Injury for Standing Purposes When Constitutional Rights are Violated: Common Law Public Value Adjudication at Work

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Introduction

For the past ten years, Article III standing in the federal courts has required the litigant to show that he or she has suffered or is threatened with "distinct and palpable" injury, that the respondent's actions caused the injury, and that the relief requested will redress the injury.[1] As these requirements suggest, the keystone of standing is injury. Without injury, there is no need to proceed with the analysis. Furthermore, the definition of injury radically affects application of the causation and redressability requirements.[2]

Injury analysis begins with the identification of the litigant's interests, the invasion or impairment of which results in cognizable injury.[3]

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1. *See generally* 13 C. WRIGHT, A. MILLER, AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3531.4-3531.6 (2d ed. 1984). The existence of three separate and distinct standing requirements of injury, causation, and redressability has not always been clear from the Court's summary statements about standing. The Court has sometimes described causation and redressability as the same thing. *See, e.g.,* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 74 (1978) has sometimes mentioned only redressability in summarizing the requirements, *id.* at 79, and Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); has sometimes mentioned only causation in summarizing, Gladstone Realtors, 441 U.S. at 99; and has sometimes spoken as if causation and redressability were two separate requirements. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) and Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982). In recent cases, however, there has been a greater tendency to distill out three distinct requirements, *see, e.g.,* Heckler v. Mathews, 465 U.S. 728, 737-40 (1984); Allen v. Wright, 104 S. Ct. 3315, 3325 (1984).

2. *See infra* text accompanying notes 93-113. *See also* Nichol, *Rethinking Standing,* 72 CAL. L. REV. 68, 79-82 (1984).

3. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 n.22 (1976) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)); Sierra Club v. Morton, 405 U.S. 727, 734 (1972). *See also* C. WRIGHT, A. MILLER AND E. COOPER, *supra* note 1, at § 3531.4;

The determination of whether the litigant has suffered injury requires an evaluation of whether the impaired interest deserves protection against injury.[4] Presently, there are two approved sources of a litigant's legally cognizable interests: the courts and Congress.

The courts' contribution is embodied in what I shall call the "common law public value interest" model of injury analysis.[5] Professor Vining has described this process as a search for interests shared by society that are imbued with a "public value."[6] Some of these interests are tangible economic ones, but they need not be. Their ultimate source, however, is a perceived social value system rather than a legal one. The "common law" label attaches because it is the courts that determine whether the invasion of a particular interest can be stated in terms of a public value and, hence, whether it constitutes injury.

Congress contributes to the creation of cognizable interests by way of statutes, in accordance with what I shall call a "statutory legal interest" model of injury.[7] Congress has virtually unfettered legislative power to "create legal rights, the invasion of which creates standing even though no injury would exist without the statute."[8] Thus, if a litigant alleges that his or her statutory rights are violated, that allegation is sufficient to show injury.

Having legitimized a legal interest model of injury analysis for statutory rights, the Court could easily apply that model to rights secured by the Constitution. However, the Court has steadfastly refused to do so. Of the numerous anomalies in the current law of standing,[9] perhaps the most puzzling is the Court's refusal to acknowledge the Constitution as a proper source of legal rights, the invasion of which constitutes injury for standing purposes. As early as *United States v. Richardson,*[10] and as re-

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Burnham, *Aspirational and Existential Interests of Social Reform Organizations: A New Role for the Ideological Plaintiff,* 20 HARV. C.R.-C.L. L. REV. 153, 185 n.116 (1985).

4. C. WRIGHT, A. MILLER AND E. COOPER *supra* note 1, § 3531.4, at 420; Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450, 468 (1970).

5. *See infra* notes 20-43 and accompanying text.

6. J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 61 (1978).

7. *See infra* notes 44-63 and accompanying text.

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

9. It is difficult to find commentary on standing that is not critical. Recent taxonomies of doctrinal anomalies include K. DAVIS, 4 ADMINISTRATIVE LAW TREATISE §§ 24: 1-:36 (2d ed. 1983); Nichol, *supra* note 2; Nichol, *Abusing Standing: A Comment on Allen v. Wright,* 133 U. PA. L. REV. 635 (1985). *See also* Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action,* 73 CAL. L. REV. 52 (1985); Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons,* 59 N.Y.U. L. REV. 1 (1984). For other critical commentary and citations to the only two articles with positive views, see Nichol, *supra* note 2, at 68 n.3.

10. 418 U.S. 166 (1974).

cently as *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,[11] and *Allen v. Wright*,[12] the Court has emphasized that "an 'injury' consisting solely of an alleged violation of a 'personal constitutional right' " does not alone constitute injury for standing purposes.[13]

However one might criticize this state of affairs, there are indications that the Court does find injury in cases alleging violations of constitutional rights where no other injury is evident. This has occurred in primarily four areas: equal protection,[14] procedural due process,[15] voting rights,[16] and religious freedom.[17]

Some commentators consider these apparent departures from standing doctrine as evidence of the Court's cynical willingness to abandon the injury principle when attracted to the merits of a particular case or category of cases.[18] Others more charitably have acknowledged the departures as *sui generis* or as responses to overriding policy considerations that play a legitimate role in shaping standing results, if not standing doctrine.[19] The problem with these explanations is that the Court has never provided a doctrinal basis for them. The Court shows every indication that it intends to stick to the standing doctrine it has articulated and that it expects the doctrine to be applied in a principled way in deciding standing questions.

This Article's purpose is to set out a principled explanation for the Court's apparently inconsistent behavior. While I believe that the statutory legal interest model of injury analysis cannot be applied to support a finding of injury in constitutional rights cases, I believe that the Court has properly applied and should continue to apply the common law public value model to find intangible noneconomic injury when certain constitutional violations are alleged.

This Article is divided into four parts. Part I discusses the two models of injury analysis previously mentioned. Part II explores the Court's rejection of the legal interest model as applied to constitutional guarantees, and the Court's persistence, despite that rejection, in finding injury in the four constitutional areas mentioned above. In Part III, I

11. 454 U.S. 464 (1982).
12. 104 S. Ct. 3315 (1984).
13. *Valley Forge*, 454 U.S. at 489 n.26. *See infra* notes 73-92A.
14. *See infra* notes 93-110, 142-154 and accompanying text.
15. *See infra* notes 111-112, 155-164 and accompanying text.
16. *See infra* notes 113-119, 167-179 and accompanying text.
17. *See infra* notes 120-134, 180-198 and accompanying text.
18. *See infra* note 134 and accompanying text.
19. *Id.*

argue that a principled basis for the Court finding injury in these and perhaps other constitutional rights violation cases is found in the common law public value model, and I discuss the circumstances under which litigants suffer "personal" injury in such cases. Part IV considers how the Court has failed to recognize that it engages in common law public value adjudication. I suggest how the Court might better approach that task in order to bring clarity and certainty to the standing doctrine and address possible objections to the common law public value adjudication process.

I. The Nature of Injury in Fact and the Two Models of Injury Analysis

A. The Common Law Public Value Interest Model

Injury in fact became part of standing doctrine vocabulary in *Data Processing Service v. Camp.*[20] Before *Camp,* standing could exist only if injury to a "legal interest" was shown.[21] Litigants suing the government were required to show that the interest injured was secured by the common law (or, more accurately, by analogy to the common law when the government was the opposing party), by statute, or by the Constitution.[22] Because this requirement of "legal injury" often bore an unsettling resemblance to the parties' claim on the merits,[23] *Camp* established that the relevant injury was not the invasion of legal interests, but injury *in fact*—that is, an injury that is real and concrete and accepted as such without the need to find that the law protects against it.[24] Thus, in *Camp,* the plaintiffs' demonstration that they were losing business to banks was sufficient to show injury, regardless of whether they could claim a common law, statutory, or constitutional protection from injury

20. 397 U.S. 150 (1970). In *Camp,* data processing businesses challenged a federal banking regulation that would have permitted banks to provide data processing services in competition with plaintiffs' businesses, allegedly in violation of a federal statute prohibiting banks from engaging in any activity other than banking services.

21. *Id.* at 153. *See also infra* notes 22 and 25.

22. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring) ("A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. . . . Or standing may be based on an interest created by the Constitution or a statute.") (citation omitted).

23. *Camp,* 397 U.S. at 153 ("The 'legal interest' test goes to the merits."). *But see* Barlow v. Collins, 397 U.S. 159, 167-78 (1970) (Brennan, J., concurring and dissenting) (criticizing *Camp's* additional requirement that injury be within the "zone of interests" created by the statute sued under as suffering from the same defect).

24. *Camp,* 397 U.S. at 152.

to competitor interests.[25] Though economic injury was involved in *Camp*, the Court nonetheless opined that injury in fact is not limited to economic interests, but may reflect injuries to noneconomic values as well.[26]

The post-*Camp* litigant no longer need show that the interest allegedly injured is legally secured in the sense of being protected by positive law. Instead, it is sufficient that the interest exists in a non-legal value system shared by society.[27] It is the province of courts, and the Supreme Court in particular, to determine which injured interests represent public

25. The principal case relied upon by the court of appeals in *Camp* was Tennessee Elec. Power Co. v. T.V.A., 306 U.S. 118 (1939). According to *T.V.A.*, "legal rights" include property or contract rights, protection from tortious invasion of privileges granted by statute. *Id.* at 137-38. In *T.V.A.*, private power companies sought to enjoin government development of power on due process grounds, asserting that such development competed with their businesses, thereby causing economic loss. *Id.* at 138. The Court rejected this injury as not invading any legal right, because the common law does not protect a person against the consequences of competition. *Id.* at 139. By contrast, in Frost v. Corporation Comm., 278 U.S. 515 (1929), the Court found legal injury to competitor interests where the competitor plaintiff was engaged in a regulated industry. The Court held that injury to competitor interests is legal injury where state law provides that the right to engage in the regulated industry is not a license, but a franchise. *Id.* at 519-20.

26. 397 U.S. at 154. *See infra* text at note 29. This statement has been borne out by subsequent history. *See infra* notes 30-36 and accompanying text.

27. *See* J. VINING, *supra* note 6, at 61. In Professor Vining's terms, courts will acknowledge an invaded interest as a cognizable injury in fact if "the effect complained of can be cast in terms of public values." According to Vining, the courts will recognize invasion of an interest as harm only if the interest is a "trait and motive of behavior widely enough shared to permit us to recognize it as a social role." *Id.* By contrast, invasion of private interests—interests which are idiosyncratic or not widely shared or understood—will not be seen by courts as cognizable injury.

The process by which private values become public values is not entirely clear. With a hypothetical, Vining illustrates the process involved when a litigant presents a novel claim:

> Suppose a landscape predominantly blue—water, distant hills, houses. An authority decides to build a red building. There may be all manner of legal defects in the decision to build: lack of a necessary hearing, excessive height, noncompliance with sewage regulations. An individual comes in to challenge and when asked in what capacity he is appearing, what *his* interests are, replies that he loves scenes that are *entirely* blue, and that the decision to build red would make it more difficult for him to realize his hopes. Would a court proceed to the merits, no matter how much he cried out? I think not. The court would say, "You are not harmed . . . ." There may be every reliable evidence of hurt and willingness to argue the merits with every resource: tears, investment of money in the litigation, a longpast history of interest in all-blue. What prevents the court from seeing harm is the absence, in the court's eyes, of a "you" to be harmed; and what prevents the court from seeing a "you," a person, is the absence of any *public* value to define a class for which the individual voice might speak. To say "I am an all-blue lover, That is my identity, that is who 'I' am, that is 'who' is speaking here before the court" does not have meaning until the love of all-blue (as opposed to a love of a balance of colors including blue) becomes a trait and motive of behavior widely enough shared to permit us to recognize it as a social role.

Id. at 61. For an application of Vining's theory to the interests of social reform organizations as a means of explaining direct standing for such groups, see Burnham, *supra* note 3, at 200-08.

values worthy of redress. This is usually done on a case-by-case basis, though the Court has occasionally set forth in dictum categories of interests which it sees as imbued with a public value. Because the courts are the source of this category of injured interests, finding that certain interests represent "public values" without any immediate textual aids, I label this group "common law" injury in fact.[28]

The development of environmental and aesthetic interests as protected public values provides an example of this process. In *Camp,* the Court recognized in dictum that the interests alleged to be injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values."[29] Two years later, in *Sierra Club v. Morton,*[30] the plaintiff's complaint alleged that the challenged commercial development of national park land "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations."[31] The Court stated that it "[did] not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing" and that the complaint therefore alleged "injury to a cognizable interest."[32] The only support offered for this conclusion was the observation that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society."[33] This common sense conclusionary observation about the public value status of environmental and aesthetic interests has not been improved upon. A year later, in *United States v. SCRAP,*[34] the Court relied upon *Sierra Club* to find in-

28. *See infra* note 64. As indicated *infra* notes 286-300 and accompanying text, common law public value adjudication shares other qualities with other species of common law adjudication.

29. 397 U.S. at 154.

30. 405 U.S. 727 (1972).

31. *Id.* at 734.

32. *Id.* at 39-55. The Court, however, proceeded to deny standing to the Club because, although there was "injury to a cognizable interest," the Club's members were not "among the injured" since the Club had failed to allege that its members used the parkland in question. *Id.* at 735. Rather, the Club relied on its members' interest and expertise in environmental degradation. The Court labeled this relationship to the admittedly cognizable interest in the degradation that might occur a "mere 'interest in the problem.'" *Id.* at 739. *See infra* notes 218-256 and accompanying text (addressing when a particular litigant's relationship to an invaded cognizable interest is sufficiently close that he can be said to be personally affected by an invasion of that interest). The Court's rejection of the Club's allegation that its members, based on their interest and expertise, represented the cognizable interest involved is criticized in J. VINING, *supra* note 6, at 158 n.*. An argument favoring direct standing for the Club based on a different set of interests is developed in Burnham, *supra* note 3, at 194-96, 203-04.

33. 405 U.S. at 734.

34. 412 U.S. 669 (1973). The public value underpinnings of *SCRAP* are discussed in J. VINING, *supra* note 6, at 175.

jury caused by the possibility of more littering in Washington, D.C. parks. Five years later, in *Duke Power Co. v. Carolina Environmental Study Group,*[35] the Court simply relied upon *SCRAP* and *Sierra Club* to find that "the environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed [nuclear] power plants is the type of harmful effect which has been deemed adequate in prior cases to satisfy the 'injury in fact' standard."[36]

It is undoubtedly true that there was a time "when the courts would have called a plaintiff claiming harm because of the acidification of a stream in a nearby national forest an interloper asserting no injury whatsoever."[37] However, that is probably untrue today. Something has clearly changed, and that change has been a social change, not a legal one. No statute is cited to support the *Sierra Club* observation, which forms the only basis for finding the interests cognizable. Moreover, the very language chosen to describe the standard employed in that statement—whether the proffered interests "are important ingredients of the quality of life in our society"[38]—bespeaks a social hierarchy of values, not a legal one.

An example of an interest that was not perceived by the Court as a public value is the interest claimed by the Does in *Roe v. Wade.*[39] The Does were a childless married couple and the wife was not pregnant. The couple claimed Texas' criminal prohibition of abortion caused injury to their "marital happiness."[40] The Court called the alleged injury "speculative," involving a "possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health."[41] Though admitting that "these possibilities might have some real or imagined impact on [the Does'] marital happiness,"[42] no sufficient injury in fact was found. Professor Vining comments:

> [R]unning out this chain of consequences was irrelevant, because the consequence at the end was not the injury the Does had in mind. The Does represented sexual play, for which "marital happiness" was a euphemism, and a desire and capacity for sexual play might be "immediately" and "palpably" affected by a mere possibility that an abortion might be necessary and unavailable,

35. 438 U.S. 59 (1978).
36. *Id.* at 73-74.
37. Nichol, *supra* note 2, at 89.
38. *Sierra Club,* 405 U.S. at 734.
39. 410 U.S. 113 (1973).
40. *Id.* at 128.
41. *Id.*
42. *Id.*

> just as "safety" in a gasoline storage area is "palpably" affected by the mere possibility of fire from lighted cigarets. The court simply did not recognize or was not brought to focus upon sexual play as a [public] value.[43]

B. The Statutory Legal Interest Model

The other category of injured interests comprising the current law of standing has its source in congressional action. As indicated earlier, Congress has the power to create by statute "legal rights the invasion of which creates standing, even though no injury would exist without the statute."[44] The Court has accepted as injury the impairment of interests which exist solely by virtue of these statutory rights. For example, in *Havens Realty v. Coleman,*[45] the defendant realtor misrepresented the availability of apartments to a black housing discrimination tester—a person with no desire to rent an apartment but who contacted realtors solely to gather evidence of violations of housing discrimination laws. The misrepresentation constituted injury, according to the Court, because the realtor's action violated the tester's congressionally secured "legal right to truthful information about available housing."[46]

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43. J. VINING, *supra* note 6, at 175. Deciding questions of injury based upon a social value system rather than a legal one raises important questions of methodology, legitimacy, and relative institutional competence. *See infra* Part IV for a discussion of some of these issues.

44. Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973). *See also* Havens Realty v. Coleman, 455 U.S. 363, 373 (1982); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 n.22 (1976); Warth v. Seldin, 422 U.S. 490, 500 (1975).

45. 455 U.S. 373 (1982).

46. *Id.* at 374 (relying on the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631, particularly § 3604(a)). In *Linda R.S.,* the Court juxtaposed a statement regarding Congress' power to create standing through the creation of new legal rights with the truism that "Congress may not confer jurisdiction on Article III federal courts to render advisory opinions." 410 U.S. at 617 n.3 (quoting Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972)). *See also* Muskrat v. United States, 219 U.S. 346 (1911). In addition, in Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982), plaintiffs argued that they had standing under the Administrative Procedure Act. The Court remarked that "[n]either the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III." *Id.* at 487 n.24.

Clearly, the Court reserves the power to say when Congress has gone too far. The observation, however, that the injury occasioned by invasion of a new right is cognizable "even though no injury would exist without the statute" shows that Congress can go beyond common law public values defined by the Court. *Cf. id.* ("Respondents do not argue that the Administrative Procedure Act creates a legal right 'the invasion of which creates standing.' "). How far Congress may go remains to be seen, since the Court has never held unconstitutional any standing granted by Congress.

