ABUSING STANDING: A COMMENT ON *ALLEN V. WRIGHT*

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The Burger Court's treatment of the standing requirement has been, at best, erratic.¹ Access has, on occasion, been liberally granted.² More often, the doctrine has been employed without consistent rationale to fence out disfavored federal claims.³ This vacillation has created a body of article III decisions that ranks among the most uniformly criticized of the entire Burger Court legacy.⁴

This much said, last summer's decision in *Allen v. Wright*⁵ can hardly be considered surprising. In *Allen*, parents of black school children were denied standing to challenge Internal Revenue Service guidelines that allegedly enabled racially discriminatory private schools to obtain tax-exempt status.⁶ At first blush, *Allen* appears to be merely another case in which the Supreme Court has raised a jurisdictional hurdle to bar a claim designed to force a government entity to toe the

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¹ See, e.g., K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.00 (Supp. 1982); Chayes, *The Supreme Court: 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 14-22 (1982); Davis, *Standing*, 1976, 72 NW. U.L. REV. 69, 69-70 (1977).

² See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 81 (1978) (residents near nuclear power plant granted standing to challenge congressional limitation on nuclear accident liability); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976) (physicians granted standing to challenge criminal abortion statute based on threat of future prosecution); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) (student environmentalists granted standing to challenge ICC approval of freight rate increases on grounds that higher rates might discourage recycling and increase consumption of natural resources, thereby harming plaintiffs' aesthetic and recreational interests in nearby camping areas).

³ See, e.g., *Leeke v. Timmerman*, 454 U.S. 83 (1981) (inmates denied standing to sue state officials for blocking issuance of warrants to prison guards for unnecessary beatings); *Warth v. Seldin*, 422 U.S. 490 (1975) (builders, taxpayers, potential residents, and neighborhood association denied standing to bring exclusionary zoning claim); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (mother of illegitimate child denied standing to challenge child support laws enforced only on behalf of legitimate children).

⁴ See, e.g., Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 17 & n.91, 42 n.227 (1984); Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68, 68 n.3 (1984) (collecting sources critical of standing doctrine).

⁵ 104 S. Ct. 3315 (1984).

⁶ *Id.* at 3319, 3326.

constitutional mark. That alone is hardly worthy of comment.⁷

Yet *Allen* may prove to be a watershed. Without explanation, and unsupported by two decades of decisions and commentary,⁸ the *Allen* Court has ruled that the requirements of standing are to be interpreted primarily by reference to "separation of powers principles."⁹ At the very least, *Allen* has introduced a new factor into the already complex standing calculus. At most, *Allen* may portend a major tightening of judicial access by the Supreme Court in the name of deference to other branches of government.

Part I of this Article centers on *Allen*'s separation of powers premise. Not only is the introduction of justiciability analysis at odds with the development of the standing doctrine, it misperceives the requirement's very function. Rather than focusing on the litigant's stake in the controversy (traditionally the core of any standing inquiry),¹⁰ *Allen* seems to call for dismissal under a hybrid doctrine that offers no meaningful examination of either the litigant's interest or of separation of powers principles.

Part II argues that *Allen* takes the development of standing doctrine in exactly the wrong direction. *Allen* neatly caps a broader pattern of Burger Court standing decisions that either openly or covertly

⁷ A number of other Burger Court opinions have used standing to bar claims against governmental officials or practices. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (victim of police chokehold denied standing to enjoin its continued use); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (taxpayers denied standing to challenge government gift of surplus property to church-affiliated college); *Rizzo v. Goode*, 423 U.S. 362 (1976) (minorities denied standing to challenge racially directed police brutality); *United States v. Richardson*, 418 U.S. 166 (1974) (taxpayer denied standing to demand public accounting of CIA expenditures).

⁸ Early decisions often did not delineate the various strands of justiciability analysis. *See, e.g.*, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 140-41 (1951) (opinion of Burton, J., joined by Douglas, J.); *id.* at 150-60 (Frankfurter, J., concurring); *Massachusetts v. Mellon*, 262 U.S. 447, 480-89 (1923).

