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Injury and the Disintegration of Article III

Gene R. Nichol, Jr.†

The past three decades have witnessed a substantial rejection of the private rights model of adjudication.¹ As the embrace of public law litigation has broadened, jurisdictional and procedural concepts rooted in private rights analysis have fallen away.² Nowhere has the pressure for change been more direct than on the formulation of the “case or controversy” requirement of article III of the United States Constitution. As a result, after almost two hundred years, the judiciary has yet to outline successfully the parameters of a constitutional “case.” In law, as in life, the most fundamental questions often prove to be the most intractable.

Uncertainty about the demands of article III, however, is hardly attributable to lack of attention. The case or controversy requirement has been the focus of greater judicial energies in recent years than in any corresponding period in our history. Reacting both to a burgeoning federal docket and to perceived dangers from the aggrandizement of judicial power, the Supreme Court has attempted to pour content into article III by constitutionalizing a variety of jurisdictional inquiries—the standing,³ mootness,⁴ ripeness,⁵ and political question⁶ doctrines.

The lynchpin of these efforts is the demand for “distinct and palpa-

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1. The change has hardly gone unnoticed. The classic treatment is Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290-91 (1976).

2. See generally R. COVER & O. FISS, *THE STRUCTURE OF PROCEDURE* (1979).

3. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40-42 (1976) and *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (both cases holding that article III requires the injury, causation, and redressability components of the standing doctrine).

4. See *DeFunis v. Odegaard*, 416 U.S. 312, 315-20 (1974) (dismissing race discrimination challenge as moot).

5. See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 458-60 & n.10 (1974) (holding the ripeness requirement to be a component of the case or controversy standard).

6. See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (four-justice plurality voted to dismiss as a political question congressmen's challenge to president's authority to revoke a treaty); cf. *Laird v. Tatum*, 408 U.S. 1, 13-16 (1972) (holding, *inter alia*, that the Court will not examine the nature of Army surveillance programs absent a specific and objective injury or threat of injury). It is arguable that a political question determination is merely a constitutional ruling on the merits. See Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

ble" injury.⁷ As the Court has noted, "whatever else the 'case or controversy' requirement embodie[s], its essence is a requirement of 'injury in fact.'"⁸ According to this standard, courts appropriately exercise their power only to remedy harms that are distinct to the litigant and palpable in nature. The recognition of abstract interests⁹ or the entertainment of naked claims of the illegality of government action, unaccompanied by concrete impairment of protected interests,¹⁰ falls beyond the scope of legitimate judicial review.

The individual harm standard, now employed by the justices for over a decade,¹¹ is firmly entrenched in the jurisprudence of article III. The Court's dedication to the injury concept has seemed to solidify with succeeding terms.¹² Though the implementation of this principle has engendered a substantial body of criticism,¹³ the injury standard has recently enjoyed something of an intellectual resurgence. Academics¹⁴ and noted jurists, including Justice Scalia,¹⁵ have praised the requirement as an essential tool in assuring an appropriately limited judicial role. The future of the injury standard as the principal component of the case or controversy requirement thus seems secure. This Article will attempt to explore both the content and the complexity of the injury calculation.¹⁶

In reviewing the Supreme Court's treatment of injury under article III, commentators have tended to fall into two broad camps. Supporters of a more rigorous injury standard, carrying forward a Bickellian tradi-

7. See *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

8. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218 (1974) (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970)).

9. See *Sierra Club v. Morton*, 405 U.S. 727, 734-36 (1971) (Sierra Club lacked standing to challenge proposed development because it failed to allege individualized injury).

10. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-86 (1982) (no standing to challenge distribution of government largesse to religious organization due to failure to identify personal injury suffered as a result of government's action).

11. See *infra* text accompanying notes 33-34.

12. See, e.g., *Allen v. Wright*, 104 S. Ct. 3315 (1984); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

13. See the articles cited in Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68, 68 n.3 (1984).

14. See Burnham, *Injury for Standing Purposes When Constitutional Rights Are Violated: Common Law Public Value Adjudication at Work*, 13 HASTINGS CONST. L.Q. 57, 114-17 (1985); Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 869 (1985); Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 69-70.

15. See Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 894-97 (1983); see also *People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 172-73 (7th Cir. 1984) (Posner, J.); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1177-79 (D.C. Cir.) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983).

16. The constitutional component of the standing requirement, as presently formulated, demands not only the demonstration of injury, but proof of causation and judicial redressability as well. See *Allen*, 104 S. Ct. at 3325. This Article explores only the injury prong of the standing inquiry.

tion,¹⁷ have emphasized the institutional benefits resulting from tightened justiciability requirements. They argue that restricting access to courts augments democratic accountability and conserves judicial authority for its most essential tasks.¹⁸ Critics of the Court's rulings, on the other hand, have stressed not only that diminished reviewability of government action reduces constitutional oversight, but also that the nature of the Court's injury decisions are dramatically inconsistent.¹⁹ Such disparate views of constitutional harm, these critics argue, reflect the justices' views of the attractiveness of the underlying claims rather than any objective measurement of injury.²⁰

At least implicitly, however, both positions embrace the fundamental premise of the Supreme Court's case or controversy rulings: that "injury" is a straightforward, semi-intuitive determination capable of providing an objective and independent basis for ascertaining federal jurisdiction. Accepting this common ground, both sides have limited their criticism to charges of misuse. Defenders of restrictive justiciability standards typically object that the Court has erred by accepting injuries that are too diffuse and too abstract.²¹ Advocates of eased judicial access, myself included, have accused the justices of willfully manipulating the injury standard to fence out disfavored claims.²²

17. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) (restrictive justiciability standards are a necessary and vital element of judicial review).

18. See Floyd, *supra* note 14, at 869; Scalia, *supra* note 15, at 894-97.

19. See Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863, 869-76 (1977); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 664 (1977).

20. See *supra* note 19. By attractiveness of the underlying claims, I mean the judicial desire to reach (either to accept or to reject) the substantive merits of the challenge. See Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185, 206-13 (1981). The tendency of the justices to peek past the jurisdictional determination has long been noted. An almost comical example of such "merits distortion" occurred in *Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326 (1986). In *Bender*, the Court dismissed for lack of standing the equal access challenge filed by a religious group desiring to meet in a public school during a scheduled activity period. The majority ordering dismissal was composed of Justices Stevens, O'Connor, and the frequent advocates of liberalized standing, Justices Brennan, Marshall, and Blackmun. Apparently desiring to rule that the establishment clause poses no hurdle to such equal access claims, Justices Rehnquist, White, Burger, and Powell dissented. These four architects of the Burger Court's tightened standing requirement argued for eased access here. See *id.* at 1336-39.

21. See Brown, *Quis Custodiet Ipsos Custodes?—The School Prayer Cases*, 1963 SUP. CT. REV. 1, 15-31; Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 46-47; Scalia, *supra* note 15, at 894-97.

22. See Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 653-55 (1985); Tushnet, *supra* note 19, at 663.

This Article represents something of a departure in my thought about the standing doctrine. I have argued, on more than one occasion, that standing is not a separation of powers doctrine. See, e.g., Nichol, *supra*, at 645 ("separation of powers analysis simply cannot be applied to current standing doctrine requirements"); Nichol, *supra* note 13, at 98-101.

My arguments here concern the complexities of the injury determination. I conclude, in short, that the injury calculus—to be made both overt and comprehensible—must include an examination

In reality, the injury determination is considerably more subtle and multifaceted than either these countercharges, or the Court's opinions, might suggest. Rather than merely being an instinctive appraisal of the magnitude of harm, the injury calculus carries two distinct inquiries under its broad mantle. Injury analysis demands the exploration of not only the directness or actuality of the litigant's claimed injury, but also the judicial cognizability of the *interest* alleged to be injured. Since modern judicial opinions have focused exclusively on the first of these two questions, the present articulation of "injury in fact" is radically incomplete.

The Court's cursory treatment of injury has not been without its costs. Since what I will call cognizability analysis is not yet an overt aspect of the article III determination, the judicial examination of the actuality of asserted harms has suffered. The diverse rulings that make up the Supreme Court's case or controversy jurisprudence cannot be explained by simply asking whether the asserted injuries are real or concrete. That is hardly surprising, I shall argue, since the Court has burdened the actuality prong of the injury determination with a greater analytical load than it can logically bear. The unstated interplay between the actual injury requirement and cognizability analysis has rendered unduly complex the task of deciding whether an injury, or threat of an injury, is sufficiently real to support jurisdiction.

More significantly, this approach leaves lower federal courts without guidance. Injury decisions necessarily incorporate a determination that the plaintiff's allegedly injured interests either are or are not judicially cognizable. Since the Supreme Court has conducted this determination *sub rosa*, however, trial judges have been left completely at sea in the examination of which sorts of interests, if abrogated, sustain jurisdiction. The Court's decisions do not inform the lower courts of the need for cognizability analysis. Moreover, the decisions do not develop a body of

of the nature of judicially cognizable interests. If standing law is so altered, it will be necessary to introduce or formalize separation of powers scrutiny under the injury umbrella. See *infra* text accompanying notes 149-64. My examination of the injury concept, therefore, leads me to conclude that a jurisprudence of constitutional harm should be developed. In the evolution of this jurisprudence, the overt consideration of the appropriate allocation of judicial power should play a substantial part.

Much of this Article, then, could be characterized as a recantation. Perhaps it is that. It does, of course, remain true that the "standing doctrine" announced by the Court affords no avenue for separation of powers scrutiny. As I have claimed, causation and redressability analysis are logically distinct from separation of powers scrutiny. See *infra* note 176. According to the Court's present treatment of the injury standard, injury is also distinct from separation of powers scrutiny. I make the claim here, however, that injury analysis is not the straightforward inquiry suggested by the Court's opinions. A reformulated injury determination, I conclude, should openly embrace separation of powers concerns.

law openly addressing the factors that shape judicial cognizability as a guide to future decisionmaking.

Finally, by oversimplifying the injury determination, the Supreme Court has managed to pretend that the individual harm standard is something other than what it is—a vehicle through which judges implement their own perceptions of the proper scope of article III power. Constitutional standing decisions reflect an ad hoc character that hardly enhances institutional credibility. I argue, therefore, that the injury calculation should be a bifurcated one, exploring both the actuality of the alleged harm and the cognizability of the underlying interest alleged to have been harmed.

The following sections consider, in some depth, the nature of injury analysis. Part I briefly examines the adoption and current designs of the individual harm standard. Part II then turns to the complexity of the injury calculus. I focus initially on the measurement of the reality or actuality of the claimed harm. Next I consider the concept and role of judicially cognizable interests in the injury finding. Part III suggests a reformulation of the injury determination. Only by more directly incorporating cognizability analysis into the injury calculation can the Court make the case or controversy standard both workable and comprehensible. Unfortunately, perhaps, such a reformulation requires the reintroduction of many of the legal interest, separation of powers, and federalism issues that the Court sought to eliminate from the article III determination by adopting the injury-in-fact standard.

I

THE INDIVIDUAL INJURY STANDARD

Article III's case or controversy requirement carries little definitive content. Madison explained to the delegates of the Constitutional Convention that the reference limits judges' attention "to cases of a Judiciary Nature."²³ But outlining the sorts of activities that are of a "Judiciary Nature" is hardly a simple task. As the Eleventh Circuit recently admitted, "An all-purpose definition of justiciability has never been published because of the 'notorious difficulty' of defining the concept."²⁴

In *Marbury v. Madison*,²⁵ the touchstone in interpretation of the judicial function, Chief Justice Marshall emphasized the necessity for judicial protection of vested or legal rights. His arguments for judicial review were premised on the Court's duty to decide the rights of individ-

23. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 430 (1966).