Professor Nichol argues that under the legal rights device, "Congress could most likely create rights of the most ethereal sort, for example, rights to honest government, an efficient bureaucracy, or an integrated society, and grant standing to 'any person' to enforce them." Nichol, *supra* note 2, at 84. On the other hand, Nichol argues that *Muskrat,* "if still good law,

The Court's statement that there is injury "even though no injury would exist without the statute,"[47] makes it clear that legal interests established by congressional action exist independently from the *social* value system involved in common law public value injury analysis. The statement indicates that an interest chosen for protection by Congress might not exist in any shared social value system. Using the tester in *Havens Realty* as an example, it is doubtful whether, absent statutory protection, merely being lied to would constitute injury. Personal feelings of outrage over lies are a part of everyday existence with which we must all live, and would not constitute the "distinct and palpable" injury sufficient to support standing.[48]

The legal rights or interests secured by statute not only may be intangible, as demonstrated by the tester's injury in *Havens Realty,* but they may be diffuse and generalized. Under the concept of neighborhood standing, for example, the Fair Housing Act was construed in *Havens Realty* and two other cases[49] as securing an interest in "the social and professional benefits of living in an integrated society"[50] and "an actionable right to be free from the adverse consequences . . . of racially discriminatory practices directed at and immediately harmful to others."[51] Based on this injury, residents of an apartment complex,[52] a village,[53] and a large metropolitan area[54] were granted standing conditional upon their proving the requisite causal link between the alleged injury and the challenged conduct.[55]

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indicates that Congress cannot decide the 'adverseness of the parties prospectively; such determinations must be left to the courts.' " *Id.* at 91-92.

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

48. A strong case could be made that such activity constitutes injury without the assistance of the Fair Housing Act. *See* Watts v. Boyd Properties, 758 F.2d 1482, 1484-86 (11th Cir. 1985) (relying on *Havens Realty* to hold that testers have standing to prosecute a case against racial steerers under 42 U.S.C. § 1982). *Cf.* Evers v. Dwyer, 358 U.S. 202 (1985) (tester bus rider threatened with arrest has standing). *But see infra* notes 56-58 and accompanying text (though neighborhood standing is available for plaintiffs making out a Fair Housing Act claim, it is not available for those suing only under general civil rights statutes).

49. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 111-14 (1979); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209-11 (1972).

50. *Havens Realty,* 455 U.S. at 376 (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. at 91, 111 (1979)).

51. Warth v. Seldin, 422 U.S. 490, 513 (1975) (explaining *Trafficante*).

52. *Trafficante,* 409 U.S. at 209-10.

53. *Gladstone,* 441 U.S. at 112-14.

54. *Havens Realty,* 455 U.S. at 377-78.

55. *Gladstone,* 441 U.S. at 114; *Havens Realty,* 455 U.S. at 377-78. The fact that the interest created by the statute is diffuse or general should be distinguished from general federal statutes that provide nothing more than a cause of action for violations of rights secured by other statutes or the Constitution. *See, e.g.,* 42 U.S.C. § 1983 (1984) (providing a cause of action for violations of "any rights, privileges, or immunities secured by the Constitution and

The Court's handling of the statutory neighborhood standing injury also emphasizes the distinction between common law public value injury analysis and the statutory legal interest analysis. Acceptance of neighborhood injury in the Fair Housing Act cases stands in stark contrast to *Warth v. Seldin.*[56] In *Warth,* the plaintiffs could not bring their case within the scope of the Act and thus were limited to arguing injury in accordance with the common law public value model. Applying that model, the Court in *Warth* found that the alleged interest in the "benefits of living in an integrated community"[57] did not exist apart from the provisions of the Fair Housing Act and thus could not form any basis for injury to the plaintiffs.[58] The Court thus implicitly held that the neighborhood interest does not exist in the common law public value system, though it does exist in the statutory legal system for those to whom the statute applies.

The independence of statutory legal interests from public value interests shows why, despite the clarity of the legal interest model as applied in *Havens Realty,* there are not a great many instances in which the model is explicitly relied upon to find injury. In a case where the interest at stake is sanctioned by both value systems, there is no need to rely on the statutory violation to find injury. For example, had the tester in *Havens Realty* been a bona fide apartment seeker who failed to obtain an apartment because of the realtor's misrepresentations, the loss of that tangible benefit would have supplied the injury for standing purposes. A consideration of whether a violation of a statutory "right to truthful information about housing" constituted injury would have been unnecessary. Although there is no established preference for tangible over

laws" of the United States); Administrative Procedure Act, 5 U.S.C. § 702 (1983) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Such statutes add nothing to the injury analysis, and injury determinations are made either by reference to common law public values or legal interests secured by another statute. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 487 n.24 (1982) (implying that the Administrative Procedure Act does not create a legal right, the invasion of which would create standing).

56. 422 U.S. 490 (1975).

57. *Id.* at 512.

58. *Id.* at 512-13. Plaintiffs in *Warth* sued under 42 U.S.C. §§ 1981, 1982 and 1983. *Id.* at 493. Although the Court's treatment of any section 1983 claim is consistent with the legal interest model, *see supra* note 55, the Court could be criticized for not considering carefully whether sections 1981 and 1982 secured statutory legal rights. *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968) (Sections 1981 and 1982 "prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein."). In addition, in view of the "cross-pollination" that takes place between statutory policy and public values, *see infra* notes 65-72 and accompanying text, arguably the *Warth* Court took a rather narrow view of the impact of the national policies embodied in the Fair Housing Act.

intangible interests,[59] courts are likely to search for the familiar before exploring the unknown. Further, lower courts may be slow to accept the Court's statements that a statutory violation *vel non* may constitute injury, since that implies that part of the "legal injury" test discredited in *Camp* has crept back into standing law.[60]

Consequently, reliance on an alleged violation of a statutory right as injury usually will occur when the plaintiff cannot rely on tangible public value interests. This would arise in two situations: First, when the tangible public value interest cannot be identified, for example the situation represented by the tester in *Havens Realty*; and second, when a tangible interest can be identified, but the injury to that interest is ineligible for consideration as a predicate for standing because it fails to pass the other standing requirements of causation or redressability. An example of the latter category are cases involving procedural rights secured by statutes or regulations. In such cases, the plaintiff may have tangible interests that were adversely affected by the administrative action taken. But if the plaintiff argues that the action was wrong because the agency failed to follow correct procedures, relief compelling the agency to follow correct procedures to redetermine the plaintiff's rights may result in the same agency decision. In effect, although the plaintiff can show he was injured by the agency action, he cannot show that the relief requested would redress that injury.

National Conservative Political Action Committee v. FEC[61] illustrates the problem. The plaintiffs challenged the legality of an FEC advisory opinion permitting the Democratic National Committee to solicit funds to pay off pre-1975 campaign debts, without applying the 1976 limitations on individual contributions. The plaintiffs claimed they had been denied the opportunity to comment on the proposed advisory opinion. In sustaining standing, the District of Columbia Court of Appeals held:

> The Act and the Commission's own regulations provide that interested persons must be given an opportunity to comment upon the Commission's proposed advisory opinions. A plaintiff need only allege that it was denied that opportunity and that, had the opportunity been made available, it would have commented upon the

59. *Cf. Camp,* 397 U.S. at 153-54 (standing may stem from non-economic values as well as economic ones).

60. *See supra* notes 21-25 and accompanying text. *See also* Nichol, *supra* note 2, at 83 (observing that "the analysis of statutorily . . . based standing claims has been hampered by the relatively recent adoption of the injury-in-fact standard as an overriding standing requirement," but arguing that "[n]othing in the historical progression of standing analysis . . . should indicate that the concrete injury [in fact] requirement should limit plaintiffs seeking to protect statutory or constitutionally based interests").

61. 626 F.2d 953 (D.C. Cir. 1980).

> opinion. Because appellants' complaint contains both allegations, they have standing to challenge the advisory opinion on procedural grounds.[62]

Since injury to the procedural right to comment was found, there was no need to determine that any comments the plaintiff would have made would have been likely to affect the content of the advisory opinion.[63]

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62. *Id.* at 957-58.

63. *Id.* Watt v. Energy Action Educ. Found., 454 U.S. 151 (1981), evidences a parallel analysis. *Watt* involved the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., which authorized the Secretary of the Interior to lease tracts of the outer continental shelf (OCS) for mineral development. The 1978 amendments to the Act required the federal government to turn over a fair share of the revenues from OCS leases to the neighboring coastal state whenever the federal government and the state own adjoining portions of an OCS oil and gas pool. The 1978 amendments also required the Secretary to experiment with different lease bidding systems to see which would assure receipt of a fair market value for the lands leased. However, the Secretary did not engage in any such experimentation. California, which owned a number of OCS tracts adjoining federal land, sued to compel experimentation. Congress provided in the 1978 amendments that standing was extended to those having "a valid legal interest." At first, the Court simply stated that California had standing because of its direct financial stake: because California alleged that "the bidding systems currently used . . . are incapable of producing a fair market return, California clearly asserts the kind of 'distinct and palpable injury' . . . that is required for standing." *Id.* at 160-161. The Court, however, retreated from its position in response to the Secretary's argument that the redressability requirement was not satisfied. According to the Secretary, even if California won the suit and experimentation was ordered, there was no assurance that California would benefit immediately (since it could not show that it would be in an experimental area) or in the long run (since it could not show that experimentation would ultimately lead to use of a system different from the existing one). *Id.* at 161-62. To these observations, the Court responded:

> The essence of California's complaint, however, is that the Secretary . . . , by failing to test non-cash-bonus systems, has breached a *statutory obligation* to determine through experiment which bidding system works best. According to California, only by testing non-cash- bonus systems can the Secretary . . . carry out his duty to use the best bidding systems and thereby assure California a fair return for its resources.

Id. (emphasis added). The Court, however, assumed that the Secretary would adopt the system shown by experimentation to be the best one. This did not solve the problem of redressability since the best system could well be the existing one. Consequently, the only injury that an order requiring experimentation would redress is the injury to California's statutorily secured interest in experimentation. *See also* Committee for Full Employment v. Blumenthal, 606 F.2d 1062, 1065 (D.C. Cir. 1979) ("Complainants are injured if this procedural right [to review and investigation of discrimination complaints] is denied them, regardless of whether their complaint is ultimately found meritorious."). *Cf. id.* at 1068 (Tamm, J., concurring and dissenting) ("Standing to sue in federal court must be based on more than allegations of violations of procedural regulations by an agency. In my view, injury to an underlying substantive interest must be alleged.").

C. The Relationship Between Statutory Legal Interests and Common Law Public Value Interests in the Two Models of Injury Analysis

The foregoing analysis presented two distinct models of injury analysis. Nevertheless, as independent and distinct as the models may appear, the categories are not hermetically sealed. In adjudicating public values according to an intuitive social value system, all data is taken into account, including the requirements of positive law. Since statutory policy forms some evidence of society's values, the Court is clearly affected by the overall statutory topography when it engages in common law public value adjudication even though it may not acknowledge that effect.[64] For example, in *Camp* the Court mentioned, and in *Sierra Club v. Morton*[65] and *Duke Power Co. v. Carolina Environmental Study Group*[66] found, injury to environmental and aesthetic interests, observing that "[a]esthetic and environmental well-being, like economic well-being, are

64. *See* P. BATOR, P. MISHKIN, D. SHAPIRO AND H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 770 (2d ed. 1973) ("The demarcation between 'statutory interpretation' or 'constitutional interpretation', on the one hand, and judge-made law on the other, is not a sharp line. Statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advertance to the issue at hand attenuates."). *See also* Monaghan, *The Supreme Court 1974 Term Foreword: Constitutional Common Law,* 89 HARV L. REV. 1, 30-34 (1975). Merrill, *The Common Law Powers of Federal Courts,* 52 U. CHI. L. REV. 1, 3-5 (1985) (" 'Federal common law,' as I use the term, means *any* federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or unconventional sense."(footnote omitted)).

The difficulty of separating the statutory and common law modes of injury analysis is compounded by courts switching between the two virtually in mid-sentence. *See, e.g.,* Watt v. Energy Action Educ. Found., 454 U.S. 151, 161-62 (1981). In addition, perhaps due to an abundance of caution, some courts feel the need to state a procedural injury partly in terms of a risk of impairment to the more tangible public value-sanctioned interests. For example, in City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975), the Court stated:

> The procedural injury implicit in agency failure to prepare an EIS [environmental impact statement]—the creation of a risk that serious environmental impacts will be overlooked—is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have.

Concern about "ripeness" might cause one to find fault with this choice of "threatened" injury. *See* Warth v. Seldin, 422 U.S. 490 (1975) (injury may be "actual or threatened"). *But see Duke Power,* 438 U.S. at 103 (Stevens, J., concurring) ("It is remarkable that such a series of speculations [about possible future nuclear accidents in plants not yet built] is considered sufficient either to make this litigation ripe for decision or to establish appellees' standing."). A less convoluted route to injury in *Coleman,* which avoids ripeness problems, would be to find injury to the plaintiff's congressionally secured legal interest in an EIS.

65. 405 U.S. 727 (1972).

66. 438 U.S. 59 (1978).

important ingredients of the quality of life in our society."[67] It would be difficult to imagine the Court reaching this conclusion prior to the revolution in social awareness of environmental quality that has ensued since 1968. And, although the Court cited no statutes in support of its finding of injury, the National Environmental Policy Act of 1969[68] and other federal statutes[69] comprised a large part of that revolution.

The relationship between legislative action and public values is undoubtedly complex. One variable at work is the relative importance and strength of the legislative statement. The Court has repeatedly emphasized that invasions of congressionally secured rights may constitute injury even though no injury exists apart from the statute.[70] This is a sensible observation, since many congressionally created rights are relatively technical and their counterparts in a social value system often do not exist.[71] For those statutory policy statements that are important enough that public value counterparts to them can be identified, the cause-and-effect relationship between the two is difficult to sort out. In some cases, the statute may be a direct and obvious product of strong social forces. In others, Congress may be well ahead of society in forging new values. Most often the truer description is probably that the relationship is reciprocal, with the statute both reflecting and shaping public values simultaneously. The important point here is that, while the statutory legal interest model focuses solely upon the legal rights created by the statute and injury is automatic whenever a violation of those rights is alleged, statutes may also be relevant, beyond the "mere" legal rights they create, as evidence of broader public values.

Given this framework, it is theoretically possible that a legal right originally created by statute could take on a life of its own in a social value system and continue to be a public value without any further assistance from the statute. Thus, if Congress, in a sudden anti-environmentalist pique, were to repeal all environmental protection statutes enacted to date, the courts might still recognize environmental well-being

67. *Id.* at 74 n.18 (quoting *Sierra Club v. Morton,* 405 U.S. 727, 734 (1972)).

68. 42 U.S.C. §§ 4321-4370 (1982).

69. *See, e.g.,* Clean Air Act of 1970, 42 U.S.C. §§ 7401-7626 (1983); Federal Water Pollution Control Acts of 1972, 33 U.S.C. §§ 1251-1266 (1983).

70. *See supra* note 44.

71. The "technical" label could well be pinned on the procedural requirements involved in Watt v. Energy Action Educ. Found., 454 U.S. 151 (1981) (experimentation with bidding systems); National Conservative Political Action Comm. v. FEC, 626 F.2d 953 (D.C. Cir. 1980) (comment opportunity); and City of Davis v. Coleman, 521 F.2d 61 (9th Cir. 1975) (EIS). *See supra* note 61-63 and accompanying text. *But see* C. WRIGHT, A. MILLER AND E. COOPER, *supra* note 1, at § 3531.4, at 433-34 (quoted *infra* note 164).

as an important ingredient in the quality of life in our society.[72]

II. The Supreme Court's Rejection of a Legal Interest Model as a Basis for Injury When Constitutional Rights are Violated and the Continuing Conundrum of "Constitutional Injury" Cases

At various times individual Justices of the Court and commentators have argued that a legal interest injury model similar to the one applied when violations of statutory rights are involved should be applied to rights secured by constitutional provisions.[73] Under this theory, the Constitution would create legal rights, the invasion of which creates standing, even though no injury would exist without the constitutional provision.[74]

This was Justice Stewart's dissenting position in *United States v. Richardson.*[75] In *Richardson,* the plaintiff contended that a denial of his request for a copy of the CIA budget violated the constitutional provision that " 'a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.' "[76] In Justice Stewart's view, the plaintiff had standing:

> He [plaintiff] contends that the Statement and Account Clause gives him a right to receive the information and burdens the Government with a correlative duty to supply it. Courts of law exist for the resolution of such right-duty disputes. When a party is seeking a judicial determination that a defendant owes him an affirmative duty, it seems clear to me that he has standing to litigate the issue of the existence *vel non* of this duty once he shows that the defendant has declined to honor his claim.[77]

This position was rejected by the majority, which held that the plaintiff's

72. *See Sierra Club,* 405 U.S. at 734. The same cross-pollination phenomenon exists with respect to statutes and the general common law. In Lohmann v. Lohmann, 50 N.J. Super. 37, 171 A.2d 84 (1958), the plaintiff wife sued her husband for an accounting of rents and profits received from their business partnership. A statutory right to such an accounting had existed in the state since 1705, but the statute was repealed in 1951. Nonetheless, the court held that an accounting was available as a matter of common law in view of the tradition and recognition of the right embodied in the statute. *Id.* at 92-93. *See also* State v. Culver, 23 N.J. 495, 129 A.2d 715 (1957) (drawing upon the common law power to correct a criminal sentence after the statutory basis therefor had been repealed).

73. *See infra* notes 75-77 and accompanying text (Justice Stewart), note 85 (Justice Brennan), notes 87-89 and note 134 and accompanying text (commentators).

74. *See supra* note 44 and accompanying text.

75. 418 U.S. 166, 202-07 (1974) (Stewart, J., dissenting).

76. *Id.* at 168 (quoting U.S. CONST. art. I, § 9, cl. 7).

77. *Id.* at 203 (Stewart, J., dissenting).

allegation only amounted to a "generalized grievance"[78] and did not constitute "concrete injury."[79]

In the companion case of *Schlesinger v. Reservists Committee to Stop the War,*[80] the plaintiffs contended that members of Congress holding reserve commissions in the armed forces were in violation of Article I, section 6 of the Constitution. In an analysis similar to that in *Richardson,* the majority in *Reservists* labelled any effect on the plaintiff caused by the alleged violation "an abstract injury."[81] Interestingly, although violation of the right secured by the constitutional provision was insufficient in itself to constitute injury, the majority noted that it had "no doubt that if *Congress* had enacted a *statute* creating such a legal right, the requisite injury for standing would be found in an invasion of that right."[82]

Valley Forge Christian College v. Americans United for Separation of Church and State[83] provides an even more definitive rejection of the application of a legal interest injury model to constitutional rights violations. The Court in *Valley Forge,* relying on *Richardson* and *Reservists,* stated that the "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Article III without draining those requirements of meaning."[84] The Court overturned the Third Circuit's holding that the Establishment Clause creates in every citizen a " 'personal constitutional right' to a government that does not establish religion."[85] To emphasize its rejection of the legal interest model, the *Valley Forge* majority noted:

> Were we to recognize standing premised on an 'injury' consisting solely of an alleged violation of a 'personal constitutional right' to a government that does not establish religion, a principled consis-

78. *Id.* at 176-177.

79. *Id.* at 179-180.

80. 418 U.S. 208 (1974).

81. *Id.* at 217. Justice Stewart, who had dissented in *Richardson,* voted with the majority in *Reservists. See infra* note 250.

