by proposing a method for determining standing to sue in cases in which the "rights" asserted flow from constitutional guarantees and the "injuries" sustained are shared by the populace at large.

I. STANDING TO SUE AS CITIZEN OR TAXPAYER

Though hardly plowing new ground, any consideration of the propriety of the *Valley Forge* decision must begin with a review of what has gone before. Prior to examining the particulars of the case, therefore, a brief description of the Court's track record in public actions is appropriate.

A. The Major Decisions

When in 1923 Justice Sutherland wrote for the Court in *Frothingham v. Mellon*,[45] he declared that the "right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this court."[46] Technically that was true. In the preceeding twenty-five years, however, the

42. 262 U.S. 447 (1923).

43. Justice Rehnquist declared for the majority in *Valley Forge*: "Moreover, we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States." 454 U.S. at 484 (footnote omitted). Such a strong position is surprising given the Court's decisions in Flast v. Cohen, 392 U.S. 83 (1968); Norwood v. Harrison, 413 U.S. 455 (1973); Baker v. Carr, 369 U.S. 186 (1962); Tilton v. Richardson, 403 U.S. 672 (1971); and Everson v. Board of Educ., 330 U.S. 1 (1947).

44. The *Valley Forge* decision probably indicates that the only "reconsideration" of the citizen and taxpayer rules the present Court is willing to countenance would be overruling Flast v. Cohen, 392 U.S. 83 (1968). As discussed below in section II-C, however, even doing away with that remnant of the overt public action would leave the citizen standing principle confused, given such cases as Norwood v. Harrison, 413 U.S. 455 (1973), and Baker v. Carr, 369 U.S. 186 (1962). *Valley Forge* does lead one to predict, however, that the United States Supreme Court is hardly open to the idea of public constitutional actions.

45. 262 U.S. 447 (1923).

46. *Id.* at 486.

Court had several times assumed that taxpayers or citizens had standing to challenge congressional or executive actions in cases in which the plaintiffs' claims were ultimately denied on the merits.[47] Further, standing had been expressly granted in various cases challenging state and local conduct without specific concern for whether it was based upon citizen, taxpayer, or any other status.[48] In *Frothingham*, however, the Court directly addressed the propriety of taxpayer status as the basis for standing to contest the constitutionality of a federal expenditure.

Frothingham represented a challenge by both the State of Massachusetts and a taxpayer to a federal spending program designed to reduce infant mortality.[49] Mrs. Frothingham claimed that the Maternity Act in question operated to take her property, under the guise of taxation, "without due process of law."[50] Justice Sutherland, although expressing approval of federal cases allowing taxpayers to sue a municipality, declared that the interest of a federal taxpayer was "minute and indeterminable,"[51] and as a result, an inappropriate basis for standing. Not only would the acceptance of taxpayer standing result in the "attendant inconveniences" of a multitude of suits,[52] but it would thrust the judiciary into a "position of authority over the government" that it did not possess.[53]

The door to the federal courthouse was similarly closed to citizens' suits in *Ex parte Lévitt*.[54] In *Lévitt* the plaintiff, suing as a "citizen and member of

47. In Bradfield v. Roberts, 175 U.S. 291 (1899), a citizen and taxpayer suit, a resident of the District of Columbia sued the Treasurer of the United States to stop the payment of federal funds to a Catholic hospital located in the nation's capital. The Court upheld the spending program on the merits, "[p]assing the various objections" to the parties' maintenance of the suit. *Id.* at 295, 300. Similarly, in Millard v. Roberts, 202 U.S. 429 (1906), the Court assumed that a taxpayer had standing to claim that a revenue bill must originate in the House of Representatives. *Id.* at 438. Again, in Wilson v. Shaw, 204 U.S. 24 (1907), the Court noted the possible lack of a sufficient "pecuniary interest" in a citizen suit filed to challenge the construction of the Panama Canal, but proceeded to adjudicate the merits and ultimately upheld the federal action. *Id.* at 31, 35.

48. In Crampton v. Zabriski, 101 U.S. 601, 609 (1879), a New Jersey taxpayer was granted standing to challenge a local, rather than federal, program. That decision was cited with approval in Massachusetts v. Mellon, 262 U.S. 447, 486 (1923). The Supreme Court upheld Oklahoma's decision to move its capital from Guthrie to Oklahoma City against a challenge by "taxpayers and citizens" in Coyle v. Smith, 221 U.S. 559, 563 (1911). Standing was apparently based upon an Oklahoma statute giving its state supreme court "original jurisdiction" to entertain any proceeding to determine the legality of the removal of the capital. *Id.* Nine years later, in Hawke v. Smith, 253 U.S. 221 (1920), the Court invalidated the process used in Ohio to ratify the eighteenth amendment. The action was filed by an Ohio taxpayer seeking to enjoin the Ohio Secretary of State from "spending the public money in preparing and printing forms of ballot for submission of a referendum to the electors . . . ." *Id.* at 224.

49. Massachusetts claimed that the Maternity Act in question violated sovereign rights protected by the tenth amendment. Ultimately, the Court held that the state's claim was plainly "political, and not judicial in character." 262 U.S. at 483. Although reported in a single opinion, the two cases are often referred to separately, with the taxpayer action labeled *Frothingham v. Mellon* and the suit filed by the state entitled *Massachusetts v. Mellon*.

50. 262 U.S. at 486. In essence, however, Mrs. Frothingham's challenge was also based upon the tenth amendment. *See id.* at 479.

51. *Id.* at 487.

52. *Id.*

53. *Id.* at 489.

54. 302 U.S. 633 (1937) (per curiam).

the bar" of the Supreme Court,[55] was denied standing to contest the appointment of Justice Black as contrary to article I, section 6 of the Constitution.[56] Describing mere citizen status as "insufficient" to support standing, the Court indicated that a plaintiff "must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."[57] Although it was unclear whether the prohibition against taxpayer and citizen suits was mandated by article III, by 1950 Justice Frankfurter argued in his noted concurring opinion in *Joint Anti-Facist Refugee Committee v. McGrath*[58] that "[a] litigant must show more than that 'he suffers in some indefinite way in common with people generally.'"[59] Over the next two decades, however, these seemingly absolute prohibitions would be loosened considerably.

The barrier against taxpayer suits began to be whittled away as early as the Court's decision in *Everson v. Board of Education*,[60] in which a taxpayer sued to challenge expenditures by a local school board for the transportation of students to Catholic schools. The Court reached the merits of the establishment clause claim without discussing the standing issue.[61] Five years later, however, a New Jersey taxpayer was denied standing to contest required reading of the Old Testament in public schools in *Doremus v. Board of Education*.[62] In *Doremus* the Court described a "direct dollar-and-cents injury" as the requisite to any taxpayer claim.[63] Since Bible reading did not result in a particular appropriation or expenditure, plaintiff's claim was characterized as merely "a religious difference."[64]

Taxpayer standing was expanded, and the strains of both *Everson* and *Doremus* preserved, in *Flast v. Cohen*.[65] Faced with a first amendment challenge to the use of federal funds to support instructional activities and materials in religious schools, the Court in *Flast* for the first time unequivocably recognized taxpayer status, without more, as a basis for standing. Sweeping aside any claimed article III barrier to taxpayer standing, Chief Justice Warren's opinion established a two-pronged test allegedly designed to determine whether a sufficient "nexus" could be demonstrated between the plaintiff's sta-

55. *Id.* at 634.

56. *Id.* at 634. U.S. CONST. art. I, § 6, cl. 2, provides as follows: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time."

57. 302 U.S. at 634.

58. 341 U.S. 123, 149 (1950) (Frankfurter, J., concurring).

59. *Id.* at 151 (Frankfurter, J., concurring) (quoting Frothingham v. Mellon, 262 U.S. at 447).

60. 330 U.S. 1 (1947).

61. *See id.* at 4-7.

62. 342 U.S. 429 (1952).

63. *Id.* at 434.

64. *Id.*

65. 392 U.S. 83 (1968). Arguably, *Flast* preserved the theories of both *Everson* and *Doremus* since taxpayer standing was granted only to contest expenditures.

tus as a taxpayer and the constitutional violation claimed.[66] Accordingly, plaintiff was required to allege that the statute challenged was an exercise of the spending power[67] and that the expenditure violated a specific constitutional limitation.[68] Since the plaintiff in *Flast* contested a federal spending program, and since the establishment clause was deemed to be a specific rather than general limitation, standing was granted.[69] Determination of the exact parameters of the ruling was left for future cases.[70]

Although the Burger Court has been willing to apply the *Flast* test by its terms,[71] and has followed the local taxpayer exception recognized in both *Frothingham* and *Flast*,[72] its reception of taxpayer standing has been less than warm. In *United States v. Richardson*[73] plaintiff challenged the accounting procedures of the Central Intelligence Agency under the article I, section 9 requirement that a statement of expenditures for "all Public Money . . . be published from time to time."[74] Chief Justice Burger's opinion stated that the allegations of the plaintiff fell "far . . . short of the . . . criteria of *Flast*."[75] The action was characterized as an attack on the statutes governing CIA accounting rather than a spending challenge; the Court apparently regarded the article I, section 9 accounting requirement as something other than a "specific constitutional limitation upon . . . spending."[76]

The complaint in *Richardson*, if not viewed as a challenge to a spending program, could rationally have been seen as a necessary requisite to a spending challenge. It would be difficult to attack CIA expenditures without first discovering what they were.[77] The allegations could also have been read as a claim that the entire CIA budget was appropriated illegally, given the disclosure requirements of article I, section 9. Finally, the conclusory determination that the provision was not a specific limitation on federal spending was baffling since it could easily have been seen as more specific than the establishment clause guarantee that the Court found specific enough in *Flast*. Thus, *Richardson* suggested that the door opened in *Flast* was viewed with disfavor. By the time *Valley Forge* was decided, that disfavor apparently had turned to hostility.

In comparison with the Court's treatment of the taxpayer suit, the devel-

66. *Id.* at 102-03.

67. See U.S. CONST. art. I, § 8.

68. 392 U.S. at 102-03.

69. *Id.* at 105.

70. *Id.*

71. *See* Tilton v. Richardson, 403 U.S. 672 (1971) (plurality opinion) (test implicitly followed).

72. *See* Meek v. Pittenger, 421 U.S. 349 (1975) (exception implicitly followed).

73. 418 U.S. 166 (1974).

74. U.S. CONST. art. I, § 9, cl. 7.

75. 418 U.S. at 174.

76. *Id.* at 175 (quoting Flast v. Cohen, 392 U.S. at 104); *see id.* at 173 (party must plead specific constitutional limitation).

77. The Third Circuit treated the case in precisely that way, asking: "[H]ow can a taxpayer make that challenge unless he knows how the money is being spent?" Richardson v. United States, 465 F.2d 844, 853 (3d Cir. 1972), *rev'd*, 418 U.S. 166 (1974).

opment of the citizen suit has been both more simple and more complex. The apparently absolute bar to such actions espoused in *Ex parte Lévitt* was expressly retained in *Schlesinger v. Reservists Committee to Stop the War*,[78] in which citizens were denied standing to raise a claim that the incompatability clause[79] prevents a member of Congress from simultaneously holding a commission in the Armed Forces Reserve.[80] Fashioning a rule in direct contradiction to *Flast*, Chief Justice Burger declared that "standing to sue may not be predicated upon an interest . . . held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share."[81]

Despite the strong language of *Reservists Committee*, the law of standing has evolved to encompass a variety of injuries that are both generalized and abstract. The apportionment cases, for example, are constructed upon a "fiction" of injury related to vote dilution that is abstract and indefinable.[82] Accordingly, Justice Frankfurter claimed in dissent in *Baker v. Carr* that the plaintiffs argued no more than that "the frame of government is askew."[83] Similarly, standing has been achieved in school prayer cases despite the absence of individual injury.[84] Both lines of cases, though cast in the mode of particularized harm,[85] approach grants of citizen standing merely to enforce governmental compliance with the Constitution. Further, in nonconstitutional cases an assortment of relatively abstract injuries have been accepted to support standing.[86] In actions based upon standing granted by statute, plaintiffs have even been allowed to sue as representatives of the public interest—by definition an interest common to all.[87]

B. Valley Forge—*Limiting the Public Action*

Against this somewhat checkered framework, a group of taxpayers/citizens was denied standing to challenge the transfer of a valuable parcel of government property to a religious organization in *Valley Forge Christian*

78. 418 U.S. 208 (1974).

79. U.S. CONST. art. I, § 6, cl. 2. For its text, see *supra* note 56.

80. 418 U.S. at 220-21.

81. *Id.* at 221.

82. Jaffe, *supra* note 19, at 1046 n.45; Baker v. Carr, 369 U.S. 186 (1962).

83. 369 U.S. 186, 299 (1962) (Frankfurter, J., dissenting).

84. Abington School Dist. v. Schempp, 374 U.S. 203, 224 n.9 (1963).

85. The complexities involved in defining particularized injury—as opposed to generalized grievance—are explored fully in section II-C below.

86. Aesthetic and environmental interests have regularly provided the requisite basis for standing. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972). *See also* Trafficante v. Metropolitan Life Ins. Co., 409 U.S 205 (1972), in which the Supreme Court recognized the loss of "important benefits from interracial associations" as an adequate demonstration of injury-in-fact. *Id.* at 209-10.

87. *See, e.g.*, TVA v. Hill, 437 U.S. 153, 164 n.15 (1978) (plaintiffs had standing under the Endangered Species Act, which allows "any person" to bring an action in federal court to enforce the Act); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940) (holding explicitly that plaintiff who had no legal interest nevertheless could be a proper party if he met the terms of the statute). *See also* Jaffe, *Standing Again*, *supra* note 36, at 635 (discussing *Sanders Bros. Radio Station*).

College v. Americans United for Separation of Church & State.[88] In 1976, pursuant to the Federal Property and Administrative Services Act,[89] the Department of Health, Education and Welfare (HEW) transferred a seventy-seven acre tract, which included a "surplus" Army hospital, to Valley Forge Christian College. The Christian College, operated under the auspices of the Assembly of God, was instituted "to offer systematic training on the collegiate level to men and women for Christian service as either ministers or laymen."[90]

The Act authorized HEW to grant a "public benefits allowance" to tax exempt institutions to offset the price of the property "on the basis of benefits from the use of such property for educational purposes."[91] The appraised value of the hospital compound at the time of the transfer was over $500,000. Because of HEW's computed 100% public benefit allowance, however, the Christian College was permitted to acquire the facility without making any payment whatsoever. The resulting purchase was conditioned upon the Christian College's promise to use the property for thirty years solely for educational purposes.