24. *Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072, 1085 n.34 (11th Cir. 1983), cert. denied, 465 U.S. 1103 (1984) (quoting Marshall, *Justiciability*, in OXFORD ESSAYS IN JURISPRUDENCE: A COLLABORATIVE WORK 265, 269 (A.G. Guest ed. 1961)).

25. 5 U.S. (1 Cranch) 137 (1803).

uals. *Marbury* thus presaged the adoption of a private rights model of judicial authority that analogizes constitutional review to the common law system of adjudication. It is a judge's obligation to decide private disputes. If, as part of that process, interpretation of the constitutionality of statutes is required, so be it. The trigger of judicial power, however, is the protection of private rights.

The modern jurisdictional implement of the private rights model was the legal interest test.²⁶ Under its premises, a "case" was presented if the actions of the defendant harmed a "legal interest" of the plaintiff. Of course, the cases presenting the greatest potential for judicial overreaching have always been those that call into question the actions of federal or state government. Extending the common law analogy, courts treated government defendants as if they were private persons. Courts recognized claims against a government official, therefore, only if the official's conduct would have given rise to a cause of action in property, contract, or tort had the defendant been a private person.²⁷ Thus, judicial power could appropriately be employed only if the harm presented was the sort that the common law system sought to remedy in disputes between private parties.

As the system of constitutional oversight became more pervasive, however, the analogy to common law adjudication became less satisfactory. Government owes substantial duties and obligations to its citizenry that have no clear counterparts in the common law system. Supreme Court decisions recognizing jurisdiction to challenge a malapportioned legislature's dilution of individual voting strength,²⁸ a school district's program of public prayer,²⁹ and the government's distribution of largesse to religious schools³⁰ could not fit easily into the confines of the legal interest test.

Liberalized judicial review of administrative decisionmaking also led to a fatal collision with the purely private rights model. Agencies charged with regulation in the public interest, plaintiffs characterized as "private Attorney Generals,"³¹ and jurisdictional grants offering access

26. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 151-53 (1951) (Frankfurter, J., concurring).

27. See generally J. VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 20-33 (1978).

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

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

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

31. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated*, 320 U.S. 707 (1943) (Congress can confer statutory power on private individuals to litigate for the public interest); see also *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942) ("[T]hese private litigants have standing only as representatives of the public interest"). These cases, among others, expanded review of administrative decisionmaking to litigants only indirectly affected by regulatory action.

to persons "adversely affected" by agency action³² greatly expanded the purview of judicial power. Finally, the hint of circularity in the legal interest approach—we won't hear your case because it's not the kind of thing we do—helped to cap the doctrine's demise.

As the Warren era came to a close, the Supreme Court scrapped the legal interest test, and by implication, the purely private rights model in *Association of Data Processing Service Organizations, Inc. v. Camp*.³³ No longer did a plaintiff need to demonstrate the abrogation of a legally protected interest. Rather, a litigant could challenge government action by asserting "injury in fact."³⁴ The injury-in-fact standard thus substantially liberalized access to the federal courts.

The Court also made clear in *Data Processing* that injury was not limited to economic harm.³⁵ That in itself was hardly a controversial step. One assumes that even an unemployed vagabond would have standing to challenge his deprivation of liberty through summary detention at the hands of the state. The Court expressly pointed, however, to "'aesthetic,'" "'conservational,'" and "'spiritual'"³⁶ values as examples of interests that, if harmed, would establish injury. In the years following *Data Processing* the Supreme Court acted on these suggestions and gave cognizance to an assortment of environmental,³⁷ religious,³⁸ electoral,³⁹ egalitarian,⁴⁰ and other nontraditional claims⁴¹ that the federal courts would have rejected in earlier eras.

More significantly perhaps, a variety of the interests accepted as permissible bases for jurisdiction were intangible, subjective, and widely shared. One's interest in the aesthetic state of her own front lawn is per-

32. Administrative Procedure Act, 5 U.S.C. § 702 (1982).

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

34. *Id.* at 152-53 & n.1 (noting that "[t]he 'legal interest' test goes to the merits," and is therefore "quite distinct from the problem of standing.").

35. *Id.* at 154.

36. *Id.* (quoting *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966)).

37. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (recognizing that harm to environmental interests, if properly pled, can be the basis for standing).

38. *Tilton v. Richardson*, 403 U.S. 672 (1971) (permitting, without discussion of standing, review of establishment clause challenge brought by citizen-taxpayers against federal construction grants to religious universities).

39. *See, e.g., Town of Lockport v. Citizens for Community Action At The Local Level, Inc.*, 430 U.S. 259 (1977) (legislative apportionment case); *Mahan v. Howell*, 410 U.S. 315, *modified*, 411 U.S. 922 (1973) (same).

40. *Norwood v. Harrison*, 413 U.S. 455 (1973) (allowing, without discussion of standing, challenge to state school book lending program to private discriminatory schools as state encouragement of segregation).

41. *See, e.g., Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972) (interest in benefits of interracial association recognized in action based on 1968 Civil Rights Act).

haps tangible, but concern for the future of an endangered species,⁴² in any normal sense of the word, is surely not. Whether or not one is harmed by the distribution of government resources to religious schools depends, in some part, upon the subjective state of mind of the litigant. Some people are outraged by such developments, others laud them, and in most, one guesses, could not care less. And the litigants' interests flowing from damage to a national forest, or the dilution of electoral strength resulting from a malapportioned legislature—whatever else they may be—are widely shared among the populace.

With such a record in place, it is not surprising that federal plaintiffs began to present "cases" based upon other intangible and diffuse claims. If shared and elusive injuries to the right to vote or the right to a pristine environment could sustain jurisdiction, why not harm to a litigant's desire for the separation of church and state or for a Congress that complies with the accounts clause⁴³ or the incompatibility clause?⁴⁴ Would-be reformer plaintiffs claimed "injury" from the papal mass on Boston Common,⁴⁵ the White House nativity scene,⁴⁶ the printing of Christmas stamps,⁴⁷ the government endorsement of segregation,⁴⁸ the government adoption of a year of the female without embracing a male counterpart,⁴⁹ and other nontraditional claims.⁵⁰ During the same period, the federal courts accepted a variety of claims based on express statutory grants of standing, even though the interests supporting jurisdiction in such cases were decidedly intangible and rooted in law, not fact.⁵¹

42. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (recognizing standing under the Endangered Species Act to challenge alleged threat to the snail darter).

43. *United States v. Richardson*, 418 U.S. 166 (1974) (standing denied).

44. *Schlesinger v. Reservist Comm. to Stop the War*, 418 U.S. 208 (1974) (standing denied).

45. *Baird v. White*, 476 F. Supp. 442 (D.C. Mass. 1979); *see also Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973) (action seeking removal of monolith with etching of ten commandments from public property); *O'Hair v. Paine*, 432 F.2d 66 (5th Cir. 1970), *cert. denied*, 401 U.S. 955 (1971) (challenge to religious activities conducted by astronauts of Apollo 8 and Apollo 11).

46. *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970).

47. *Protestants and Other Ams. United for Separation of Church and State v. Watson*, 407 F.2d 1264 (D.C. Cir. 1968).

48. *Norwood v. Harrison*, 413 U.S. 455 (1973).

49. *Men's Ass'n for Liberty and Equality v. United States*, 79 F.R.D. 144 (M.D. Fla. 1978).

50. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-75 (1982) (members of nonprofit organization posing as would-be renters to detect racial steering practices by private landlords granted "tester standing" to complain of violations of federal fair housing statutes); *see generally, LeBel, Standing After Havens Realty: A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013.

51. *See, e.g., Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 164 n.15 (1978) (challenging administrative decisionmaking in deciding to dam a river under the Endangered Species Act). Before the existence of the Endangered Species Act, a court probably would have dismissed such a suit based on the threatened extinction of the snail darter for lack of injury in fact. The enactment of the statute, however, "creates" an interest in the snail darter's plight that can support jurisdiction. That interest, obviously, is legally based. The injury-in-fact standard of *Association of Data Processing*

The Burger Court responded to what it apparently perceived as a barrage of constitutional grievances by substantially tightening the *Data Processing* test. No longer is injury alone sufficient to sustain jurisdiction. Rather, the injury standard demands harm that is "distinct and palpable."⁵² "Distinct" suggests that the challenged government action must affect the plaintiff in a different manner than the rest of the populace. "Palpable," on the other hand, seems to require that the litigant's harm be tangible or concrete. The Burger Court indicated that prudence, if not article III itself, further cautions against recognizing mere "generalized grievances" where the litigant's asserted injury is shared by the populace at large.⁵³

On the basis of this toughened standard, the Court denied the existence of a constitutional "case" in actions such as *Schlesinger v. Reservists Committee to Stop the War*,⁵⁴ *United States v. Richardson*,⁵⁵ *Warth v. Seldin*,⁵⁶ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,⁵⁷ and *Allen v. Wright*.⁵⁸ In elevating the distinct and palpable harm requirement to constitutional status, the Burger Court fashioned one of its major jurisprudential legacies. Federal courts exercise the "judicial power" only to remedy harms that are distinctly suffered by the litigant and palpable in character. The cognition of other sorts of interests or the assertion of naked illegality unaccompanied by concrete harm falls beyond the scope of judicial power.

The Court's goals in focusing on individual harm are both ascertainable and, in perspective, laudable. The very language of article III suggests that there must be some line of demarcation between the presentation of "cases" and the mere airing of political disagreements. The tool adopted to provide this demarcation, personal injury, was thought to carry particular advantage. Most pointedly, the Court intended the injury standard to insulate the case or controversy determination from the sway of the claim on the merits. In *Data Processing*, the

Serv. Orgs. v. Camp, 397 U.S. 150 (1970) assumes, however, that injuries can be determined without reference to law. The economic, spiritual, and aesthetic harms discussed in that opinion are, in this sense, "factual," not "legal." See *id.* at 154-55.

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

53. *Id.* at 499-500; see also *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979).

54. 418 U.S. 208 (1974) (challenging Congressmen's membership in Armed Forces Reserve as violating incompatibility clause of the Constitution, article I, § 6, cl. 2).

55. 418 U.S. 166 (1974) (challenging Congress's failure to require detailed account of CIA expenditures under the accounts clause of the Constitution, article I, § 9, cl. 17).

56. 422 U.S. 490 (1975) (challenging city's zoning ordinance as discriminating against persons of low and moderate income).

57. 454 U.S. 464 (1982) (challenging Congress's conveyance of property to religious college as violation of the first amendment's establishment clause).

58. 104 S. Ct. 3315 (1984) (challenge to IRS guidelines for denying tax-exempt status to racially discriminatory private schools).

Court emphasized that the "‘legal interest test’ goes to the merits."⁵⁹ Article III's standing requirement, the Court insisted, is "different."⁶⁰ The terminology employed—injury "in fact" rather than "in law," layperson's⁶¹ injury rather than lawyer's injury—suggests the Court's desire to convert the case or controversy hurdle to a straightforward and objective measurement uninfluenced by the attractiveness of the cause of action or the political predilections of the decisionmaker.