82. *Id.* at 224 n.14 (emphasis added).

83. 454 U.S. 464 (1982).

84. *Id.* at 483.

85. *Id.* (quoting Americans United for Separation of Church and State v. HEW, 619 F.2d 252, 265 (3d Cir. 1980)). Justice Brennan argued in dissent:

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

Valley Forge, 454 U.S. at 493 n.5 (Brennan, J., dissenting). The majority responded to this argument charging that it amounted to a "substitution of 'legal interest' . . . for 'standing'." 454 U.S. at 484 n.20.

> tency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws, to choose but two among as many possible examples as there are commands in the Constitution.[86]

The paradox of cognizable injury resulting from invasions of statutory rights, but not from invasions of constitutional rights, has been criticized. Professor Nichol suggests that "the rights reflected in the Constitution merit every bit as much judicial protection as do those contained in the United States Code."[87] Professor Doernberg takes a slightly different tack. He argues, based on the "social compact" theory of Locke, that violations of "collective constitutional rights" should form an appropriate basis for standing[88] and that a slightly modified form of citizen standing should be recognized by the Court.[89] However valid these criticisms, the decisions of the Court clearly reject any application of a legal interest injury model.

Despite the statements in the above cases, the Court persists in finding or assuming standing in cases that do not appear to fit any traditional injury mold. The cases are predominantly in four areas: equal protection, procedural due process, religious freedom, and reapportionment.

A. Equal Protection and Procedural Due Process Cases: The Problem of Ineligible Injury

The equal protection and procedural due process cases are considered together because the injury problem in both is intertwined with the requirement of redressability. In these cases, there is no difficulty identifying tangible injury caused by the allegedly illegal action. However, that injury is ineligible for consideration in the standing calculus because it does not satisfy the redressability requirement. The equal protection and procedural due process cases thus parallel the standing problem in *National Conservation Political Action Committee v. FEC.*[90] In that case,

86. *Id.* at 489 n.26 (citation omitted). *See also* Allen v. Wright, 104 S. Ct. 3315, 3327-28 n.21 (1984).

87. Nichol, *Standing on the Constitution: The Supreme Court and Valley Forge,* 61 N.C. L. REV. 798, 817 (1983) [hereinafter Nichol, *Standing*]. *See supra* note 60. Constitutional rights seem to score lower than rights reflected in the Code of Federal Regulations and "past practices" of an administrative agency. *See* National Conservative Political Action Comm. v. FEC, 626 F.2d 953, 957-58, 959 (D.C. Cir. 1980). *See also* K. DAVIS, *supra* note 9, at § 24:20 (criticizing *Richardson* and *Reservists* on similar grounds).

88. Doernberg, *supra* note 9.

89. Doernberg, *supra* note 9, at 110-17.

90. 626 F.2d 953 (D.C. Cir. 1980).

the injury to the plaintiffs caused by the FEC's advisory opinion allowing the Democratic National Committee to pay compaign debts did not qualify as injury for standing purposes, because plaintiffs could not show that relief providing them with the opportunity to comment on the opinion's legality would change the content of the opinion.[91] The difference, of course, between statutory procedural rights cases and constitutional ones is that in constitutional cases the legal interest model is not available.[92]

Redressability as a standing requirement was conceived in *Linda R.S. v. Richard D.*[93] In *Linda R.S.*, an unwed-mother sought an injunction against the discriminatory application of a Texas statute permitting criminal non-support prosecutions to be brought against fathers of legitimate children but not against fathers of illegitimate children.[94] The Court defined the relevant injury as lack of child support and denied standing. It did so because the plaintiff failed to show that the relief requested would provide her with child support, since the prosecution she sought "would result only in the jailing of the child's father."[95] The prospect that prosecution would result in support payments was described as "at best . . . only speculative."[96]

As one commentator has pointed out, a change in the definition of the injury involved would satisfy the redressability requirement.[97] If the plaintiff redefined her injury as a denial of equal treatment, *that* injury clearly could be redressed by a decree mandating equal consideration of criminal complaints by unwed mothers. The problem with redefining the injury this way is that a denial of equal treatment is injury only if there exists some interest in or right to equal treatment, the most logical source of which would seem to be a personal constitutional right secured by the Equal Protection Clause.[98]

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91. *See supra* text at notes 61-63.

92. *See supra* notes 73-86 and accompanying text.

93. 410 U.S. 614 (1973).

94. *Id.* at 616.

95. *Id.* at 618.

96. *Id.*

97. *See., e.g.,* Nichol, *supra* note 2, at 80.

98. Ironically, the *Linda R.S.* Court, in a footnote, approved the district court's observation that "the proper party to challenge the constitutionality of [the statute] would be a legitimate child's parent who has been prosecuted under the statute. Such a challenge would allege that because the parents of illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children." 410 U.S. at 619 n.5. This statement is ironic because the same redressability problems exist. Barring acceptance of an injury to an interest in equal treatment, the relevant injury to the legitimate father is the burden of undergoing prosecution and any sanctions imposed upon conviction. If the father wins his equal protection claim, however, it will not remove this injury since the state may comply with the Court's holding by simply prosecuting fathers of illegitimate children as well. The prospect

Regents of the University of California v. Bakke[99] presented the same difficulty as *Linda R.S. v. Richard D.,* but the Court in *Bakke* had no problem redefining the injury in the manner suggested above. Bakke sued the University of California claiming that its affirmative action program for medical school admissions violated equal protection. Under the injury in fact requirement, the logical injury would be denial of admission. However, redressability would have required Bakke to show that, but for the illegal affirmative action program, he would have been admitted. The Court surmounted this problem by finding a redressable "injury . . . in the University's decision not to permit Bakke to compete for all 100 places in the class. . . ."[100] Since nonwhite applicants were allowed to compete for all 100 places, the Court, in effect, found injury to an interest in equal treatment.[101]

The most recent case addressing the problem, *Heckler v. Mathews,*[102] explicitly adopting this position, held that "the right to equal

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that the state would simply forego all prosecutions of nonsupporting parents is even less than "speculative." *Id.* at 618.

99. 438 U.S. 265 (1978).

100. *Id.* at 281 n.14.

101. Orr v. Orr, 440 U.S. 268 (1979), presented the same problem as *Linda R.S.* and *Bakke.* Mr. Orr mounted an equal protection challenge to the Alabama alimony statute which allowed alimony awards to wives, but not husbands. Since he made no claim for alimony, his only injury was the alimony award ordered against him by the Alabama courts. However, the Alabama legislature could comply with any equal protection holding of the Supreme Court by simply extending the statutory authorization of alimony to permit awards to husbands as well. Thus, the Court's holding the statute unconstitutional would not redress Mr. Orr's injury, since it would not relieve him of his alimony obligation. *Id.* at 271-72.

Orr is interesting because of the Court's efforts to justify standing on a basis other than an injury to a right of equal treatment. The Court's first response to the problem was to assert that "unless we are to hold that underinclusive statutes can never be challenged because *any* plaintiff's success can theoretically be thwarted, Mr. Orr must be held to have standing here." *Id.* at 272 (emphasis in original). This contradicts the Court's statements elsewhere that "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge,* 454 U.S. at 489 (quoting *Reservists,* 418 U.S. at 227). The *Orr* Court's second response was to assert that "[we] do not deny standing simply because the 'appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win [his] lawsuit.' " *Orr,* 440 U.S. at 273 (quoting Stanton v. Stanton, 421 U.S. 7, 18 (1975)). This is difficult to reconcile with the results in such cases as Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) and Warth v. Seldin, 422 U.S. 490, 505 (1975), in which the Court rejected just such an argument by the plaintiffs.

A third response to the problem, contained in a footnote, was the allegation that a gender-neutral statute passed in response to the equal protection holding would do away with certain collateral gender-related factors traditionally used in determining the amount of alimony awards. This could result in a possible lower alimony award against Mr. Orr on remand. *Id.* at 273 n.3. The Court, however, eschewed any reliance on this allegation since it believed that standing had been demonstrated on the other two bases. In any event, the Court gave short shrift to similar elaborations of possibilities in *Warth, Simon* and *Linda R.S.*

102. 465 U.S. 728 (1984).

treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against."[103] Consequently, "those persons who are personally denied equal treatment solely because of their membership in a disfavored group" suffer injury regardless of whether other tangible interests are affected by the challenged action.[104]

Mathews presented an even more difficult redressability problem than *Linda R.S.* or *Bakke,* because in *Mathews* it was clear that the plaintiff could not benefit in any tangible way from the relief requested. In *Mathews,* plaintiff was denied Social Security benefits because the "pension offset" provision of the Social Security Act required that the amount of his benefits be offset by the pension he was receiving.[105] The pension offset provision did not apply to similarly situated women, and Mathews sued to invalidate the law on equal protection grounds. Congress, however, had included a severability clause in the law which provided for the equal application of the provision to all Social Security applicants, male or female, in the event the offset provision was declared invalid.[106] Defining the relevant injury as a denial of Social Security benefits would fail to present an injury that could be redressed by a decision in Mathews' favor.[107] Consequently, at the government's suggestion,[108] a unanimous Court redefined the injury as an invasion of Mathews' "right to equal treatment."[109] That injury could be redressed:

> by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class. . . . Because the severability clause would forbid only the latter and not the former kind of relief in this case, the injury caused by the unequal treatment allegedly suffered by appellee may 'be redressed by favorable decision' . . . and he therefore has standing to prosecute this action.[110]

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103. *Id.* at 739.

104. *Id.*

105. *Id.* at 735-36.

106. *Id.* at 734.

107. *Id.* at 738.

108. Brief of Appellant at 48-49, Heckler v. Mathews, 465 U.S. 728 (1984). *See also* Miller, *Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of Heckler v. Mathews,* 20 HARV. C.R.-C.L. L. REV. 79, 102-04, 120-30 (1985) (an article by one of Mr. Mathews' counsel labelling the standing holding regarding injury "a dangerous fiction" and arguing that the severability clause was an unconstitutional attempt to divest the federal courts of jurisdiction).

109. 465 U.S. at 738.

110. *Id.* at 738-39. Interestingly, Justice Brennan does not cite *Bakke* in support of this conclusion and cites Orr v. Orr, *see supra* note 101 only as part of a footnote string cite for the proposition that two remedial options are open to a court finding an equal protection violation. *Mathews,* 465 U.S. at 739 n.6.

The Court in *Mathews* observed that, similar to invasions of the right to equal protection, invasions of the right to procedural due process, without more, can result in injury.[111] As with equal protection claims, the problem with injury to procedural due process stems from the redressability requirement. A hypothetical demonstrates this problem. A person applies for but is denied a driver's license. She sues, contending that procedural due process requires that she be given a statement of reasons for the denial and an opportunity for a hearing to contest the denial. If the relevant injury is deprivation of the license itself, then that injury is remedied only by an order giving the plaintiff the license. The more likely remedy, however, is simply an order to provide the plaintiff with a statement of reasons and an opportunity for a hearing. Since it is unknown whether the plaintiff would win the hearing, the remedy may not redress the injury. However, if the injury were redefined as the failure to receive procedural protections, that injury would be redressed by an order mandating a statement of reasons and a hearing.

Although the *Mathews* opinion cites no standing cases in support of the proposition, the Court has decided numerous procedural due process cases without questioning whether there was any injury other than the "injury" occasioned by the nonexistence of the procedural opportunities.[112]

111. *Id.* at 739 ("These decisions [regarding underinclusive equal protection challenges] demonstrate that, *like the right to procedural due process,* . . . the right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against.") (emphasis added).

112. *See, e.g.,* Perry v. Sindermann, 408 U.S. 593 (1978) (college professor's contract was not renewed and he claimed he was entitled to notice of reasons and a hearing under the Due Process Clause). The Court discussed in *Perry* and its companion case, Board of Regents v. Roth, 408 U.S. 564 (1972), what sort of "property interest" was necessary to trigger due process protections and concluded that there must be some "legitimate claim of entitlement." *Roth,* 408 U.S. at 577. The Court observed in *Perry*: "Proof of such a property interest . . . would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603. Thus, unless lack of procedural protections qualifies as injury, the plaintiffs in *Roth* and *Perry* did not have standing.

Procedural due process cases in which the merits were reached and neither redressability nor any other standing problems were mentioned, include Goss v. Lopez, 419 U.S. 565 (1975) (school suspension); Wolff v. McDonnell, 418 U.S. 539 (1974) (prison disciplinary action); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocations); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin of goods); Bell v. Burson, 402 U.S. 535 (1971) (driver's license suspensions); Goldberg v. Kelly, 397 U.S. 254 (1970) (hearing rights upon termination of welfare benefits); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (garnishment). *But cf.* Fuentes v. Shevin, 407 U.S. at 87 ("It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.").

B. Reapportionment and Religious Freedom Cases: The Problem of Non-existent Injury

The reapportionment and religious freedom cases differ from the equal protection and procedural due process cases in that the injury problem is not that the redressability requirement eliminates from consideration more tangible interests; rather, rarely if ever can any tangible interest be identified at all. These cases thus parallel the standing problems of the housing discrimination tester in *Havens Realty* in that it was just such an inability to find any tangible interest in that case that forced the Court to search for and find an injury in the violation of the tester's statutory right to truthful information about housing.[113] That route to standing is foreclosed in the constitutional context, however.[114]

In the voting rights area, *Baker v. Carr*[115] still seems to be good standing law despite the difficulty in finding concrete injury in reapportionment cases—unless violation of a "personal constitutional right" to vote constitutes injury. The Court's observation regarding the source of injury in *Baker* was the "citizen's right to a vote free of arbitrary impairment by state action [—a judicially recognized] right secured by the Constitution,"[116] followed by the conclusion that plaintiffs "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.' "[117] In *Reservists,* where the injury to an asserted constitutional right was described as "abstract," *Baker* was distinguished as a case involving "concrete injury to fundamental voting rights."[118] But, as the Court observed in *Valley Forge*:

> [T]he plaintiffs in [*Reservists* and *Richardson*] plainly asserted a 'personal right' to have the Government act in accordance with their views of the Constitution . . . . Each [constitutional provision] establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution. . . . [W]e know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States.[119]

113. *See supra* text following note 60.

114. *See supra* notes 73-86 and accompanying text.

115. 369 U.S. 186 (1965).

116. *Id.* at 208.

117. *Id.* (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939)).

118. 418 U.S. at 223 n.13.

119. 454 U.S. at 483-84. *See also supra* notes 83-86 and accompanying text. *Cf.* Nichol, *supra* note 87, at 835 ("Both [*Reservists* and *Baker*] represent attempts to alleviate intangible limitations upon the ability of citizens to be heard in the legislature. . . . Is the magnitude of that [diluted vote] injury any greater than the injuries complained of in *Reservists Committee, Richardson,* and a variety of other cases dismissed for lack of 'injury'?").

If any injury appears to fit the legal interest mold, it is the "injury" occasioned by government violation of the Establishment Clause. *Abington School District v. Schempp*[120] and *Engel v. Vitale,* [121] decided before the advent of injury in fact and in the heyday of "legal injury,"[122] established injury based on the fact that the challenged "religious exercises . . . are being conducted in direct violation of the [plaintiffs' Establishment Clause] rights."[123]

The Court, however, disapproved application of a legal interest test in *Valley Forge,* holding that standing could not be shown based upon a "personal constitutional right" secured by the Establishment Clause. The Court distinguished *Schempp* as a case in which the plaintiffs "had standing, not because their complaint rested on the Establishment Clause . . . but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them."[124] Even accepting this revisionist approach to *Schempp,* one might ask why "unwelcome religious exercises" constitute injury to school children while equally if not more "unwelcome" pop quizzes on long division do not. The answer can only lie in the determination that "religious exercises" do not belong in the public schools while "math exercises" do. The obvious source of this determination—the Establishment Clause—is eliminated by the Court, and no other source of the underlying normative judgment is acknowledged. Despite this puzzling state of affairs, the Court continues to decide *Schempp*-type Establishment Clause cases on the merits without even a hint that cognizable injury may be lacking.[125]

Another strange phenomenon in the religious freedom area is that the *Valley Forge* opinion makes it clear that federal taxpayer standing

120. 374 U.S. 203 (1963) (contesting school district requirement that passages from the Bible be read in public school).

121. 370 U.S. 421 (1962) (contesting recitation of a nondenominational "Regent's prayer").

122. *See supra* notes 21-22 and accompanying text.

123. *Schempp,* 374 U.S. at 224. This injury could be shown regardless of "whether [the challenged practices] operate directly to coerce nonobserving individuals or not." *Engel,* 370 U.S. at 430. *See also* Wallace v. Jaffree, 105 S. Ct. 2479, 2492 n.51 (1985).

124. *Valley Forge,* 454 U.S. at 486 n.22. *But cf. id.* (noting in dictum that *Schempp* was an example of cognizable injury to plaintiffs' "spiritual stake in First Amendment values") (quoting *Camp,* 397 U.S. at 154).

125. A recent example is Wallace v. Jaffree, 105 S. Ct. 2479 (1985), a case involving claims by a parent that a state statute allowing "meditation or voluntary prayer" in the public schools violated the First Amendment. *See also* Lynch v. Donnelly, 465 U.S. 668 (1984) (residents of cities suing to enjoin city's annual Christmas creche), *reh'g. denied* 104 S. Ct. 2376 (1984). For other cases, see C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3531.4, at 427-29.

under *Flast v. Cohen*[126] continues to exist, at least for challenges to congressional actions taken pursuant to the Spending Clause which allegedly violate the Establishment Clause.[127] The continuation of *Flast*-type taxpayer standing was approved despite the Court's statements in *Valley Forge* and its citation with approval to numerous other statements that doubt whether taxpayers suffer any real injury. For example, the Court noted that *Frothingham v. Mellon*[128] established that "[a]ny tangible effect of the challenged statute on the plaintiff's tax burden was 'remote, fluctuating and uncertain.' "[129] And the Court also noted that *Doremus v. Board of Education*[130] established "that the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer."[131] This was because the "interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers

126. 392 U.S. 83 (1968). *Flast* held that a taxpayer has standing to challenge governmental action if he meets two "nexus" requirements. The first nexus between the taxpayer status and the governmental action challenged permits a taxpayer to challenge only congressional action pursuant to the Taxing and Spending Clause. The second nexus between the taxpayer status and the constitutional provision he seeks to enforce requires the taxpayer to demonstrate that the constitutional provision is a specific limitation on the taxing and spending power. *Id.* at 102-03. In *Flast,* the plaintiff challenged, on First Amendment grounds, the federal funding of educational materials for use in religious schools. Since the congressional action was taken pursuant to the Taxing and Spending Clause, the plaintiff satisfied the first nexus. As to the second nexus, the Court concluded that "one of the specific evils feared by those who drafted the Establishment Clause . . . was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103. Consequently, the plaintiff satisfied the second nexus requirement.