Since the early 1960's, however, the standing inquiry has been separated from other article III concerns. *See infra* text accompanying notes 39-52. Several modern standing cases have discussed separation of powers principles as an underlying justification for the article III "case or controversy" limitation of federal court jurisdiction. *See, e.g.*, *Allen*, 104 S. Ct. at 3345 (Stevens, J., dissenting); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-76 (1982); *Warth v. Seldin*, 422 U.S. 490, 498-500 (1975); *Flast v. Cohen*, 392 U.S. 83, 94-97 (1968). No case other than *Allen*, 104 S. Ct. at 3330 n.26, however, has explicitly suggested that separation of powers principles be used to interpret or give meaning to the injury, causation, and redressability requirements of the standing determination. In so doing, *Allen* brings separation of powers analysis out of the prudential realm and squarely into the article III constitutional inquiry.

⁹ 104 S. Ct. at 3330 n.26.

¹⁰ *See Flast v. Cohen*, 392 U.S. 83, 99-100 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962).

mix various strands of justiciability analysis. The standing hurdle has, over the course of the last decade, been raised or lowered to accommodate the various dictates of federalism, separation of powers, equitable restraint, and the appeal of particular claims on their merits. Neither standing nor the different interests it has been molded to serve have fared well in the process. Standing guidelines have been rendered incomprehensible precisely because they already carry too much baggage. Measuring the appropriate role of the federal judiciary or the desirability of substantive claims has overburdened a "threshold"¹¹ requirement designed to examine the personal stake of the litigant. *Allen* will thus serve to move standing doctrine further away from clarity, insuring that standing's "intellectual crisis"¹² will get worse before it gets better.

I. ALLEN v. WRIGHT

In its 1983 Term, the United States Supreme Court ruled that racially discriminatory private schools could not qualify for tax-exempt status.¹³ The complaint in *Allen* seemed to present the Court with its next logical step. Parents of black children attending various public schools brought a nationwide class action to challenge the effectiveness of the IRS guidelines designed to exclude discriminatory schools. According to the complaint, the school district of each of the parents was presently engaged in the agonizing process of desegregation.¹⁴ That process, they claimed, was impaired by the existence of private schools in each of the districts, typically begun at the same time as the desegregation plan, that discriminated against black students and enabled white students to leave the public schools.¹⁵ The crux of the *Allen* complaint was that the IRS procedures fostered and encouraged discriminatory private schools, thereby limiting the plaintiffs' opportunity to obtain an integrated education.¹⁶

¹¹ Warth v. Seldin, 422 U.S. 490, 498 (1975) (calling standing a "threshold question in every federal case").

¹² J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 1 (1978).

¹³ See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). *Bob Jones* involved two cases in which fundamentalist Christian schools were denied tax exemptions by the IRS. Bob Jones University, the plaintiff in one of the cases, prohibited interracial dating or marriage among its students, claiming that such relations were prohibited by the Bible. The university filed suit seeking a refund of tax payments.

¹⁴ See *Allen*, 104 S. Ct. at 3321.

¹⁵ See *id.* at 3321-22, 3335-38 (Brennan, J., dissenting); *id.* at 3343 n.2 (Stevens, J., dissenting).

¹⁶ See *id.* at 3322. The direct impact of discriminatory private schools on desegregation efforts was apparent from the complaint. For example, in Prince Edward County, Virginia, only 64 white school children remained in public schools after deseg-

Specifically, the plaintiffs challenged Revenue Procedure 75-50, which required schools applying for tax-exempt status to adopt a "racially non-discriminatory policy . . . that is made known to the general public," and annually to certify that the school had followed that policy.¹⁷ This adopt-and-certify-without-necessarily-implementing standard, the *Allen* plaintiffs claimed, allowed private schools to discriminate in fact while retaining tax-exempt status. Accordingly, the plaintiffs requested a declaratory judgment that the challenged IRS practices were illegal and a permanent injunction requiring the IRS to implement substantially more stringent nondiscrimination guidelines.¹⁸ Over two bitter dissents,¹⁹ the Court dismissed the suit for lack of standing.

Justice O'Connor authored the majority opinion. As in most Supreme Court standing decisions of the past decade, the core article III requirement was described as a three-part showing of "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."²⁰ The plaintiffs easily met the personal injury requirement through allegations of harm to their opportunity to receive an integrated education.²¹ They failed, however, to

regation, while 1311 attended private Prince Edward Academy. See Brief of the NAACP as Amici Curiae in Support of Respondents at 22 n.14, *Allen v. Wright*, 104 S. Ct. 3315 (1984).

¹⁷ Rev. Proc. 75-50, 1975-2 C.B. 587, quoted in *Allen*, 104 S. Ct. at 3319-20.