To this end, the Supreme Court has ruled that the article III determination is to be made without regard to the substantive issues litigated and "in no way depends on the merits of the plaintiff's contention."⁶² The demands of the standard do not "diminish as the 'importance' of the claim . . . increases."⁶³ Nor does the standard countenance a "hierarchy of constitutional values or a complementary 'sliding scale,'"⁶⁴ allowing easier access for some actions than for others. The Court thus designed the injury standard largely to cure the perceived defects of the legal interest test. By employing a test of simple harm, the justices could free the system of constitutional review from ill-fitting common law forms. Injury in fact, it was also hoped, could be ascertained without "premature legal value judgments"⁶⁵ about either the merits of the claim or the role of the judiciary in our system of government. The following sections make the argument that the injury standard, as employed by the federal courts, cannot attain these desirable goals.

II EXPLORING INJURY

The initial difficulty in applying the distinct and palpable injury standard lies in determining what it means to be injured. The answer is not as obvious as it may seem. While Nietzsche apparently thought that nothing he survived did him harm,⁶⁶ Donne believed that injury to any of us affects us all.⁶⁷ The measurement of article III injury may be less philosophical in tone and less intertwined with the question "What does

59. 397 U.S. 150, 153 (1970).

60. *Id.*

61. See Burnham, *supra* note 14, at 111.

62. Warth v. Seldin, 422 U.S. 490, 500 (1975).

63. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 484 (1982).

64. *Id.*

65. Burnham, *supra* note 14, at 111.

66. "Maxim No. 8. From the military school of life.— What does not kill me makes me stronger." F. NIETZSCHE, TWILIGHT OF THE IDOLS AND THE ANTICHRIST 23 (1968).

67. "'No man is an Iland, intire of itselfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse . . . ; any man's death diminishes me . . .'" J. Donne, *Devotions XVII* (quoted in *Sierra Club v. Morton*, 405 U.S. 727, 760 n.2 (1972) (Blackmun, J. dissenting)).

it mean to be human?" than the statements of Nietzsche or Donne suggest. It is complicated nonetheless.

The most obvious aspect of the injury calculus focuses on the reality of the litigant's claim of harm. Plaintiffs seek access to the federal courts on the basis of asserted injuries to interests that are important to them. The law of article III, if it is to be a limitation on the power of courts at all, cannot allow a court merely to accept the litigant's subjective claim that his injury is actual. The court must ask whether the litigant's injury can reasonably be regarded as true or real. A court could well reject, for example, a plaintiff's assertion that the mere existence of the FBI intimidates his exercise of free expression. If the court concludes that a reasonable person would not be intimidated, it has a basis for finding the plaintiff's assertion of harm too unlikely to qualify for judicial redress. The injury standard thus provides an essential judicial screen through which a plaintiff's subjective claim that his interest has been injured must pass. It is to this aspect of injury analysis that I now turn.

A. *The Actuality of the Harm*

Judicial measurement of the reality of an injury can take a number of forms. Perhaps the most obvious is represented by a case like *Poe v. Ullman*.⁶⁸ There, the litigants sought to attack a Connecticut statute that made the use of contraceptives illegal. The statute, however, had apparently gone unenforced for decades. The Court thus ruled that no justiciable case was presented, since the litigants could claim no actual harm.⁶⁹ It may well be that the Court in *Poe* gave too little credence to the inhibitions that flow from a statute's presence, even a moribund statute's presence, on the books. But the case illustrates the sort of inquiry entailed in determining whether a plaintiff's claimed injury is real. There was no doubt that the liberty to choose to use contraceptives was the sort of interest to which, if diminished, the justices would pay attention.⁷⁰ But the majority apparently had doubts about whether the plaintiffs' liberty had, in any meaningful way, been infringed.

Other cases have turned on the narrower ground that, though the source of harm is capable of injuring someone, it has not injured the particular plaintiff before the court. It may be, for example, that Professor Broslawsky, who was denied standing to challenge a California criminal syndicalism statute in *Younger v. Harris*,⁷¹ failed this aspect of injury

68. 367 U.S. 497 (1961).

69. *Id.* at 507-08.

70. The *Poe* ruling suggests, at the least, that had the plaintiffs actually been threatened with prosecution for the use of contraceptives, the case would have been justiciable. *Id.* at 507; see also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (sustaining challenge to same statute).

71. 401 U.S. 37 (1971).

analysis. Plaintiff Broslawsky, a history instructor at Los Angeles Valley College, claimed that as a result of the prosecution of Harris under the statute, he was "uncertain as to whether he could teach about the doctrine of Karl Marx . . . as part of his classwork."⁷² Given that the language and tenor of the statute were apparently concerned with conspiracies, it may be that the Court refused to believe that the professor was actually inhibited in his classroom performance. Lower federal courts have similarly refused to deem a plaintiff injured as a result of his own strained reading of a statute.⁷³ An injury is not real if the litigant is merely making it up.

On the other hand, examination of injury to the particular plaintiff before the court can be pressed too far. An aside in *Laird v. Tatum*⁷⁴ reveals the risk of overzealous judicial scrutiny of the reality of the claimed harm. There, the Court dismissed a challenge to the domestic operations of an Army intelligence gathering system for want of a concrete injury.⁷⁵ The Court seemed to suggest that even if reasonable persons might have been chilled in the exercise of first amendment rights by the program of Army surveillance, these plaintiffs were not chilled, and therefore could have no "personal stake" in the litigation.⁷⁶ That, of course, moves the inquiry beyond the objective, back into the subjective realm, arguably raising the specter of judicial exploration into individual suitor's motives.⁷⁷ But the thrust of inquiry—the reality of the asserted harm—provides a necessary component of the injury determination.

Finally, actuality of harm demands that the injury asserted occur to the plaintiff, as opposed to someone else. As an obvious example, imagine a challenge filed by a parent on behalf of children who are being forced to pray in school. Discovery, however, reveals that the plaintiff's children have long since graduated from the school in question. The injury standard would thus require dismissal. There may well be "injury" inflicted at the school in question, but it is not the plaintiff's injury. This is essentially the teaching of cases like *Ellis v. Dyson*,⁷⁸ which

72. *Id.* at 39-40.

73. See, e.g., *J.N.S., Inc. v. Indiana*, 712 F.2d 303 (7th Cir. 1983) (plaintiff sought declaratory judgment that state RICO provisions violated first amendment; complaint dismissed because plaintiff had never been prosecuted or threatened with prosecution).

74. 408 U.S. 1 (1972).

75. *Id.* at 13-16.

76. *Id.* at 13 n.7. Counsel for plaintiffs admitted at oral argument that his clients were not "cowed and chilled." *Id.*

77. If the Court in *Laird* had ruled that a reasonable litigant would have been chilled by the Army's spying program, but that these plaintiffs, because of their hardy natures, were not, and as a result lacked standing, the ruling would have opened an unfortunate door. Imagine, for example, the parameters of a trial on the comparative psychological profiles of various litigants. The Court's actual holding, however, turned on the absence of a reasonable threat of injury. *Id.* at 15.

78. 421 U.S. 426 (1975).

involved a challenge to a Dallas loitering ordinance. The Court noted that if it were determined on remand that the petitioners "no longer frequent[ed]" the Dallas area, there was no credible threat of prosecution, and the case would have to be dismissed for lack of actual injury.⁷⁹ The harm that forms the basis of federal jurisdiction must belong to the plaintiff.

The benefits of an actual injury requirement are numerous. As the Supreme Court has long indicated, real harm ensures "personal stake"⁸⁰ in the outcome of the dispute and thus a minimum of litigant incentive. The Court has thought this incentive to be instrumental to the proper functioning of the judicial process.⁸¹ Perhaps more importantly, actual injury demands that the plaintiff demonstrate the concrete effects of the challenged government action. Examination of these effects serves to fine tune the judicial decisionmaking process since abstract rulings based on hypothetical impacts are more apt to be unwise ones. The demand for proof of actual harm also helps to assure the judicial nature of the litigation process. The application of legal principle to factual occurrence is a distinctive aspect of the exercise of "judicial power."

Finally, the actual harm standard fosters self-determination. On one level, it operates as something of a best-plaintiff rule. The victim of a restrictive zoning scheme, for example, may be better able to inform the decisionmaker of the harshness of the regulation than could the speculations of a libertarian advocacy organization. More fundamentally, however, the requirement of the injury's concreteness, when combined with standing law's charge that the asserted injury belong to the party, works to ensure that those most directly affected by the defendant's challenged policy control the litigation.

The Supreme Court's two most recent standing decisions demonstrate the injury standard's preference for the specific victim of regulation. In *Diamond v. Charles*,⁸² the justices dismissed for want of jurisdiction an appeal seeking to sustain parts of an Illinois abortion statute. The suit began as a challenge to the statute filed by several doctors who performed abortions in Illinois. Diamond, a pediatrician opposed to abortion, was allowed at trial to join the state as a party defendant. After the district and circuit courts upheld the bulk of the plaintiffs' claims, the state chose not to appeal. Diamond, however, asserting his interest in conscientious objection to abortion and his status as a losing defendant, sought to continue the unwilling state's defense of the legislation. Finding the requisite case or controversy lacking, the Court ruled that even

79. *Id.* at 434.

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

81. *Id.*

82. 106 S. Ct. 1697 (1986).

though the doctor may well have possessed a strong interest in the enforcement of the statute, the right to defend its criminal statutes on appeal belongs to the state⁸³—not to mere “‘concerned bystanders’ who will use it simply as a ‘vehicle for the vindication of value interests.’”⁸⁴

In *Bender v. Williamsport Area School District*,⁸⁵ the Court reached a similar result. There, a school board member who was sued for prospective relief in his official capacity was not allowed to “‘step into the shoes of the Board’” and, contrary to its wishes, “‘invoke its right to appeal.’”⁸⁶ Again, the Court barred a party defendant from challenging an adverse judgment because the harm asserted as a basis for jurisdiction was not his harm.⁸⁷ In the process, the Court accorded appropriate respect to the school board’s decision not to contest the ruling below.

These various applications of the injury-in-fact test rotate on a central axis: Does the plaintiff assert an actual injury to a personal interest? Although the Court has used different doctrinal headings to categorize the analysis,⁸⁸ the nature of the examination has been relatively consistent and overt. The Supreme Court has also recognized the present reality of threatened future harm and shaped its jurisdictional principles to allow preenforcement judicial access,⁸⁹ with a few exceptions.⁹⁰ The cau-

83. *Id.* at 1704.

84. *Id.* at 1703 (quoting *United States v. Students Challenging Regulatory Agency Proceedings* (SCRAP), 412 U.S. 669, 687 (1973)).

85. 106 S. Ct. 1326 (1986).

86. *Id.* at 1333.