127. *Valley Forge* distinguished *Flast* on two rather unsatisfying bases. First, plaintiffs in *Valley Forge* sued to enjoin a HEW decision to transfer a surplus hospital to the Assemblies of God. Therefore, the plaintiffs did not meet the second nexus test of *Flast,* which the Court read as limited to exercises of *congressional,* not executive, power. 454 U.S. at 479. Second, plaintiffs failed the first nexus test of *Flast* because the transfer was made by HEW under the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, rather than the Taxing and Spending Clause. 454 U.S. at 480. Thus, there was no nexus between the taxpayer status and the Taxing and Spending Clause. Both these bases for distinguishing *Flast* are subject to criticism. *See id.* at 510-12 (Brennan, J., dissenting). Nonetheless, it would appear that after *Valley Forge,* federal taxpayer standing is limited to challenging the validity of congressional action taken pursuant to the Spending Clause, which expends public funds, as opposed to transferring surplus property, in aid of religion.

128. 262 U.S. 447 (1923).

129. 454 U.S. at 477 (quoting *Frothingham,* 262 U.S. at 487). The Court noted that *Flast*-type taxpayer standing was a narrow exception to the "*Frothingham* principle." 454 U.S. at 481.

130. 342 U.S. 429 (1952). *Doremus* involved facts similar to *Schempp, Engle,* and *Wallace*—religious exercises in public school classrooms—but standing was not allowed to plaintiffs as state taxpayers. The *Schempp* "spiritual stake" injury was not found either.

131. 454 U.S. at 477.

of the Court over their manner of expenditure."[132] According to the *Valley Forge* Court, in such cases, the "plaintiffs' grievance [is] 'not a direct dollars-and-cents injury but is a religious difference.' "[133]

Without necessarily disapproving of the *Valley Forge* Court's decision not to overrule *Flast,* the Court's recognition of the continued existence of *any* federal taxpayer standing is a bit puzzling in the post-*Camp* era of "distinct and palpable" injury in fact. Whatever governmental action is challenged, even the congressional financial aid to religion falling within the scope of *Flast,* it is apparent that no "dollars-and-cents" injury exists for taxpayers. An increase in one's tax obligation cannot be tied to commencement of the challenged conduct and, even if it could, cessation of that conduct certainly would not mean that one's tax burden would be decreased.[134]

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132. *Id.* at 478 (quoting Doremus v. Board of Educ., 342 U.S. at 429, 433 (1982)).

133. *Id.* (quoting Doremus v. Board of Educ., 342 U.S. 429, 434 (1982)). *See* Nichol, *supra* note 87, at 838: "Since there is little possibility that a successful suit will reduce the plaintiff's tax bill, the only claim a taxpayer can possibly assert is a right that the government spend his money in a legal fashion." *Cf. infra* notes 195-198 and accompanying text.

Municipal taxpayers are treated differently because, unlike the federal taxpayer, whose interest is "shared with millions of others," *Frothingham,* 262 U.S. at 487, the "interest of a taxpayer of a municipality in the application of its monies is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." *Id.* at 486. One might well question whether municipalities are any more likely to refund taxes paid than the federal government. The continued availability of standing for state taxpayers to challenge even in-kind subsidies to religion after *Valley Forge* was recognized recently in Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3221 n.15 (1985).

134. Some commentators have noted the apparent aberrational nature of some of the cases, but their explanations are less than satisfying. Professor Nichol has argued that the Establishment Clause and reapportionment cases, when contrasted with *Richardson, Reservists,* and *Valley Forge,* demonstrate that the Court does not take the injury requirement seriously, but only selectively imposes it to deny review for reasons unrelated to standing. Nichol, *supra* note 87, at 832-36 and Nichol, *Abusing Standing, supra* note 9, at 658-59. *See also* Tushnet, *The New Law of Standing: A Plea for Abandonment,* 62 CORNELL L. REV. 663 (1977) and K. DAVIS, *supra* note 9, § 24:1, at 209 ("The Court tends to manipulate the law of standing in order to produce wanted substantive results, so that the generalizations about standing often collide with other generalizations similarly motivated.").

More charitably, but just as unhelpfully, Wright, Miller and Cooper note that injury to "abstract interests" has been found in the Court's standing decisions involving "interests in the electoral process, [and] various First Amendment values . . . because courts believe that protection of individual constitutional rights is a central part of the role assigned to the judiciary in the separation of powers." C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3531.4, at 426-27. While these observations may be correct, the Court has not indicated that standing requirements may be "trumped" by an overriding need to get to the merits or by extraneous policy considerations. *Cf.* Allen v. Wright, 104 S. Ct. 3315, 3325 (1984) ("[t]he law of Art. III standing is built upon a single basic idea—the idea of separation of powers."). *But cf. infra* notes 264-267 and accompanying text. Any proffered doctrinal explanations have been based upon the legal interest injury analysis, which the Court has explicitly rejected. *See supra* notes 74-89 and accompanying text. Not surprisingly, such "legal injury" theories fail to explain the rationale of the *Richardson* and *Reservists* decisions, except by reference to doctrines outside

III. Application of the Common Law Public Value Model to Violations of Constitutional Rights

Professor Davis has stated that "[t]he cure for manipulation of the law of standing is not abandonment of principle; the cure is a strengthening of the principle and a stronger insistence that it be followed."[135] Concurring in his view and acknowledging that the Court has no intention of altering its standing requirements despite strong criticism, I believe an obligation exists to find a principled explanation for the Court's holdings in the above "constitutional injury" cases that does as little violence as possible to established precedent.[136]

A. Public Value Interests Corresponding to Constitutional Guarantees

As noted in Part II above, *Valley Forge* and other cases clearly reject any notion that the statutory legal interest model can be applied to constitutional violations.[137] Nothing in *Valley Forge* or other cases, however, indicates that the common law public value model is not available. Indeed, the *Valley Forge* opinion implies it is available when it states, immediately after rejecting the "personal constitutional right" theory, that "[i]n reaching this conclusion, we do not retreat from our earlier holdings that standing may be predicated on noneconomic injury."[138]

The common law public value model relies upon finding interests protected by a social value system that exists apart from, but which is related to, the legal value system.[139] It is my position that the Court can and does exercise its power to find social values corresponding with and underlying some of the basic constitutional guarantees, social values of sufficient magnitude and quality to support a finding of injury. Thus, injury exists in the invasion of the interest in the full impact of one's vote,

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standing that the Court did not acknowledge. Thus, the legal theories are not responsive to the Court's disclaimer of a hierarchy of constitutional rights under which the legal force of any given constitutional provision is no greater than that of any other. *See Valley Forge,* 454 U.S. at 484-85.

135. K. DAVIS, *supra* note 9, § 24:6, at 230 (emphasis omitted).

136. Prof. Nichol has apparently at least retreated from, if not surrendered, the battle over making sense of the standing doctrine. In his latest article he comments: "It may well be . . . that the Supreme Court has no desire to make sense of the standing doctrine. As the doctrine presently exists, standing can apparently be either rolled out or ignored in order to serve unstated and unexamined values." Nichol, *Abusing Standing, supra* note 9, at 658. After cataloging the cases denying standing (mainly those brought by minorities, poor persons, and civil libertarians) and those granting standing (mainly cases where the decision upholds government power), he concludes his article with the acid observation that "[o]ne could perhaps be forgiven for confusing standing's agenda with that of the New Right." *Id.* at 659.

137. *See supra* notes 74-86 and accompanying text.

138. 454 U.S. at 486 (citing *SCRAP,* 412 U.S. at 686-88 and *Camp,* 397 U.S. at 153-54).

139. *See supra* notes 20-47, 65-72 and accompanying text.

in avoiding state-sponsored religious exercises, in equal treatment, and in procedurally fair treatment, because each of these interests in a more general sense has become a "trait and motive of behavior widely enough shared to permit us to recognize it as a social role."[140] The Court recognizes the injury because "the effect complained of can be cast in terms of public values,"[141] irrespective of whether the constitutional provisions themselves secure a legally protected right. The legal commands of the relevant constitutional provisions are not irrelevant to the public value determination. Rather, they play the same indirect role that federal statutes do in the public value adjudication process: they are "some evidence" of society's values.

Separating the intuitive public value interests corresponding to a constitutional provision from the legal rights secured by the provision is admittedly a difficult task. Despite this difficulty, a second look at the cases in each of the four constitutional areas previously discussed discloses an effort by the Court to search beyond the legal rights secured by the constitutional provision in question and find corresponding public value interests that are invaded by the challenged government action. In addition, we find further support from other sources for the conclusions reached.

1. Recognized Public Value Interests Corresponding to Constitutional Guarantees

a. The Interest in Equal Treatment

The search for public value interests is evidenced in the many cases in which the Court describes the injury in everyday nonlegal terms. For instance, in *Bakke,* rather than use the legal jargon of the Equal Protection Clause, the Court defined the injury as "the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race."[142] In *Mathews,* the Court used the terms "right to equal treatment" and "discrimination"—not "equal protection."[143] Equally important in *Mathews* was the Court's focus on the real psychological impact that discrimination causes rather than the legal criteria for showing a violation of the Equal Protection Clause:

> [D]iscrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the

140. J. VINING, *supra* note 6, at 61.
141. *Id.*
142. 438 U.S. at 281 n.14.
143. 465 U.S. at 739.

> political community, . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.[144]

The Court's intent in *Mathews* to base injury upon broader concepts of public values rather than legal rights, is revealed by examining the first case cited in support of the above quotation—*Bob Jones University v. United States.*[145] In *Bob Jones University,* the Court addressed the issue of whether the Internal Revenue Service properly interpreted the "established public policy" when it required that private nonprofit educational institutions provide equal treatment on racial grounds in order to qualify as a "charitable" institution for the purpose of receiving tax-deductible contributions from the public.[146] The Court's inquiry was not whether the institution's ban on interracial dating violated anyone's legal rights,[147] but whether it evinced an institutional purpose "so at odds with the common community conscience as to undermine any public benefit that [the institution] might otherwise . . . [confer]."[148] The Court drew upon *Brown v. Board of Education*[149] and numerous other court decisions, congressional enactments, and executive orders to conclude that "racial discrimination in education violates deeply and widely accepted views of elementary justice."[150]

144. *Id.* (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)). Admittedly, the Court's opinion initially refers to the interest as the "right to equal treatment guaranteed by the Constitution." 465 U.S. at 739. Thereafter, however, the opinion speaks more in public value injury terms. Despite the resulting ambiguity, the Court goes to great lengths to avoid the simple solution of stating the interest in legal rights terms. The reason for avoiding that simple solution is that accepting it would run afoul of the *Valley Forge* maxim that violation of a "personal constitutional right" without more cannot provide sufficient injury for standing purposes. *See supra* notes 74-92 and accompanying text. *See also* Allen v. Wright, 104 S. Ct. 3315 (1984). While finding that the plaintiffs in *Allen* were not "personally denied equal treatment" and thus did not suffer injury, the Court observed that "the stigmatizing injury often caused by racial discrimination," is the "sort of non-economic injury [that] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." *Id.* at 3327 (citing *Mathews,* 465 U.S. at 739.)) *See infra* notes 218-256 and accompanying text (discussing the problem of deciding whether or not a particular litigant has been "personally" injured with respect to a public value interest).

145. 461 U.S. 574 (1983).

146. *Id.* at 586.

147. *Cf.* Runyon v. McCrary, 427 U.S. 160 (1976) (42 U.S.C. § 1981 applies to bar racial discrimination in private schools).

148. 461 U.S. at 592.

149. 347 U.S. 483 (1954).

150. 461 U.S. at 592. The Court's use of social science data in *Brown,* 347 U.S. at 494 n.11, suggests another possible source of data for courts to use in their search for evidence of public values. The use of social science studies in *Brown* to support the Court's equal protection decision has been vigorously criticized. *See, e.g.,* Cahn, *Jurisprudence, 1955 Survey of American Law,* 30 N.Y.U. L. REV. 150 (1955). Aside from problems with ethical neutrality or legal irrelevance of social science data when used to give content to judicially fashioned substantive

Although the *Bob Jones University* decision parsed intuitive notions of "elementary justice" as they applied to racial discrimination in education, there is no reason to believe that the denial of equal treatment in any context on any discriminatory ground would not be recognized as injury by the "common community conscience."[151] Indeed, the Court's decision in *Brown* and the civil rights movement that it sparked have served but as models for other minority and disadvantaged groups to press their demands for equality both in and out of court. The result has been unprecedented expansion of the concept of equal treatment beyond racial equality in equal protection cases[152] and a virtual explosion of federal and state statutes prohibiting discrimination on numerous grounds in virtually every public and private undertaking.[153] The progression of society's notions of equality and awareness of the evils of discrimination in all its forms exemplifed by these developments are ample support for the Court's observation in *Mathews* that unequal treatment causes cogni-

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rules of conduct, an additional problem is that the substantive law is normative while social science data presumably is not.

> Concerned with ordering men's conduct in accordance with certain standards, values, and societal goals, the legal system is a prescriptive and normative one dealing with the "ought to be." Much scientific knowledge, on the other hand, is purely descriptive; its "laws" seek not to control or judge the phenomena of the real world, but to describe and explain them in neutral terms.

Korn, *Law, Fact and Science in the Courts,* 66 COLUM. L. REV. 1080, 1093-94 (1966). At least *this* objection to the use of social science data does not apply to its use in the injury adjudication process, because the purpose of the injury adjudication is to reflect what *is* considered injury by society, not what *ought* to be considered injury.

151. 461 U.S. at 592.

152. Some of these cases, grouped by discriminatory characteristic, are: *sex*, Reed v. Reed, 404 U.S. 71 (1971), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), Stanton v. Stanton, 421 U.S. 7 (1975), Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); *alienage*, Graham v. Richardson, 403 U.S. 365 (1971), In re Griffiths, 413 U.S. 717 (1973), Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), Nyquist v. Mauclet 432 U.S. 1 (1977); *illegitimacy*, Gomez v. Perez, 409 U.S. 535 (1973), Mills v. Habluetzel, 456 U.S. 91 (1982), New Jersy Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973), Jimenez v. Weinberger, 417 U.S. 628 (1974); *mental condition*, Schweiker v. Wilson, 450 U.S. 221 (1980), City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). Other discriminatory characteristics have not fared as well but evidence the sensitivity of the era that produced them. *See, e.g., wealth*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); *age*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

153. *See, e.g.,* federal statutes prohibiting discrimination on numerous grounds in employment, 42 U.S.C. §§ 2000(e)-2000(e-17)(1984), housing, 42 U.S.C. §§ 3601-3631(1984); public accommodations, 42 U.S.C. §§ 2000(a)-2000(a-6)(1984), and all activities receiving federal funding, 42 U.S.C. §§ 2000(d)-2000(d-6)(1984). The parallel state laws are too numerous to mention here, but recognition of the widespread availability of state remedies for discrimination is evidenced by the requirement in some federal anti-discrimination statutes that claimants first seek relief from a parallel state agency before pursuing the matter in the federal forum provided. *See, e.g.,* 42 U.S.C. § 2000(e-5)(c)(1984).

zable injury in fact.[154]

b. The Interest in Procedurally Fair Treatment

The Court in *Mathews* observed that the "right to equal treatment" is "like the right to procedural due process"[155] with respect to the noneconomic injury occasioned by its denial. Unfortunately, the *Mathews* Court cited no standing cases to support the statement and research discloses no cases in which injury to an interest in procedurally fair treatment provided the basis for standing. In support of its conclusion, however, the *Mathews* opinion cited *Carey v. Piphus,*[156] a case involving claims for money damages for an unconstitutional suspension from public school. Though the relevance of a constitutional tort action to standing injury is not immediately apparent, the parallel becomes clear upon an examination of *Carey.*

In *Carey,* the plaintiffs, suspended from school without the required procedural due process protections,[157] had their suit dismissed for lack of proof of any injuries resulting from the admittedly illegal suspensions.[158] The Court was called upon to determine whether, in the absence of proof of punitive or compensatory damages, an action for violation of the procedural due process right to a hearing could be sustained.[159] The Court held that it could, since "[e]ven if [the plaintiffs'] suspensions were justi-

154. It is not clear whether injury to the interest in equal treatment is limited to circumstances in which the alleged discrimination is along traditionally "suspect" or "quasi suspect" lines or whether it would apply to support a finding of injury in cases in which the so-called "rational basis" equal protection standard is applied. The broader reading of the scope of the injury is obliquely suggested by a cryptic footnote in Allen v. Wright, 104 S. Ct. 3315 (1984). As pointed out *supra* note 144, *Allen* recognized the possibility of injury to the interest in equal treatment, but rejected the *Allen* plaintiffs' claim that they suffered injury by reason of the IRS's overly lax enforcement of the requirement that private schools claiming charitable tax exemption status have nondiscriminatory admission policies. The Court noted:

> We assume, *arguendo,* that the asserted stigmatic injury may be caused by the Government's grant of tax exemptions to racially discriminatory schools even if the Government is granting those exemptions without knowing or believing that the schools in fact discriminate. That is, we assume, without deciding, that the challenged Government tax exemptions are the equivalent of Government discrimination.

Id. at 3326 n.20. The aspect of all unequal treatment that causes its victims to have the psychological reactions described by the Court in *Mathews* is the conviction that they are treated differently than other people who, from all relevant appearances, are in the same position. Thus, it would seem that the injury caused by "rational basis" unequal treament should be treated the same as "suspect" classification unequal treatment.

155. Mathews, 465 U.S. at 739. *See supra* note 111 for full quotation.

156. 435 U.S. 247 (1978).

157. *See* Goss v. Lopez, 419 U.S. 565 (1975) (students facing short-term suspension are entitled to due process safeguards of notice and hearing).

158. *Carey,* 435 U.S. at 248-52.

159. *Id.* at 266.

fied, and even if they did not suffer any other actual injury, the fact remains that [they] were deprived of their right to procedural due process" and were thus entitled to nominal damages.[160]

To evidence the "importance to organized society" of an "absolute" right to procedural fairness, the Court in *Carey* cited the concurring opinion of Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath,*[161]—an opinion emphasizing the prominent place of procedural protections in our shared collective sense of fairness. Justice Frankfurter observed:

> [V]alidity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[162]

Justice Frankfurter also noted that "[t]he high social and moral values inherent in the procedural safeguard of a fair hearing are attested by the narrowness and rarity of the instances when we have sustained executive action even though it did not observe the customary standards of procedural fairness."[163]

Although *Carey* is not a standing case, it stands for the proposition for which it was really cited in *Mathews*—that the interest in procedurally fair treatment is a public value, and invasion of that interest constitutes injury regardless of the ultimate outcome of the underlying dispute and regardless of what specific protections the Due Process Clause requires in the particular case.[164]

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160. *Id.* The portion of the *Carey* opinion to which the *Mathews* Court refers includes this language:

> Common law courts traditionally have indicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivation of rights.
>
> Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of the claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, . . . we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

435 U.S. at 266.

161. 341 U.S. 123, 149-74 (1951) (Frankfurter, J., concurring).