Three months after the transfer, Americans United for Separation of Church and State (Americans United) brought suit to challenge the conveyance under the establishment clause. The trial court dismissed the complaint, finding that plaintiffs lacked standing under *Flast*.[92] The Court of Appeals for the Third Circuit reversed.[93] Despite its agreement with the trial court that "it may well be that the plaintiffs here lack *taxpayer* standing,"[94] the majority of the court of appeals found that Americans United had standing as "citizens" claiming "injury in fact to their . . . right to a government that 'shall make no law respecting the establishment of religion.' "[95] By a bare majority,[96] the United States Supreme Court reversed, denying both taxpayer and citizen standing.[97]

Writing for the majority, Justice Rehnquist first determined that plaintiffs had failed to meet the test for taxpayer standing set forth in *Flast*. In short, the claim ran afoul of the first prong of the nexus test since plaintiffs challenged a decision by HEW to transfer a parcel of federal property rather than an exercise of the congressional spending power.[98] The majority reasoned that a rigorous, if not unduly literal, reading of the *Flast* test was mandated by the

88. 454 U.S. 464 (1982).

89. 40 U.S.C. §§ 471-535 (1976 & Supp. V 1981).

90. 454 U.S. at 468.

91. *Id.* at 467 (quoting 34 C.F.R. § 12.9(a) (1980)).

92. *Id.* at 469.

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

94. *Id.* at 260 (emphasis original).

95. *Id.* at 261.

96. Justice Brennan dissented in *Valley Forge*, joined by Justices Marshall and Blackmun. 454 U.S. at 490. Justice Stevens filed a separate dissent. *Id.* at 513.

97. *Id.* at 490.

98. *Id.* at 479.

Court's decisions in *Richardson* and *Reservists Committee*.[99] As a result, Americans United were "plainly without standing to sue as taxpayers."[100]

The claim of citizen standing was treated even more bluntly. Accusing the Third Circuit Court of Appeals of ignoring "unambiguous limitations" on citizen standing, Justice Rehnquist declared that such actions based directly on the Bill of Rights have "no place in our constitutional scheme."[101] The lower court's conclusion that the first amendment created a "personal constitutional right"[102] to separation of church and state was nothing more than the assertion of a right to a particular kind of government conduct—the sort of generalized grievance prohibited by article III.[103] Despite *Flast*, the Court indicated that there is "no principled basis" on which to base a "hierarchy of constitutional values" allowing special status to sue under the establishment clause.[104] Finally, the Court relied on *Reservists Committee* for the proposition that there are "no boundaries" to any standing theory based merely upon the position of citizens as the ultimate beneficiaries of various constitutional provisions.[105] Accordingly, the complaint was dismissed.

C. *Taxpayer and Citizen Standing After* Valley Forge: *Rules and Anomalies*

Article III standing, cast in its most general terms, requires that a litigant allege "distinct and palpable injury"[106] that is "fairly traceable" to the acts of the defendant[107] and is likely to be redressed by a favorable decision.[108] Although injury has been defined very broadly in a number of contexts,[109] *Richardson*, *Reservists Committee*, and *Valley Forge* teach quite clearly that standing cannot be predicated merely upon the "harm" a citizen sustains as the result of the government's failure to comply with the Constitution.[110] Therefore, under present article III guidelines, the ideological non-

99. *Id.* at 481.

100. *Id.* at 482.

101. *Id.* at 489.

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

103. 454 U.S. at 483.

104. *Id.* at 484.

105. *Id.* at 485.

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

107. Watt v. Energy Action Educ. Found., 454 U.S. 151, 161 (1981) (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977)).

108. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976); *see also* Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185 (1981).

109. *See* Andrus v. Sierra Club, 442 U.S. 347, 353 (1979) (environmental harms); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978) (same); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972) (harm to "benefits of interracial associations").

110. Of course, government action that allegedly violates the Constitution in a manner particularized to the plaintiff can constitute "injury" for purposes of article III. *See, e.g.*, Davis v. Passman, 442 U.S. 228, 248 (1979); Pierce v. Society of Sisters, 268 U.S. 510, 519 (1925).

Hohfeldian[111] citizen or taxpayer, if not the beneficiary of a statutory grant of standing,[112] may not sue in federal court unless he meets the *Flast* test. That test, together with the resulting standing prohibition for ideological litigants who fail to meet its terms, provides a less than satisfactory response to the difficult problems raised by citizen standing.

1. The *Flast* Nexus Test

Chief Justice Warren's opinion in *Flast v. Cohen*[113] purported to reject the separation of powers basis of *Frothingham v. Mellon*[114] and described the focal point of the standing inquiry as "whether the Party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy' " sufficient to invoke relief.[115] Under the test announced in *Flast*, a taxpayer is deemed to have the sufficient "personal stake in the outcome" only if there is a "logical nexus between the status asserted and the claim sought to be adjudicated."[116] The requisite nexus is measured by a two-pronged test. First, the taxpayer must establish that the action challenged involves an exercise of congressional power under the taxing and spending clause of the Constitution, article I, section 8. Second, the litigant must allege that the challenged conduct violates specific constitutional limitations imposed upon the exercise of the taxing and spending power.[117]

The initial query the *Flast* holding raises is that posed by Professor Bickel: "what in the world does it mean?"[118] Lower federal courts have struggled with the question whether federal expenditures that are supported not only by the taxing and spending clause but also by some independent constitutional source of power fall under *Flast*'s first prong. If not, as most have indicated,[119] one wonders if a congressional funding program to support religion

111. As Justice Harlan indicated in dissent in *Flast v. Cohen*, a Hohfeldian plaintiff is one who has the "personal and proprietary interest of the traditional plaintiff, and [not] the representative and public interests of the plaintiff in a public action." 392 U.S. 83, 119 n.5 (1968) (Harlan, J., dissenting). *See* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasonings*, 23 YALE L.J. 16 (1913); Jaffe, *supra* note 19.

112. In TVA v. Hill, 437 U.S. 153 (1978), for example, the Supreme Court had no trouble recognizing standing under the terms of the Endangered Species Act that allow "any person" to sue in federal court. *Id.* at 164 n.15.

113. 392 U.S. 83 (1968).

114. 262 U.S. 447 (1923) (discussed *supra* at text accompanying notes 42-53).

115. 392 U.S. at 101 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

116. *Id.* at 102.

117. *Id.*

118. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 64 (1970).

119. The *Flast* opinion declared that "incidental expenditure of tax funds in the administration of an essentially regulatory statute" could not be challenged by a taxpayer. 392 U.S. at 102. In Richardson v. Kennedy, 313 F. Supp. 1282 (W.D. Pa. 1970), for example, a three-judge court determined that a challenge to the Postal Revenue and Federal Salary Act of 1967 was not a spending challenge. The court found that the congressional pay raises in question were supported not only by the taxing and spending clause but also by the provision in article I, § 6 that "Senators and Representatives shall receive a Compensation . . . ." *Id.* at 1286. Of course, plaintiffs had alleged that the procedure for granting pay raises did not comply with article I, § 6. Similiarly, in Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), the Tenth Circuit dismissed a taxpayer challenge to Vietnam War expenditures because such funds were not spent pursuant to the taxing and

in order to promote commerce would be nonreviewable. Nor has the Court successfully explained why the establishment clause—but no other provision of the Constitution—is sufficiently "specific" to justify taxpayer standing.[120]

However difficult it may be to determine exactly what the *Flast* test was designed to encompass, that inquiry pales in comparison to the effort required to discover any relationship that exists between the "nexus" standard and the plaintiff's "personal stake" in the lawsuit. Taxpayer cases do not contest taxes. Standing would be a simple matter if they did, for taxpayers have consistently been held to have standing to contest the constitutionality of taxes specifically levied against them.[121] Rather, taxpayer cases contest expenditures. Accordingly, it is difficult to see how the status of being a taxpayer increases one's interest in the litigation. Certainly the plaintiffs in *Flast* had no expectation that their bills would be reduced, nor was such a reduction even contemplated by the Court's standing analysis. In fact, since a primary argument for public aid to parochial schools is tax savings, it was perhaps more reasonable for the *Flast* plaintiffs to expect that their tax burden would be increased if they prevailed.[122] Of course, that gave the *Flast* plaintiffs little reason to hesitate since they obviously sued as separationists rather than as taxpayers.[123]

Regardless of whether tax subsidies to parochial schools increase or decrease the public fisc, it is virtually certain that federal funds allocated to any program challenged by a taxpayer will simply be diverted to a constitutionally "safe" purpose if the litigant prevails. Accordingly, any claim of financial interest by the taxpayer is negligible.[124] The absence of any relationship be-

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spending clause, but were supported by the power of Congress to raise an army under article I, § 8, clauses 12 and 13. *Id.* at 239.

120. *Flast* preserved the decision in *Frothingham v. Mellon* by characterizing that taxpayer challenge, which was based upon the due process clause and the tenth amendment, as a general challenge. 392 U.S. at 104-05. The specific disclosure provisions of article I, § 9, which easily could be seen as an effective declaration that federal funds cannot be spent absent regular statements of account, were deemed general in United States v. Richardson, 418 U.S. 166, 176 (1974). The circuit courts tended to characterize the congressional power to declare war under article I, § 8, clause 11 as general. *See* Pietsch v. President of the United States, 434 F.2d 861, 863 (2d Cir. 1970); Velvel v. Nixon, 415 F.2d 263, 239 (10th Cir. 1969). Justices Brennan and Douglas, however, considered the same provision to be a specific limitation under the second prong of *Flast*. Sarnoff v. Shultz, 409 U.S. 929, 930 (1972) (Brennan & Douglas, JJ., dissenting).

121. *See, e.g.*, United States v. Butler, 297 U.S. 1, 57-61 (1936).

122. *See* J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 124 (1978). Professor Vining argues that the "Court could not honestly say to the world that it was moved to examine an act of Congress to save the challengers a dollar, and still talk of judicial economy, nonprejudicial error, and harm de minimis." *Id.* at 124.

123. Consider the following excerpt from the appellants' brief filed in *Flast*:

> But the plaintiffs in the present suit and in similiar First Amendment suits are not watchdogs of the public treasury. They are not motivated by any desire to keep taxes down. They sue, in the phraseology of *Doremus*, to prevent a pocketbook injury but only because that is part of what they deem a much graver injury, an injury to the right to live under a government which separates itself strictly from the church and church affairs.

Brief for Appellant at 37, Flast v. Cohen, 392 U.S. 83 (1968).

124. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 36, § 3531 ("the taxpayer is hard put to identify any substantial interest qua taxpayer rather than citizen"). *See also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 485 (1965); Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After* Flast v. Cohen, 36 U. CHI. L. REV. 364, 372 (1969) ("damages are never awarded to the plaintiff, and it is possible that Congress will

tween the financial interests of a taxpayer and the constitutionality of government expenditures is demonstrated by the consistent refusal of the federal courts to allow taxpayers to raise constitutional objections to expenditures as a defense to tax collection actions.[125]

Since a taxpayer can make no realistic claim that he is litigating to keep his taxes down, he is relegated to an assertion that his money is being spent in violation of the Constitution—the same generalized complaint repeatedly rejected in the citizen cases. The status of taxpayer can thus be distinguished from the status of citizen only if one is willing to accept the payment of taxes as a sort of de facto admission charge for use of the federal courts to challenge congressional expenditures. It would seem apparent, however, that such a theory of taxpayer standing would suffer from the same defects of wealth discrimination that proved fatal to the poll tax and to other financial limitations on the exercise of civil liberties.[126] As a result, there is no acceptable distinction to be drawn between taxpayer status and the broader concept of citizen standing.

Similarly, the two prongs of the nexus test are not directed at measuring the plaintiff's personal stake. A taxpayer has no less an interest in challenging allegedly unconstitutional expenditures that are incidental to a regulatory program than would be the case with "pure" spending exercises. It is also unclear how a litigant's personal stake varies depending upon whether the constitutional guarantee under which he seeks relief is a specific or a general limitation upon the spending power. A brief examination of two lower court decisions demonstrates the curious results mandated by the "specific" prong of the *Flast* test.

Shortly after *Flast* was decided, the United States Court of Appeals for the District of Columbia Circuit granted standing to a group of taxpayers in *Protestants & Other Americans United for Separation of Church & State v. Watson*.[127] Through an arguably incorrect reading of the *Flast* test, the court allowed the taxpayers to challenge the issuance of a postage stamp commemorating Christmas.[128] In *Tax Analysts & Advocates v. Blumenthal*, however, the same court dismissed a taxpayer suit brought to challenge IRS rulings that allowed oil company payments to foreign nations to constitute

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spend 'his tax money' in other, unassailable programs if the one he attacks is held unconstitutional").

125. *See* First v. Commissioner, 547 F.2d 45 (7th Cir. 1976) (per curiam), refusing to allow the Firsts to assert a "war tax deduction" in order to protest the Vietnam War. Rejecting Professor Sedler's arguments on behalf of the litigants, the court indicated: "There has been a long, undeviating pattern of cases—all the way from the Tax Court to the United States Supreme Court—holding against the Firsts on the ground that they have no standing to raise their religious and other claims in avoidance of their legally imposed tax obligations." *Id.* at 46. *See also* Autenrieth v. Cullen, 418 F.2d 586, 588 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970); Kalish v. United States, 411 F.2d 606, 607 (9th Cir. 1969) (per curiam); Crowe v. Commissioner, 396 F.2d 766, 767 (8th Cir. 1968); Swallow v. United States, 325 F.2d 97, 98 (10th Cir. 1963) (per curiam).

126. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956). *See also* Bittker, *supra* note 124, at 372.

127. 407 F.2d 1264 (D.C. Cir. 1968).

128. *Id.* at 1265-66.

United States tax credits.[129] The suit was not founded upon a specific constitutional limitation.

It is difficult to understand how the printing of one postage stamp rather than another, as in *Protestants*, hurts the taxpayer *qua* taxpayer.[130] In contrast, the plaintiffs in *Tax Analysts* specifically alleged that the contested IRS rulings had cost the United States Treasury over three billion dollars in a single year.[131] Thus, the *Flast* test allows taxpayers to present certain cases—primarily those in which the taxpayer interest is merely a cover for the plaintiffs' true motivation[132]—while denying the justiciability of what might more appropriately be characterized as "true" taxpayer cases designed to achieve an equitable allocation of the tax burden.