87. The principle of *Diamond* and *Bender* would seem to cast doubt on the standing of at least some of the congressional plaintiffs in the pocket-veto case presently before the Supreme Court. See *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom. Burke v. Barnes*, 106 S. Ct. 1258 (1986) (As this Article went to press, the Supreme Court dismissed *Barnes* as moot. 55 U.S.L.W. 4103 (Jan. 14, 1987)). Over a lengthy and vehement dissent by Judge Bork, the D.C. Circuit granted standing to 33 members of the House of Representatives, the House Bipartisan Leadership Group, and the U.S. Senate, to challenge the validity of an intersession pocket veto. 759 F.2d at 25-26. If *Diamond* and *Bender* employ the standing principle to assure that the decision to sue is reserved for the centrally affected entity, individual members should not be able to present the interests of the House and the Senate. In *Barnes*, the circuit court relied on its holding in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), that a senator had standing to challenge a veto. 759 F.2d at 25-26. The future of *Kennedy* does not look bright. Nor should it be. One way to guarantee that actions filed by members of Congress are not merely the grievances of legislators who have failed to win their colleagues’ support is to require that such suits be brought “officially” by one or both Houses. Such a theory, of course, would not deny standing to the U.S. Senate in *Barnes*.

88. The Court has used the standing and ripeness doctrines interchangeably to measure the “reality” of harm. See generally Nichol, *Ripeness and the Constitution*, 54 U. CHI. L. REV. (1987) (forthcoming).

89. For decisions allowing preenforcement review of governmental action under a ripeness analysis, based upon the present burdens of pending acts, see, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 200-02 (1983); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 143-45 (1975); *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974); and *Lake Carriers’ Ass’n v. MacMullan*, 406 U.S. 498, 506-08 (1972).

90. See *California Bankers Ass’n v. Schultz*, 416 U.S. 21, 55-57 (1974) (refusing challenge to banking regulatory scheme despite possible present harm to first amendment interests from the

sation and redressability requirements, which round out the standing calculation, can be seen as a part of the same analysis. Causation assures that the plaintiff's injury has actually resulted from the actions of the defendant.⁹¹ The redressability hurdle demands that a favorable ruling will actually alleviate the asserted harm.⁹² Both prongs have suffered from dramatically inconsistent application.⁹³ But by design they assure an acceptable nexus between the injury that provides the basis for jurisdiction and the cause of action asserted.

B. Judicially Cognizable Interests

There is far more to the injury calculus, however, than measuring the reality, or concreteness, of the harm or threat of harm. The Supreme Court has typically focused the injury inquiry solely on the directness or the tangible nature of the party's loss. But it is an oversimplification to characterize a litigant as either simply injured or not. We are rarely harmed in our totality. Perhaps only if I am killed am I "completely" injured. Even then, from some religious perspectives, we think that something remains. We sustain injuries, rather, in different capacities, based on some interest we pursue as humans. Or at least the injuries are most comprehensible to third parties on the basis of capacities harmed. The most obvious example, perhaps, is bodily injury. My physical capacity has been diminished by the actions of the defendant. But we may also, of course, suffer injuries to a variety of other interests.

A litigant may be economically harmed or injured to some extent in the expanse of his liberties. No longer, for example, will I bring home as much money per week or be able to move about town as I wish. These economic and mobility losses may trigger other harms. My diminished paycheck may make it difficult to provide for my wife and family—thus implicating my interest as husband and father. Or my hampered right to travel may force me to forego attendance at religious services, abrogating my interest in the free exercise of religion.

The question "Are you injured?" folds within itself two inquiries. Is

operation of the statute); *Poe v. Ullman*, 367 U.S. 497, 507-08 (1961); *United Public Workers v. Mitchell*, 330 U.S. 75, 87-90 (1947) (refusing challenge to Hatch Act by public employees not yet suffering enforcement action, despite present chill on political activity).

91. See Nichol, *supra* note 20, at 193-97 and cases cited therein.

92. See *Warth v. Seldin*, 422 U.S. 490, 501-05 (1975); see also Nichol, *supra* note 20, at 198-201; Nichol, *supra* note 22, at 656.

93. I have extensively criticized the Court's application of the causation and redressability standards. See Nichol, *supra* note 20; Nichol, *supra* note 13; Nichol, *supra* note 22. The severe manipulation of the standards perhaps says a great deal about Supreme Court decisionmaking. It does not, however, prove the broader point—that the inquiries have no appropriate place in the standing determination. Without causation analysis, the jurisdictional inquiry would be mere formalism, having no relation to the claim on the merits. Similarly, a redressability requirement is, at some level, essential to avoid gratuitous decisionmaking.

the interest asserted actually injured? And, is the interest asserted, if injured, one of which the court will take cognizance? The second question is often more subtle, less straightforward, than the first. Nevertheless, it too makes up an essential component of the injury determination. Under its aegis, the injury standard seeks to ferret out those interests that are sufficient to support the exercise of judicial power.

To consider the interplay, and the dichotomy, between the two inquiries, recall *Warth v. Seldin*.⁹⁴ There, a number of different plaintiffs sought to challenge an allegedly exclusionary zoning ordinance enacted by Penfield, New York. The bulk of the litigants were dismissed pursuant to a determination that the defendants had not actually caused the injuries asserted.⁹⁵ If the would-be Penfield residents had indeed been unable to locate housing, the Court reasoned, other factors—economic, social, etc.—had likely caused the wrong.⁹⁶ The Court left no doubt, however, that had the litigants actually been precluded from obtaining housing, that interest was one to which the judiciary would give cognizance.⁹⁷

Metro-Act, an organization including Penfield residents, was also among the plaintiffs in *Warth*. Since these residents already lived in the community, they obviously did not suffer personal exclusion. Rather, Metro-Act attacked the ordinance's rigorous demands as destructive of their interests in "the benefits of living in a racially and ethnically integrated community."⁹⁸ The Court did not reach the issue of the causal link between the ordinance and this injury. The justices ruled rather that harm to one's interest in interracial association, even if proven, does not constitute injury in fact absent a specific statutory grant of standing.⁹⁹ The interest in living in an integrated community, alleged to provide the foundation for the injury claim, was held not to be "judicially cognizable."¹⁰⁰

94. 422 U.S. 490 (1975).

95. *Id.* at 502-04.

96. *Id.* at 504-07.

97. *Id.* at 507-08. Because the Court has not explicitly recognized cognizability as a distinct issue, however, the operation of this essential component must be teased out of opinions, which speak only of the injury's actuality.

98. *Id.* at 512.

99. *Id.* at 513-14. The Court distinguished *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) which, unlike *Warth*, was based on the Civil Rights Act of 1968. The Supreme Court found that distinction to be compelling since "[c]ongress may create a statutory right . . . the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Id.* at 514.

100. *Id.* The Court did not explain why the benefit "of living in a racially and ethnically integrated community" is not a judicially cognizable interest in the absence of a statutory grant of standing. But the decision can only be read as holding that such an interest is not cognizable. *Warth* is, in fact, one of the rare cases that uses the term "cognizable," though the concept is neither developed nor employed as a distinct aspect of injury analysis. Despite its lack of development, I

The nonresident plaintiffs in *Warth* failed the first aspect of injury analysis. They could not convince the Court that the defendant had actually harmed their interest in living in Penfield. The residents, represented by Metro-Act, apparently failed the second. Even if Penfield had acted to diminish the litigants' pursuit of racial diversity, deprivation of such an ethereal interest, at least in this context,¹⁰¹ could not sustain federal jurisdiction.

Determining what sorts of interests are judicially cognizable is a slippery and amorphous process. Without acknowledging that it is making cognizability determinations, the Court has embraced a multitude of interests: interest in economic advantage, interest in family development, interest in the use of the environment or the plight of an endangered species, interest in the full power of the vote, interest in not being forced to disclose religious contributions, interest in not being forced to go to public schools. The list is literally endless.¹⁰²

But what of other interests? What of my longing for a perfect separation of church and state, or for a government that refuses to impose the cruel and irreversible penalty of death? Or, to move in a different direction, what of my interest in impeding the integration process—an interest in racial purity? Or an interest in the economic prosperity of my business as an international drug smuggler? Or in remaining in the country, undetected, as an illegal alien? Why are some of these interests appropriate foundations for injury, while others are not? The question, often the most fundamental of the injury determination, cannot be answered by simply responding that the injury is actual or not, distinct and palpable

argue that the cognizability inquiry is a necessary component of the injury determination. It is unfortunate that the scope and demand for the examination can only be gleaned indirectly from the language of the Court's opinions.

101. The Court in *Trafficante* and *Havens Realty* allowed standing based upon similar injuries pursuant to the 1968 Civil Rights Act. See *Trafficante*, 409 U.S. at 209-10; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-78 (1982). Of course, whether the interracial association claim involves a "distinct and palpable" injury does not depend on whether suit is brought under the 1968 Civil Rights Act or the equal protection clause. What apparently does change—though again the Court has failed to say so explicitly—is the cognizability of the asserted injury. It may well be, in light of the analysis of cognizability decisions I will present, see *infra* text accompanying notes 104-17, that *Warth* was wrong on the cognizability of Metro-Act's claim. Once Congress has afforded recognition to the "interracial association" interest in one context, perhaps it should be given judicial recognition across the board. See discussion of statutory standing *infra* at pp. 1946-47; see also Nichol, *supra* note 13, at 90-92 (if Congress passes legislation in which it intends to create a legally enforceable interest, it has effectively announced a public value to be recognized by the courts).

102. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970) (economic advantage); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (plight of endangered species); *Gordon v. Lance*, 403 U.S. 1 (1971) (full power of the vote); see, e.g., *U.S. v. Ballard*, 322 U.S. 78 (1944) (reviewing solicitation practices of religious group); *Larson v. Valente*, 456 U.S. 228, *rehearing denied*, 457 U.S. 1111 (1982) (action based on interference with solicitation activities of religious group); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (statute requiring children to attend only public schools).

or not. Injury analysis demands as well an answer to the question "Injury to what?"

Consider an example. Suppose that the Federal Housing Authority, in a fit of concern over residential crime, required that all new houses receiving FHA loans use dead bolt locks on all entrances. Suppose then that five different plaintiffs challenge the legality of the regulation in federal court. Each claims, on the merits, that the FHA has violated its constitutive statutes. Plaintiff One is a builder of FHA funded homes. She complains of the increased costs necessitated by the rule and fears that she will be unable to recoup the new expenditures from her customers. Plaintiff Two is the maker of an advanced secure form of door lock, which does not employ a dead bolt. He argues that his lock business will be hurt unreasonably by the regulation. Plaintiff Three is an aesthetic, utopian. He dreams of a world free of locks, walls, and possessions. The new FHA rule, he claims, hinders the development of the world he would bring to pass. Plaintiff Four is a burglar. The loss he alleges is straightforward and economic. Plaintiff Five is the head of a public interest group that lobbies on behalf of the poor. He claims not only that the regulation is illegal, but that if the FHA devoted less energy to supervising building construction, it could make more loans available to the poor. Because the regulation undermines the goals of his group, he asserts harm to his efforts as a lobbyist.

The first two plaintiffs are, of course, traditional and Hohfeldian.¹⁰³ Plaintiff One, the builder, is not only economically harmed, but directly regulated by the provision. Her standing claim would likely satisfy not only the injury standard, but also its predecessor, the legal interest test. Plaintiff Two, the lock maker, suffers a similar sort of harm to a different business. His relationship to the rule, however, is indirect. His harm is collateral to the regulation's operation. Although he might have trouble mounting a challenge under the legal interest test, he clearly can demonstrate injury in fact, which would be characterized as distinct and tangible.