162. *Id.* at 171-72 (Frankfurter, J., concurring).

163. *Id.* at 167.

164. Professor Tribe has commented:

C. The Interest in the Effectiveness of One's Vote

An analysis of cases involving the religion clauses and the right to vote reveals less evidence of the Court's search for social values corresponding to those constitutional guarantees than in the equal treatment and procedural due process cases. This is largely because the existence of a litigant's personal stake in these cases has been assumed for so long. That infringement of a person's right to vote results in injury has not been seriously questioned since 1962.[165] Perhaps the longstanding assumption of injury in a category of cases is the best evidence that the invaded interests constitute public values. For example, the Court has always viewed economic loss as the paradigm injury in fact. Yet, the Court has never seriously discussed whether the interest in pursuit of economic well-being reflects a public value. It is a public value simply because we know it is, despite the argument that there is certainly nothing special about it when compared to other values.[166] If an argument

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> [T]he right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person,* rather than a *thing,* is at least to be consulted about what is done with one.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 503 (1978). *See also* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value,* 44 U. CHI. L. REV. 28, 46-57 (1976). Professor Michelman has commented in the same vein:

> [T]he individual may have various reasons for wanting an opportunity to discuss the decision with the agent. Some pertain to external consequences: the individual might succeed in persuading the agent away from the harmful action. But again a participatory opportunity might also be psychologically important to the individual: to have played a part in, to have made one's apt contribution to, decisions which are about oneself may be counted important even if the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential.

Michelman, *Formal and Associational Aims of Procedural Due Process,* in DUE PROCESS, NOMOS XVIII 127-28 (J. R. PENNOCK & J. W. CHAPMAN, eds. 1977).

The firmly-established public value nature of the interest in procedurally fair treatment may be reflected by the broad statement made in C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 1: "Failure to comply with procedural requirements of itself establishes sufficient injury to confer standing. Procedural requirements deserve protection whether or not it can be shown that the final administrative decision would have been affected." § 3531.4 at 433-34. The context of this statement is admittedly a discussion of cases involving procedural rights secured by statute or regulation, some of which were discussed earlier. *See, e.g.,* National Conservative Political Action Committee v. F.E.C., 626 F.2d 953, 957-58 (D.C. Cir. 1980) (discussed *supra* notes 61-63 and accompanying text) and City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975). Though Wright, Miller and Cooper do not draw upon the due process clause-based cases, the proliferation of procedural rights as a matter of statutory and regulatory right, when added to the similar explosion of constitutional due process cases, has a clear "cross-pollination" effect on non-legal public value concepts of procedural fairness. *See supra* notes 65-72 and accompanying text.

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

166. Professor Vining puts the interest in economic well-being in perspective in the following manner:

against recognizing economic loss as injury were made to a court, one can imagine the impatience of the judge in disposing of it.

The Court's opinion in *Baker v. Carr*[167] reflects a muted version of just this sort of impatience with the state's argument that voters have no real personal stake in the apportionment of the legislature. The Court responded to this argument by pointing out that the right to vote is secured by the Constitution, and by stating that the plaintiffs "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.' "[168] Nevertheless, the Court admitted that "[m]any of the cases have assumed rather than articulated the premise in deciding the merits of similar claims."[169] Since *Baker,* reapportionment cases have continued to assume rather than articulate the injury.[170]

Still, *Baker* presents some textual evidence of the Court searching beyond legal rights for the relevant public value. The Court appears to distinguish between a legal interest model and a common law public value model in its statement that plaintiffs assert " 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' . . . not merely a claim of 'the right, possessed by every citizen, to require that the Government be administered according to law. . . .' "[171] This distinction was carried forward in a slightly more confused way in *Schlesinger v. Reservists Committee to Stop the War,*[172] when the Court observed in a footnote that "[t]he injury asserted in *Baker* was . . . a concrete injury to fundamental voting rights, as distinguished from the abstract injury in nonobservance of the Constitution asserted by respondents as

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> There is nothing *distinctively* economic about the interests in survival, growth, power for its own sake, competitive struggle, or technological advancement represented by what we call economic institutions, nor about the commitment of a life to automobiles, toys, innkeeping, or any of the other substantive human concerns that particular business institutions are created to serve. The only economic value is doing what one is trying to do efficiently, choosing among means in such a way as to maximize the satisfactions of all one's wants. A musician can be as economic as a venture capitalist. Indeed, money maximizing may not be economic, since the time and capacities used to maximize money might have been better spent. . . . Striving, the value most associated with the business ethic, is decidedly foreign to economics. As Knight has observed, if the object of a football game is to get the ball over the goal line, an economist would put all twenty-two men on the same side.

J. VINING, *supra* note 6, at 157-58.

167. 369 U.S. 186 (1962).

168. *Id.* at 208 (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939)).

169. *Id.* at 206.

170. *See, e.g.,* cases cited *infra* notes 253-255. *See also* C. NOWAK, R. ROTUNDA AND J. YOUNG, CONSTITUTIONAL LAW 765-802 (1980), and L. TRIBE, *supra* note 163, at 738-71.

171. 369 U.S. at 208 (quoting Coleman v. Miller, 307 U.S. 433,438 (1939); Fairchild v. Hughes, 258 U.S. 126, 129 (1911)).

172. 418 U.S. 208 (1974).

citizens."[173]

The parallel between constitutional tort damages law and injury for standing purposes, suggested by the *Mathews* Court's citation of *Carey v. Piphus,*[174] provides further support for the Court's conclusion that an interest other than a strictly legal one is implicated in voter's rights cases. In *Carey,* the plaintiffs, in addition to their argument for nominal damages, contended that the cases supported a presumption of substantial damages from violation of a number of constitutional rights, including procedural due process, even if no proof of actual injury is shown.[175] This *per se* rule for all violations was rejected by the Court, which observed that compensation for "injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. . . . [T]hese issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question."[176] In reviewing the cases offered in support of the plaintiff's argument, the Court was able to distinguish all but those involving interference with the right to vote. Those cases, the Court conceded, "do appear to support the award of substantial damages simply upon a showing that a plaintiff was wrongfully deprived of the right to vote."[177] To the extent that *Carey* is relevant to the existence of noneconomic injury flowing from the denial of procedural protections,[178] this observation in *Carey* supports a similar proposition vis-a-vis interference with voting rights.[179]

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173. *Id.* at 223 n.13.

174. *See supra* notes 155-164 and accompanying text.

175. 435 U.S. 247, 260-64 (1978).

176. *Id.* at 265.

177. *Id.* at 264 n.22 (citing Wayne v. Venable, 260 F. 64 (8th Cir. 1919), and Ashby v. White, 1 Bro. P. C. 62, 1 Eng. Rep. 417 (HL 1703), reversing 2 Ld. Raym. 938, 92 Eng. Rep. 126 (KB 1703)).

178. *See supra* notes 155-164 and accompanying text.

179. The Court in *Carey* drew a distinction between cases in which injury is presumed to exist (and therefore nominal damages are awardable upon a simple showing of violation) and cases where plaintiffs are entitled, upon proof, "to recover substantial . . . damages to compensate them for 'the injury which is "inherent in the nature of the wrong . . . .' " 435 U.S. at 260-61. Included in such compensatory damages subject to proof could well be "real, if intangible, injury." *Id.* at 261. The Court approvingly described this rule of proved compensatory damages as applied to procedural due process. "[D]eprivation of protected interests without procedural due process, even where the premise for the deprivation is not erroneous, inevitably arouses strong feelings of mental and emotional distress in the individual who is denied this 'feeling of just treatment.' " *Id.* (quoting *Joint Anti-Fascist Refugee Comm.,* 341 U.S. 123, at 162 (1951) (Frankfurter, J., concurring)).

Although the Court's discussion of the provable compensatory damages for the "injury which is 'inherent in the nature of the wrong' " is some recognition of the notion that intangible injury can flow from a violation of procedural due process and is generally helpful in showing the public value status of injury to an interest in procedurally fair treatment, direct

d. The Interest in Religious Autonomy

The Establishment Clause cases present a unique opportunity to view the contrast between the legal interest model and the common law public value model. This is so because *Valley Forge,* while explicitly holding that claims of violations to a "personal constitutional right" secured by the Establishment Clause cannot give rise to injury, also approved the "spiritual stake" injury identified in *Abington School District v. Schempp.*[180] Originally, standing in religious freedom cases such as *Schempp* and *Engel v. Vitale*[181] was considered to be based on a legal interest model. The injury was to the Establishment Clause legal right to insist on separation of church and state. The Court in *Valley Forge,* however, rejected application of this model in Establishment Clause cases, and felt compelled to recast the injury involved in *Schempp* in current standing case terms. The Court stated: "The plaintiffs in *Schempp* had standing, not because their complaint rested upon the Establishment Clause . . . but because impressionable school children were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them."[182]

Why does the Court view exposure to state-sponsored religious exercises as injury? In the absence of the Establishment Clause, one could argue that such exercises represent a benefit rather than a loss or, at the very least, are no more "harmful" than any other activities that make up

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application of the analogy of constitutional tort damages law to standing injury analysis should be limited to rights violations that would result in *presumed* damages. Of course, if the plaintiff alleges compensatory damages, such damages should be awarded and he should have "standing" to seek them, the injury being the economic value of the damages claimed. *See* C. WRIGHT, A. MILLER AND E. COOPER, *supra* note 1, at § 3531.2, at 397.

In an injunctive case, however, the nature of public value injury cannot be confined to specific provable past effects on the individual plaintiff. Lyons v. Los Angeles, 461 U.S. 95 (1983) (fact that plaintiff was choked in the past pursuant to unconstitutional chokehold practice does not give him standing to pursue injunctive case unless he can show that he will be choked again in the future). A public value interest is one that is recognized "as an end in itself." J. VINING, *supra* note 6, at 174. For example, the Court's recognition of environmental injury, *see supra* notes 29-38 and accompanying text, "reveals that the preservation of nature has been accepted as an end in itself." J. VINING, *supra* note 6, at 175. Consequently, in environmental injury cases, "the injury is not the [actual] consequence at the end [of the causation chain] and the person injured is not the individual walking in the park. The injury is rather the *plausibility of a general impact* . . . ." *Id.* (emphasis added). Thus, unless the relevant injury is one that can be *presumed* to happen to all who undergo similar treatment, there is an "absence of any *public* value to define a class for which the individual [litigant] might speak." *Id.* at 61 (emphasis in original). Consequently, only constitutional rights violations in which injury is *presumed* will provide an appropriate analogy for standing injury, since it is only in these cases that a "class" of similarly injured persons can exist.

180. 374 U.S. 203 (1963). *See Valley Forge,* 454 U.S. at 487 n.22.

181. 370 U.S. 421 (1962).

182. *Valley Forge,* 454 U.S. at 487 n.22.

the school day. The Court does not answer this question in *Valley Forge.* However, since the Court found injury and eschewed reliance on the Establishment Clause, it must have had in mind some public value interest in avoiding state-sponsored religious indoctrination. It is the invasion of that interest, not the legal rights secured by the Establishment Clause, that constitutes injury in fact.

The basis for finding this public value interest is not disclosed in the Court's brief footnote discussion of *Schempp.*[183] However, the history of and fundamental assumptions underlying a constitutional guarantee—as carried forward by the Court's opinions—are evidence of public value interests at stake.[184]

Recently, in *Wallace v. Jaffree,*[185] the Court spoke broadly of the "elementary proposition" of religious autonomy underlying the First Amendment: "As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience."[186] When action abridging the guarantees of the First Amendment takes place, the state " 'invades the sphere of intellect and spirit' "—the interest unifying the various freedoms in the First Amendment.[187] That this invasion can cause cognizable injury was recognized by the Court in *Engel v. Vitale,*[188] quoted with approval in *Wallace:* "When the power, prestige and financial support of the government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[189]

Though there is much dispute on precisely where the wall of separa-

183. *Id.*

184. *See supra* notes 157-163, 176-179 and accompanying text. As was the case with the interest in procedurally fair treatment and voting, there is some support from constitutional tort law for the public value status of the interest in religious autonomy. Recently, the Tenth Circuit relied upon *Carey* and the voting rights cases cited therein, *see supra* note 177 and accompanying text, to find it proper for a federal court to award *substantial* presumed damages for violations of plaintiffs' establishment clause rights in a case involving school sponsored religious meetings. Bell v. Little Axe Indep. School Dist., 766 F.2d 1391 (10th Cir. 1985). *See also* Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) (presumed damages for an unlawful arrest).

185. 105 S. Ct. 2479 (1985).

186. *Id.* at 2486.

187. *Id.* at 2487 (quoting Wooley v. Maynard, 430 U.S. 705, 714-15 (1977), Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943)). In *Wooley,* though, sufficient injury for standing purposes was provided by previous and threatened future prosecutions of the plaintiff for defacing his license plate by covering the motto "Live free or die." 430 U.S. at 710. *See infra* notes 214-215 and accompanying text.

188. 370 U.S. 421 (1962).

189. 105 S. Ct. at 2492 n.51 (quoting *Engel,* 370 U.S. at 431).

tion between church and state should be located,[190] "[c]ompulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies."[191] The origins of this early development of First Amendment law are traced to Virginia's "Bill for Establishing Religious Freedom," a forerunner to the First Amendment to the Constitution.[192] This document states in relevant part: "We, the General Assembly, do enact, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief. . . ."[193] These sources suggest that there is a more than adequate basis for saying that compelled exposure to state-sponsored religious exercises implicates our shared sense of harm, even apart from the strict legal commands of the Establishment Clause.[194]

The injury to the taxpayer occasioned in cases of governmental support of religion also has not been explicitly recast by the Court in post-*Camp* injury in fact terms. However, the use of one's tax money—the payment of which is no less compulsory than is public school attendance for "impressionable" school children—seems only a slightly removed form of "unwelcome religious exercise."[195] The First Amendment Establishment Clause was directed at precisely this religious exercise of compulsory tithes.[196] If "financial support of government . . . placed behind a particular religious belief" results in at least "indirect coercive

190. *See, e.g., Wallace,* 105 S. Ct. at 2496-505 (O'Connor, J., concurring) (discussing how even mandatory moment of silence laws would not violate the First Amendment).

191. Everson v. Board of Educ., 330 U.S. 1, 44 (1946) (Rutledge, J., dissenting).

192. *Id.* at 28-29.

193. *Id.* at 28 (quoting A Bill for Establishing Religious Freedom, 12 HENING'S STATUTES OF VIRGINIA 84 (1823)). *See also Everson,* 330 U.S. at 13; *Valley Forge,* 454 U.S. at 503 (Brennan, J., dissenting).

194. Whether the "true" historical record discloses that the First Amendment was intended only to prohibit favoring one religion over another, *see Wallace,* 105 S. Ct. at 2508-20 (Rehnquist, J., dissenting), or to erect a complete "wall of separation between church and State," Reynolds v. United States, 98 U.S. 145, 164 (1878), does not matter as much as the fact that it is widely assumed, in part based upon the long line of cases following the *Reynolds* notion, that state-sponsored religious exercises of any kind constitute coercion.

195. *Valley Forge,* 454 U.S. at 486 n.22.

196. *See Everson,* 330 U.S. at 40-41 (Rutledge, J., dissenting); *id.* at 8-13; *Reynolds,* 98 U.S. at 162-63. *See also supra* text accompanying notes 181-182. Justice Rutledge summed up James Madison's views:

> Madison and his coworkers made no exceptions or abridgements to the complete separation [between church and state] they created. Their objection was not to small tithes. It was to any tithes whatsoever. 'If it were lawful to impose a small tax for religion, the admission would pave the way for oppressive levies.' Not the amount but 'the principle of the assessment was wrong.'

pressure upon religious minorities to conform,"[197] then use of a taxpayer's compulsorily extracted taxes to sponsor religious activities compels conformity to a tithe system. The coercion of the taxpayer, and thus the violation of his interest in religious autonomy, is complete upon the government's payment of his tax money to fund religious activities. This explanation for taxpayer standing places it in conformity both with the post-*Camp* injury in fact concept and with the injury to the interest in religious autonomy represented by *Schempp* and *Wallace.*[198]

2. *Constitutional Provisions for Which No Corresponding Public Value Interests Have Been Recognized*

The findings of injury in the above cases stand in stark contrast to *United States v. Richardson*[199] and *Schlesinger v. Reservists Committee to Stop the War,*[200] where no injury was found. In those two cases, the Court rejected the plaintiffs' assertion that allegations of violation of their constitutional rights was sufficient injury for standing purposes. After rejecting the legal injury model, however, the Court searched unsuccessfully for other injury in fact. It acknowledged that the "categories of judicially cognizable injury were . . . broadened" by the *Camp* decision,[201] and mentioned the intangible non-economic injury to environmental interests present in *United States v. SCRAP*[202] and the "injury to fundamental voting rights" present in *Baker v. Carr.*[203] However, the Court failed to identify any interests with public value status corresponding to the Statement and Accounts Clause and the Incompatibility Clause.

It is significant that the plaintiffs in both *Richardson* and *Reservists* attempted to identify public value interests corresponding to their consti-

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Everson, 330 U.S. at 41 (Rutledge, J., dissenting) (quoting ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA 105 (1910)).

197. *Wallace,* 105 S. Ct. at 2492 n.51 (quoting Engel v. Vitale, 370 U.S. at 431).

198. This theory of taxpayer standing, as upheld in *Flast,* also accounts for situations in which, instead of a cash payment, the government grants a tax exemption, *see* Walz v. Tax Comm., 397 U.S. 664 (1970), or makes an in-kind donation of surplus property, *see Valley Forge,* 454 U.S. 464 (1982). In both of those situations, there would not be a "personal" injury to a taxpayer interest in religious autonomy (which exists by reason of their stake in the funds in the public treasury) because tax exemptions and transfers of surplus property do not involve a drain on monies paid into the treasury as do cash subsidies. *See infra* notes 237-242 and accompanying text.

199. 418 U.S. 166 (1974).

200. 418 U.S. 208 (1974).

201. *Id.* at 218.

202. 412 U.S. 669 (1973).