The only fair reading of the *Flast* test, therefore, is that it was a compromise apparently meant to open the door to one type of generalized constitutional claim while preserving the *Frothingham* bar to the rest. The theory of *Flast*, however, is not so easily limited. Rather, in the words of the late Professor Bickel "taxpayers invoking the Establishment Clause are not distiguishable, except by an arbitrary *ipse dixit*, from other taxpayers attacking federal expenditures on other grounds . . . ."[133]

2. The Anomalies

On its face, the taxpayer standard announced in *Flast* provides the weakest foundation upon which to construct a law of standing governing the presentation of public constitutional actions. The standing decisions handed down over the past decade demonstrate that generalized constitutional claims will be entertained only if the Supreme Court agrees that the *Flast* test has been met. The grudging interpretations of the nexus test in *Richardson* and *Valley Forge*, however, have served to render an already questionable standard little more than ludicrous. The inconsistencies and anomalies created by the rule and its literal applications now comprise the law of standing to present public constitutional actions.

a. Property v. Money: Trashing Flast

The transfer contested in *Valley Forge* involved property that was initially purchased with federal funds and that bore "the mark of ten million dollars in federal improvements."[134] At the time of its transfer to the Christian College, the property's fair market value was approximately $1.3 million.[135] Yet because the conduct challenged was merely the transfer of a valuable piece of

129. 566 F.2d 130, 145 (D.C. Cir. 1977).

130. *See* D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 72 (1975).

131. 566 F.2d at 134 n.10.

132. For a fuller discussion of the "fiction" of taxpayer standing and the undesirable results of employing the fiction, see *infra* Section III-A.

133. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 76 (1970).

134. 454 U.S. at 512 n.19 (Brennan, J., dissenting).

135. *Id.*

property rather than the expenditure of tax dollars, standing was denied.[136] One is hard pressed, no doubt, to discover a "constitutional difference"[137] between a cash grant to construct a building and the transfer of an existing facility. Apparently, however, standing now exists under *Flast* to contest a five dollar appropriation to a religious sect. But if Congress were to appropriate $5,000,000 to buy a building and a member of the executive branch decided to give the building to his local church, the action would be nonreviewable. James Madison would likely find that result curious—especially if dictated by the standing doctrine.[138]

The Court's determination that plaintiff's standing turned on whether the transfer was an exercise of the spending power or the power to dispose of tangible property reflects an obvious hostility to the holding of *Flast*. Further, it curiously reflects a limitation only upon the legislative branch, and thus a taxpayer's "personal stake" is limited solely to scrutinizing congressional appropriations. As Justice Stevens pointed out in dissent, such a literal reading of the taxpayer rules ultimately "trivialize[s] the standing doctrine."[139]

Valley Forge is also flatly inconsistent with *Tilton v. Richardson*,[140] in which a group of citizens and taxpayers mounted a partially successful challenge to the administration of the Higher Education Facilities Act of 1963. The statute had authorized a loan program for both public and sectarian colleges that was designed to encourage the construction of educational facilities. Plaintiffs' broad-based attack on the statute as applied to sectarian schools was denied on the merits. Largely because the loans were conditioned upon the promise that the buildings would not be used for religious purposes, the Court determined that the act had no "principal or primary effect" of advancing religion.[141]

One provision of the Act, however, was deemed constitutionally defective. The statute granted the federal government a remedy akin to recision for any violation of the prohibition against religious use.[142] Under the terms of the Act, however, the recision remedy was available to the federal government for only twenty years. In striking down the twenty-year limititation, Chief Justice Burger wrote for a plurality of the Court:

> Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. *It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable*

136. Justice Rehnquist, writing for the Court in *Valley Forge*, determined that the source of the complaint "is not a congressional action, but a decision by HEW to transfer a parcel of federal property." *Id.* at 479.

Accordingly, the conduct challenged was "not an exercise of authority conferred by the taxing and spending clause of Art. I, § 8." *Id.* at 480.

137. *Id.* at 511 (Brennan, J., dissenting).

138. *See infra* note 292.

139. 454 U.S. at 514 (Stevens, J., dissenting).

140. 403 U.S. 672 (1971).

141. *Id.* at 679-80.

142. *Id.* at 682-83.

> *property is in effect a contribution of some value to a religious body* . . . . If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.[143]

Had the Court in *Tilton* been as anxious to deny standing as it was in *Valley Forge*, plaintiffs would have been barred from raising the constitutionality of the twenty year limitation. The limitation was held to violate the establishment clause because it failed to provide sufficient safeguard against the possibility that the subsidized property would one day be used for religious purposes. Any conversion or transfer of the property in the future, however, arguably would not have been an expenditure under the *Flast* test since the money, as in *Valley Forge*, would have long been spent. Plaintiffs would merely have been asserting their desire for a particular type of government behavior. Yet standing was never questioned by the Court in *Tilton*.

Regardless of its hypothetical outcome under the inhospitable nexus test employed in *Valley Forge*, *Tilton* demonstrates that the establishment clause prohibits governmental support of religion through the distribution of largesse either in the form of money or property. It is ironic that when Judge Frankel dissented from the three-judge determination to refuse standing at the trial court level in *Flast*, he characterized as "frivolous" the possibility that "[t]he First Amendment's commands, so sensitively and astutely enforced in their essential substance under the decisions of the Supreme Court . . . could be avoided by details of government bookkeeping . . . ."[144] The decision in *Valley Forge* allows the constitutional standing determination to turn on precisely such details.

b. Local v. Federal Taxpayers

Unfortunately, the money/property rationale is not the only peculiar aspect of the law of standing to bring a public constitutional action. The interest of a taxpayer of a municipality in the use of its funds has consistently been characterized as "direct and immediate" and, without more, an appropiate basis for standing.[145] The federal courts have also granted taxpayers standing to sue a variety of state and local agencies despite the apparent failure of the suits to come within the terms of the *Flast* test.[146] This "local" exception to the taxpayer standing rules can hardly withstand scrutiny.

First, as several commentators have pointed out, the "personal stake" that many huge corporations have in federal tax revenues is far larger proportion-

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143. *Id.* at 683 (emphasis added).

144. Flast v. Gardner, 271 F. Supp. 1, 11 (S.D.N.Y. 1976) (Frankel, J., dissenting).

145. *See* Frothingham v. Mellon, 262 U.S. 447, 486 (1923); *accord* Crampton v. Zabrisskie, 101 U.S. 601, 609 (1879).

146. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975) (taxpayer suit against state agency); Everson v. Board of Educ., 330 U.S. 1 (1947) (suit against local school board); Public Funds for Pub. Schools of N.J. v. Byrne, 590 F.2d 514 (3d Cir. 1979) (action against state officials); Ramsey v. Chaco, 549 F.2d 1335 (9th Cir. 1977) (suit against Guam territorial officials).

ally than the tiny fractions contributed by ordinary taxpayers to giant municipalities.[147] No doubt the impact upon the average municipal resident's tax bill of any successful challenge to a local expenditure is "both speculative and minute."[148] Second, the different treatment of local and federal taxpayers reveals quite clearly the separation of powers basis of the Court's taxpayer standing rules. Somehow it is more constitutionally vexing to allow taxpayers to challenge congressional programs than those of their state counterparts. Yet *Flast* characterized separation of powers concerns as irrelevent in a standing inquiry that focuses upon the personal stake of the plaintiff.[149]

Finally, the "local" exception creates an ample irony in the enforceability of the Bill of Rights. Under present article III analysis, it appears that taxpayer standing would have been upheld if a state agency, rather than HEW, had carried out the actions challenged in *Valley Forge*.[150] The first amendment, however, indicates that "*Congress* shall make no law . . . ." It was, of course, only through a complex and strained interpretation that many provisions of the Bill of Rights were made enforceable against the states.[151] Any local exception to the taxpayer standing rules, therefore, is not only a "crowning paradox,"[152] but it also turns the language of the Constitution on its head.

c. Constitutional v. Statutory Rights

The decisions in *Richardson*, *Reservists Committee*, and *Valley Forge*, which counsel that constitutional "rights" shared in common by the citizenry cannot provide the basis for standing, are surprising when compared with judicial treatment of broad statutory rights. In *Richardson*, for example, plaintiffs were denied standing to seek the compelled disclosure of the CIA budget under article I, section 9, clause 7.[153] It must be assumed that article I, section 9 does not create judicially cognizable "rights" because such interests are "generalized." Had plaintiffs been able to pursue an analogous cause of action under the Freedom of Information Act, however, standing would have been assured despite the generalized nature of the claim.[154]

Similarly, plaintiffs in *Reservists Committee* complained essentially of a congressional conflict of interest in violation of article I, section 6. Because the

147. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 36, § 3531, at 178; *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 2, 493 (1966) (letter from K.C. Davis to Senator Sam Ervin).

148. L. JAFFE, *supra* note 36, at 485.

149. 392 U.S. at 100.

150. *See* Meek v. Pittenger, 421 U.S. 349 (1975) (resident taxpayers allowed to challenge loans and transfers to parochial schools by a state agency).

151. *See* Adamson v. California, 322 U.S. 46 (1947); Palko v. Connecticutt, 302 U.S. 319 (1937).

152. Professor Jaffe argued that it is a "crowning paradox that the constitutionality of state and local expenditures can be adjudicated by the Supreme Court but not the constitutionality of federal expenditures." L. JAFFE, *supra* note 124, at 459-60.

153. 418 U.S. at 167-70.

154. Standing to contest the denial of a statutory freedom of information request is given to any person. *See* 5 U.S.C. § 552 (1976); United States v. Richardson, 418 U.S. 166, 204-05 (1974) (Stewart, J., dissenting); EPA v. Mink, 410 U.S. 73, 79, 92 (1973).

claim was one "shared by all citizens," standing was denied.[155] Curiously, Chief Justice Burger explained: "We have no doubt that if the Congress enacted a statute creating such a legal right, the requisite injury for standing would be found in an invasion of that right."[156]

The law of standing, therefore, prohibits the assertion of constitutional rights that are held in common, yet generalized statutory rights regularly constitute a basis to sue in the federal courts. Therefore, had a statute existed prohibiting the federal government from supporting religion and giving citizens authority to enforce it, standing to sue would have been granted in *Valley Forge*. Since plaintiffs "merely" claimed the first amendment as the source of their separationist rights, however, their action was dismissed.

The interplay between generalized statutory and constitutional rights demonstrates clearly that despite protestations to the contrary in *Flast*, taxpayer/citizen standing rules are based upon separation of powers concerns—not concern for the party's stakes in the controversy. No doubt the "personal stake" of any citizen suing under the Freedom of Information Act is identical to that of the plaintiffs in *Richardson*.

Grants of generalized statutory standing also lead one to question the theory of the citizen standing cases. Cases recognizing standing for "any person" based upon congressional grants would seem to indicate that although rights are shared by all, this is not necessarily fatal to standing.[157] Other cases make it clear that judicially cognizable "rights" can be based directly upon the Constitution.[158] Apparently it is only the combination of the two—generalized rights based upon the Constitution—that is unreviewable under article III. Thus far, however, the Court has failed to offer a meaningful explanation of the aversion. What Eugene Rostow has called "the constitutional instincts of the nation, always the strongest force in its public life,"[159] suggest that the rights reflected in the Constitution merit every bit as much judicial protection as do those contained in the United States Code.

d. Enforceability of the Constitution

The taxpayer/citizen standing decisions of the Supreme Court accept quite readily the possibility that the particularized injury requirement might render certain constitutional provisions unenforceable. Speaking directly to the issue in *Richardson*, Chief Justice Burger wrote for the Court:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to

155. 418 U.S. at 217.

156. *Id.* at 224 n.14.

157. *See* TVA v. Hill, 437 U.S. 153 (1978) (Endangered Species Act); Environmental Protection Agency v. Mink, 410 U.S. 73 (1973) (Freedom of Information Act).

158. *See* Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

159. E. ROSTOW, THE IDEAL IN LAW 3 (1978).

> the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.[160]

The rights asserted in *Valley Forge*, *Richardson*, and *Reservists Committee* are not among those sorts of interests designed to be left to the protection of the democratic process in our system of government. Speaking of the same amendment to the Constitution that was implicated in *Valley Forge*, the Court declared almost forty years ago in *West Virginia State Board of Education v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend upon the outcome of no elections.[161]

Similarly, the rights asserted under the incompatablity clause in *Reservists Committee* were especially appropriate for judicial enforcement.[162] Since plaintiffs claimed that members of Congress were in specific violation of the Constitution, and that conflict arising from dual allegiance resulted in unfair representation in the legislature, it might have been unrealistic to expect the political process to provide relief. In analogous situations, the judiciary has been willing to police the very operation of the political process.[163]

The information sought by the litigants in *Richardson* was purportedly desired to allow citizens to "intelligently follow the actions of Congress . . . [and] fulfill [their] obligations" as members of the electorate.[164] Accordingly, judicial intervention would have worked to implement rather than subvert the democratic process. Therefore, it would seem apparent that it is inappropriate to base a complete prohibition of public constitutional actions upon reliance on the democratic process.

It is evident that the present law of standing to bring generalized constitutional actions is unacceptable. Citizen and taxpayer suits, though indistinguishable in terms of stake in the controversy, are examined under different standards. Citizen cases are barred. Taxpayer cases are permitted—but only if the plaintiff can successfully meet a "nexus" test that has no discernible relationship to general standing principles. Without convincing explanation, local taxpayer cases and actions challenging congressional expenditures under the establishment clause are given judicial cognizance. Yet the distribution of governmental largesse in the form of real property to religious organizations is

160. 418 U.S. 166, 179 (1974).

161. 319 U.S. 624, 638 (1943).

162. *See* H. HART & H. WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 60 (Supp. 1981).

163. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (allegation that a state statute deprived state voters of due process presented a constitutional cause of action, not a nonjusticiable political question).

164. 418 U.S. 166, 177 (1974).

not actionable by either citizens or taxpayers. Even worse, the entire standing framework is cast in conclusory terms relating to directness of injury, while complex and recurring issues concerning the appropriate role of the judiciary in our system of government remain unaddressed.

II. JUSTICES REHNQUIST AND POWELL—*MARBURY*'S PRIVATE RIGHTS MODEL

Justice Rehnquist's opinion in *Valley Forge Christian College v. Americans United for Separation of Church & State*[165] is quite explicit in its adoption of a private rights theory of judicial review. Characterizing the judicial power to measure the authority of government as "legitimate only in the last resort,"[166] the majority opinion reads recent standing decisions to require "at an irreducible minimum . . . injury."[167] Plaintiffs argument for standing based upon rights created by the establishment clause was, therefore, wholly outside the scope of this requirement. The complaint actually asserted only the right to a particular kind of government conduct. The Court found that this allegation "cannot alone satisfy the requirements of Art. III without draining those requirements of meaning."[168] Further, the recognition in the Court of Appeals for the Third Circuit of a personal constitutional right to separation of church and state was based upon the "importance of the claim on the merits," thus violating the aphorism that standing focuses on the party, not the issues.[169] *Valley Forge* could not be distinguished from *United States v. Richardson*[170] and *Schlesinger v. Reservists Committee to Stop the War*[171] since there is "no principled basis on which to create a hierarchy of constitutional values . . . ."[172]

The theory espoused by Justice Rehnquist leads one easily to the conclusion that there should have been no standing in *Valley Forge*. The most obvious problem with this rationale, however, is that it has little relationship to the current law of standing. *Flast v. Cohen*,[173] which the Court cited repeatedly, stands in bald contradiction to the private rights theory of *Valley Forge*. Plaintiffs in *Flast* were obviously incapable of demonstrating injury-in-fact. It was the absence of particularized harm that necessitated the creation of the nexus test. The *Flast* complaint asserted nothing more than the right to a particular kind of government conduct—conduct that does not violate the establishment clause. Further, the second prong of the nexus test, which requires that a taxpayer action be based upon a specific constitutional limitation, is a

165. 454 U.S. 464 (1982).
166. *Id.* at 471 (quoting Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892)).
167. *Id.* at 472.
168. *Id.* at 483.
169. *Id.* at 484.
170. 418 U.S. 166 (1974).
171. 418 U.S. 208 (1974).
172. 454 U.S. at 484.
173. 392 U.S. 83 (1968).

clear institutionalization of the belief that a "hierarchy of constitutional values" can be recognized.