Plaintiff Three's case is more interesting, and more difficult. The interest he asserts, the desire for a property-less utopia, is comprehensible to us. Yet somehow it is not shared by us. It is not so much that the interest is not real to the plaintiff, but that it has not been embraced and accepted by society. It has not been, to use Professor Vining's words, capped as a public value.¹⁰⁴ Or, to put it another way, the interest

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

104. J. VINING, *supra* note 27, at 171 ("[I]n the very recognition of a 'person' who is 'harmed' courts formally cap the formulation of a value . . . , confirm it in our language and our thought, and permit a full and continuous search for its realization to begin.").

asserted is not a judicially cognizable one. It may be important, in some time or place, but it is not the sort of interest which the jurisdiction of the federal courts will be employed to protect.

This, no doubt, sounds all too mystical. Recall, however, the Supreme Court's determination in *Roe v. Wade*¹⁰⁵ that a married couple, who had been warned by physicians against both childbirth and the use of contraceptives, was not harmed by Texas's restrictive abortion statute. The couple claimed an infringement of their "marital happiness."¹⁰⁶ If we assume that the couple was using "marital happiness" as a euphemism for their sexual freedom and intimacy, which was hampered by the unavailability of abortion should pregnancy result, then the Court effectively ruled that such a harm could not sustain jurisdiction.¹⁰⁷ Implicitly, at least, protecting one's sexual freedom was not regarded as a judicially cognizable interest.

To view this issue from another perspective, imagine a lawsuit challenging the clear cutting of timber in a national forest filed by John Muir toward the close of the last century. Muir would claim loss to himself in his use and enjoyment of the forest, and loss to the public for generations to come in the destruction of the wilderness. Muir would likely have been ejected from the courthouse as an officious intermeddler. Why then were the litigants in *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*¹⁰⁸ treated in so much friendlier terms? Because we had, in the intervening years, come to accept concern for the environment as a true public value. The judiciary's recognition of this interest became acceptable, even necessary, as a result of the shared nature of the concern.¹⁰⁹ No longer was the desire for a pristine environ-

105. 410 U.S. 113, 128 (1973).

106. *Id.*

107. *Id.* Again, the language of the Court's opinion in *Roe* turns to actuality rather than cognizability analysis. The litigants were tagged not harmed or subject only to a contingent sequence of possibilities. There is no reason apparent from the opinion to assume that the couple's sexual freedom and intimacy were not harmed. Nor was the harm unreal or contingent. The couple did not need actually to experience pregnancy and take the child to term in order to suffer an injury to their sexual intimacy; the prospect was sufficiently real to deter them before it happened. Though disguised in actuality language, therefore, the ruling appears to be that this form of "marital happiness" is not a judicially cognizable interest. That, of course, makes the case difficult to square with *Griswold v. Connecticut*, 381 U.S. 479 (1965), declaring the importance and sanctity of the right to marital privacy.

108. 412 U.S. 669 (1973) (student association had standing to challenge regulatory order of the Interstate Commerce Commission based on allegations of injury to their use and enjoyment of the environment and natural resources).

109. It can be argued that the notion of "capping" an interest is not as complicated as I make it here. Perhaps, the argument would go, the difference between the *SCRAP* plaintiffs and John Muir is the recognition of environmental interests by the U.S. Congress in the interim through various pieces of federal legislation. Thus the judiciary should only recognize interests that have received legislative imprimatur.

I have no doubt that the process of recognizing interests should take substantial account of

ment relegated to the hinterland of individual pipe-dreams and preferences, like the wish for a property-less utopia. It had become part of us. Much of the enterprise of measuring constitutional injury, therefore, is judicial scrutiny of the nature of the interest that the litigant claims has been harmed. Only if the interest is comprehensible to the Court, nonidiosyncratic, and sufficiently accepted by society at large to be considered judicially cognizable can its diminution sustain jurisdiction.

Plaintiff Four presents a different, but related problem. No one doubts that the burglar would be excluded from the federal courts. But why? It is certainly not his inability to show plausible economic injury. It is rather that the injury asserted implicates an interest to which the courts will not give credence. Judicial capital will not be expended, at least not knowingly, to foster lawlessness. This dynamic may have been at least part of the motivation for the Court's restrictive jurisdictional decisions in *O'Shea v. Littleton*,¹¹⁰ *Rizzo v. Goode*,¹¹¹ and *City of Los Angeles v. Lyons*.¹¹² In order to sustain the various claims for injunctive reformation of the police and criminal justice practices challenged in those cases, the majority of the Court considered it essential to determine whether the litigants labored under a reasonable threat of repeated wrongdoing at the hands of the state. The litigants would be injured again by the defendants, the Court reasoned, only if they violated the law, and thus again came into contact with police officials.¹¹³ That likeli-

legislative action. See *supra* note 101. But the process cannot be so easily explained. First, it proceeds from a massive common law foundation—recognizing economic, liberty, and aesthetic interests as the everyday business of the federal courts—which was created largely by judges. Second, since cases like *Sierra Club v. Morton*, 405 U.S. 727 (1971) do not involve express statutory grants of standing, any process of capping must result from a screening of legislatively recognized values, which allows the Court substantial leeway. Third, legislative capping alone fails to explain some cornerstones of article III jurisprudence such as *Baker v. Carr*, 369 U.S. 186, 206 (1967) (voters have standing to challenge legislative apportionment on grounds of vote dilution) and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (HOME organization granted standing based on impairment of counselling services provided to low income persons seeking housing). Fourth, even if we were to assume that interests are cognizable only if rooted in positive law (contrary to the injury-in-fact rubric), the toughest article III problems would remain. The case or controversy requirement shows the greatest strain in public actions based directly on the Constitution. See *infra* text accompanying notes 154-58. Assuming that the Constitution is positive law, the entire universe of constitutional interests would be cognizable under a capping scheme that depended entirely on positive law. Yet a variety of such claims have been deemed to lack judicial cognizability. Cognizability analysis demands an overt process of inclusion and exclusion in which judges must play a major role.

110. 414 U.S. 488 (1974).

111. 423 U.S. 362 (1976).

112. 461 U.S. 95 (1983).

Of course federalism interests also motivated the dismissals in *O'Shea*, *Rizzo*, and *Lyons*. See Nichol, *supra* note 13, at 98-101.

113. See *Lyons*, 461 U.S. at 105-06 ("Lyons would have . . . to allege that he would have another encounter with the police"); *Rizzo*, 423 U.S. at 370-73 (risk of injury to plaintiffs from inadequate police disciplinary procedures seen as "too conjectural"); *O'Shea*, 414 U.S. at 496 ("here the

hood was one to which the justices were hesitant to give cognizance.¹¹⁴ The theory that seems, in part, to motivate the dismissal of claims in cases such as *Rizzo* and *Lyons* is thus more resolute than that which disposed of the dreamer, Plaintiff Three, in the hypothetical above. Not only have the litigants' interests been presented in a context that has failed to garner societal acceptance, they have been positively rejected as shared values.¹¹⁵

The fifth and final hypothetical plaintiff alleged injury to his ability to lobby successfully for concerns more directly related to the poor as a result of the FHA deadbolt rule. The gist of his claim of harm is that he would prefer for the FHA to allocate its resources in another fashion. The Supreme Court would almost certainly not consider Plaintiff Five to have been actually injured. Any injury "suffered" may be too diffuse to locate or describe. The heart of any determination to deny standing to the lobbyist, however, would be that, although injured, he has not asserted a judicially cognizable interest. The plaintiff has pleaded only a public policy preference—like a wish that the government would put more money into Aid to Families with Dependent Children or build a lighthouse off the coast at Nags Head. Any injury sustained, if frustration of a public policy preference can be called that, should be addressed to the legislature or the executive rather than the courts. Perhaps this is the bottom line of the Burger Court's "generalized grievance" decisions.¹¹⁶ If so, a more open and accurate methodology is required.¹¹⁷ The injury standard demands not only that the alleged harm be real, but that the interest asserted be one recognizable by the Courts.

prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law").

114. The Second Circuit's decision in *Burrafato v. United States Dep't of State*, 523 F.2d 554 (2nd Cir. 1975), *cert. denied*, 424 U.S. 910 (1976) is perhaps more directly illustrative. There, an alien who had entered the United States illegally was denied standing to challenge State Department regulations concerning the allocation of permanent immigration visas. Although the litigant had a clear stake in the outcome of the dispute, the circuit court thought that giving credence to his claim would encourage illegal entry. *Id.* at 557.

115. Rejection of values can occur through means other than the criminal law. Imagine a lawsuit filed by a wealthy plaintiff seeking to challenge the system of federal student loans. As his injured interest, he lists his desire to allow his children to grow up and be educated in an aristocratic world, unsullied by the "democracy" of publicly funded education. Or posit a challenge to the increasing ease, in most states, of voter registration. Is the interest in being part of a more limited and exclusive voting pool judicially cognizable? We would not expect, for that matter, a federal court to give cognizance to a Klansman's interests injured by statutes requiring him to sit beside a black man on a public bus. Some value-based interests, though widely accepted at one phase of our history, have clearly been rejected over the course of time. Courts would be perfectly justified in ruling that these plaintiffs lacked standing under the cognizability prong of analysis I propose.

116. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974).

117. See *infra* text accompanying notes 121-37.

The Supreme Court has ignored this duality of the injury determination. Rather than analyze the interest proffered as a basis for jurisdiction in terms of its shared acceptance as a public value, or as a judicially cognizable interest, the Court has routinely dismissed asserted harms as "abstract," "hypothetical," "indirect," "speculative," or "generalized" complaints about the way government operates. The Court uses each of these terms to connote that the plaintiff has not actually been injured for purposes of article III. It is clearly true, however, that injuries to some interests, though real, will not sustain jurisdiction. Article III injury analysis thus incorporates, even if unstated or cloaked in actuality terms, a decisionmaking process whereby the judicial cognizability of the asserted claim is measured.

If the injury determination is appropriately segregated into consideration of the actuality of the claimed harm and cognizability of the interest, much of the Court's article III jurisprudence takes on a different cast. Consider, for example, *Schlesinger v. Reservists Committee to Stop the War*,¹¹⁸ *United States v. Richardson*,¹¹⁹ and *Valley Forge Christian College v. Americans United for Separation of Church and State*,¹²⁰ cases in which plaintiffs asserted their interests as citizens in seeing the Constitution obeyed. The line distinguishing personal injury from general political disagreement drawn in these cases is thought to set the outer boundaries of judicial power.

It is not meaningful to say that these cases turned on the belief that the interests asserted by the litigants were not actually injured. The interests of the *Schlesinger* plaintiffs in compliance with the incompatibility clause were at least arguably transgressed by the service of Congressmen in the Armed Forces.¹²¹ The *Richardson* plaintiffs' "right" to public disclosure of the CIA budget, as seemingly demanded by the accounts clause, was clearly denied by the defendant.¹²² And the separationist plaintiffs in *Valley Forge* surely alleged, and could have proven, harm to their interests in the appropriate relations between church and state.¹²³ If anyone has an interest in compliance with these clauses, there

118. 418 U.S. 208 (1974).

119. 418 U.S. 166 (1974).

120. 454 U.S. 464 (1982).

121. 418 U.S. at 210-14.

122. 418 U.S. at 167-70.

123. 454 U.S. at 468-70. It is not true, as a general matter, that the Court has considered the establishment clause to be beyond judicial cognizance. The school prayer cases are obvious examples of personalized harm to non-establishment values. See, e.g., *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985) (one-minute period of silence violated establishment clause). The Court has balked, rather, at recognizing the intangible harm that results when one's government gives money to religious groups contrary to one's wishes. *Valley Forge* is an example. 454 U.S. at 477-78. Yet the Court has entertained such claims when they arise from congressional expenditure, see *Flast v. Cohen*, 392 U.S. 83 (1968), or local government action, see *Lynch v. Donnelly*, 465 U.S. 668 (1984).

is no reason these plaintiffs were not among the injured.