203. 369 U.S. 186 (1962). *See Reservists,* 418 U.S. at 223 n.13 and *Richardson,* 418 U.S. at 179-80.

tutional rights. In *Richardson,* the plaintiff claimed that "without detailed information on CIA expenditures—and hence its activities—he [could not] intelligently follow the actions of Congress or the Executive, nor [could] he properly fulfill his [voting] obligations as a member of the electorate."[204] In *Reservists,* attempts to identify the public value interests are found in the dissenting opinions. Justice Douglas, citing Alexander Hamilton, found that "the Incompatability Clause had a specific purpose: to avoid 'the danger of executive influence upon the legislative body' "[205] and that the plaintiff's complaint "alleges injuries to the ability of the average citizen to make his political advocacy effective whenever it touches upon the vast interests of the Pentagon."[206] Justice Marshall more specifically pointed to the purposes of the organization to which plaintiffs belonged—"to persuade the Congress of the United States and all members of the Congress to take all steps necessary and appropriate" to end the Vietnam War—and identified as a "judicially cognizable interest" their "right . . . to have their arguments considered by Congressmen not subject to a conflict of interest by virtue of their position in the Armed Forces Reserves."[207]

Although the Statement and Accounts Clause and Incompatibility Clause were deemed important enough requirements that the Framers saw fit to place them in the Constitution, the Court's decision that the injury occasioned by their breach were "abstract" or "generalized" stands as a failure or refusal to recognize the values reflected by the Clauses as "trait[s] and motive[s] of behavior widely enough shared" to constitute public values.[208] In short, the clauses impose mere "technical" requirements, but do not correspond with core substantive values alive in society's intuitive value system.[209]

204. *Richardson,* 418 U.S. at 176.

205. *Reservists,* 418 U.S. at 232 (Douglas, J., dissenting).

206. *Id.* at 233.

207. *Id.* at 239 (Marshall, J., dissenting).

208. J. VINING, *supra* note 6, at 61. *See supra* note 27. *See also supra* notes 42-46 and accompanying text, discussing the treatment of the injury to Does in Roe v. Wade, 410 U.S. 113 (1973).

209. Just as there are technical constitutional requirements, there are similarly technical statutory and regulatory rights with respect to which no corresponding public value interest can be identified. *See supra* notes 44-48, 56-58, 70-71 and accompanying text. The difference between technical statutory and regulatory rights and technical constitutional guarantees, of course, is that the former may establish a predicate for injury to the legal interest secured while the latter may not. *Compare supra* notes 44-58 and accompanying text *with supra* notes 74-86 and accompanying text. This distinction between technical statutory requirements and technical constitutional ones is explicitly recognized by footnote statements in both *Richardson* and *Reservists* opinions. *See Richardson,* 418 U.S. at 175 n.8, and *Reservists,* 418 U.S. at 224 n.14 (There is "no doubt that if the Congress enacted the statute creating such a legal right, the requisite injury for standing would be found in an invasion of that right."). One could well

Without necessarily approving of the Court's determination, it is admittedly hard to conjure up the same intuitive sense of injury in *Reservists* and *Richardson* that one feels when there is a discriminatory denial of public benefits, a failure to provide a hearing, a compelled exposure to state-sponsored religious exercises, or an interference with one's vote. The difference between the decisions clearly is not the legal commands of the constitutional provisions—all are stated in strong terms—but the Court's assessment of society's "sympathy with and understanding of the loss[es]" occasioned by the allegedly unconstitutional conduct.[210] It is this perception of loss that governs and not the legal requirements of the particular constitutional provision involved.[211]

3. *Public Value Interests Corresponding to Other Constitutional Provisions*

The four constitutional areas discussed in Part III.A.1 above were selected because the cases demonstrate that the Court has recognized the intangible public value interests involved. One might well ask, however, why the Court has not found similarly cognizable interests corresponding to other constitutional guarantees of apparently equal social importance. The reason can be found in the fact that often the Court can sustain standing on some more familiar basis, thereby making it unnecessary to reach the question of what intangible interests may be implicated by the alleged constitutional violation.[212] In most cases there are public value

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argue that, given the cross-pollination that occurs between statutory policy and public values, *see supra* notes 65-72 and accompanying text, the Court, by excluding any consideration of conflict of interest and freedom of information statutes analogous to the constitutional provisions involved, took an overly narrow view of the impact of statutory policy on the public value adjudication process. *Cf.* Note, *Informational Injuries as a Basis for Standing*, 79 COLUM. L. REV. 366 (1979) and Scientists' Inst. for Public Information v. Atomic Energy Comm'n, 481 F.2d 1079, 1086 n.29 (D.C. Cir 1973) (finding injury to informational interests).

210. J. VINING, *supra* note 6, at 177.

211. The common law public value theory of injury in constitutional cases could be criticized as establishing a "hierarchy of constitutional values." *Valley Forge*, 454 U.S. at 484. *See supra* text accompanying notes 86 and 119. Upon closer examination, however, this objection is unwarranted. The public value interest model adjudicates injury according to a societal value system which exists largely independently of legal rights secured by the law. Some constitutional provisions reflect and have a profound impact upon basic values shared by society, while others do not. Where public value interests correspond with the constitutional guarantees, the Court will find injury. Where they do not correspond, the Court will not find injury. Thus, there is no problem with a hierarchy of constitutional rights. There is simply a problem of ascertaining which challenged government action invades public value interests and which does not. This is the identical inquiry that must be made to determine standing in all other instances when no statutory legal right can be relied upon. *See supra* notes 20-47 and accompanying text.

212. Not coincidentally, the presence of a more tangible and familiar public value interest has retarded the growth of the statutory legal interest model as well. Thus, both the statutory legal interest model and the consitutional public value model have developed from the same

interests invaded other than the intangible ones corresponding to the constitutional right involved. For example, Fourth Amendment cases generally involve actual or threatened injury beyond simple violation of the constitutional right. Doors are broken and premises and people searched, thereby implicating well settled notions of property and privacy,[213] and criminal proceedings may be brought, implicating economic and liberty interests.[214] In a First Amendment speech case, the litigant is often subject to a possible fine or imprisonment or loss of a job, thereby invading widely shared values of liberty and economic loss.[215]

Although the Court generally predicates standing injury in such cases on a more familiar basis than the intangible constitutional public value interest, one can imagine First and Fourth Amendment cases where this solution would not work. By varying the facts of the Fourth Amendment and First Amendment examples above to remove the more tangible interests, and by assuming the plaintiffs seek only injunctive relief, we can see how the need to search for intangible public value interests might arise.[216] For example, what is the nature of the injury when

exigencies: cases in which a public value interest can be identified but is ineligible to form a predicate for injury because of the redressability requirement and cases in which no more tangible and cases in which familiar public value interest can be identified at all. *See supra* Part IIA (ineligible injury) and Part IIB (non-existent injury).

213. The line between "tangible" and "intangible" injury occasioned by such a search, and the presumed greater importance of the tangible over the intangible injury, is not so clear. Presumably the most "tangible" injury is the broken door, which costs money to repair. Yet, certainly a person subject to a "no- knock" search where police break down his door and rush in, would not focus upon the cost of repairing the door as the "true" injury, even if the police do nothing else. Fear, shock, surprise, humiliation, and embarrassment are more likely to be emphasized. In addition, many of these so-called intangible effects are closely tied up with intuitive concepts of security of property and person. These concepts, in turn, have shaped the requirements of the Fourth Amendment, *see infra* note 217, which in turn has continued to shape those intuitive values. Undoubtedly the relationship between constitutional provisions and public values is equally as complex as the relationship between federal statutes and public values. *See supra* notes 70-71 and accompanying text.

214. In Rakus v. Illinois, 439 U.S. 128 (1978), the Court held that when authorities seek to introduce seized evidence and the criminal defendant moves to suppress, the only issue is whether there was a search that violated the defendant's Fourth Amendment rights, and there is no separate "standing" issue. *Id.* at 133-40. As the Court observed, "[t]here is no reason to think that a party whose rights have been infringed will not, if the evidence is used against him, have ample motivation to suppress it." *Id.* at 134. The threatened use of the evidence obtained in criminal proceedings is sufficient injury for standing purposes.

215. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972). *Cf.* Healy v. James, 408 U.S. 169 (1972) (use of campus facilities denied).

216. A plaintiff seeking money damages has alleged economic injury and therefore need not rely on any other injury to pursue that claim. *See* C. WRIGHT, A. MILLER AND E. COOPER, *supra* note 1, at § 3531.2, at 397 ("Once it is concluded that the plaintiff has stated valid claims for damages, there can be no question of standing."). *Cf.* Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) (economic loss from past violations will not provide standing to pursue injuctive relief absent a showing that the past illegal conduct will happen again).

the police threaten to engage in surveillance that involves no physical contact or intrusion, such as videotaping a garden party from a distance by high-powered camera and long-distance microphone? What is the injury to a would-be speaker of unpopular views if he is denied a permit to deliver his speech in a city park?

The injuries in these situations, if they exist, cannot be found in the alleged violation of any legal rights secured by the constitutional provisions involved, because the Court has rejected application of a legal interest injury analysis model to constitutional rights. Rather, a court would need to find a public value interest in living one's life free of governmental surveillance and in expressing one's views publicly without governmental interference. As the discussion of the four areas where the Court has already recognized constitutional public value interests indicates, the history and purpose—as well as the commands—of the relevant constitutional provisions would figure prominently in this determination. The relevance of this data, however, is not to flesh out the *legal* limitations upon the government in each situation. Whether the legal limitations of the Fourth and First Amendments are transgressed by the challenged government action is a different question from whether a plaintiff has alleged injury. The relevance of the constitutional data is to gauge how well we have incorporated the interests at stake into our public value system. If we have—and we thus have sympathy for and understanding of the litigant's loss in each situation—there is injury.[217]

217. Fourth Amendment cases outside the criminal proceeding context are unusual, because there may be a "double" public value interest analysis: one to determine standing and one to determine whether there was a search. Under Katz v. United States, 389 U.S. 347 (1967), the question of whether there is a search depends upon whether the person had a "legitimate expectation of privacy." As the Court noted in Rakus v. Illinois, 439 U.S. 128 (1978), "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id.* at 143 n.12. *See also* Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring) (issue is whether the expectation is "one that society is prepared to recognize as 'reasonable' ").

In the criminal proceeding context, sufficient "injury" is shown by the threatened introduction into evidence of the alleged illegal fruits of the search. *See supra* note 214. In a suit for money damages, there is no question of standing. *See supra* note 216. In a suit for an injunction, however, standing injury of the kind discussed here must be shown. This will involve determining whether the interest invaded by the alleged illegal conduct can be stated in terms of a public value. This determination, like the determination of whether there is a search, will need to be made "by reference to" the very same "concepts of real or personal property law or to understandings that are recognized and permitted by society." If the salient issue is whether there is a search (as opposed to whether, given a search, the search was reasonable), injunctive actions raising this issue may be the only cases where the issues of standing and the merits will amount to the same thing. *Cf.* Rakus v. Illinois, 439 U.S. 128 (1978) (in Fourth Amendment suppression cases, there is no separate issue of standing).

B. Deciding When the Litigant Is Personally Affected with Regard to the Invaded Public Value Interests

Arguing that the Court has held that at least four intangible interests which correspond to constitutional provisions represent public values, solves only half the problem. The question remains under what circumstances the Court should recognize that the challenged action invades those interests. In traditional standing terms, "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[218]

Several cases allude to this problem. The Court in *Mathews* recognized that discrimination "can cause serious non-economic injury to those persons who are *personally denied* equal treatment,"[219] and concluded that the requirement was met by Mr. Mathews. *Valley Forge* distinguished *Abington School District v. Schempp* by noting that the "impressionable" school children in *Schempp* were personally "subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them."[220] In *Baker v. Carr,* the Court described the plaintiffs' interest in their votes as "plain" and "direct."[221]

In determining that the litigant asserting intangible interests corresponding to constitutional guarantees is personally affected, the Court is, of course, not writing on a clean slate. It has already held that intangible non-constitutional interests can form a basis for injury. And it has indicated how the public value adjudication process operates not only to determine that the interests at stake represent public values, but also to determine when those cognizable interests are "at stake."[222]

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218. *Sierra Club,* 405 U.S. at 734-35.

219. 104 S. Ct. at 1395 (emphasis added). *See* Allen v. Wright, 104 S. Ct. 3315, 3327 (1984).

220. 454 U.S. at 486 n.22.

221. 369 U.S. at 208 (quoting *Coleman v. Miller,* 307 U.S. at 438).

222. Professor Vining has argued that when a court declines to find injury for standing purposes, there are two possible bases for its decision: "Either what [the litigant] represents is not a public value. *Or he does not represent the public value he claims to represent: it is not part of him.*" J. VINING, *supra* note 6, at 171 (emphasis added). *See* United States v. SCRAP, 412 U.S. 669, 687 (1973) (standing may not be a vehicle to vindicate the interests of "concerned bystanders"). It is, of course, possible to have standing to assert the rights of third persons. *See, e.g.,* Secretary of State of Md. v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984); Craig v. Boren, 429 U.S. 190 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972). The third party standing bar has been considerably relaxed in recent years. *See* Monaghan, *Third Party Standing,* 84 COLUM. L. REV. 277 (1984); Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts,* 35 U. MIAMI L. REV. 393 (1981). Before third party standing is possible, however, the plaintiff must meet the Article III threshold "price of admission" to federal court—personal injury of some kind.

In an economic interests case, the task of determining whether those interests are invaded is relatively easy. We simply determine if the litigant will lose money as a result of the challenged action. For noneconomic intangible interests there is no such certain test. We could accept the person's allegation that he feels his interest is invaded, possibly supported by corroborating evidence of subjective effect, but this is fraught with the difficulty of allowing standing to practically anyone. A more objective measure is needed. For a court to say that there is injury, the litigant's relationship to the admittedly cognizable interest must be such that we have "sympathy with and understand"[223] how a person in that position would justifiably feel "personal loss." Just as the first question of the public value status of the interest is whether it is a "trait and motive of behavior widely enough shared to permit us to recognize it as a social role,"[224] the question of whether there is personal injury to that interest depends upon whether there is some basis in our shared sense of what it means to have "personal loss" in terms of that interest.[225]

The cases involving intangible harm not surprisingly require the litigant to show concrete circumstances under which a court would be willing to say that a reasonable person in the litigant's position would experience the intangible harm claimed. The Court in *Sierra Club v. Morton* held that the challenged construction of a highway and other improvements by the Disney company in the national park area could

223. J. VINING, *supra* note 6, at 177.

224. *Id.* at 161.

225. *See id.* at 60:

> In an administrative case a 'real' individual is there as a representative of the class of which he is a member, pursuing its interests, its purposes, its values. Only as such can we 'see' him, is he there.
>
> But note that he only *says* he is a member of the class. We are entitled to ask . . . is he really a member of that class? Are its interests and values *his* interests? . . . And this we do in double fashion, by deciding first, of course, what is the class or the set of values that defines it, and second, what connection this individual has to it.
>
> Much of our analysis takes place as we answer the question: Is he harmed? Suppose an individual plaintiff comes into court. He identifies himself by name—John Jones. The court says, we all say, 'That is not important except for purposes of convenient reference. Who *are* you?' Let us assume he replies, 'I am appearing as a parent, in my role as child raiser. I challenge this administrative decision as such.' On further questioning we learn that he has no children and never has had. We may then say, '*You* are not harmed,' by which we mean we do not recognize him as part of the class for which he purports to speak . . . any more than a manufacturing corporation is authorized to speak for particular religious interests.
>
> If the challenger does have children, we then ask, 'How is your role involved in *this* case?' If he answers that the administrative decision, say a new customs regulation, makes it too difficult to obtain chemicals to make psychedelic drugs for his own use (which let us assume has not yet been specifically prohibited) we might, at this point in history, say again, '*You* are not harmed,' by which we would mean that we do not recognize the value he is seeking to vindicate or the interest he is seeking to protect as a value and interest *of a parent.*

impair a person's aesthetic, conservational, and recreational interests.[226] The Sierra Club members, however, were not "among the injured" because they failed to allege that any of them hiked or camped in the area.[227] Rather, the Club relied on injury to its members as experts on and advocates of aesthetic, conservational, and recreational interests. In the Court's view, if impact upon experts on and advocates of particular interests were counted as "personally" affecting those interests, injury would have no objective measure, since anyone claiming expertise and belief in those interests could establish injury.[228] What was required, then, was that the litigant personally engage in what society would consider activity of persons truly representing those interests. Unless members could show concrete activity expressive of their aesthetic, conservational, or recreational interests, their claim of intangible injury would not be recognized.[229]

The requirement that the litigant show that he is personally affected from injury to intangible interests corresponding to constitutional guarantees is illuminated by two cases—*Valley Forge* and *Allen v. Wright.*[230] In *Valley Forge,* the interest involved was that of religious autonomy; in *Allen* it was the interest in equal treatment. In both cases, the Court, while recognizing the existence of the relevant intangible public value interest, rejected each litigant's claim of personal injury with respect to that interest.

In *Valley Forge,* the Court acknowledged that a person has a cognizable "spiritual stake" in religious autonomy.[231] The *Valley Forge* plaintiffs, however, could not rely on that interest because they were unable to show they were personally affected by the actions of the government impinging on that interest. In the paragraph disposing of the "spiritual

226. 405 U.S. 727, 734 (1972).

227. *Id.* at 735.

228. *Id.* at 739-40:

> The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short-lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

229. Camping and hiking by Club members were not the only concrete activites that could have led to standing for the Club. *See Sierra Club,* 405 U.S. at 735 n.8 (suggesting that not only use of the parkland by members, but also camping trips conducted by the Club itself would be a sufficient predicate for injury); Burnham, *supra* note 3, at 194-95 (finding direct standing for the Club without any need to rely upon member activities).

230. 104 S. Ct. 3315 (1984).

231. *See supra* notes 180-194 and accompanying text.

stake" argument, the Court distinguished *Schempp,* in which the plaintiff school children were personally exposed to "unwelcome religious exercises or were forced to assume special burdens to avoid them,"[232] and indicated that the *Valley Forge* plaintiffs were not in an analogous position vis-a-vis the interest claimed: "Respondents complain of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer [of the surplus property to The Assemblies of God] through a news release."[233] Although the interest in religious autonomy is a proper public value, the *Valley Forge* plaintiffs "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees."[234]

In *Valley Forge,* any claim of injury analogous to *Schempp* was destined to be undercut by the plaintiffs' focus on the transfer of the property rather than its use by a religious organization.[235] In cases similar to *Schempp,* it is the plaintiff's exposure to government-sponsored *religious activity* that creates the injury to the interest in religious autonomy.[236]

Another basis for alleging injury to the interest in religious autonomy—focusing on the transfer of property—is the post-*Camp* version of *Flast* taxpayer standing.[237] *Flast* taxpayer standing, recast in injury in fact terms, lies in the exposure of the taxpayer to the "unwelcome religious exercise" of tithes in support of religious activity. In a direct subsidy case, the taxpayer is forced to contribute to the treasury and the burden on the treasury caused by payment therefrom to a religious institution amounts to the exaction of a tithe. Although payment of money and its use by the government form the basis of injury, the injury is to the taxpayer's noneconomic interest in religious autonomy. However, the taxpayer's relationship to direct cash subsidies, on the one hand, and the tax exemptions and the donation of surplus government property in *Valley Forge,* on the other, are different. Tax exemptions are qualitatively different from compulsory tithes since they do not place any burden on

232. 454 U.S. at 486 n.22.

233. *Id.* at 486-87 (footnote omitted).

234. *Id.* at 485 (emphasis by the Court).