Nor are *Flast* and the cases decided under its banner the only departures from a private rights theory.[174] Standing has been granted on a number of occasions by employing creative definitions of "injury" in actions that are essentially indistinguishable from mere citizen suits.[175] It is perhaps a more charitable reading of Justice Rehnquist's opinion, therefore, to regard *Valley Forge* as the implicit announcement of an article III policy that will eventually result in the overruling of *Flast* and its progeny.[176] Similarly, Justice Powell called for the return to a pure private rights model in his concurring opinion in *United States v. Richardson*.[177] Acknowledging the obviously public nature of actions such as *Flast* and *Baker v. Carr*,[178] both of which he called "sui generis,"[179] Justice Powell claimed that absent a specific statuary grant of review, standing requires that the plaintiff "allege some particularized injury that sets him apart from the man on the street."[180] Otherwise, the conclusion is "inescapable" that relaxed standing rules would "significantly alter the allocation of power at the national level."[181] Although a pure private rights model cannot be squared with current standing law, it is far from clear that such a standard should be rejected. Few would deny that citizen and taxpayer rules need to be reconsidered. The question that remains, therefore, is whether a private rights model requiring the demonstration of individualized injury separate and distinct from the claimed constitutional violation is a good idea. Justices Rehnquist, Powell, and apparently Chief Justice Burger[182] have

174. *See* Meek v. Pittenger, 421 U.S. 349 (1975); Tilton v. Richardson, 403 U.S. 672 (1971).

175. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Baker v. Carr, 369 U.S. 186 (1962). For a discussion of "injury," see *infra* notes 260-88 and accompanying text.

176. Justice Rehnquist has received no small degree of criticism for a purported tendency to distort precedents and to ignore aspects of past decisions that run contrary to the Justice's desired result in the case before him. *See* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976); Nichol, *Backing Into the Future: The Burger Court and the Federal Forum*, 30 KAN. L. REV. 341, 379-80 (1982).

177. 418 U.S. at 188-89 (Powell, J., concurring).

178. 369 U.S. 186 (1962).

179. 418 U.S. at 195 n.17.

180. *Id.* at 194.

181. *Id.* at 188.

182. Chief Justice Burger authored the opinion for the Court in *Reservists Committee*, in which he claimed to reaffirm the holding of *Ex parte* Lévitt, 302 U.S. 633 (1937) (per curiam), that standing cannot be based upon "injury all citizens share." 418 U.S. at 220. Certainly that would appear to make him an advocate of a pure private rights model. One wonders, however, about the rationale for the holding in *Reservists Committee*. The Chief Justice claimed that particularized injury was essential in that case because it would serve to lend a "dimension of specificity" and a "complete perspective upon the adverse consequences . . . from the specific set of facts." *Id.* at 221. Unfortunately, the action in *Reservists Committee*, which was based upon the incompatibility clause and sought to prohibit members of Congress from being officers in the Armed Forces Reserve, would not have been rendered more concrete by particularized injury. The suit presented a clear constitutional question and further factual development was either unnecessary or perfectly achievable by the parties already present. Therefore, the grounds for denying standing appeared to have no relation to the lawsuit.

To complicate matters further, the Chief Justice authored Tilton v. Richardson, 403 U.S. 672 (1971), in which standing was granted in a taxpayer action similiar to *Flast*. Accordingly, it is difficult to make a good estimate of the views of the Chief Justice.

indicated their preferences for just such a standard.

A. *Evaluating the Particularized Injury Requirement*

An absolute, across-the-board article III requirement of particularized injury would entail several components. As a basic constitutional threshold, the injury-in-fact requirement dating from *Association of Data Processing Service Organizations v. Camp*[183] would be applicable to all cases. The private rights model, however, goes further. Because the standard would demand injury that sets the plaintiff apart "from the man on the street,"[184] the violation of a consititutional right that affects the citizenry as a whole would fall outside the definition of "injury."

Professors Jaffe and Berger have presented strong cases that a constitutional requirement of injury cannot be based upon the history or language of article III.[185] Even if an injury component could be historically sustained, however, nothing in the case or controversy requirement supports a *particularized* injury standard. A reading of article III does not lead one to the conclusion that the violation of constitutionally recognized rights creates no injury. Therefore, it seems clear that the individualized harm rule of *Reservists Committee* and *Valley Forge* is not constitutionally mandated.[186]

A particularized injury standard would, however, lend a degree of consistency to the standing doctrine. The judicial power of the federal courts could be exercised only upon a showing of individual harm. There would be no need for separate taxpayer or citizen standing rules. Such actions would be barred because the rights asserted are "public" and "generalized." There would of course be inconveniences. *Flast* and the local exception to the *Frothingham* rule would have to be overturned. The establishment clause would be rendered unenforceable in some instances, as would a number of other constitutional provisions. But the Court could counter that it was operating within its properly limited role in our system of government.

Consistency alone, however, even if it could be achieved,[187] is an insufficient reason to adhere to a particularized harm standard. Rules granting standing to all taxpayers or citizens would tend to promote consistency as well, though they might not adequately measure article III interests. Accordingly, it is necessary to examine the reasons put forth by the Justices to support a particularized injury requirement.

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183. 397 U.S. 150 (1970).

184. United States v. Richardson, 418 U.S. 166, 194 (1974) (Powell, J., concurring).

185. L. JAFFE, *supra* note 36, at 462-67 (1965); Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 837-40 (1969).

186. *See* Monaghan, *supra* note 36.

187. Of course a "true consistency" for purposes of article III analysis would necessitate not only the overruling of *Flast*, but also the reconsideration of cases such as Norwood v. Harrison, 413 U.S. 455 (1973); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Baker v. Carr, 269 U.S. 186 (1962). Further, if particularized harm is constitutionally mandated, citizen actions based upon statutory standing grants such as TVA v. Hill, 437 U.S. 153 (1978), and Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942), would become questionable.

Not surprisingly, the Supreme Court has given its most complete explanation of the policies underlying an actual injury requirement in the two cases directly rejecting citizen standing, *Reservists Committee* and *Valley Forge*. In those cases, two broad categories of interests were identified. The first, and most carefully emphasized, category can generally be characterized as "concreteness interests," which assure that a sufficient factual record will be presented to enlighten judicial inquiry. The second and ultimately more essential category of article III considerations reflects separation of powers concerns. Any departure from an individualized injury requirement would purportedly alter the relationship between the judiciary and its coequal branches of the federal government. These diverse rationales will be examined in turn.

1. Concreteness Interests

Chief Justice Burger's opinion for the Court in *Reservists Committee* declared that concrete injury provides an "essential dimension of specificity."[188] Particularized harm supplies a "complete perspective upon the adverse consequences . . . from the specific set of facts."[189] Similarly, Justice Rehnquist declared in *Valley Forge* that a requirement of actual distinct injury furnishes a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[190]

Apparently, the theory is that concrete, individualized harm is indispensable to make the record factually complete and the advocacy sufficiently informed to meet judicial standards. In practice, however, particularized injury is a poor predictor of either the adequacy of the record or the quality of counsel.[191] More often, the injury rule has been used to exclude plaintiffs who have demonstrated effective and continuing interest in the issues litigated.[192] Further, it is clearly inappropriate for the standing determination to turn on the perceived quality of representation.[193]

The lack of relationship between concreteness interests and the specific injury requirement is perhaps best demonstrated by a review of the major cases in which the court has employed the doctrine. In *Richardson* it is difficult to see how a more "concrete" factual record would have aided the Court in determining whether the refusal to publish the CIA budget violated article

188. 418 U.S. at 220-21.

189. *Id.* at 221.

190. 454 U.S. at 472.

191. *See* Parker & Stone, *Standing and Public Law Remedies*, 78 COLUM. L. REV. 771, 775 (1978) ("One plaintiff can be granted standing although he is an inadequate representative of the interest of his class, while another, fully qualified representative is eliminated at the threshold for lack of standing").

192. Consider, for example, the plaintiffs ousted in Sierra Club v. Morton, 405 U.S. 727 (1972) (Sierra Club lacked standing to challenge extensive skiing development in the Sequoia National Forest), and in *Valley Forge*.

193. Professor Davis has argued that the theory of using the standing doctrine to distinguish between better and worse representatives of various federal interests "deserves quiet burial. Standing should not depend upon the probable manner in which a party will present a case . . . ." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.00-04, at 724 (Supp. 1970).

I, section 9.[194] In *Reservists Committee* plaintiffs claimed that it was unconstitutional to be a member of Congress and an officer in the Armed Forces Reserve at the same time.[195] That assertion also appears to be both concrete and specific. In either case, if the record did prove to be factually deficient, the trial court could have either taken steps to assure a fuller perspective,[196] or found against the plaintiffs upon the facts as presented.

Finally, consider *Valley Forge*. The constitutionality of a single transfer of real property to a religious organization was at issue. The various opinions of the Third Circuit and Supreme Court relate the factual underpinnings of the transfer in totality.[197] Plaintiffs were well represented at all three levels of the federal judiciary. The absence of what the Court characterized as particularized injury simply bore no relation to whether the case would have been presented in the adversary context article III is purported to require.

Most commentators have suggested that ideological plaintiffs are even more apt than monetarily motivated litigants to present a case in its best light.[198] The costs of major litigation alone assure a substantial "personal stake."[199] In addition, the continuing commitment to various interests that initially brings ideological litigants into the federal courts should enhance rather than detract from the quality of representation.

It is also clear that in public constitutional actions even the typical Hohfeldian, injury-laden plaintiff is apt to be ideologically motivated. Professor Tushnet has correctly pointed out that the "material rewards of public interest litigation rarely justify the effort."[200] On an even more amorphous level the typical plaintiff in a reapportionment case does not bear the expense and inconvenience of litigation merely to assure that his vote is changed from eighty to ninety-five percent of its ideal weight. More likely, he is trying to force the defendant to comply with the Constitution.

None of these considerations mandates that every ideological plaintiff be given standing to sue in the federal courts. They do demonstrate, however, that the particularized injury requirement cannot be rationally based on a judicial belief that only individually harmed plaintiffs will present a case in the appropriate adversary context.

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194. *See* 418 U.S. at 183-84 (Powell, J., concurring).

195. 418 U.S. at 210-11.

196. Professor Tushnet describes such tools as "nonconstitutional auxiliary devices" designed to ensure that the Court has a complete understanding of the issues. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1707 (1980).

197. *See* Americans United for Separation of Church & State v. HEW, 619 F.2d 252, 253-54 (3d Cir. 1980) (outlining facts in detail); *Valley Forge*, 454 U.S. at 466-70 (majority opinion), 512 n.19 (Brennan, J., dissenting).

198. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 36, § 3531, at 224-28; Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Tushnet, *supra* note 196.

199. "The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom." Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 674 (1973).

200. Tushnet, *supra* note 196, at 1711.

2. Separation of Powers

The more weighty justifiction put forth for a particularized injury requirement lies in a healthy judicial deference to coequal branches of government. Justice Powell based his willingness to overrule *Flast*, and thus prohibit generalized constitutional claims, almost entirely upon separation of powers concerns: "It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation power at the national level, with a shift away from a democratic form of government."[201] Chief Justice Burger's claim in *Reservists Committee* that citizen suits have "no boundaries" and could result in "government by injunction" reflects similar misgivings.[202] The Court in *Valley Forge* refused to recognize standing based directly upon the first amendment in part because to do so would purportedly affect "relationships between the coequal arms of the National government."[203]

Clearly, judicial concern for the appropriate role of the federal courts in our tripartite scheme of government is a significant interest. It is less clear, however, that the Hohfeldian/non-Hohfeldian distinction,[204] upon which a private rights theory of standing is based, is in any sense an effective measuring rod of what that role should be. The short answer to an attempt to justify the particularized harm requirement by separation of powers considerations is that such interests are supposed to be irrelevant to the standing inquiry. For at least the past twenty years, it has been understood that the standing doctrine focuses on the party seeking federal relief rather than the issues sought to be adjudicated.[205] In *Flast*, the Court specifically held 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 related to improper judicial interference in areas committed to other branches of the Federal Government."[206] Separation of powers questions are purportedly within the bailiwick of the political question doctrine.[207]

Even if it becomes acceptable to surreptitiously introduce separation of powers or federalism issues into standing analysis, a particularized injury re-

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201. United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

202. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974).

203. 454 U.S. 464, 473 (1982). Professor Bickel similarly argued against citizen or taxpayer standing primarily upon a separation of powers basis. He claimed that such broad standing grants would "materially alter the function of judicial review and seriously undermine any acceptable justification for it." A. BICKEL, *supra* note 2, at 122.

204. *See generally* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

205. *See* Flast v. Cohen, 392 U.S. 83, 98-100 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

206. Flast, 392 U.S. at 100. *See* Parker & Stone, *Standing and Public Law Remedies*, 78 COLUM. L. REV. 771, 775 (1978):

> Although this is a legitimate concern, the role allocation burden is not easily carried by a doctrine which purports to have as its fundamental goal the measurement of the qualifications of the party seeking access. As defined by the courts, "personal stake" is not germane to the question of balance between the judicial, legislative and executive roles.

207. *See* Goldwater v. Carter, 444 U.S. 996 (1979); Powell v. McCormack, 395 U.S. 486 (1969); Baker v. Carr, 369 U.S. 186 (1962).

quirement has little bearing on defining the proper role of the judiciary. Obviously, standing determinations have much less effect upon perceived judicial "capital" than do decisions on the merits of constitutional claims. Standing guidelines were rigid during the heyday of substantive due process, when the Court stretched its authority beyond acceptable boundaries.[208] Modern moves to "put the judiciary in its place" flow from decisions on controversial topics such as abortion,[209] school desegregation,[210] school prayer,[211] and prison reform[212]—all of which fall neatly under an individual injury theory.