The Court must have reasoned rather, that the interests to which the plaintiffs alleged injury were not, at least in these instances, appropriate to support jurisdiction. I have argued that the Court ascertains which sorts of interests will support federal jurisdiction by a complicated process of inclusion and exclusion, whereby interests or values are deemed sufficiently shared or public to be judicially cognizable. But if that is so, how can the interests reflected in the accounts, incompatibility, and establishment clauses, which are so fundamental that they were written into our constitutional charter, fail the test of judicial cognizability? It would seem that enshrinement in the text of the Constitution would be the foremost possible proof of public acceptance. The answer is that in determining standing, the Court considers not only which injuries are actual and which are capped, but it also examines which interests are appropriately vindicated by the judiciary.¹²⁴

The line that the Burger Court has attempted to navigate between distinct and palpable injuries and merely intangible claims becomes more perplexing, then, since it cannot be explained by reference to actual injury terms or as lacking shared societal values. The underlying premise of the body of the Court's article III jurisprudence is that the injury standard constitutes an objective, autonomous, and overarching barrier to the exercise of judicial power. By adhering to its demands, the argument goes, judges avoid considering the attractiveness of the claim on the merits or the perceived importance of the substantive cause of action in the article III inquiry. But only by oversimplifying the injury determination has the Court managed to keep the inquiry intact. A major step in the inquiry is apparently, if not actually, shunned, since the Court's analysis is more than an examination of how direct, tangible, or speculative is the alleged harm. In order to complete the determination, the Court must explore the judicial cognizability of the interest allegedly diminished. That process implicates both the shared nature and judicial acceptability of the underlying interest—whether the Court chooses explicitly to consider those issues or not.

Even if one accepts the Court's silence as an acceptable way to make decisions, the results in the cases confound. It cannot actually be that the Court's rulings turn on the distinction between the concrete and the intangible nature of the harm. Decisions granting standing based upon intangible injuries abound.¹²⁵ Nor does the key lie in the supposedly

(nativity scene in public display). The distinction, apparently, is that "abstract" violations of separation by the executive branch of the federal government are not cognizable—a difficult principle to discover in the text of the Constitution.

124. See *infra* text accompanying notes 149-64.

125. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984) (standing to challenge municipality's

"distinct" manner in which the challenged conduct burdens the plaintiff. Both statutory and constitutional cases, based upon diffuse and widely shared harms, populate the agenda of the federal courts.¹²⁶ Not even the line, if there is one to be drawn, between naked assertions of illegality and objective injuries caused by illegal means provides the compass. There are many examples of judicially accepted claims in which the plaintiff's only interest was in seeing the defendant comply with the Constitution, without any other personal benefit.¹²⁷

Current application of the standing doctrine has also seriously eroded *Marbury's* implicit claim that constitutional review could be sustained only to protect private rights. Federalism cases like *National League of Cities v. Usery*¹²⁸ and *South Carolina v. Katzenbach*¹²⁹ are not

maintenance of creche); *Heckler v. Mathews*, 465 U.S. 727, 737-40 (1984) (harm to right to equal treatment recognized even though court's remedial options limited to removing unequal benefit from class that excluded plaintiff); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) ("tester" with no intention of renting has right to truthful information about availability of rental housing); *Norwood v. Harrison*, 413 U.S. 455 (1973) (state support of discrimination); *Gordon v. Lance*, 403 U.S. 1 (1971) (vote dilution); *School Dist. v. Schempp*, 374 U.S. 203, 224-25 (1963) (allowing challenge to school prayer from which children could be excused).

126. See, e.g., *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 164 n.15 (1978) (Court relied on Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1982), which grants standing to "any person"); *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*, 412 U.S. 669, 686 (1973) (recognizing harm to aesthetic and environmental interests as basis for standing); *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (standing to challenge congressional expenditures for religious schools); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (standing to challenge congressional reapportionment); *Baker v. Carr*, 369 U.S. 186, 206-07 (1962) (same).

127. See, e.g., *Agnilar v. Felton*, 105 S. Ct. 3232, 3235 (1985) (permitting challenge to use of state and federal funds to pay salaries of public employees who teach in parochial schools); *Heckler*, 465 U.S. at 737-40; *Regents of the University of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (opinion of Powell, J.) (allowing challenge to medical school's affirmative action program despite Bakke's inability to show he would have been admitted absent the program; Court allowed challenge because the University's decision was "not to permit Bakke to compete for all 100 places"); *Norwood v. Harrison*, 413 U.S. 455, 463-65 (1973) (allowing challenge to state distribution of textbooks to racially discriminatory private schools); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Flast*, 392 U.S. at 103 (taxpayer standing granted to challenge federal aid to parochial schools); *Havens Realty Corp.*, 455 U.S. 363.

In the establishment clause cases, the Court has invalidated a number of government programs that require public supervision of the sectarian beneficiaries of state largesse. See, e.g., *Aguilar*, 105 S. Ct. 3232 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977) (declaring unconstitutional the provision of certain instructional materials and equipment to sectarian schools). The supervision, according to the Court, constitutes an impermissible entanglement of church and state. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (state supervision of nonpublic school accounting procedures is unconstitutional). In none of these decisions, however, has the Court demanded that the program be challenged by a member of the class "victimized" by religious organization. See *Lynch*, 465 U.S. 685 (minority religious status not required of litigant challenging municipal Christmas creche). The programs have been successfully attacked, rather, by litigants who are unhappy that the government benefits are being used to foster religion. The challenges are based on bare assertions of illegality, unaccompanied by consequential harms.

128. 426 U.S. 833 (1976) (declaring application of Fair Labor Standards Act to certain local government employees unconstitutional).

129. 383 U.S. 301 (1966) (challenge to 1965 Voting Rights Act).

based on private interests at all. They are overt disputes lodged by one governmental unit against another as a means of vying for power. The Burger Court's separation of powers cases, *Buckley v. Valeo*,¹³⁰ *Immigration and Naturalization Service v. Chadha*,¹³¹ and now *Bowsher v. Synar*,¹³² have added a substantial twist. Litigants relying on private injuries—deportation, reduced pensions, etc.—have been allowed, on the merits, to present arguments over the appropriate separation of powers. In *Chadha*, for example, the plaintiff won because the powers of the President had been usurped.¹³³ The pensioners who challenged the Gramm-Rudman provision in *Bowsher* prevailed, not because the government could not reduce their pensions, but because the process employed to reduce the payments trammelled executive prerogative.¹³⁴ Since the suits were not third-party standing cases, ultimately each plaintiff could claim only the right to a decisionmaking process that reflects an appropriate separation of powers. The claims increasingly parallel arguments that the frame of government is askew,¹³⁵—a jurisdictional base repeatedly rejected in the taxpayer and citizen standing cases.

The Court's article III jurisprudence, then, is distressingly incomplete. No standard, or even method of inquiry, is set forth to determine the judicial cognizability of asserted interests. None of the labels even partially explain the outcomes of many cases. It is easy to conclude that the more one looks at the case or controversy rulings, the less one finds.

III

LIMITING JUDICIAL POWER

As was common with much of the Warren Court's jurisprudence, its jurisdictional decisions moved primarily in one direction: liberalized access. While the Warren Court removed traditional barriers to the exercise of judicial power, it left the task of erecting the proper new boundaries for constitutional courts to its successor. The Burger Court's effort to limit judicial authority, therefore, is understandable. Fearing that a marked expansion of judicial authority would result from the acceptance of a variety of nontraditional suits, the Court attempted to give substantive content to the article III case or controversy requirement. The chief product of this effort has been the distinct and palpable injury standard.¹³⁶

130. 424 U.S. 1 (1976) (per curiam) (challenge to regulation of campaign contributions).

131. 462 U.S. 919 (1983) (resident alien has standing to challenge the constitutionality of congressional veto of executive suspension of deportation).

132. 106 S. Ct. 3181 (1986) (declaring Gramm-Rudman-Hollings Act unconstitutional).

133. 462 U.S. at 947-958.

134. 106 S. Ct. at 3192.

135. See *Baker v. Carr*, 369 U.S. 186, 266-300 (1962) (Frankfurter, J., dissenting).

136. See *supra* text accompanying notes 33-58 (discussion of evolution).

The injury requirement, however, as presently defined by the Court is a poor tool with which to limit judicial power meaningfully. As Part II demonstrates, the Court's opinions have largely evaded the full complexity and depth of the injury determination. Instead, the justices often turn to a language of private rights and obligations that belongs to an earlier day. The modern judicial agenda is hardly limited to cases of concrete injury to private rights. The injury standard thus plows a field that is badly eroded. It is small wonder that the Court has found the going difficult.

The recent embrace of the distinct and palpable harm standard by jurists and commentators does not help to resolve these complexities. Professor Floyd, for example, has characterized the Burger Court's treatment of the injury standard as "healthy" and "more consistent with the limited role" of judicial power.¹³⁷ He sees the cases as excluding plaintiffs who assert "no legitimate claim," no "arguable claim of legal right," and no "personal injury."¹³⁸ I am not sure that the cases stack up that way.¹³⁹ But even if they did, the injury decisions provide little guidance in the determination of what is a "legitimate," "legal," or "personal" interest.

Justice Scalia, on the other hand, has argued that the "law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against the imposition of the majority."¹⁴⁰ The public action cases like *Tennessee Valley Authority v. Hill*¹⁴¹ or *Flast v. Cohen*,¹⁴² however, are difficult to square with that characterization. From the opposite perspective, it is possible to see the rejection of jurisdiction in cases like *Valley Forge* as refusals to enforce minority religious rights against the majority.

Scalia argues as well that strict standing requirements foster separation of powers since such requirements render many issues unreviewable.¹⁴³ If refusing to review cases assures separation of powers,

137. Floyd, *supra* note 14, at 869.

138. *Id.*

139. See *supra* text accompanying notes 118-27.

140. Scalia, *supra* note 15, at 894.

141. 437 U.S. 153 (1978).

142. 392 U.S. 83 (1968).

143. Scalia, *supra* note 15, at 892-97. Justice Scalia's vision of the standing doctrine is, of course, considerably more subtle than the "less is better" characterization suggests. He argues that a tight standing doctrine serves separation of powers goals both as an aspect of judicial function and as a means of excluding issues from the judicial purview. He apparently would have decided *Flast* the other way and stresses that the standing doctrine serves to exclude issues as well as plaintiffs: If "the determination of whether a particular federal expenditure constitutes an establishment of religion cannot be made the business of the courts at the instance of a federal taxpayer, it is difficult to imagine who else could possibly bring it there." *Id.* at 892. For me, however, the mere fact that the establishment clause's enforcement is left to the legislature does not create an appropriate separation of powers. It may be that our scheme of separated powers relies on the judiciary to assure

however, the ideal solution would be for the Court to forego judicial review entirely. Separation of powers demands that the judiciary fulfill its function. The "less is inherently better" model addresses only half of the separation of powers equation.