¹⁸ See 104 S. Ct. at 3322-23. The plaintiffs sought an injunction requiring the IRS to deny tax-exempt status to all private schools in desegregating school districts that (1) have insubstantial minority enrollments, (2) were established or expanded at the time of desegregation, and (3) either were found racially discriminatory in judicial or administrative proceedings or were unable to demonstrate that they did not provide segregated educational opportunities for white students seeking to avoid integrated public schools.

The IRS Commissioner conceded that the existing guidelines were ineffective and indefensible. See 104 S. Ct. at 3334 n.2 (Brennan, J., dissenting). In settlement negotiations in 1979, the IRS had agreed to adopt guidelines (revenue procedures) nearly identical to those requested by the plaintiffs, but Congress refused to approve or fund enforcement of the modified guidelines. See *id.* at 3323 & nn.15-16; 44 Fed. Reg. 9451-55 (1979) (proposed revenue procedure); 43 Fed. Reg. 37,296 (1978) (proposed revenue procedure).

¹⁹ Justice Brennan and Justice Stevens (joined by Justice Blackmun) filed spirited dissents. See 104 S. Ct. at 3333-42 (Brennan, J., dissenting); *id.* at 3342-48 (Stevens, J., dissenting). Justice Marshall took no part in the decision.

²⁰ *Id.* at 3325 (following *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)).

²¹ All participating Justices agreed that the plaintiffs had sufficiently alleged injury. See *id.* at 3328; *id.* at 3335-36 (Brennan, J., dissenting); *id.* at 3342 (Stevens, J., dissenting). In fact, the majority conceded that the "children's diminished ability to receive an education in a racially integrated school . . . is, beyond any doubt, not only judicially cognizable but . . . one of the most serious injuries recognized in our legal system." *Id.* at 3328 (citations omitted).

The *Allen* majority addressed two other injuries alleged by the plaintiffs: that they

show that their injuries were fairly traceable to the actions of the IRS. The "line of causation" between IRS policy and the effective desegregation of the litigants' schools was "attenuated at best."²² Whether a change in the IRS guidelines would lead school officials to alter their discriminatory policies or motivate parents to send their children back to the public schools was "pure speculation."²³ Similarly uncertain was the likelihood that a "large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools" attended by plaintiffs' children.²⁴ The causation component of the standing hurdle thus proved fatal to the plaintiffs' claim.²⁵

One may easily fault the *Allen* Court's application of standing doctrine.²⁶ The "fairly traceable" requirement was again employed in

were harmed by the unconstitutionality of the government's conduct, and that they suffered denigration from the government's grant of tax-exempt credentials to discriminatory schools. The first allegation was held too abstract, *see id.* at 3326, and the plaintiffs were not permitted to raise the second because their children had not applied for admission to the private schools, *see id.* at 3322, and thus personally had not been denied equal treatment. *See id.* at 3327.

²² *Id.* at 3328.

²³ *Id.* at 3329.

²⁴ *Id.*

²⁵ *Id.* Justice O'Connor's opinion makes clear only that the second prong of the standing inquiry—the requirement that the harm be "fairly traceable" to defendant's actions—was not met. The opinion also argues that courts should separate the "fairly traceable" and "redressability" components of the standing inquiry. *Id.* at 3326 n.19. This footnote implies that plaintiffs may have met the redressability hurdle. *See id.* ("Even if the relief respondents request might have a substantial effect on the desegregation of public schools . . .").

Even after explicitly separating the inquiries, however, Justice O'Connor recombinates them. Her entire opinion is designed to show that the plaintiff's harms were not "fairly traceable" to the IRS policy, yet she concludes that standing was lacking because "the plaintiff who seeks to invoke judicial power [must] stand to profit in some personal interest." *Id.* at 3333 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976)). This conclusion is redressability analysis. *See* C. WRIGHT, *LAW OF FEDERAL COURTS* § 13, at 68 n.43 (4th ed. 1983); Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 Ky. L.J. 185, 193-201 (1980-81); *see also* *Community Nutrition Inst. v. Block*, 698 F.2d 1239, 1245 n.28 (D.C. Cir. 1983) (distinguishing between "redressability" and "fairly traceable causation" requirements), *rev'd*, 104 S. Ct. 2450 (1984).