235. This focus on the transfer is understandable since the *Valley Forge* plaintiffs primarily sought standing as taxpayers. *See Valley Forge,* 454 U.S. at 476 ("The injury alleged by respondents in their amended complaint is the 'depriv[ation] of the fair and constitutional use of [their] tax dollar.' ").

236. *See infra* notes 237-242 and accompanying text for treatment of possible injury to taxpayers arising out of the transfer of the property.

237. *See supra* notes 195-198 and accompanying text.

the taxpayers' dollars in the treasury and thus do not "compel a man to furnish contributions of money for the propagation of opinions which he disbelieves."[238] Justice Brennan, concurring in *Walz v. Tax Commission,* distinguished tax exemptions from cash subsidies involved in cases such as *Flast:*

> A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, '[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches,' while '[i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions.'[239]

Property donations, such as in *Valley Forge,* are more difficult to distinguish from compulsory tithes because they seem less passive than tax exemptions. However, *Valley Forge* indicates that, at least with respect to the donation of *surplus* property, there is a qualitative difference. This should be so particularly when, despite the obvious benefit to the religious group, the transfer of that property represents no burden on taxpayers and may in fact result in a benefit to them. The *Valley Forge* Court discussed this aspect of the transfer issue in a footnote, opining in dictum that "any connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst nonexistent."[240] The Court explained:

> [R]espondents [do not] dispute the Government's conclusion that the property has become useless for federal purposes and ought to be disposed of in some productive manner. . . . [E]ach year of delay in disposing of the property *depleted* the Treasury by the amounts necessary to maintain a facility that had lost its value to the Government.[241]

Thus, the plaintiffs in *Valley Forge* did not have standing even under a revised post-*Camp* definition because, although invasion of the interest in religious autonomy is a cognizable injury, they were not, as taxpayers, personally injured in the absence of a demonstrable drain on their tax

238. A Bill for Establishing Religious Freedom (Preamble), 12 HENING'S STATUTES OF VIRGINIA 84 (1823), *quoted in* Everson v. Board of Educ., 330 U.S. 1, 13 (1946) *and Valley Forge,* 454 U.S. at 503 (Brennan, J., dissenting). *See also supra* notes 192-193 and accompanying text.

239. 397 U.S. 664, 690-91 (1970) (Brennan, J., concurring).

240. 454 U.S. at 480 n.17.

241. *Id.*

dollars as a result of the government action.[242]

Allen v. Wright[243] rejects a claim of injury to the interest in equal treatment for reasons similar to those involved in *Valley Forge*. In *Allen*, the parents of public school students challenged the legality of certain IRS guidelines. These guidelines were used to insure compliance with IRS requirements that private schools not discriminate on grounds of race in their admissions process. As injury, plaintiffs claimed " 'the denigration they suffer as black parents and schoolchildren when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth.' "[244] The Court understood the plaintiffs to allege, *inter alia*, "stigmatic" injury to their right to equal treatment.[245]

The *Allen* Court reiterated the view set forth in *Heckler v. Mathews*,[246] that the stigmatizing injury to the equal treatment interest "often caused by racial discrimination . . . is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing."[247] Nonetheless, the Court denied standing because the plaintiffs had "not allege[d] a stigmatic injury suffered as a direct result of having personally been denied equal treatment."[248] The plaintiffs in *Allen* had never applied for (nor were they

242. This explanation also accounts for the result in Doremus v. Board of Educ., 342 U.S. 429 (1952). In *Doremus*, plaintiffs brought suit in part as taxpayers, claiming that a New Jersey law which authorized public school teachers to read passages from the Bible in the classroom violated the Establishment Clause. The Court denied taxpayer standing. Consistent with the theory posited here, there would be no taxpayer standing in *Doremus* for the same reason given when tax exemptions and transfers of surplus property are involved—there is no extra drain of money from the treasury when teachers teach religion rather than math. *Cf.* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3221 n.5 (1985) (state taxpayers have standing to challenge "shared time" public instruction in sectarian schools).

Clearly, some property donations could be said to "personally" injure taxpayers' interest in religious autonomy. For example, if the government were to construct buildings and then give them to religious organizations immediately, the drain on the treasury would be identifiable and would be the same as in the case of a direct subsidy to build those buildings. *See Valley Forge*, 454 U.S. at 511-12 (Brennan, J., dissenting) (discussing Tilton v. Richardson, 403 U.S. 672 (1971) (taxpayer challenge to federal statute providing construction grants for buildings limited to sectarian use for 20 years)).

243. 104 S. Ct. 3315 (1984).

244. *Id.* at 3324 (quoting Wright v. Regan, 656 F.2d 820, 827 (D.C. Cir. 1981)).

245. 104 S. Ct. at 3327.

246. 465 U.S. 728.

247. 104 S. Ct. at 3327.

248. *Id.* Plaintiffs' membership in the racial group generally affected by the challenged government policies was an insufficient basis for injury. As the Court in *Allen* explained:

> The consequences of recognizing respondents' standing on the basis of their first claim of injury illustrate why our cases plainly hold that such injury is not judicially cognizable. If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the govern-

interested in applying for) admission to any of the private schools in question. The plaintiffs also failed to allege that "there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public-school integration."[249] Presumably, had they made these allegations, they would have shown that they were "personally subject to discriminatory treatment" by the IRS guidelines.[250]

On the positive side of the personally-affected question, the Court in *Allen* recognized, as has been argued here, that "personal" injury to the intangible interests corresponding to a constitutional guarantee "requires identification of some concrete interest with respect to which [the litigant is] personally subject to" invasion of the intangible interest. The Court portrayed *Mathews* as a case satisfying this requirement.[251] Examination

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> ment was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'

104 S. Ct. at 3327 (citing United States v. SCRAP, 412 U.S. 669, 687). *Cf. Valley Forge,* 454 U.S. at 483 (disallowing as a basis for standing the premise that plaintiffs sued as "separationists").

249. 104 S. Ct. at 3328.

250. The Court described the injury as "not sufficient for standing in the abstract form in which [plaintiffs'] complaint asserts it . . . ." 104 S. Ct. at 3328 n.22. The term "abstract" was used to describe the problem with the injury alleged in *Reservists,* 418 U.S. at 227, and may be the term chosen by the court to indicate lack of personal injury with respect to an admittedly cognizable interest. This suggests that *Reservists* may not have been decided on the ground that the interest in lobbying Congressmen free of conflicts of interest is not a public value, *see supra* notes 199-211 and accompanying text, but rather on the ground that the plaintiffs in *Reservists* did not allege facts that showed they were personally affected with respect to that interest. Even the more specific characterizations of their lobbying interests alluded to by Justices Marshall and Douglas in dissent fail to mention any particular legislation with respect to which the lobbying efforts had been thwarted, or even that they were engaged in such efforts with respect to any particular legislation. *Richardson* cannot be explained in this way since the plaintiff there had requested the specific information for which he ultimately sued. *See Richardson,* 418 U.S. at 168-69. This perhaps explains why Justice Stewart dissented in *Richardson,* but not in *Reservists. See Reservists,* 418 U.S. at 228-29 (Stewart, J., concurring) ("Standing is not today found wanting [in *Reservists*] because an injury has been suffered by many, but rather because *none* of the respondents has alleged the sort of direct, palpable injury required for standing under Art. III.").

251. 104 S. Ct. at 3328 n.22. The language following that quoted above, however, creates a potential ambiguity. The Court goes on to say that "[the concrete] interest must independently satisfy the causation requirement of the standing doctrine," and describes *Mathews* as a case in which the "causation component . . . was satisfied with respect to the claimed [Social Security] benefits." *Id.* There are two ways of reading the Court's reference to the "causation requirement of standing doctrine." If "concrete interest" refers to a tangible interest with clear public value status on its own and "causation requirement" refers to *both* the "fairly

of the facts of *Mathews* shows that this is a correct portrayal. In *Mathews,* the plaintiff was personally denied equal treatment because he applied for and was denied Social Security benefits because of the very statutory classification that he challenged. It would not have been enough that he was able to show—in parallel fashion to the facts of *Allen v. Wright*—that he was a member of the general group that was affected by the discriminatory pension offset provision, i.e., a male insured person over 65 receiving pensions from some other source.[252]

In the reapportionment cases, the plaintiffs were personally affected because they were voters residing in the more populous counties that were disfavored by the challenged apportionment system.[253] This is not to suggest that vote dilution might not also personally affect others, such as candidates for public office,[254] or persons similarly affected in a concrete way by district line-drawing or the lack thereof.[255] However, if the

traceable" and redressability requirements, then the intangible noneconomic injury corresponding to the constitutional guarantee is irrelevant to the standing issue. If plaintiffs are able to show injury to a different, concrete and tangible public value interest that satisfies all the standing requirements, then standing exists without any need to inquire into any less tangible interests involved. *See supra* notes 212-215 and accompanying text. Because footnote 22 in *Allen* describes *Mathews* as a case in which the "causation component . . . was satisfied with respect to the claimed [Social Security] benefits," 104 S. Ct. at 3328 n.22, and the redressability requirement clearly was *not* met with respect to Mathews' interest in the claimed benefits, the footnote must be taken as a simple reiteration of the circumstances required for a showing that an intangible interest is "personally affected." Under this reading, no violence is done to the unanimous opinion in *Mathews* and the footnote reference to "causation requirement of standing doctrine" is simply a restatement of what the Court has always required in cases involving claims of intangible injury. *See supra* notes 222-229 and accompanying text.

There is, in addition, some general definitional support for the view that the Court's use of the term "causation requirement" in *Allen* could have referred only to the "fairly traceable" requirement and not to redressability. *See supra* note 1 (the Court's reference to causation sometimes includes redressability and sometimes does not). In this respect, it is noteworthy that earlier in the opinion in *Allen,* the Court separated the two, framing them in the form of two distinct questions: "Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" 104 S. Ct. at 3325. *But cf. id.* at 3326 n.19 and 3329 n.24.

252. Similarly, in the due process driver's license hypothetical set forth *supra* text accompanying notes 111-112, the plaintiff had applied for and been denied a license without statement of reasons or opportunity for a hearing. Allegations that the plaintiff was over 16, knew how to drive, and met all the requirements for a license would not have been sufficient to show personal injury to the interest in procedurally fair treatment.

253. Baker v. Carr, 369 U.S.186, 204-05, 207-08 (1962), and cases cited *id.* at 207 n.28. *See, e.g.,* Avery v. Midland County, 390 U.S. 474, 476 (1968); Reynolds v. Sims, 377 U.S. 533, 540 (1964).

254. *See, e.g.,* MacDougall v. Green, 335 U.S. 281, 282 (1948) (concerning the " 'Progressives Party' and its nominees for United States Senator, Presidential Electors and State offices").

255. *See, e.g.,* Mobile v. Bolden, 446 U.S. 55, (1980) (at large city commission election system challenged by black voters for diluting black voting strength).

litigants are not voters or are not members of the group of voters that has been allegedly undercounted by the existing apportionment, their intangible interest in their vote would not be deemed to be personally affected by malapportionment. They would not be "asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes' " but "merely . . . claim[ing] . . . 'the right possessed by every citizen to require that the Government be administered according to law . . . .' "[256]

IV. Problems and Issues in Common Law Public Value Injury Adjudication

The Court's recognition that public values corresponding to core constitutional principles can provide a predicate for injury is an important development which should serve to expand standing in "constitutional injury" cases. Yet it is a simple and modest application of the injury in fact doctrine of *Data Processing Organizations v. Camp.* No longer is it necessary to show that one's interest is protected by the positive law; it is sufficient that the interest represented by the litigant be recognized as a public value. The cases discussed in Part III.A demonstrate that, like environmental and economic well-being, certain core principles reflected in the Constitution are "important ingredients of the quality of life in our society."[257] However, if common law public value

256. Baker v. Carr, 369 U.S. at 208. Laird v. Tatum, 408 U.S. 1 (1972), is another example of lack of injury based upon failure of plaintiffs to show that they represented the public value interest. In *Laird,* plaintiffs claimed their First Amendment rights "were being invaded by the Department of the Army's alleged 'surveillance of lawful and peaceful civilian political activity.' " *Id.* at 2. Army Intelligence had established a data gathering system "consist[ing] . . . of the collection of information about public activities that were thought to have at least some potential for civil disorder." *Id.* at 6. Plaintiffs claimed that the existence of that system "exercise[d] a present inhibiting effect on their full expression and utilization of their First Amendment rights." *Id.* at 10 (emphasis omitted). The Court phrased the issue as "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of [an allegedly illegal] governmental investigative and data-gathering activity." *Id.* The Court acknowledged that a government action could be challenged "even though it has only an indirect effect" on First Amendment rights. *Id.* at 12-13. Thus, the Court was acknowledging that the interest in free political expression is a public value. *See also supra* notes 212-217 and accompanying text. However, the Court held that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." Laird, 408 U.S. at 13-14. Further, because plaintiff's counsel "admitted that his clients were 'not people, obviously, who are cowed and chilled,' " they "clearly lack that 'personal stake in the outcome of the controversy' essential to standing." *Id.* at 13 n.7. *See also id.* at 8 n.5. A parallel between *Laird, Allen* and *Valley Forge* exists. In all three cases the plaintiffs claimed injury based solely on their membership in the general group which the illegal activity offended: in *Laird* it was civilians, in *Allen* it was blacks, and in *Valley Forge* it was separationists. *See supra* note 248 and accompanying text.

257. *Sierra Club,* 405 U.S. at 734.

injury adjudication is to avoid the problems of inconsistency and confusion to which standing generally has been heir, some clarification of the purpose of the injury requirement and the overall process of public value adjudication is needed.

Two strands of reasoning concerning the purpose of the injury requirement emerge from the cases, neither of which is completely satisfactory. One often repeated statement is that injury guarantees that the litigant has a "personal stake"[258] in the controversy sufficient to assure an incentive to litigate vigorously and responsibly. In this vein, the Court has held that "[t]he requirement of 'actual injury redressable by the court' . . . tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[259] As the Court observed in *Valley Forge,* "the requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.' "[260]

Some threads of truth underlie this idea, particularly where the injury is substantial. But the injury requirement, if narrowly applied only to tangible injuries, is indeed only a "rough attempt" at assuring vigorous and responsible advocacy. This is demonstrated by simply looking at some of the more insubstantial tangible injuries that have given rise to standing. In *United States v. SCRAP*[261] the Court approvingly quoted Professor Davis' observation that "an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."[262] However, this

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

259. *Valley Forge,* 454 U.S. at 472 (citation omitted). *See also* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement,* 93 HARV L. REV. 297 (1979). *But cf.* K. DAVIS, *supra* note 9, § 24:2. Professor Davis, who advocates strongly that injury in fact should be the beginning and end of the standing analysis, believes that the notion that injury somehow provides the motivation to litigate vigorously is an "idea [that] deserves a quiet burial." Davis, *supra* note 4, at 470.

260. 474 U.S. at 473 (quoting Sierra Club v. Morton, 405 U.S. 727, 740 (1972)). *See also* Data Processing Orgs. v. Camp, 397 U.S. 150, 172-73 (1970); Flast v. Cohen, 392 U.S. 83, 106 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

261. 412 U.S. 669 (1973).

262. *Id.* at 689 n.14, (quoting Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601, 613 (1968)). The Court reviewed the minor nature of the injuries that have been sufficient for standing by observing that "important interests . . . [have been] vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote (citing Baker v. Carr, 369 U.S. 186 [1962]); a five dollar fine and costs, (citing McGowan v. Maryland, 366 U.S. 420 [1961]); and a $1.50 poll tax, (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663

need not be so if the thesis of this article is correct. It is only an injury requirement that fails to take seriously the real if intangible public value interests affected when constitutional rights are violated, that is doomed to test only "trifles."[263]

According to a second theory of the purpose of the injury requirement, injury is said to be tied to our notion of what constitutes a "case" or "controversy".[264] Because Article III limits federal courts to "cases," and "cases" are supposed to involve two or more adverse parties, at least one of whom has suffered or is threatened with personal injury by the other, the injury requirement assures that the courts will not exceed the "judicial power" set forth in Article III. Thus, injury serves a separation of powers function. Injury tests whether there is a "case" or "controversy" and, in so doing, operates to "limit the federal judicial power 'to those disputes . . . which are traditionally thought to be capable of resolution through the judicial process.' "[265] As Professor Berger has pointed out, there can be no proper historical basis for this reading of Article III.[266] Moreover, there are logical limits to how the separation of powers idea can inform standing determinations. Separation of powers principles only get the Court to the point that injury in fact, causation, and redressability are required; they do not help to apply these requirements or, more specifically, to differentiate among different claims of injury. It may be that, even *given* injury, other doctrines expressive of separation of powers principles may militate against a decision on the merits or against

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[1966])." *Id.* *But see* Valley Forge, 454 U.S. at 486 ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy."); *Reservists*, 418 U.S. at 225-26 ("the essence of standing 'is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured ' ") (quoting Doremus v. Board of Educ., 342 U.S. 429, 435 (1952)).

263. *See supra* note 213 (discussing the mixture of tangible and intangible injuries involved in a Fourth Amendment case). *See also supra* note 166 and accompanying text.

264. *See* Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues,* 75 HARV. L. REV. 40, 42-47 (1961). *See also* Glidden v. Zdanok, 370 U.S. 530, 563 (1962); Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting) (under the historic understanding of Article III, "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies' ").

265. *Valley Forge,* 454 U.S. at 472 (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)).

266. *See* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?,* 78 YALE L.J. 816 (1969).

Marshalling an impressive array of historical material, Professor Berger concludes that "[t]here may well be policy arguments in favor of a 'personal interest' limitation on standing, but they cannot rest on historically-derived constitutional compulsions." *Id.* at 840. There is support in the cases and the commentary, however, for a modified version of this proposition, although it is not necessarily stated in historical terms. *See* Allen v. Wright, 104 S. Ct. 3315, 3324-25 (1984); *Valley Forge,* 454 U.S. at 474; Flast v. Cohen, 392 U.S. at 97; K. DAVIS, *supra* note 9, § 24.7, at 231.

the grant of some particular relief requested. But if this is so in a particular case, it is nonsensical to say that—because standing requirements are applied "in light of" separation of powers principles—what first appeared to be an injury caused by the defendant's conduct and redressable by the court is in fact not injury at all.[267]

Whatever the reasons for requiring injury and whatever the rules for determining whether it exists in particular cases, the Court, if it is serious about the injury requirement, must decide injury questions by reference only to harm suffered by the litigant. The Court should keep in mind that although injury adjudication is important, it does not comprise the whole of standing law, nor of justiciability, nor of federal court jurisdiction. There is more than adequate opportunity—in application of prudential standing bar, justiciability requirements, the political question doctrine, and federalism restraints—to pretermit adjudication on the merits should overriding policies expressed in other doctrines dictate that result. In approaching the question of injury, however, the Court should be solely concerned with that issue and nothing more.