As the Supreme Court's injury analysis presently stands, the distinct and palpable harm standard may actually increase rather than diminish judicial power. In cases presenting fundamental questions of judicial supervision, the justices typically do little more than label the cause as acceptable or not. Judge Bork has approvingly characterized the standing inquiry as guided by an "idea" of the constitutional limits on the powers of the judiciary that is "more than an intuition but less than a rigorous and explicit theory."¹⁴⁴ But if judges can decide which cases are to be heard on the basis of a bolstered "intuition" rather than obedience to principle, they exercise more power, not less.

Nor, on the other hand, are the arguments for eliminating injury analysis persuasive, though they at least recognize the present embrace of the public litigation model. Professor Tushnet has suggested that standing analysis be abandoned in favor of a "barebones" approach pursuant to which the deciding court would seek to guarantee only an adequate record and adversary presentation of the issues.¹⁴⁵ Professor Albert, recognizing the strong tie between the Burger Court's justiciability analysis and actionability, would collapse the standing determination into the decision on the merits.¹⁴⁶

These formulations overlook standing law's function at the threshold stage of litigation. The doctrine has at least served courts comprehensibly in exploring whether the litigant's harm is actual. Demanding that a plaintiff's claimed injury be real and his own is a desirable component of both standing analysis and article III. More importantly, jurisdictional decisionmaking entails a preliminary determination that the

compliance with the establishment prohibition. It is difficult to see the challenges presented in *Flast* and *Valley Forge* as posing substantial dangers that the Court will interfere with appropriate legislative or bureaucratic prerogative.

Of course, Justice Scalia's view of *Flast* reflects a broader theory that would grant standing only to truly "concrete" and "particularized" injuries that set the litigant "apart from the citizenry at large." *Id.* at 882, 895. That theory, as he at least partially recognizes, would demand a major dismantling of case or controversy jurisprudence. See, e.g., the litany of cases described *supra* at notes 125-33 that fail to meet the distinct and palpable harm standard. Moreover, Justice Scalia would apparently declare unconstitutional broad statutory grants of standing based upon shared or generalized rights. *Id.* at 894-97. That pushes the separation of powers notion in an unusual direction because the vague contours of the case or controversy requirement are used to thwart the will of the United States Congress.

144. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1179 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

145. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1706 (1980).

146. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1143-60 (1977).

plaintiff's interest is one that should be judicially recognized. In the hypothetical described above, Tushnet and Albert would, I assume, grant standing to the burglar, utopian, and lobbyist. The law of article III is, no doubt, troubling. That does not mean that it is useless.

Professor Doernberg would grant access in the public constitutional cases since they represent violations of the Lockean theory of social contract.¹⁴⁷ Even if that is true, however, the universe of Lockean violations is not necessarily coextensive with that of American judicial power. In Doernberg's sense, every allegation of illegality, statutory as well as constitutional, could be said to threaten the social compact. Every claimed transgression is potentially ultra vires. Yet a judiciary that reviews every claim of government illegality may truly threaten the separation of powers.

The heart of the problem is that, because of the Court's conclusory treatment of the injury requirement, we know little about why some public actions are entertained and others avoided. We do know, however, that distinct and palpable harm is not the distinguishing characteristic. Nor do the cases explain what is.¹⁴⁸

The answer, if indeed there is one, lies in the concept of judicially cognizable interests. Litigants can offer, no doubt, an endless array of essentially public claims. It is hardly difficult to imagine citizen suits brought to challenge the Nixon pardon, the naming of an ambassador to the Vatican, the processes by which congressional salaries are determined, the refusal of the President to depict an accurate state of the Union, the payment of government obligations during budget crises from the Social Security Trust Fund, the origination of revenue bills in the Senate rather than the House, the use of religious symbols in the Supreme Court building, or any other asserted government illegality.

147. Doernberg, "We the People": John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52 (1985). Perhaps a more accurate representation of standing law is reflected in Burnham, *supra* note 14. Professor Burnham, following the work of Joseph Vining, recognizes many of the complexities of the injury determination. Accordingly, he characterizes the injury calculus as a common law process of adjudication, turning on the "public" nature of the values being asserted as the basis for jurisdiction.

Unfortunately, this leads Burnham to conclude that cases like *Richardson* and *Schlesinger* are appropriately based on the justices' lack of "sympathy with and understanding of the loss[es] occasioned by the allegedly unconstitutional conduct." *Id.* at 96 (quoting J. VINING, *supra* note 27, at 177). As I have explained, *supra* at text accompanying notes 121-23, given the constitutional pedigree of the interests asserted in *Richardson* and *Schlesinger*, a judicial determination that the interests are not cognizable because they are insufficiently "capped" is clearly illegitimate. Perhaps the interests lacked cognizability as the result of deference due to other branches of government. They are, however, undoubtedly "capped" public values in the Vining/Burnham sense.

148. Evidently there is a line that separates *Baker v. Carr*, 369 U.S. 186 (1962), *Flast v. Cohen*, 392 U.S. 83 (1968), *Norwood v. Harrison*, 413 U.S. 455 (1973), *Heckler v. Mathews*, 465 U.S. 728 (1984), and *Aguilar v. Felton*, 105 S. Ct. 3232 (1985) from *Valley Forge*, *Schlesinger*, *Richardson*, and *Allen v. Wright*, 468 U.S. 737 (1984).

Even beyond this, it is possible to envision plaintiffs asserting public policy preferences in challenges to legislative and executive decisionmaking. If all such claims were judicially cognizable, the lines between the legislative, executive, and judicial functions, now fuzzy, would be lost completely. But it is also true that the Supreme Court has, time and time again, deemed it necessary to the judicial function to entertain essentially public claims.

It is helpful, therefore, in exploring judicially cognizable interests to address openly the factors—in terms of the appropriate judicial role—that separate the wheat from the chaff. Cognizability analysis, as the hypothetical discussed above demonstrates, must incorporate a substantial evaluation of the public acceptance of the interest in question. Cognizable interests must have been “capped” as public values. Moreover, in the “generalized grievance” actions challenging noncompliance with the Constitution, cognizability analysis must focus on the propriety of *judicial* recognition of the proffered claims. There are strong reasons that the interest in voting strength recognized in *Baker v. Carr*¹⁴⁹ is one appropriate for the courts. The role of the judiciary, especially as explained by participational theorists like Dean Ely, includes the mandate to referee the political process and to unplug the channels of political change.¹⁵⁰ *Flast v. Cohen*,¹⁵¹ *Lynch v. Donnelly*,¹⁵² and *Aguilar v. Felton*¹⁵³ might be seen in a similar light. If the first amendment was designed to remove speech and religion concerns from the “vicissitudes of political controversy,”¹⁵⁴ much of the argument for judicial recognition of free expression and religious interests is successfully borne. Finally, cases like *Heckler v. Mathews*,¹⁵⁵ *Norwood v. Harrison*,¹⁵⁶ and *Regents of the University of California v. Bakke*,¹⁵⁷ even if based upon intangible claims, implicate the majority’s responsibility to govern impartially. As such, it would be appropriate, consistent with modern visions of the judicial role, to grant access to these claims.

It seems unlikely that similar arguments concerning the appropriateness of judicial cognizability could be made in many of the real and hypothetical public actions listed above. The issues, however, are hardly simple ones. Many of the structural provisions of the Constitution implicate the appropriate functioning of the democratic process, and thus

149. 369 U.S. 186 (1962).

150. J. ELY, DEMOCRACY AND DISTRUST 73-134 (1980).

151. 392 U.S. 83 (1968).

152. 465 U.S. 685 (1984).

153. 105 S. Ct. 3232 (1985).

154. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

155. 465 U.S. 728 (1984).

156. 413 U.S. 455 (1973).

157. 438 U.S. 265 (1978).

may be of particular import to the courts. It is certainly easy to see *Richardson* as a candidate for judicial cognizability. One would guess that the accounts clause was designed to promote democratic accountability, assuring that the electorate has sufficient information to cast its franchise. There may be prudential reasons to avoid some such cases,¹⁵⁸ but the conclusion that the interest is not judicially cognizable under article III seems misplaced.

Yet the arena of public, generalized, intangible constitutional claims is a troubling one for the courts under any calculus. If all such cases are accepted, the judiciary embraces a dramatically larger segment of the universe of government decisionmaking as its domain. If, on the other hand, the courts eschew all generalized claims, they ignore both their own handiwork and the powerful and beneficial role that public law plays in our present jurisprudence. It might be best to assume, therefore, that generalized constitutional claims are not the appropriate subject of judicial recognition unless they trigger a special need for intervention. Concern for the limited role of the judiciary in our system of government might justify such a presumption against jurisdiction.

Perhaps in accordance with that presumption, then, cases like *Schlesinger* and *Ex parte Levitt*¹⁵⁹ could be seen as correct in result, if not in theory. Those cases implicated no interest expressly reserved to the citizenry. Nor did the practices challenged render the democratic process substantially askew. Challenges to the procedures by which revenue bills originate, congressional salaries are determined or ex-presidents are pardoned could, for similar reasons, be treated to a similar fate. Under this line of reasoning, the congressional standing cases¹⁶⁰ should perhaps also be rejected for lack of a judicially cognizable interest. Members of Congress asserting the interests of the Senate or the House of

158. I have pointed to some such prudential barriers in previous essays. See, e.g., Nichol, *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C.L. REV. 798, 846-47 (1983).

159. 302 U.S. 633 (1937) (per curiam) (interest of a citizen and member of the bar is insufficient to challenge appointment and confirmation of a U.S. Supreme Court justice).

Certainly *Schlesinger* is a difficult case. The incompatibility clause is a structural provision of the Constitution which implicates the functioning of the democratic process. To the extent that the clause is designed to assure that legislators representing citizens are not unduly influenced by the executive branch, *Schlesinger* becomes similar to the reapportionment cases. The incompatibility clause, however, is primarily a separation of powers provision designed to prohibit the intermingling of the executive and legislative branches. If that is the case, *Schlesinger* implicated no strong interest reserved to the citizenry. *Richardson*, on the other hand, presented stronger arguments for judicial cognizability. The "sunshine" provided by the accounts clause seems closely tied to democratic decisionmaking. Of course, the main thrust of my argument in this Article is not that cases such as *Schlesinger* and *Richardson* are either right or wrong. The Supreme Court should explain why asserted interests are accepted or rejected rather than merely characterizing the injury as generalized or hypothetical, and therefore insufficiently real.

160. *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974); *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 779 (1985).

Representatives typically base their claims on alleged diminutions of governmental power. The pocket veto case recently before the Supreme Court,¹⁶¹ for example, implicated no personal interests. Rather, the litigants claimed harm to the "lawmaking power of the two houses of Congress."¹⁶² But if one governmental entity's claim that another has limited its power is deemed a cognizable interest, it markedly augments the scope of judicial authority. "Congressional" standing quickly becomes "governmental standing," with analogous claims presented by members of the executive and judicial branches, or by local officials protesting federal intrusion.¹⁶³ Nor does there appear to be any strong reason to afford judicial access. A determined Congress, in the usual course, can protect its own interests.¹⁶⁴ The Court should not needlessly travel such dangerous roads.

The line between judicial cognizability and legislative or executive prerogative is not an easily constructed one. It is, however, a constructed one. No outside, objective, and nonmanipulable standard determines the demarcation. When measured alone, directness of injury, concreteness of injury, and substantiality of injury all miss the mark. Analyzing those interests that support jurisdiction completes the calculus. Any true examination of the judicial cognizability of interests must also consider the function of the judiciary to produce acceptable results.