The cases in which the Supreme Court has recognized implied causes of action based directly upon the Constitution also illustrate the basic irrelevence of particularized harm to separation of powers concerns. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[213] a damages action premised directly upon the fourth amendment was authorized against agents of the executive branch. Similarly, in *Davis v. Passman* the Court countenanced a cause of action based upon the equal protection component of the due process clause.[214] In *Davis* an administrative assistant was allowed to sue her boss, a United States Congressman, for sex discrimination. In both instances, the standing of the plaintiffs was clear because of the presence of individual injury. Further, as in all of the public actions described in this article, the suits were founded directly upon constitutional wrongs. Yet separation of powers problems that were clearly more acute than those lurking in *Valley Forge* and *Richardson* in terms of sheer intrusion into the workings of the legislative and executive branches posed no hurdle to recovery. Moreover, a demand for particularized injury furthers no elucidated role of the federal judiciary. Scholars such as Alexander Bickel and Archibald Cox have argued that the function of the Supreme Court is tied to its character as a judicial rather than political body.[215] Accordingly, judicial review is justified by the

208. See, e.g., such decisions as Adkins v. Children's Hosp., 261 U.S. 525 (1923), and Lochner v. New York, 198 U.S. 45 (1905). The Court's retreat is recorded in such cases as Nebbia v. New York, 291 U.S. 502 (1934), and United States v. Carolene Prods., 304 U.S. 144 (1938).

209. Roe v. Wade, 410 U.S. 113 (1973).

210. Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Educ., 347 U.S. 483 (1954).

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

212. Jones v. Zockhart, 484 F.2d 1192 (8th Cir. 1973); Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970).

213. 403 U.S. 388 (1971).

214. 442 U.S. 228 (1979).

215. Professor Bickel argued that the best support for judicial review is not to be found in the premises of *Marbury v. Madison*, but in the ability of the Court "to appeal to men's better natures, to call forth their aspirations" on fundamental constitutional principles. As a result, the legislative perspective, in which the "pressure for immediate results is strong enough and emotions ride high enough, [that] men will ordinarily prefer to act on expediency rather than take the long view," can be tempered by the "sober second thought" of judicial review. A. BICKEL, *supra* note 2, at 20, 25.

Archibald Cox has similarly described the legitimacy of judicial review by contrasting it with the political process:

> The political branches are the forums where group-interests are served, coalitions are built, loyalities are formed, and obligations respected. The function of the Court—the role implicitly assigned to it by history as well as the fact of its having been created as a court—is illuminated by contrast with the political branches. Its decisions are legitimate only when it seeks to dissociate itself from individual or group interests and to judge by disinterested and more objective standards.

unique position the Court occupies in our governmental framework. Removed a step from the pressures of politics, the judiciary may be hoped to offer the "long view";[216] to provide the "sober second thought."[217] On troublesome constitutional issues the Court might be hoped to "quicken the moral education"[218] of the populace.

Some commentators go even further. Owen Fiss argues that the very "function of a judge is to give concrete meaning and application to our constitutional values."[219] Eugene Rostow characterizes the Supreme Court not only as the guardian and expositor of the Constitution, but also as part of "the great unifying force, and spiritual center of the nation's life."[220] Such accolades, no doubt, prove to be a bit quixotic. If, however, the federal judiciary is to be expected to play a substantial part in the nation's constitutional dialogue, it is unclear why the "discussion" should be limited only to rights triggered by particularized harm. For example, the federal courts have labored for a generation to carve out the appropriate first amendment barriers between church and state. It seems unacceptable that federal actions to support religion should be exempt from the inquiry merely because all suffer from the constitutional violation in the same way.

A particularized inquiry requirement is also irrelevant to process-oriented theories of judicial review. John Hart Ely's persuasive arguments for judicial review that sustains, rather than thwarts, the democratic process call for activism to clear the "[c]hannels of [p]olitical [c]hange."[221] Although the protection of allegedly fundamental values is deemed beyond judicial authority, rights that are "critical to the functioning of an open and effective democratic process"[222] must be safeguarded strenuously.

Such "process" rights may, however, fall on either side of the Hohfeldian line. The plaintiffs in *Richardson* sought to attack the concealment of CIA expenditures, a secret that hampers efforts at political reform.[223] Similiarly, the *Reservist Committee* plaintiffs tried to remove an impediment to effective representation—namely the supposed conflict of interest resulting from holding office in both the legislative and executive branches of government. Yet both actions were dismissed without consideration of the need to "clear channels" because injury was purportedly indirect and shared.

The particularized harm standard, in short, has at best only a remote connection to reasonably measured judicial authority. One may well accept that the need for intervention is at its highest when the victims of government ac-

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A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 108 (1976).

216. A. BICKEL, *supra* note 2, at 25.

217. *Id.* at 20.

218. A. COX, *supra* note 215, at 117.

219. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979).

220. E. ROSTOW, *supra* note 159, at 4.

221. J. ELY, DEMOCRACY AND DISTRUST 105 (1980). Louis Lusky has espoused a somewhat similar theory of judicial review. *See* L. LUSKY, BY WHAT RIGHT? (1975).

222. J. ELY, *supra* note 221, at 105.

223. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 92 (1978).

tion are discrete and insular minorities. Yet exclusion from the political process is not the only basis for judicial review, and methods of "exclusion" may be broad-based. The individual harm standard takes insufficient cognizance of the fact that "many rights may be held *in gross* as well as *in personam*."[224] Accordingly, as a measuring rod for judicial authority, it represents no more than an unexplained refusal to enforce certain substantive guarantees.

B. Marbury *Reconsidered*

To demand particularized injury as an article III requisite is to constitutionalize *Marbury*'s private rights model as the outer boundary of federal judicial competence. As Professor Bickel made clear a generation ago, however, the "power to which Marshall laid claim is not the full measure of the Court's authority in our day."[225]

Marbury was clear in its holding that the Court could decide constitutional issues in cases properly brought before it. Chief Justice Marshall, however, did not claim that judicial interpretation reached beyond the litigants to bind other branches of government. Nevertheless, almost two centuries of constitutional interpretation coupled with the perceived status of the Supreme Court in the eyes of the populace have clearly established the Court as the final arbiter of the Constitution.[226] The Supreme Court in *Cooper v. Aaron* declared no less.[227]

Americans accept as "necessary to the constitutional order"[228] what Professor Monaghan has called the "special function"[229] of the Court to interpret the Constitution. Therefore, any view of the federal judiciary that posits its authority as merely the power to decide private disputes bolstered by the freedom to "disregard" unconstitutional legislation ignores reality.[230] It would be equally inaccurate to characterize the nation's interest in *University of California Board of Regents v. Bakke*[231] as a widespread concern for the welfare of one potential medical student.

Further, the Court's decisions, especially those of the last decade, have embraced for the Court the role of "referee" between various branches of government even when "private" rights are not at stake. In *Buckley v. Valeo*[232] the Court protected the executive appointment power from legislative usurpa-

224. Monaghan, *supra* note 36, at 1369.

225. A. BICKEL, *supra* note 2, at 188.

226. *See, e.g.*, A. BICKEL, *supra* note 2, at 14; A. COX, *supra* note 215, at 117.

227. 358 U.S. 1 (1958). As a unanimous Court stated in *Cooper*, "[t]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Id.* at 18.

228. Kauper, *The Supreme Court: Hybrid Organ of State*, 21 SW. L.J. 573, 587 (1967).

229. Monaghan, *supra* note 36, at 1370.

230. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283-84 (1976): "[W]hatever its historical validity, the traditional model is clearly invalid as a description of much current civil litigation in the federal courts."

231. 438 U.S. 265 (1978).

232. 424 U.S. 1 (1976).

tion by striking down portions of the Federal Election Campaign Act of 1971. This was done despite the absence of traditional private interests to challenge the makeup of the Federal Election Commission. Justice Rehnquist's controversial opinion for the Court in *National League of Cities v. Usury* adjudicates no private rights.[233] The case is a direct examination of the powers of local government in the face of federal legislation. In other instances, the Court has abandoned the narrow role of "pure" expositor of private rights by allowing states to litigate federalism issues on their own behalf.[234] Accordingly, it is late in the day to construct a standing doctrine solely upon the premises announced by Chief Justice Marshall in *Marbury*.

C. *The Thin Line of Injury*

The rejection of citizen standing in *Valley Forge* is based upon an alleged distinction between private and public rights. In theory this dichotomy can be plainly drawn. Litigants who claim particularized harm assert interests that are in some manner distinctively their own. Government action has affected their pocketbooks[235] or limited their liberties[236] in objective ways that not only reflect individual, measurable harm, but that are also capable of being alleviated by judicial decree.[237]

Ideological or citizen litigants, on the other hand, sue primarily as representatives of the public interest. Such plaintiffs either suffer no harm, or harm that is indistinguishable from the injury incurred by all other members of the populace. Since they do not complain of government behavior that restrains their freedom or causes them financial loss, they seek only to force the government to comply with the law—an obviously abstract, subjective, and generalized interest. In short, ideological, non-Hohfeldian plaintiffs have no grievances of their own. Rather, they apparently search the statute books and monitor the activities of government in an attempt to find allegedly illegal government behavior.

The actual operation of the particularized injury standard, however, has not resulted in such a clear distinction between private and ideological plaintiffs. Modern standing decisions reveal that there is no easily ascertainable line to be drawn between public and private rights. The types of interests subject to judicial cognizance have expanded beyond concrete claims and include a variety of subjective, intangible concerns. The quantum of injury required to satisfy article III can scarcely be discovered through any objective

233. 426 U.S. 833 (1976).

234. *See* Oregon v. Mitchell, 400 U.S. 112 (1970); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 84-90.

235. *See, e.g.*, Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970) (plaintiffs claimed that government-encouraged competition would impair business opportunities); Harding v. Kentucky Util. Co., 390 U.S. 1 (1968) (same).

236. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (parent fined for failure to send child to school allowed standing to challenge state compulsory attendance law); Younger v. Harris, 401 U.S. 37 (1971) (plaintiff threatened with prosecution under state criminal syndicalism statute given standing to present first amendment challenge).

237. Warth v. Seldin, 422 U.S. 490, 504 (1975).

calculus. As government activity has become more widespread, and its effects correspondingly more incidental, the distinction between direct and indirect sources of harm has been muddied. Accordingly, the very definition of individual injury has become subject to judicial manipulation—usually in order to accomodate concerns ranging from judicial deference to the perceived importance of the claim on the merits. Thus, the distinction upon which the *Valley Forge* decision rests is somewhat illusory.[238]

The injury-in-fact requirement has been diluted in a variety of ways. Most obviously, the universe of injuries that article III is deemed to encompass has been noticeably enlarged. The losses suffered through vote dilution and diminished representation that result from a malapportioned legislature,[239] for example, are far more generalized than traditionally recognized physical or financial injuries. The abrogation of certain protected "social" rights represents, in relative terms, only a modest impact upon an individual plaintiff.[240] Further, by accepting aesthetic and environmental harms as actionable claims,[241] the Court has countenanced injuries that are not only diffuse, but also clearly subjective in that the harm is dependent upon the intellectual and political makeup of the plaintiff.

1. Statutory Injury

The major area in which standing has been liberalized, and the paricularized injury requirement commensurately diluted, is in the recognition of statutorily granted standing rights. Standing based upon statute, despite the absence of traditionally recognized individual harm, has become so well accepted that, at least in result, Professor Tribe is correct in his claim that "any Article III based requirement of factual or concrete injury serves only to limit the ability of federal courts to confer standing in the absence of statute . . . ."[242] In practical terms, a plaintiff is injured-in-fact by the government if he has a statutory right to complain of the government's action.[243]

The expansion of standing pursuant to statute arises from two distinct theories of congressional power. Early cases such as *Scripps-Howard Radio, Inc. v. FCC* recognized the standing of private plaintiffs as citizen-enforcers or

238. For a perceptive analysis of the volatility of the injury requirement, see Albert, *supra* note 36, at 1147-54.

239. Baker v. Carr, 369 U.S. 186 (1962), was such a case.

240. In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972), for example, the Supreme Court recognized the loss of "important benefits from interracial association" as an adequate demonstration of injury in fact. The action was based, however, upon the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73-92.

241. Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. Students Challenging Regulatory Agency Procedure, 412 U.S. 669 (1973); and Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978), involved such claims.

242. L. TRIBE, *supra* note 223, at 80.

243. Justice Powell has expressed an arguably more limited view of congressional authority to confer standing. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 n.22 (1976). *But see* Warth v. Seldin, 422 U.S. 490, 514 (1975); Linda R. S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

private attorneys general.[244] Rather than basing standing upon private harm, the Court in *Scripps-Howard* found that plaintiffs could properly assert a cause of action "only as representatives of the public interest."[245] More recently, in *Trafficante v. Metropolitan Life Insurance Co.*[246] a group of plaintiffs were given such representational standing under the Civil Rights Act of 1968. In *Trafficante* standing was based not only upon new statutorily created "private" rights,[247] but also upon plaintiffs' status as enforcers of the fair housing laws: "The complainants act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be a highest priority.' The role of private attorneys general is not uncommon in modern legislative programs."[248]

Representational statutory standing was taken a step further by the Court in *Havens Realty Corp. v. Coleman*.[249] The Court held that a "tester"[250] had standing under the Fair Housing Act to challenge steering practices despite the fact that plaintiff apparently approached the realtor-defendant fully expecting to receive false information and without any intention of actually buying or renting a home.[251] If a plaintiff asserts no desire to actually obtain housing, it is clear that the sole interest upon which standing could be based is that of citizen-enforcer of federal fair housing laws.

The private attorneys general theory of statutory standing reveals once again the unspoken separation of powers roots of the standing doctrine. Because standing can be based upon a statutory grant even if no private rights are asserted, the constitutional propriety of the private attorneys general theory has been debated with vigor.[252] Ultimately, however, the development of

244. 316 U.S. 4, 14 (1942). In Associated Indus. v. Ickes, 134 F.2d 694, 704 (1943), for example, Judge Frank wrote: "[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals." *See also* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940).

245. 316 U.S. at 14.

246. 409 U.S. 205 (1972).

247. *Id.* at 208.

248. *Id.* at 211. The importance of the statutory grant of standing was perhaps made most explicit in Justice White's concurrence (joined by Justices Powell and Blackmun): "Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners complaint in this case presented a case or controversy . . . ." *Id.* at 212.

249. 455 U.S. 363 (1982).

250. A "tester" is an individual who, without intent to rent or purchase a home or apartment, poses as a renter or purchaser for the purpose of collecting evidence of unlawful racial steering practices. *Id.* at 1121.

251. *Id.*

252. Professor Jaffe asserts that any citizen can constitutionally sue in the public interest. *See* Jaffe, *The Citizen As Litigant In Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 635 (1971). Justice Harlan's dissent in Flast v. Cohen, 392 U.S. 83, 116-33 (1968), also argues that article III poses no barrier to private attorneys general standing. Professor Davis disagrees energetically in Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 617 (1968).