Although getting the Court to stick to injury *qua* injury is difficult enough, requiring a reasoned adjudication process for injury to public value interests is even more difficult. The problem lies first in the Court's failure to clearly perceive the true nature of post-*Camp* injury in fact and second in the difficulty judges and lawyers have articulating and working with the reasons that must be advanced for finding or rejecting a post-*Camp* claim of injury.

I believe the problem lies in the Court's inability to comprehend fully the ramifications of its holding in *Camp,* which cast injury loose from its familiar though perhaps faulty moorings. Before *Camp,* legal injury occurred when there was an invasion of an interest secured by statute, the Constitution, or the common law (or by analogy to the common law when the government was the respondent).[268] *Camp* abolished these relatively well-defined legal injury sources and substituted "injury in fact." The legal interest test has essentially returned for rights created by statute,[269] but we are left in all other areas without familiar source material for interests. The command of *Camp* and later cases is injury in fact, but except for the added requirements that the injury be "concrete,"[270] "distinct and palpable,"[271] and not "generalized"[272] or "too

267. *See* Nichol, *Abusing Standing, supra* note 9, at 642-49.
268. *See supra* notes 22-25 and accompanying text.
269. *See supra* notes 44-72 and accompanying text.
270. *Richardson,* 418 U.S. at 177; *Sierra Club,* 405 U.S. at 740 n.16.
271. Warth v. Seldin, 422 U.S. 490, 501 (1975).
272. *Richardson,* 418 U.S. at 176.

abstract,"[273] the Court has told us little about how we can recognize such injury.

The *Camp* changeover from legal injury to injury in fact created an essential contradiction. Legal injury was rejected because it forced the court into a premature value judging role about legal types of injury.[274] Uncomfortable with making premature legal value judgments, the Court in *Camp* indicated that beyond showing that the litigant simply lost something of value, the "legal type" of loss was irrelevant.[275] The litigant had a sufficient stake in the litigation if he could show that the allegedly illegal actions caused loss and that the loss would be redressed if he prevailed.[276] By abolishing legal injury, the Court believed that it could avoid value judgments. Injury in fact, which everyone could recognize without resort to archaic common law distinctions or complicated legislative history, was to be the rule. Injury was to be "popularized". To the extent that the basis for standing is the litigant's, and not the lawyer's, "stake" in the outcome of the litigation, it makes some sense to require "layperson's" rather than "lawyer's" injury.

The contradiction in the *Camp* changeover is that the Court, far from avoiding the process of judging values, has simply exchanged one set of values for another. In so doing, the Court has increased the difficulty and uncertainty in ascertaining injury. The old set of values, for all its failings, was relatively easy to discover and apply; the new set is not. Lawyers are comfortable with consulting cases and statutes to marshal an argument that the interest in the money lost is really more like a franchise interest than a competitor interest, or even an argument that recent cases and statutory changes show that this sort of competitor interest is now protected by law. How do lawyers argue and how do judges determine that an interest asserted by a litigant represents a "trait or motive of behavior widely enough shared" that invasion of it "can be cast in terms of public values"? How do lawyers argue or do judges determine that society as a whole has "sympathy for and understanding of" a

273. *Reservists,* 418 U.S. at 227.

274. *Camp,* 397 U.S. at 153 ("The 'legal interest' test goes to the merits."). For example, before *Camp,* if a litigant sued claiming he was losing money, that loss in and of itself was not sufficient injury unless it was further determined that the type of financial interest involved was protected from loss by some provision of law. Thus, loss of money because of "mere competition" was not injury because no provision of the law protected against fair competition, *see* Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 138 (1939), discussed *supra* note 25; yet loss of money because of the loss of a franchise was injury because franchises were "rights" to financial advantage secured by statute and the common law. Frost v. Corporation Comm'n, 278 U.S. 515, 519-20 (1929), discussed *supra* note 25.

275. *Camp,* 397 U.S. at 153-54.

276. *See supra* note 1 and accompanying text.

litigant's loss? How is an "abstract" injury to be distinguished from a "concrete" injury, and a "palpable" injury from an "unpalpable" one?[277]

One can easily ask difficult questions about the precise source of the values underlying the interests. For example, why does exposure to "unwelcome religious exercises" in the public schools constitute harm?[278] Why are persons denied equal treatment "stigmatized," and why is such a stigma considered harm?[279] Why do voters have a "plain, direct and adequate interest in maintaining the effectiveness of their votes?"[280] Why is the "absolute" right to procedural due process so "importan[t] to organized society?"[281] On the negative side, why is there no injury suffered when one requests and is denied information about government operations?[282] Without attempting an analytical answer to any of these questions, we may feel intuitively that the answers are "they just are" or "they just aren't." To the extent that we do, and we reflect society's values, the Court's conclusions are "correct." However, guidance for the future is lacking.

Just as there is a danger that a court will "peek ahead" past the issue of injury *qua* injury to the relative attractiveness of the merits of the case or other considerations and allow that glimpse to color the injury determination, injury adjudication may also reflect nothing more than a given judge's or justice's ad hoc personal notion of harm. The Court in many cases appears to use its own collective intuition, yet all the while fails to acknowledge that it is using intuition at all. Without necessarily denigrating the role of personal intuition as a starting point for analysis, both the purposes of the injury requirement and the nature of public value adjudication demand that an injury determination reflect *society's* values and not those of individual judges or justices.

Common law public value adjudication, as with all other species of common law adjudication that inquire into the "fundamental principles

277. Professor Vining points out the difficulty:

> How an aspiration [i.e., a private value] becomes a shared [public] value in a culture and what leads a court to absorb it into the intellectual machinery through which the daily exercise of social force is judged and redirected are urgent subjects of study. There are clearly intermediate stages where we are uncertain where our sympathies lie. We may be convinced of the importance of an asserted value but realize that the courts would want more formal and developed proof that the value was indeed shared in the culture before disposing of social force in its vindication. We know very little of the process, and, knowing little, are subject to it rather than masters of it.

J. VINING, *supra* note 6, at 62.

278. *Valley Forge,* 454 U.S. at 486 n.22.

279. Allen v. Wright, 104 S. Ct. at 3327; *Mathews,* 104 S. Ct. at 1395.

280. Baker v. Carr, 369 U.S. at 208.

281. Carey v. Piphus, 435 U.S. at 266.

282. *Richardson,* 418 U.S. at 177.

of our society"[283] to discover legal principles, "is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment.[284] The process, however, is different from "I know it when I see it."[285] Part of the "discipline for the task" of common law public value injury adjudication is that the Court, in deciding whether an interest is a public value and whether the litigant is personally injured with respect to that interest, must conduct those inquiries solely as a matter of determining whether the litigant is harmed, and, to the greatest extent possible, by reference to what it perceives to be the shared sense of *society* and not simply its own personal values.

The problems discussed here with respect to the discovery and application of public values corresponding to constitutional provisions raise broader questions about the legitimacy of the whole process of common law public value injury adjudication. Even if the Court limits itself to the issue of injury and conscientiously tries to reflect society's values with respect to personal harm, it is proper to ask whether this is an appropriate role for the courts to play.

Two basic criticisms of the process are that courts are not particularly well equipped to say what society values are and that these determinations are properly left to the legislature. It is perhaps enough of an answer to these objections to say that so long as injury in fact is a requirement of standing, judgment about the existence and force of public values is unavoidable, and so long as injury in fact remains an Article III requirement, it will fall upon the courts to define what injury is. But to say that public value adjudications are unavoidable does not mean that they should be unconscious. Making the public value adjudication process a conscious one may automatically improve the quality of the process and the competence of the courts to make such judgments.

The alleged improper nature of this sort of inquiry or inability of federal courts to meet the task, however, has not prevented them from doing similar things in other areas. In at least three areas the federal courts develop rules without the immediate guide of textual sources and reflect public values in giving content to those rules. First, even after *Erie Railroad Co. v. Tompkins,*[286] areas of federal common law re-

283. Bartkus v. Illinois, 359 U.S. 121, 128 (1959).

284. *Id.* The task in *Bartkus* was determining what due process meant for state criminal procedure by distilling what was "implicit in the concept of liberty" as then required by Palko v. Connecticut, 302 U.S. 319, 325 (1937).

285. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

286. 304 U.S. 64 (1938).

main.[287] In choosing what legal principles to apply in those areas, the federal courts "draw upon relevant standards of conduct available in their communities,"[288] and develop rules "in the light of reason and experience"[289] in a manner that "accords with 'common sense and the public weal.' "[290] Second, there is evidence that the Court engages in "constitutional common law" adjudication by promulgating "subconstitutional rules" that operate to enforce the principles behind both text-based and important unwritten constitutional commands.[291] Areas of such "constitutionally inspired common law" include measures that are deemed necessary to enforce, but are not compelled by, the criminal procedural protection of the Bill of Rights (e.g., Miranda warnings, the exclusionary rule) and rules designed to enforce the free trade policies behind the "dormant" Commerce Clause.[292] Third, in giving content to open-ended constitutional provisions in areas such as substantive due process and equal protection, the Court's task has been described as one by which it discovers and applies "conventional morality."[293] This form of constitutional adjudication has been widely recognized by commentators as much closer to common law lawmaking than textual interpretation.[294]

Common law injury adjudication parallels the processes exemplified by these three activities. As with the traditional common law, the Court's task is to draw "inspiration from every fountain of justice,"[295] legal and nonlegal, to discover and reflect commonly shared understandings and behavioral assumptions that are well-enough established that

287. *See, e.g.,* Texas Indus. v. Radcliff Materials, 451 U.S. 630, 641 (1981) ("[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." (footnotes omitted)).

288. City of Milwaukee v. Illinois, 451 U.S. 304, 349 (1981) (Blackmun, J., dissenting).

289. FED. R. EVID. 501.

290. City of Milwaukee v. Illinois, 451 U.S. at 315 (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)). This may include a variety of sources including nonlegal ones. Funk v. United States, 290 U.S. 377, 383 (1933); Hurtado v. California, 110 U.S. 516, 531 (1884) ("the characteristic principle of the common law [is] to draw its inspiration from every fountain of justice").

291. Monaghan, *The Supreme Court 1974 Term—Forward: Constitutional Common Law,* 89 HARV. L. REV. 1 (1975).

292. *Id.* at 2.

293. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship,* 90 YALE L.J. 1063, 1068-73 (1981), and sources cited therein.

294. *See, e.g.,* Merrill, *The Common Law Powers of Federal Courts.* 52 U. CHI. L. REV. 1, 10 (1985) and sources cited therein. Professor Merrill formally counts fundamental rights adjudication as a species of federal common law.

295. Hurtado v. California, 110 U.S. 516, 531 (1884).

legal content can be given to them.[296] Similar to both the traditional common law and "constitutional common law," common law public value injury adjudication is an area where practical rules based on reason and experience and relying heavily on "legislative facts" are the order of the day.[297] Perhaps because of this fact, the Court has recognized that injury rules may be changed by Congress, which is in an equal if not better position to sift and weigh such data.[298] In common with "fundamental rights" adjudication, common law public value injury adjudication engages in a process similar to discovering and applying "conventional morality," defined by one commentator as " 'standards of conduct . . . which are widely shared in . . . society.' "[299] The parallel is even greater when the Court ascertains public value interests corresponding to unwritten constitutional guarantees, since many of the same considerations that determine whether an interest is so fundamental that it has constitutional right status are involved in determining whether the interest is a public value for injury purposes.[300]

Not surprisingly, separation of power and institutional competence objections similar to those suggested here have been leveled at the three parallel areas of common law adjudication mentioned above. What little criticism there is of the power of federal courts to make federal common law is based upon the notion that Congress, not the courts, should be the primary policy-making branch except as it delegates that power to the judiciary.[301] There has, of course, been pointed criticism of the Court's

296. *See generally* 15A C.J.S. *Common Law* § 10 (1967) ("Customs, such as those embodied in common law, are such practices and usages as exist, not just in memory, but actively, in guidance of, or at least in influence upon, the people's current pursuits.") and 15A AM. JUR. 2D Common Law § 1 (1976) (common law is "the embodiment of broad and comprehensive unwritten principles, inspired by natural reason and an innate sense of justice, and adopted by common consent for the regulation and government of the affairs of men").

297. *See* Monaghan, *supra* note 291, at 35 (constitutional common law rules are designed to "effectuate policies found in the text and structure of the Constitution"); *id.* at 26 (constitutional common law rules "may reflect a blend of reason, analogy, experience, and pure hunch").

298. *See supra* notes 44-63 and accompanying text. *See also* New Jersey v. New York, 283 U.S. 336, 348 (1931) (federal common law is "subject to the paramount authority of Congress"). *But see* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE L.J. 221, 240 (1973) (arguing that legislative-type facts are equally available to courts in the form of expert testimony).

299. Wellington, *supra* note 298, at 244 (quoting H.L.A. HART, THE CONCEPT OF LAW 165 (1961)). *See* J. VINING, *supra* note 6, at 61 (a public value is an interest that is "a trait and motive of behavior widely enough shared to permit us to recognize it as a social role").

300. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973) (relying on the historical, moral, and social materials used to support the finding that a woman's interest in terminating her pregnancy is within the concept of liberty secured by the Due Process Clause).

301. City of Milwaukee v. Illinois, 451 U.S. at 312-13. ("The enactment of a federal rule is an area of national concern . . . is generally made not by the federal judiciary, purposefully

"constitutional common law" adjudication establishing "subconstitutional" rules[302] and discovering and applying fundamental rights.[303] Rarely is the Court's power to develop *some* federal common law or to give *some* content to constitutional provisions doubted. Rather, the criticism revolves around issues of overstepping, thereby invading the legislative province, or exceeding the institutional competence of courts.[304]

The force of these objections as applied to common law public value injury adjudication is blunted somewhat by three factors. First, Congress has input into the process, indirectly when trends in legislative policy color or reflect social values,[305] and directly when Congress modifies injury by enacting new "legal rights, the invasion of which creates standing."[306] Thus, unlike fundamental rights adjudication, but somewhat similar to the general common law and constitutional common law, there is a dialogue with Congress.[307] Second, standing is a preliminary determination rather than a ruling on the merits; thus, unlike fundamental rights adjudication and to a lesser extent the imposition of subconstitutional rules, the consequences of a "mistaken" public value determination for standing purposes is not as great. Thus, the age-old problem of fundamental rights adjudication, succinctly captured by Professor Michelman's question "why education and not golf?", loses its force when applied to injury adjudication because the answer there is probably "both."[308] Third, the source of power to define injury—Article III—is

insulated from democratic pressures, but by the people through their elected representatives."); Texas Indus. v. Radcliff Materials, 451 U.S. 630, 640-41 (1981).

302. *See, e.g.,* Schrock & Welsh, *Reconsidering the Constitutional Common Law,* 91 HARV. L. REV. 1117 (1978).

303. *See, e.g.,* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 63-67 (1980); Brest, *supra* note 293, at 1080-83.

304. *See* ELY, *supra* note 303, at 4-5, 67; Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 2-3 (1971) (fundamental rights adjudication); Shrock & Welsh, *supra* note 302, at 1126-45, 1149-53 (subconstitutional rules).

305. *See supra* notes 64-72 and accompanying text.

306. *See supra* notes 44-63 and accompanying text.

307. *See* Monaghan, *supra* note 291, at 26-30, 34-38. Congress' input may be of the "one-way ratchet" type. Though Congress can expand beyond the common law public value notion of injury, it would be hard-pressed to pass legislation which "overruled" a court determination that injury existed on particular facts. *Cf.* Miller, *Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of Heckler v. Mathews,* 20 HARV. C.R.-C.L. L. REV. 79, 132-37 (1985). However, separation of powers or federalism interests could be vindicated in other ways by statutes limiting jurisdiction, repealing statutes establishing causes of action, or by limiting relief that may be granted. *See, e.g.,* 28 U.S.C. § 2283 (1983) (anti-injunction statute).

308. Michelman, *The Supreme Court, 1968 Term—Forward: On Protecting the Poor through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 59 (1969); *See Sierra Club,* 405 U.S. at 738 (quoting Data Processing Orgs. v. Camp, 397 U.S. 150, 154 (1970): "The interest alleged to have been injured 'may reflect "aesthetic, conservational, *and recreational*" as well as economic values' ") (emphasis added).

the peculiar province of courts. Courts must live with the consequences of an injury determination. Defenses on the merits or other doctrines may well preclude a final ruling that affects other branches, but the immediate effect of a positive standing determination is that, barring other jurisdictional limitations, the court must try or otherwise dispose of the case. In addition, however the institutional competence of courts is defined, determinations of the meaning of "injury," of what a "case" or "controversy" is, and of the behavior and status of litigants, are subjects about which judges can claim expertise. Consequently, there is somewhat less chance that injury adjudication will exceed the institutional competence of the courts.

At least in the context of discovery and application of public value interests corresponding to constitutional guarantees, institutional competence objections have even less validity since, relative to other public officers, federal judges are generally knowledgeable of the historical and social contexts of law, particularly constitutional law. Consequently, the danger of judges being isolated from normal society in life-tenured positions and unknowingly infusing outmoded concepts of harm into the injury adjudication process is not as great.[309] However, there is the problem—which infects all species of adjudication but has a special history with respect to standing—that judges will take advantage of the "malleability of interest and injury"[310] to find or decline to find public value interests for reasons unrelated to whether there is injury or standing. Although the analysis and suggestions contained in this Article may help to understand and structure the inquiry, this Article cannot offer a satisfactory solution to the problems of hidden agendas and intellectual dishonesty that have pervaded the standing decisions.

Conclusion

Despite the Court's statement that there can be no standing when the only injury alleged is violation of a "personal constitutional right," it has nonetheless decided a number of cases in which that appears to have been the only injury involved. The reason for this apparently inconsistent behavior has been obscure, but recent cases suggest a rationale which is consistent with current standing doctrine and which has the

309. *See* L. TRIBE, *supra* note 168, at 454:

> *Part* of what was wrong with *Lochner* was the Court's overconfidence, both in its own factual notions about working conditions and perhaps also in its own normative convictions about the meaning of liberty; at least by the 1920's, if not yet in 1905, the Court should probably have paid more heed to the mounting agreement, if not the consensus, that the economic 'freedom' it was protecting was more myth than reality.

310. C. WRIGHT, A. MILLER AND E. COOPER, *supra* note 1, at § 3335.1, at 423.

potential for application to a wide variety of constitutional injuries. Rejection of the personal constitutional right approach to injury forecloses only one of the two possible routes, the legal interest model of injury. The other model of injury analysis—common law public value adjudication—remains available. Analysis of the cases alleging violations of constitutional rights in which standing has been allowed, even though no traditionally cognizable injury can be shown, indicates that the Court has approved of the common law public value adjudication process and has applied it to find injury to societal interests corresponding to core constitutional principles. This development should allow for standing in many constitutional cases in which it has been widely assumed that no cognizable injury existed.