Difficult as the process may be, substantial benefits will result from incorporating cognizability into the injury determination. Cognizability analysis, of course, does take place now. It is merely *sub rosa*. One result of this process is that the actuality side of the injury determination is rendered less comprehensible. Standing doctrine claims to limit judicial attention to litigation based on distinct and palpable injuries. A look at the cases, however, leads to the inescapable conclusion that the distinct

161. *Barnes v. Kline*, 759 F.2d 21, 26 (1985), *cert. granted sub nom.*, *Burke v. Barnes*, 106 S. Ct. 1258 (1986), *dismissed as moot*, 55 U.S.L.W. 4103 (Jan. 14, 1987).

162. *Id.*

163. This, of course, has already transpired, ironically at the hands of Chief Justice Rehnquist. See *National League of Cities v. Usery*, 426 U.S. 833 (1976) (association of municipalities and states challenged constitutionality of Fair Labor Standards Act amendments of 1974); see also *Oregon v. Mitchell*, 400 U.S. 112 (1970) (states challenged constitutionality of Voting Rights Act amendments of 1970).

164. In the pocket veto case, for example, Congress could have reenacted the statute in question. See *Barnes*, 759 F.2d at 69 (Bork, J. dissenting). One can envision, however, circumstances in which the legislative and executive branches might reach a true impasse. In a dispute over the war power, for example, a determined Congress might well take a series of actions to express its dissatisfaction with executive adventurism. If Congress passed a resolution under the War Powers Act and authorized its leaders to challenge the legality of the military action, the "necessity" for judicial intervention would be increased. It hardly makes sense to force Congress to endanger the lives of troops by reducing funding or to move to impeach the President in order to resolve the constitutional crisis. Only in the event of such an impasse, however, should congressional standing be recognized.

and palpable injury standard is inconsistently applied.¹⁶⁵ Separating cognizability analysis from measuring the actuality of the injury claim may help to save some content for the latter.

More importantly perhaps, under present standing guidelines inferior federal court judges are left completely without guidance on the cognizability issue. The Supreme Court has given no hint of the underlying process that leads it to conclude that abrogations of one's interest in a full powered vote, truthful information about rental housing, and a pristine environment are judicially cognizable, while similar intangible interests in being free from the stigma of government endorsement of segregation or the full pursuit of "marital happiness" are not. Given this record, it is difficult to understand what is expected of a federal district judge when presented with an action based upon "injury" to an intangible interest not previously either accepted or rejected by the Supreme Court. If cognizability analysis is overt, the federal courts will at least begin to develop a jurisprudence to instruct future decisionmaking, creating and refining a language to give structure and precedential value to cognizability concerns. The quality of judicial decisionmaking—measured in terms of consistency, honesty, and predictability—could only be improved.

Of course, the goal most directly served by incorporating cognizability analysis is judicial accountability. It is no small luxury for the Court to be able to announce, without explanation, that it will hear certain sorts of shared and intangible claims while the Constitution demands that it reject others. A study of the standing decisions of the past three decades indicates, at the least, that the Court will hear some such cases. I have argued that, given the complex nature of the injury determination, it is essential that some process of exclusion and inclusion be employed. If it is employed overtly, the reasons for choosing to entertain certain sorts of cases while closing the judicial doors to others can be weighed and criticized by the Court's constituents. The requirement that courts explain their decisions checks the exercise of judicial power.

Finally, an additional collateral benefit of focusing on cognizability would be the development of a more satisfactory explanation of the Court's statutory standing cases. At present, the judicial approach is hopelessly circular. The distinct and palpable injury standard is said to apply to statutory standing claims. Yet harm to any interest created by statute constitutes distinct and palpable injury. Thus, the Court labels a variety of shared and intangible injuries distinct and palpable. A statutory interest, however, is easily seen as judicially cognizable. The process of segregating those interests that are appropriate for judicial cognizance

165. See *supra* text accompanying notes 118-27.

from those that are not may be difficult to encapsulate. But if Congress has chosen to protect and foster a public value, a court's path should be clear. Legislative enactment reflects shared acceptance of the interest and typically alleviates any concern over separation of powers. Any interest created by statute, therefore, is judicially cognizable. If the interest is harmed, article III injury exists.

There are drawbacks to making the cognizability of interests an explicit aspect of article III decisionmaking. First, the scope of the inquiry extends beyond the traditional borders of standing analysis. If a court attempts to explain why harm to one's interest in a full powered vote is injury while the harm to one's interest in the accurate portrayal of the state of the Union is not, it must consider the appropriate role of the judiciary in a multi-faceted governmental structure. Determining which sorts of interests are judicially acceptable bases of action, therefore, necessarily involves also analyzing separation of powers and federalism issues. Accordingly, the measurement of constitutional injury must incorporate these complexities.

As one who has spent a good deal of energy claiming that the standing determination should be kept distinct from the demands of separation of powers and federalism,¹⁶⁶ I find the fusion of these issues disconcerting. The relationship between article III injury and other separation of powers concerns has been the most confusing and destructive aspect of the modern case or controversy decisions. Nonetheless, consideration of the complete parameters of the injury inquiry requires overt examination of the appropriate role of the judiciary in our system of government.

Consideration of the judiciary's role does not mean, however, that separation of powers and federalism analyses should merely skew the standing decision—the methodology most often preferred by the Supreme Court. The causation and redressability prongs of the article III standing test—frequently manipulated in the cases to meet separation of powers interests¹⁶⁷—remain logically distinct from separation and federalism concerns.¹⁶⁸ The Court's conclusion in *Allen v. Wright*¹⁶⁹ that a challenge to IRS enforcement procedures did not meet the causation standard because of unspecified separation of powers worries makes little

166. See Nichol, *supra* note 22; Nichol, *supra* note 13. I have argued that the standing guidelines announced by the Court—*injury*, *causation*, and *redressability*—do not implicate separation of powers issues. That, in substance, still seems to me to be the case. It is certainly true that the causation and redressability hurdles are analytically distinct from separation of powers analysis. Nichol, *supra* note 22, at 646-50. But as I have tried to show here, the determination of which interests, if harmed, are judicially cognizable is considerably more complex. In analyzing which sorts of intangible interests trigger article III power, consideration of the appropriate powers of other institutions of government does seem justified.

167. See Nichol, *supra* note 22, at 655-57.

168. See *id.* at 646-50.

169. 468 U.S. 737 (1984).

sense.¹⁷⁰ Similarly, in *Linda R.S. v. Richard D.*,¹⁷¹ the Court's rigid treatment of redressability in the name of federalism only makes the remedy requirement less comprehensible.¹⁷²

Nor should the Court use separation of powers as a conclusory label—or more accurately as a bugaboo—as it has done in the past. *Valley Forge*, for example, literally reeks of worry over the appropriate separation of powers.¹⁷³ Such worry is not accompanied, however, by a hint of the actual dangers such a suit would pose to legitimate bureaucratic prerogative. *City of Los Angeles v. Lyons*¹⁷⁴ has the same failings. The Court speaks extensively of federalism sensitivity.¹⁷⁵ It fails to explain, however, why the dangers posed by an injunction limiting police use of deadly force are more debilitating than a bevy of other acceptable federal restraints.¹⁷⁶ Such decisions reflect Justice Scalia's view that diminished judicial review necessarily fosters separation of powers.¹⁷⁷ The Court employs the concept only as a label, not unlike its frequent conclusions that an injury is "intangible." The disappointed plaintiff is literally told no more than: "We will not hear your case."

These concerns aside, however, making cognizability analysis an explicit and distinct step in article III standing scrutiny will mandate the marriage of separation of powers and federalism considerations to the injury determination in some instances. The bulk of the cases presented for consideration in the federal courts, of course, involve simple injury issues. Plaintiffs seek money, restoration of reputation, liberty, freedom from unfair competition, reinstatement to employment, or any of the hundreds of interests long recognized by the judiciary. Still, plaintiffs frequently assert intangible, legally based, and widely shared injuries in federal tribunals. If the harm or threat of harm to the claimed interest is actual, injury analysis demands that the allegations be scrutinized for judicial cognizability. And cognizability is finally answerable only by deciding which sorts of tasks are appropriate for federal courts.

That brings me to the second, and far more substantial, drawback to incorporating cognizability into case or controversy jurisprudence. Recognizing the complete character of the injury determination means that the standard cannot perform the straightforward and laudable task that

170. Nichol, *supra* note 22, at 645-47.

171. 410 U.S. 614 (1973) (appellant, beneficiary of child support order, had no standing to challenge discriminatory enforcement of criminal child support statute).

172. See Nichol, *supra* note 20, at 206-08.

173. The Court stated in *Valley Forge* that to recognize standing in the case would alter "relationships between the co-equal arms of the National Government." 454 U.S. 464, 473 (1982).

174. 461 U.S. 95 (1983).

175. *Id.* at 105-12.

176. See Nichol, *supra* note 13, at 99-101.

177. See *supra* text accompanying notes 140-43.

the Supreme Court has assigned to it. It has never been simple to ascertain what should trigger the federal judicial power. For nearly two centuries, federal courts found the existence of an article III case if either a statute gave authority to sue or the common law recognized an analogous claim. The common law system became, not unreasonably, the measure for the case determination. But the system of constitutional review could not forever be limited to its common law origins. Therefore, the Supreme Court turned to the injury standard, hoping to bring jurisdictional analysis into line with a rapidly developing system of constitutional oversight and to avoid the circularity and premature judgment of the legal interest test.

The Court thought that the injury-in-fact standard could provide a distinct trigger to federal jurisdiction, dependent neither on manipulable legal standards nor judicial ideology. Of course, there would be close cases, but as a general matter, litigants are either harmed at the hands of the government or they are not. Perhaps if the Court had limited the scope of article III injury to economic or physical harm, such hopes for the standard might have been realized. But environmental and religious claims brought injury to intangible and shared interests within the judicial purview. Statutory and constitutional actions based on injury to interests such as interracial association and vote dilution were not only abstract, but examples of injury rooted in law rather than in fact.

With such substantially broadened judicial horizons, talk of injury alone is no longer meaningful. Injury does not exist in a vacuum. A court may appropriately exercise its authority on the basis of an alleged diminution of electoral strength. A judge may also refuse to entertain an action based on a citizen's interest in the constitutional use of the pardon power. But that is hardly because one is a distinct and palpable injury and the other is not. Eventually, therefore, article III jurisprudence must develop standards that openly address the distinctions between the acceptable and the illegitimate. In the realm of common and abstract values, analysis of the interest's cognizability becomes a complex venture. It entails considering the role of the judiciary vis-a-vis other relevant government actors. These problems are not insurmountable. They do, however, prevent the injury standard from being realistically characterized as an intuitive, factual determination independent of judicial perspective or ideology.

The Court designed the injury standard as a free standing boundary to the exercise of federal judicial power. That boundary, if it ever existed, gradually disintegrated with the acceptance of intangible, shared, and legally based interests. The article III standard that will be erected in its stead must address considerably bolder issues. Jurisdictional determinations may well turn, for example, on the centrality of claims to the

functioning of the democratic process or the necessity for constitutional supervision of particular government actions. That means, of course, that the federal courts will decide to hear some sorts of cases because they believe it appropriate for them to do so. No independent boundary limits the federal judicial power. But then, it never has.