A thorough consideration of the propriety of private attorneys general actions would require an analysis not only of the reach of article III, but also the necessary and proper clause and, in some instances, the enforcement clause of the fourteenth amendment. *See* Nichol, *An Examina-*

the complete scope of the doctrine has been rendered essentially moot by the emergence of a second theory of congressional power to grant standing.

The Supreme Court has recognized repeatedly that "Congress may create legally enforceable rights where none before existed."[253] The invasion of such congressionally created rights constitutes injury-in-fact.[254] From these simple premises, it follows that Congress can create "private" enforcement rights in individual plaintiffs no matter how generalized or intangible the asserted interests may be. Thus in *Trafficante*, for example, the Court gave credence to the statutorily based right to assert the "benefits of living in an integrated community."[255] Similiarly, in *Reservists Committee*, the majority indicated that standing would have been clearly appropriate had Congress enacted a statute guaranteeing the right of citizens to demand that their representatives operate free of conflicts of interest.[256]

The full scope of the congressional power to confer standing by the creation of private rights is best demonstrated by envirommental cases such as *TVA v. Hill*,[257] the noted snail darter case. Plaintiffs sought to enjoin the continued construction of the Tellico Dam under the Endangered Species Act. Section 11(g) of the Act, which provides that "any person" may commence an action to enforce the provision's dictates,[258] was deemed a clear basis for standing.[259] The Act apparently creates enforceable rights, lodged in every person, to demand government action to protect various endangered animals from extinction.

The "rights" that supported standing in *Hill* are every bit as generalized and intangible as those characterized as beyond the cognizance of article III in *Richardson*, *Reservists Committee*, and *Valley Forge*. Indeed, an interest could scarcely be more generalized than one held by "any person." Moreover, a theory of enforceable rights that recognizes such interests as an appropriate basis for standing broadly encompasses the private attorneys general concept. The ability of the legislature to create new statutory interests, no matter how

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tion of Congressional Power Under Section Five of the Fourteenth Amendment, 52 NOTRE DAME LAW. 175 (1976).

253. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 136 (1947). *See also* Warth v. Seldin, 422 U.S. 490, 514 (1975): "Congress may create a statutory right of entitlement the alleged deprivation of which can confer standing to sue even when the plaintiff would have suffered no judicially cognizable injury in the absence of statute."

254. *See* Linda R. S. v. Richard D., 410 U.S. 614, 617 n.3 (1973): "Congress may enact statutes creating legal rights, the invasion of which creates standing even though no injury would exist without the statute."

255. 409 U.S. at 208.

256. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 224 n.14 (1974).

Similarly, in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), the Court bolstered its holding of "tester" standing under the Fair Housing Act by holding that "Congress has thus conferred on all 'persons' a legal right to truthful information about available housing." *Id.* at 1121. If Congress can make the right to receive "truthful information" enforceable by a plaintiff with no apparent interest other than instituting federal litigation, it would appear that there is no limit to the ability of Congress to create judicially cognizable rights.

257. 437 U.S. 153 (1978).

258. 16 U.S.C. § 1540(g) (1976).

259. 437 U.S. at 164 n.15.

ephemeral or broad-based, effectively places statutory standing beyond the reaches of the injury-in-fact limitation. Congress could apparently create shared, judicially-cognizable "rights" to a separationist government, an efficient bureaucracy, or an integrated society with equal ease. It is clear, therefore, that the particularized harm standard does not pose a meaningful curb upon the ability of Congress to grant citizen standing.

2. The Volatility of Injury

The Hohfeldian/non-Hohfeldian distinction has also been blurred through judicial manipulation of the definition of injury. Injury, as the term is employed in article III jurisprudence, is hardly a self-defining concept. Though designed to provide an overriding measurement of justiciability, the requisite threshold injury fluctuates both according to the novelty of the claim presented and the perceived import of the action on the merits.

The particularized harm standard ought to require a demonstration that the acts of the defendant have impinged upon protected legal rights of the plaintiff. The "rights" cognizable upon review may indeed be broad—encompassing political,[260] associational,[261] environmental,[262] financial,[263] and libertarian[264] interests—but the harm to the plaintiff must be concrete. "Concrete" injury can be assumed to entail something more than mere allegations that the government is not complying with the law and that the plaintiff is unhappy with the government's conduct. *Reservists Committee* and *Valley Forge* purport to be based upon just such a distinction between specific, concrete harm and a generalized desire for legal government behavior. The distinction, however, has not always been easy to discover in the Court's decisions.

In *Abington School District v. Schempp*,[265] for example, the Supreme Court struck down a school board requirement that passages from the Bible be read in public schools. The record in the case disclosed that individual students could be excused from participation upon written request of their parents.[266] The Court, however, considered the absence of coercion irrelevant to the actionability of the claim: "Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause."[267]

The *Abington* case, like its predecessor *Engel v. Vitale*,[268] can be squeezed into a paricularized harm model. The school-children plaintiffs sustained in-

260. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
261. Younger v. Harris, 401 U.S. 37 (1971).
262. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).
263. Barlow v. Collins, 397 U.S. 159 (1970).
264. Wisconsin v. Yoder, 406 U.S. 205 (1972).
265. 374 U.S. 203 (1963).
266. *Id.* at 205-07.
267. *Id.* at 224-25.
268. 370 U.S. 421 (1962).

dividual injury through the subtle coercion that exists, despite the freedom to opt out, whenever the power of government is placed behind a particular religious creed. *Abington* and *Engel*, however, specifically reject the need to allege such subtle pressures to state a claim under the establishment clause.[269] Rather, the Court has indicated:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. . . . [T]he purposes underlying the Establishment Clause go much further than [coercion]. . . . Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.[270]

These establishment clause holdings are not only contrary to the result in *Valley Forge*, but they also specifically reject the need for allegations of particularized harm. In *Abington* and *Engel* the Court declared that the mere existence of laws establishing religion, without more, is actionable under the Constitution.[271] The "harm" flowing from the government's violation of the first amendment is all that is required to achieve standing.

The 1973 decision in *Norwood v. Harrison*[272] is also inconsistent with a particularized injury requirement. In *Norwood*, the parents of four Mississippi school children successfully challenged that state's textbook loan program as applied to racially discriminatory private schools. Chief Justice Burger's opinion for the Court did not address the standing issue. The complaint alleged, however, and the Court found, that Mississippi's action in funding the book loan program was unconstitutional since it "provided direct state aid to racially segregated education."[273]

Again, one can stretch the *Norwood* decision into a particularized injury framework. The opinion contains a passing reference to a claim by the plaintiffs that the lending program "impeded the process of fully desegregating public schools."[274] That potential impediment to the achievement of educational equality might indeed have been sufficient to constitute injury-in-fact. Yet, the gist of the *Norwood* opinion is not that public education was being harmed, but rather, that Mississippi was engaged in activity that ran afoul of the equal protection clause. It was the affirmative contribution to private discrimination that was scrutinized and found to be constitutionally infirm.[275] The district court in *Norwood* had made an express finding that the "textbook loans did not interfere with or impede the State's acknowledged duty to estab-

269. *Abington*, 374 U.S. at 224 n.9; *Engel*, 370 U.S. at 430-31.

270. *Engel*, 370 U.S. at 430-31 (emphasis added). *Accord Abington*, 374 U.S. at 224-25.

271. *Abington*, 374 U.S. at 224-25; *Engel*, 370 U.S. at 431. *See generally* Sutherland, *Establishment According to* Engel, 76 HARV. L. REV. 25 (1962).

272. 413 U.S. 455 (1973).

273. *Id.* at 457.

274. *Id.*

275. *Id.* at 463-68.

lish a unitary school system . . . ."[276] The Supreme Court, however, felt no compulsion to reject the trial court determination. Rather, the absence of proven harm was deemed "irrelevant," since "the constitutional infirmity of the . . . program is that it significantly aids the organization and continuation of a separate system of private schools which . . . may discriminate if they so desire."[277]

It is certainly possible to imagine a challenge to a loan program like that involved in *Norwood* which would be based on individual harm. If, for example, students who wished to attend private, state-assisted schools were prohibited from doing so because of discriminatory admission practices, standing would be clearly appropriate. *Norwood*, however, was not such a case. Rather, plaintiffs claimed merely that Mississippi spent money to assist third parties in discriminating against other third parties. That claim was a purely generalized allegation of illegal government behavior.

Norwood, therefore, presents an interesting comparison with *Valley Forge*. If Congress were to enact a loan program similar to that employed in Mississippi, would a plaintiff be allowed to challenge it under the claimed right to live under a government that does not aid discrimination? If so, as *Norwood* seems to suggest, why is the right to government compliance with the equal protection clause more compelling than the right to government observance of the separation between church and state?

Finally, the reapportionment cases demonstrate how thin the judicially declared line separating particularized injury from generalized grievance actually turns out to be. Cases examining voting and representational rights in the wake of *Baker v. Carr*[278] have been treated as actions in which plaintiffs assert individual harm.[279] A citizen who complains of a poorly apportioned legislature purportly seeks to protect his voting rights from dilution. Accordingly, the Court has viewed these plaintiffs as Hohfeldian, asserting a "plain, direct and adequate interest in maintaining the effectiveness of their votes, . . . not merely a claim of the right, possessed by every citizen, to require that the Government be administered according to law."[280]

In reality, however, the relationship between the apportionment decisions and the private rights theory is tenuous. The cases require no allegation of actual harm resulting from inadequate representation. Although the principle of one man, one vote does have a direct correlation to individual harm,[281] the concept more accurately reflects the individual right to a legally constituted government. Such cases are the clearest examples of structural constitutional

276. *Id.* at 460-61.

277. *Id.* at 467-68.

278. 369 U.S. 186 (1962).

279. *See, e.g.*, Rogers v. Lodge, 102 S. Ct. 3272 (1982); City of Mobile v. Bolden, 446 U.S. 55 (1980); White v. Register, 412 U.S. 755 (1973); Reynolds v. Sims, 377 U.S. 533 (1964).

280. Baker v. Carr, 369 U.S. at 208 (quoting Coleman v. Miller, 307 U.S. 433, 438 (1938); Fairchild v. Hughes, 258 U.S. 126, 129 (1922)).

281. *See* Reynolds v. Sims, 377 U.S. 533, 561-68 (1964).

adjudication.[282] Hordes of such cases arise after each national census to straighten the frame of representative government that has become "askew."[283]

The public nature of the apportionment cases is demonstrated by the difficulty Chief Justice Burger experienced distinguishing *Baker* in *Reservists Committee*, in which plaintiffs relied upon the apportionment cases to support a claim that the harm they sustained in their "ability to persuade" Congressional representatives was actionable.[284] The Chief Justice rejected the argument, asserting that the injury in *Baker* was a "concrete injury to fundamental voting rights, as distinguished from the abstract injury in non-observance of the Constitution."[285] The distinction, however, is less than compelling.

Why was the action in *Reservists Committee*, which was based upon the incompatability clause, characterized as "abstract," while a reapportionment plaintiff's injury was deemed to be "concrete"? If concreteness described the quality of the impact upon the plaintiff, the two cases appear analogous. Both cases represent attempts to alleviate intangible limitations upon the ability of citizens to be heard in the legislature. The purpose of the particularized injury standard is to provide an overriding measure of objective harm, removed from the merits of the case, by which the validity of judicial intervention may be ascertained. A typical apportionment plaintiff claims that, as one of millions of citizens, his vote carries perhaps only eighty-nine percent of its maximum punch. Is the magnitude of that injury any greater than the injuries complained of in *Reservists Committee*, *Richardson*, and a variety of other cases dismissed for lack of "injury"?[286]

The response of the Chief Justice is that a reapportionment plaintiff asserts harm to a "fundamental" right.[287] That appears, however, to be an examination of the constitutional importance of the claim rather than a measure of the quantum of injury. Perhaps even an intangible and generalized harm to a fundamental interest is actionable. Yet is that anything more than a judical declaration that the rights at stake in *Baker* were important, while the interests asserted in *Reservists Committee* were not worthy of protection? Moreover, since the Court's decision in *San Antonio Independent School District v. Rodriguez*,[288] it has been understood that a right is "fundamental" if it is either explicitly or implicitly protected by the Constitution. Under that definition,

282. *See* Fiss, *supra* note 219, at 1 (1979).

283. *See Baker*, 369 U.S. at 298-300 (Frankfurter, J., dissenting).

284. *See* Brief for Respondents at 8, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

285. 418 U.S. at 223 n.13.

286. *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488 (1974) (illegal bond-setting, sentencing, and jury-fee practices in criminal cases); Roe v. Wade, 410 U.S. 113 (1973) (childless couple sued to overturn state abortion prohibition in anticipation of pregnancy if contraception failed); Laird v. Tatum, 408 U.S. 1 (1972) (chill of first amendment rights by existence of Army Intelligence data-gathering system).

287. *Reservists Comm.*, 418 U.S. at 223 n.13.

288. 411 U.S. 1 (1973).

the rights asserted in *Reservists Committee*, *Richardson*, and *Valley Forge* may be even more fundamental than those litigated in *Baker*.

The particularized harm standard upon which *Valley Forge* is based takes as its foundation the premise that a citizen's interest in "governmental regularity" is abstract and nonactionable.[289] *Abington*, *Norwood*, and *Baker* reveal, however, that citizens have been repeatedly permitted to sue merely to force the government to toe the constitutional mark. Therefore, it is late in the day to maintain a judicially constructed bright line between private and public right as an article III requirement.

Further, the foregoing sections of this article demonstrate that such a bright line does not exist. Over the past two decades the Supreme Court has expressly expanded the concept of injury to include a variety of intangible concerns. The Court has also had little choice but to accept congressionally fashioned standing grants given to the populace as a whole. Finally, the Court has chosen to characterize a number of generalized constitutional claims as instances of particularized harm. In short, the private rights theory of *Marbury* has fallen, and, as a result, the law of standing can no longer honestly use it as a cornerstone.

D. Enforcing the Constitution

The decision to cling to a particularized harm standard in the citizen standing cases has not been without its costs. In both *Richardson* and *Reservists Committee* the Court refused to respond to constitutional guarantees despite the fact that the cases presented nonmajoritarian interests that Congress could not be expected to safeguard. In *Valley Forge*, a provision of the Bill of Rights, clearly designed to be withdrawn from "the vicissitudes of political controversy,"[290] was rendered unenforceable against the executive branch. These results can hardly be explained by the language of either article III or the constitutional provisions under which relief was sought.[291] No doubt James Madison, chief architect of the first amendment, regarded the transfer of federally owned property to a religious organization to be unconstitutional.[292]

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289. *Cf.* Monaghan, *supra* note 36, at 1391 (it is "simply far too late" to deny that "a citizen's interest in governmental regularity is a 'real' one").

290. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1942).

291. Consider former Senator Sam Ervin's colorful comment:

> Is it your position that after they put this in the Constitution, for some purpose, whatever that purpose may have been, that they were such intellectual nitwits that they didn't contemplate that there could be no way in which the Court could even decide the question of whether the provision was being violated?

Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 89th Cong., 2d Sess. 17 (1966).

292. It was President Madison's veto that prevented the grant of a federal parcel to the Baptist church during his presidency. In his message vetoing the provision he declared:

> [T]he bill in reserving a certain parcel of land of the United States for the use of said [church] comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the

This article began with a discussion of the divergent judicial roles described in *Marbury*—the Supreme Court as arbiter of private rights and the Supreme Court as enforcer of constitutional limitations. Almost two centuries of constitutional adjudication, however, have resulted in the emergence of a special status for the Court as constitutional spokesman—a development that has been both gradual and fortunate for our system of government. Because they are inconsistent with the reality of modern constitutional decision making, standing decisions such as *Richardson*, *Reservists Committee*, and *Valley Forge* harm, rather than enhance, the status of the judiciary. Accordingly, the Court should reject a private rights theory that refuses to give judicial cognizance to constitutionally created rights because they are shared by the populace as a whole.

III. Alternative Approaches to Public Constitutional Actions

Rejecting the private rights theory of *Valley Forge*, without more, hardly provides a satisfactory solution to the "problem" of public actions. It seems fair to say that a particularized injury requirement cannot reasonably or consistently be used to prohibit public constitutional actions. But the problem remains—when, if ever, should generalized constitutional claims be allowed in federal courts?

Individual Justices and various commentators have suggested methods of dealing with such causes of action. Obviously none has achieved acceptance by a majority of the Supreme Court. Still, some have received enough attention to be properly considered alternative theories. In the following sections this article will examine several of the major suggestions.

In brief, Kenneth Culp Davis has argued for broad standing to challenge allegedly illegal expenditures based merely upon the status of the taxpayer. Drawing a supposed line between a trifle and nothing, however, Professor Davis would require injury in cases outside the taxpayer expenditure context.[293] Justice Harlan argued in dissent in *Flast* that the private rights theory was not mandated by article III. Rather than open the door completely to public actions or employ the beleaguered nexus test of *Flast*, however, Justice Harlan would have granted citizen standing only when authorized by statute.[294] Professor Monaghan has supported the Harlan position.[295] Finally, Professor Jaffe has endorsed broad use of the citizen suit to enforce both statutory and constitutional mandates.[296] These proposals will be considered in turn.

Constitution which declares that "Congress shall make no law respecting a religious establishment."

1 J. Richardson, Messages and Papers of the Presidents 490 (1900).

293. *See* Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613-17 (1968). For further discussion of Professor Davis' views, see *infra* text accompanying notes 297-306.

294. *Flast*, 392 U.S. at 116-133 (Harlan, J., dissenting). For further discussion of Justice Harlan's views, see *infra* notes 307-16 and accompanying text.

295. Monaghan, *supra* note 36, at 1376-79.

296. *See* Jaffe, *The Citizen as Litigant in Public Actions: The Ideological or Non-Hohfeldian Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968); L. Jaffe, Judicial Control of Administrative

A. Professor Davis and Taxpayer Standing

Professor Davis has argued that the law of standing should demand that a plaintiff be "aggrieved" or "adversely affected" by the actions of the defendant.[297] To properly achieve this status, a plaintiff must have an interest of his own at stake.[298] Accordingly, citizen suits based upon public constitutional rights would be excluded from the federal courts.[299]

Thus far, the argument is obviously based upon a private rights theory of federal jurisdiction. Surprisingly, however, Professor Davis claims that any taxpayer "should be deemed adversely affected financially by an illegal public disbursement."[300] Arguing for standing on a purely economic basis, Davis claims that "large taxpayers do have a financial stake" in government expenditures.[301] Accordingly, in contrast to *Flast*, he would grant taxpayer standing to contest any government spending, whether the claim is made under a specific or general constitutional provision, or even under a federal statute.[302] Further, no distinction would be drawn between funds disbursed under the spending clause and other "incidental" expenditures.[303] Rather, the taxpayer *qua* taxpayer has the requisite personal stake to contest any expenditure.

Professor Davis' suggestion has even less merit than a pure private rights model. First, it suffers from the same inherent shortcomings in rendering public constitutional protections unenforceable. It fails to explain why statutes can create shared grants of standing but the Constitution cannot. Furthermore, Professor Davis' proposals perpetuate the illegitimate notion that taxpayer status can be reasonably seen as a measure of a plaintiff's personal stake. That notion, despite both *Flast* and *Valley Forge*, should be laid to rest.

A carte blanche grant of taxpayer standing to contest expenditures does avoid some of the major pitfalls of *Flast*. It would no longer be necessary, for example, to distinguish between first amendment taxpayer cases and others. Unfortunately, however, indiscriminate taxpayer standing is premised upon the meritless assertion that taxpayers have money at stake when they challenge the legality of federal expenditures.[304] Since there is little possibility that a successful suit will reduce the plaintiff's tax bill, the only claim a taxpayer can possibly assert is a right that the government spend his money in a legal fashion. Once it is acknowledged that the amount of the assessment will not vary, that interest is indistinguishable from a citizen's interest in government compliance with the law—an interest Professor Davis claims is nonjusticiable.

An absence of logic is not the only flaw of a wholesale grant of taxpayer

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ACTION 459-500 (1965). For further discussion of Professor Jaffe's views, see *infra* notes 317-28 and accompanying text.

297. Davis, *supra* note 252, at 617-28. *See also* K. DAVIS, *supra* note 36, at § 22.02.

298. Davis, *supra* note 252, at 617.

299. *See id.* at 616-17.

300. *Id.* at 632.

301. *Id.*

302. *Id.* at 631-33.

303. *Id.* at 633.

304. *See generally supra* notes 120-33 and accompanying text.

standing. No reasonable person would bear the burden of modern constitutional litigation under the false hope that the challenge to a government spending program might save him tax dollars. The cases discussed in this article reveal vividly, however, that litigants will go the extra mile to assert such deeply felt beliefs as the separation of church and state and the accountability of government officials. Therefore, taxpayer standing teaches that plaintiffs must be deceptive about their true motivations for bringing suit.

Professor Vining has aptly described this phenomen as standing's "feigned personality" requirement.[305] The results of such word games are troubling:

> The feigned role does more than make the search for special beneficiaries a useless exercise. It offends the sense of justice much as the arcane pleading requirements of common-law civil procedure once did. Success at law is a function of one's cleverness, not the strength of one's complaint. It also fuels the popular sense, against which lawyers with a concern for their personal integrity have struggled for centuries, that law is a thing to be used and the profession a place for persons of manipulative mind and empty heart.[306]

Taxpayer standing to contest expenditures assumes a personal stake, distinct from a general concern for government regularity, when none exists. It also implies that a litigant can force the government to toe the constitutional line when it spends money, but not otherwise. Accordingly, it should be rejected.

B. Justice Harlan and Statutory Public Actions

The late Justice Harlan lodged a powerful dissent in *Flast v. Cohen*.[307] His arguments not only laid bare the inconsistencies of the majority's nexus test, but also demonstrated clearly that taxpayers are non-Hohfeldian plaintiffs when contesting government expenditures.[308] Justice Harlan, however, recognized that, consistent with article III, plaintiffs have been given standing as "representatives of the public interest."[309] The problem was to determine under what circumstances public actions should be permitted.

The answer entails a recognition that public actions, although appropriately within the purview of article III, threaten to "strain the judicial function and press to the limit judicial authority."[310] To avoid an undesirable reallocation of power among the three branches, citizen suits should be entertained only after being "pertinently authorized by Congress and the President."[311] Professor Monaghan has taken a similar position, based not only on the loosening of the private rights model but also upon a frank recognition of the

305. J. VINING, *supra* note 36, at 124-27.
306. *Id.* at 125-26.
307. 392 U.S. 83, 116-33 (1968) (Harlan, J., dissenting).
308. *See id.* at 117-30.
309. *Id.* at 120.
310. *Id.* at 130.
311. *Id.* at 132.

"special function" of the Supreme Court in constitutional review.[312]

Justice Harlan's proposal carries obvious advantages. It recognizes that the private rights theory of *Marbury* fails to explain much of modern article III jurisprudence. Further, it refuses to base important jurisdictional decisions on the fictions employed in taxpayer standing. Finally, it proposes a method for entertaining public constitutional actions that does not raise any separation of powers concerns. A standing rule that allows public actions only when granted by statute, however, takes separation of powers concerns too far and errs, though obviously on the side of caution.

Justice Harlan's proposal leaves a private rights model in place until Congress chooses to act. Under its rationale, the anomaly persists that generalized statutory rights are judicially enforceable while generalized constitutional rights are not. Since cases recognizing the actionability of particularized constitutional harm such as *Bivens* would not be overruled, shared constitutional rights would remain unenforceable merely because they are shared.

Depending on Congress to create public actions also creates friction with the theory of judicial review espoused in footnote four of *United States v. Carolene Products*,[313] upon which much of modern constitutional law is based. Justice Stone claimed that deference to coequal branches is inappropriate when government action appears to violate a specific constitutional prohibition, such as a provision of the Bill of Rights, or works to thwart the effective operation of the political process.[314] Yet even in those instances Justice Harlan's proposal would require congressional permission to sue.

Cases such as *Richardson* and *Reservists Committee* illustrate that antimajoritarian interests can, by definition, hardly expect Congressional protection. Further, the establishment clause cases teach that the rights asserted in *Valley Forge* are not dependent upon majority approval.[315]

A standing theory that prohibits public actions unless afforded by statute accepts both the ephemeral distinction between particularized and generalized injury and a conflict with *Carolene Products* solely out of concern for separation of powers interests. No doubt, some types of citizen suits impinge upon the separation of powers doctrine. But many, like *Valley Forge*, raise none at all.[316] Therefore, a prohibition of citizen suits absent congressional approval is overkill in the name of separation of powers. Those issues can be treated in a more forthright fashion under the political question doctrine.

312. *See* Monaghan, *supra* note 36, at 1368-92.

313. 304 U.S. 144, 152 n.4 (1938). Justice Stone set forth a number of instances in which the "presumption of constitutionality" afforded to legislative enactments might be inappropriate. Judicial intervention was deemed to be more palatable when legislation either ran afoul of a "specific" constitutional prohibition or worked to restrict "those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation." *Id.*

314. *Id.* at 152.

315. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203, 224-25 (1963); Engel v. Vitale, 370 U.S. 421, 430-31 (1962).

316. Consider, for example, *Ex parte* Lévitt, 302 U.S. 633 (1937) (per curiam); and Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

C. *Professor Jaffe and Citizen Suits*

By far the broadest endorsement of the public action has been Professor Jaffe's call for citizen standing.[317] As the "prime political unit of the democracy,"[318] the citizen would be granted standing to sue local, state, or federal officials in order to force compliance with both constitutional and statutory dictates.[319] Primarily as a means of providing "a modest measure of control of official action,"[320] Professor Jaffe argues for a pure private attorney general or citizen-enforcer theory of standing. Under such a rationale, standing would have been upheld in all of the cases discussed in this article.[321]

Broad-based citizen standing would certainly permit the enforcement of even generalized constitutional guarantees. Any imbalance between the enforceability of shared statutory and constitutional rights would be corrected with a single stroke. Nevertheless, there are minor flaws with the proposal.

First, it seems unnecessary to alter so radically the concept of standing. For several decades the standing doctrine has, in name at least, focused on the interest of the party bringing suit. Legally protected rights and judicially remediable injuries have supported the employment of article III powers. Professor Jaffe's suggestion necessarily shifts the standing inquiry from an analysis of asserted rights and injuries to the *status* of the plaintiff—his or her citizenship. The courts would still determine whether plaintiffs actually seek to assert the rights of third parties and whether the issues presented are political in nature, but many traditional standing questions would become irrelevant.[322] More importantly, citizen suits would become an exception to the standing doctrine—an exception that would threaten to swallow the entire concept.

Also, it does not appear necessary to change the law of standing to assert statutorily created rights. The main shortcoming of a private rights model, for both protected liberties and for the role of the judiciary, is that it leaves some constitutional guarantees unenforceable. Congress, on the other hand, has begun to assure citizen enforcement when it is important for the protection of statutorily created interests. The private enforcement aspects of the Federal Surface Mining and Reclamation Act,[323] the Endangered Species Act,[324] the

317. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-500 (1965); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Jaffe, *The Citizen as Litigant in Public Actions: The Ideological or Non-Hohfeldian Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

318. L. JAFFE, *supra* note 317, at 486.

319. Jaffe, *supra* note 317, at 1044-47.

320. L. JAFFE, *supra* note 317, at 483.

321. Professor Jaffe would not, however, abandon all obstacles to judicial review. It is certainly possible that had standing been achieved in *Richardson* or *Reservists Committee*, for example, the actions would have been deemed political questions. *See* Jaffe, *supra* note 317, at 1043 ("To be sure, it is possible that many of the issues generated by non-Hohfeldian plaintiffs will be political, but there will be many that are not").

322. If a plaintiff claimed, for example, that the action of a government official was contrary to statute, it would be unnecessary for the litigant to demonstrate either injury-in-fact or that his injury was likely to be redressed. *See* Warth v. Seldin, 422 U.S. 490 (1975); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970).

323. 30 U.S.C. § 1270 (Supp. V 1981).

Clean Air Act,[325] and the Freedom of Information Act[326] are just a few examples.

Even in the constitutional context, the standing doctrine has developed within a language of protected rights, interests, and injuries. In an attempt to cling to a rubric of private rights, the Court in cases such as *Valley Forge* has excluded constitutional rights that are held in gross from the purview of protected rights. It is not necessary, however, to discard the notion of rights and injuries in order to enforce the Constitution.

Finally, Professor Jaffe has placed a major limitation on his vision of the public action. Such citizen suits would be entertained, at the discretion of the Court, only "if it deems such consideration to be in the public interest."[327] This again suggests a changed focus from the rights and interests of the plaintiff to the needs and concerns of the public. Further, the Burger Court, by its own example, has taught rather effectively that broad discretion under the standing doctrine is less than desirable.[328]

IV. RIGHTS AND INJURIES: CONSTITUTIONAL AND OTHERWISE

Standing, as a component of article III, requires that the plaintiff demonstrate "injury in fact, economic or otherwise."[329] The concept of "injury" has been expanded over recent decades to include not only traditional common-law notions of actionable harm,[330] but also the infringement of economic,[331] associational,[332] environmental,[333] aesthetic,[334] and other social interests.[335]

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324. 42 U.S.C. § 7604 (Supp. IV 1980).

325. 16 U.S.C. § 1540(g) (1976).

326. 5 U.S.C. § 552 (1976).

327. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 635 (1971).

328. For example, the Burger Court has introduced a redressability requirement as part of the standing doctrine through a series of decisions handed down in the mid-1970s. In its determinations of whether an injury is "likely to be redressed," however, the Court has usually found the case outside the scope of article III in poverty law cases. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Linda R. S. v. Richard D., 410 U.S. 614 (1973). In a decision upholding the federal subsidy for private nuclear power development, though presenting much more substantial redressability problems, standing was granted. Duke Power Co. v Carolina Envtl. Study Group, 438 U.S. 59 (1978).

Professor Bickel argued for the use of discretionary avoidance devices under the rubric of "passive virtues." A. BICKEL, *supra* note 2, at 111-99. Certainly, it is "intrinsically rational" for the Court to be able to decide when to employ its own powers. *Id.* at 205. When the Court chooses, however, to avoid difficult questions concerning the constitutionality of exclusionary zoning by employing the standing doctrine, as it did in Warth v. Seldin, 422 U.S. 490 (1975), it not only avoids a decision on the merits, but also announces new article III guidelines. Therefore, what may be avoidance for the Supreme Court becomes a rule of decision for the federal district courts. No doubt a federal judge sifting through *Warth*, *Eastern Kentucky*, *Linda R. S.*, and *Duke Power* has no easy task in measuring the requisites of the case or controversy requirement.

329. Association of Data Processing Serv. Orgs. v. Camp., 397 U.S. 150, 152 (1970).

330. The "legal interest" test, predecessor to the injury-in-fact standard, embodied common law notions of actionable harm to measure standing requirements. Accordingly, Justice Frankfurter claimed in *Joint Anti-Fascist Refugee Comm. v. McGrath* that a litigant "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." 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring).

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

332. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

The result, of course, has been a considerable liberalization of the law of standing.

Buoyed by apparently expanding judicial horizons, litigants have increasingly presented grievances in the federal courts based upon intangible harms. If a court could give credence to subjective concerns for a beautiful environment[336] or an integrated community,[337] then why should an individual be prevented from litigating to effectuate a constitutionally endorsed desire for separation of church and state? *Flast*,[338] *Richardson*,[339] *Reservists Committee*,[340] and *Valley Forge*[341] are all examples of cases in which the interests asserted by the plaintiffs were created, if at all, by the Constitution itself. Further, the "harms" to those interests were suffered, if at all, by the entire citizenry, rather than just a few identifiable individuals.

In an effort to curb the burgeoning variety of interests making their way into the federal courts, the Supreme Court has in recent years attempted to refine its description of the injury requirement. Article III has been said to require "distinct and palpable" injury.[342] This particularized injury requirement has worked, for the most part, to shut the federal courthouse door to public constitutional actions.

Citizen suits such as *Reservists Committee* and *Valley Forge* fall short of a particularized harm standard in two ways. The injuries claimed are not "distinct" since the claimed constitutional deficiency objectively affects the plaintiff in the same way it affects everybody else. Nor, supposedly, are the claimed injuries palpable or tangible, because the plaintiffs assert abstract concerns such as the desire for constitutional compliance.

Candor suggests that article III requisites have been interpreted in this fashion to avoid potential threats of a disproportionate allocation of powers among the three branches of government. The problem with the law of standing that regulates the presentation of public constitutional actions, however, is that the particularized injury requirement has been misapplied. The claim that article III requires "distinct and palpable" harm is flatly inconsistent with much of case or controversy jurisprudence.

It is at least a decade too late to claim that article III requires palpable harm. Subjective concern that a wilderness area will be developed[343] or a

333. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

334. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978).

335. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (interracial association).

336. *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

337. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

338. 392 U.S. 83 (1968).

339. 418 U.S. 166 (1974).

340. 418 U.S. 208 (1974).

341. 454 U.S. 464 (1982).

342. Warth v. Seldin, 422 U.S. 490, 501 (1975). Plaintiffs have also been required to assert that their injuries "fairly can be traced" to the defendant and are "likely to be redressed by a favorable decision." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 28, 38, 41 (1976).

343. *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

species of fish endangered[344] does not represent tangible harm. The lost benefits of interracial association[345] are hardly "concrete" injuries. Further, in cases such as *Baker v. Carr*[346] and *Norwood v. Harrison*[347] the Court essentially found that some concerns for governmental regularity are actionable.

The Court's taxpayer and citizen cases, therefore, present a supreme irony in terms of the judicial recognition of injury. The Court has repeatedly demonstrated that some intangible injuries are sufficient to satisfy article III. But other intangible desires, such as that for separation of church and state or the need for governmental accountability, which are so fundamental to the American people that they were written into the Constitution, are deemed "abstract" and inappropriate for judicial protection.

Nor can the standing doctrine be said to require "distinct" injury. Clearly the *Flast* case itself is an example of judicial recognition of widely shared harm, but so are *Baker*, *Norwood*, and *Abington*.[348] In environmental cases, the Court has specifically held that the fact that a large number of people share the "same harm" is no barrier to standing.[349] Moreover, by operating under an injury rubric pursuant to which legislation can create enforceable rights, the Court has had little choice but to accept extremely generalized grants of citizen standing enacted by Congress. Therefore, the only generalized rights that are not enforceable are constitutional ones. And the Constitution in article III can be said to require no more than simple, actionable injury, not"distinct and palpable" injury.

The federal courts have recognized a variety of sources for actionable injury. As Justice Frankfurter argued over thirty years ago: "A 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*."[350]

The notion that the Constitution creates enforceable, affirmative rights is hardly novel. The cases spanning the entire tenure of the Burger Court that recognize causes of action based directly upon constitutional guarantees make at least that much clear.[351] Of course, the determination whether a constitutional provision creates an implied cause of action against government officials ultimately presents different, and tougher, questions than does the standing

344. *See* TVA v. Hill, 437 U.S. 153 (1978).

345. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

346. 369 U.S. 186 (1962) (voting rights).

347. 413 U.S. 455 (1973) (textbook loans to racially discriminatory schools).

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

349. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686 (1973).

350. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring) (emphasis added).

351. *See* Carlson v. Green, 446 U.S. 14 (1980) (eighth amendment); Davis v. Passman, 442 U.S. 228 (1979) (fifth amendment); Butz v. Economou, 438 U.S. 478 (1978) (fourth amendment); Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388 (1971) (fourth amendment).

inquiry.[352] An absolute prerequisite to a decision that a constitutional guarantee creates an action for money damages against federal officials, however, is a finding that the provision in question creates an affirmative, enforceable right. The Court could hardly have made this requirement more clear than in *Davis v. Passman*, when it noted that "[t]he equal protection component of the Due Process Clause thus confers on the petitioners a federal constitutional right to be free from gender discrimination . . . ."[353]

Similar holdings have recognized judicially protected personal rights under the fourth[354] and eighth amendments.[355] If, as Justice Rehnquist argued in *Valley Forge*, there is to be no "hierarchy"[356] of constitutional rights, the establishment clause must create a personal right to separation of church and state. Therefore, the conclusion that the plaintiffs in *Valley Forge* asserted an "injury" based upon the infringement of a constitutionally created legal interest seems inescapable.

That conclusion, of course, was not the response of a majority of the Court in either *Richardson*, *Reservists Committee*, or *Valley Forge*. When presented with such citizen suits based directly upon the Constitution, the Court has sensed dangers of judicial usurpation and thrown up an insurmountable standing barrier. The judicial response has been that the Constitution creates legally cognizable rights only when government action singles out a plaintiff and treats him differently than "the man on the street."

The Court's denial of a right to enforce shared constitutional rights, however, should not be accomplished by the standing doctrine. In no other context does the standing requirement render rights unenforceable merely because they are common to citizens in general. Further, it is simply inconsistent to contend, on the one hand, that constitutional interests are sufficiently concrete to imply causes of action for money damages, and on the other, that such interests are too abstract to constitute injury-in-fact for purposes of standing.

In short, Justice Brennan's brief declaration on the actionability of generalized claims, set forth in his *Valley Forge* dissent, outlines the manner in which the law of standing to bring public constitutional actions can be brought back into line with the rest of article III jurisprudence:

> 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

352. The "cause of action" cases not only involve an analysis of whether specific constitutional provisions create enforceable rights, but also embody explicit consideration of separation of powers concerns. One of the factors the Court considers in determining whether a constitutional violation should be actionable for money damages, for example, is whether the defendants "enjoy such independent status that judicially created remedies against them might be inappropriate." Davis v. Passman, 442 U.S. 228, 246 (1979).

353. 442 U.S. 228, 235 (1979).

354. *See* Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388 (1971).

355. *See* Carlson v. Green, 446 U.S. 14 (1980).

356. 454 U.S. 464, 484 (1982).

meaning of Article III.[357]

Rather than creating standing via a constitutional bootstrap, such a method simply recognizes that the Constitution, like statutes and the common law, creates affirmative, judicially enforceable rights. Further, a treatment of public actions consistent with the Supreme Court's standing analysis in other contexts mandates the rejection of the selectively imposed requirement of individual injury. The result would be that certain constitutional provisions would become enforceable by any person. It would not be inappropriate to recall, however, that constitutional guarantees exist for the protection of every person.

Article III standing based directly upon constitutionally created rights would not mean that a "case or controversy" exists every time a plaintiff complains of a violation of the Constitution. Rather, generalized constitutional claims would remain subject to a variety of jurisdictional constraints. First, public constitutional actions may often present political questions. Separation of powers concerns have been long proclaimed to be irrelevant to the standing inquiry.[358] They should also become irrelevant in fact. When problems of judicial usurpation are raised by public constitutional actions, those issues should be confronted openly under the political question doctrine, rather than covertly by declarations that the asserted injuries are too abstract to meet standing requirements.

Second, in public actions such as *Valley Forge*, the standing inquiry requires a threshold determination whether the constitutional provision upon which the plaintiff relies creates an interest that has allegedly been violated by the defendant. This means, of course, that standing analysis cannot be wholly separated from the merits of the claim.[359] The inquiry would be analogous to the "zone of interest"[360] review necessitated when standing is premised upon statutorily created interests.[361]

Third, standing based directly upon a constitutionally created right entails an examination of the intended beneficiaries of the provision in question.

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357. *Id.* at 493 n.5 (Brennan, J., dissenting).

358. *See supra* notes 204-18 and accompanying text.

359. Professor Albert has shown that in many instances the determination of injury cannot be meaningfully segregated from an examination of the contours of the constitutional provision under which relief is sought—nor should it be. *See* Albert, *supra* note 36, at 1154 ("Discussion of these issues would be more coherent and edifying were the Court to address the sufficiency of injury as a question pertaining to a particular claim, an interest created by the law invoked, and not as an arching principle of standing.").

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

361. For example, consider Richardson v. Kennedy, 313 F. Supp. 1282 (W.D. Pa. 1970), *aff'd*, 401 U.S. 901 (1971), in which taxpayers sought to challenge the constitutionality of a congressional pay raise effectuated by the Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 613. The litigants claimed that the pay raise violated the article I, § 6 requirement that "Senators and Representatives shall receive a Compensation . . . to be ascertained by law." The Act was alleged to be defective because salaries were keyed to Presidential recommendations rather than express statutory enactments. An allegation of standing based upon the legal rights created by the article I, § 6 requirement should trigger an examination of whether the plaintiff properly asserts interests protected by the constitutional provision. Whatever the substantive content of the compensation clause, it is not clear that the general citizenry are intended as its beneficiaries. Were the Court to determine that the clause creates cognizable rights only in Senators and

Although it is arguable that constitutional protections are designed for the benefit of the entire citizenry, most guarantees are obviously designed primarily to ensure against specific individual violations. Accordingly, a litigant might appropriately be barred from asserting, for example, a claim that a third party has been denied the right to a jury trial, the freedom to speak, or the right to equal protection of the laws. Not only would general rules of third party standing work to limit such claims,[362] but also determinative would be "the obvious principle that in cases of uniquely individual injury control of the affair should be left to the one injured."[363]

Standing analysis, so conceived, acknowledges that constitutionally recognized rights are no less tangible and no more generalized than other interests regularly enforceable in the federal courts. Moreover, the rights presented in such cases as *Valley Forge*, *Richardson*, and *Reservists Committee*,[364] unlike a variety of judicially recognized environmental and statutory interests, are uniquely within the stated province of the federal judiciary.[365] Textually

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Representatives, a private plaintiff could appropriately be denied standing as beyond the "zone of interest" created by the constitutional provision.

Millard v. Roberts, 202 U.S. 429 (1906), is a similar example. In *Millard* a taxpayer was allowed to assert an article I, § 7, clause 1 requirement that revenue bills originate in the House of Representatives. A modern court might appropriately inquire whether the origination requirement creates rights or interests in a citizen-plaintiff. It would also seem that Frothingham v. Mellon, 262 U.S. 447 (1923), is most accurately read as a determination that the due process clause of the fifth amendment creates no legal interest in a taxpayer to be free from federal intrusion on local matters.

362. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Tileston v. Ullman, 318 U.S. 44 (1943). *See also* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

363. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 36, § 3531, at 228. Accordingly, it would be unnecessary to grant standing in the examples cited by Justice Rehnquist in a footnote to the *Valley Forge* opinion:

> Were we to recognize standing premised upon an "injury" consisting solely of an alleged violation of a "'personal constitutional right' to a government that does not establish religion," 619 F.2d at 265, a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative action program on the basis of a personal right to a government that does not deny equal protection of the laws . . . .

454 U.S. at 489 n.26.

It is also worthy of note that Mrs. Frothingham actually sought to assert the federalism interests of the State of Massachusetts. Frothingham v. Mellon, 262 U.S. 447, 475-77 (1923). Therefore, her action would properly have been dismissed as a claim based upon third party rights.

364. It seems clear that the *Valley Forge* plaintiffs were intended beneficiaries of the rights created by the establisnment clause. Further, standing should have been granted in the gamut of the establishment clause cases. *See* Doremus v. Board of Educ., 342 U.S. 429 (1952); Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973); O'Hair v. Paine, 432 F.2d 66 (5th Cir. 1970); Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970); Baird v. White, 476 F. Supp. 442 (D.C. Mass. 1979). The plaintifs in *United States v. Richardson* would similarly appear to be beneficiaries of the rights to publication of government expenditures set forth in article I, § 9, clause 7.

The *Reservists Committee* plaintiffs may also have been among the intended beneficiaries of the incompatibility clause of article I, § 6, clause 2. It might have been appropriate, however, to require that a plaintiff be among the constituents of the particular Congressmen allegedly subject to a conflict of interest.

365. Speaking of rights set forth in the constitutional text, James Madison argued:

> [I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption

based constitutional protections cannot be considered beyond the realm of judicial competence merely because the interests they reflect are shared by a large number of people.

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of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789).