²⁶ *See*, for example, the cogent dissents filed by Justices Brennan and Stevens. 104 S. Ct. at 3333 (Brennan, J., dissenting); *id.* at 3342 (Stevens, J., dissenting). The outcome in *Allen* seems diametrically opposed to the Court's holdings in *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973), and *Coit v. Green*, 404 U.S. 997 (1971), *aff'g mem.* *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971). In his *Allen* dissent, Justice Brennan took apparent pleasure in quoting from the Chief Justice's opinion in *Norwood*:

"We do not agree with the District Court in its analysis of the legal consequence of this uncertainty [whether children would withdraw from private schools if free textbooks were eliminated], for the Constitution does not permit the State to aid discrimination even when there is no precise

an unduly rigorous fashion.²⁷ Since this standard continues to be given

causal relationship between state financial aid to a private school and the continued well being of the school."

104 S. Ct. at 3338 (Brennan, J., dissenting) (quoting *Norwood*, 413 U.S. at 465-66) (emphasis added by Brennan, J.). Justice O'Connor's response was an ineffectual attempt to distinguish the *Norwood* plaintiffs from the *Allen* plaintiffs because the former were enforcing rights created by an earlier court school desegregation decree. See 104 S. Ct. at 3331.

The gist of the plaintiffs' causation argument in *Allen*, however, was simple: tax-exempt status makes private schools economically more attractive. The IRS procedures allow private schools to retain that status while practicing racial discrimination. The IRS procedures therefore foster and encourage private discriminatory schools. The formation and expansion of these schools in plaintiffs' school districts harms the process of desegregation. See *id.* at 3322; see also *supra* note 16.

²⁷ Similarly rigorous applications can be found in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-43 (1976); *Warth v. Seldin*, 422 U.S. 490, 504-08 (1975).

Even accepting this harsh standard as appropriate, the proper result, as Justice Brennan recognized, would have been to remand the case for the plaintiffs to amend the eight-year-old complaint. See *Allen*, 104 S. Ct. at 3338 n.6 (Brennan, J., dissenting). A rigorous causation requirement could not have been foreseen from the usual rules of federal pleading. As the Court stated in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-78 (1982):

Under the liberal federal pleading standards, . . . dismissal on the pleadings is inappropriate at this stage of the litigation. At the same time, we note that the extreme generality of the complaint makes it impossible to say that respondents [plaintiffs] have made factual averments sufficient if true to demonstrate injury in fact. Accordingly, on remand, the District Court should afford the plaintiffs an opportunity to make more definite the allegations of the complaint.

A strict causation standard is particularly troublesome in cases where the causation issue closely approximates the claim on the merits. If IRS procedures do encourage private segregation they would certainly be illegal. Cf. *Reitman v. Mulkey*, 387 U.S. 369 (1967) (California constitutional amendment that authorized discrimination in housing found unconstitutional). The crucial question on the merits of the *Allen* claim was whether the government created a subsidy that in fact encouraged white students to leave the public schools. Under the majority's application of the traceability requirement, the connection between government action and the enrollment of white students in discriminatory private schools must be alleged in such a specific manner that there could be no speculation as to its truth. As a result, the plaintiffs were required to prove their case in the complaint without benefit of discovery or trial.

The traceability requirement, however, is not always identical to the claim on the merits. In *Simon*, for example, the litigants sought to demonstrate that a newly adopted IRS policy was contrary to congressional intent. 426 U.S. at 33-34. The merits of that claim were quite separate from the traceability of the plaintiff's injury—diminished ability to receive free emergency hospital care—to the new policy. See *id.* at 33.

The causation argument in *Allen* was also more easily made than in *Simon*. To obtain tax-exempt status in *Simon*, the hospitals were required to serve indigents without charge, *id.* at 30, thereby incurring expenses that offset the economic advantages of tax-exempt status. The private schools in *Allen*, however, were not required to make additional expenditures, thus providing a purer economic incentive. Similarly, the redressability argument in *Allen* was more certain than in *Simon*. The success of plaintiffs' suit would have yielded one of two results: either discriminatory private schools would lose their tax exemption, thereby ending the government subsidy that facilitated their expansion, or the schools would cease to discriminate. Either way, plaintiffs' in-

a more lenient construction on other occasions,²⁸ the decision looks very much like a rejection of the plaintiffs' claim on the merits.²⁹ The opinion's tortured treatment of causation, however, is less troubling than its expressed reliance on separation of powers analysis. Had the Court merely manipulated existing standing principles to reach the desired result, standing doctrine as a whole would have remained basically unchanged.³⁰ The *Allen* opinion makes clear, however, that the standing inquiry itself is to be expanded.³¹

According to Justice O'Connor, standing doctrine is "built on a single basic idea—the idea of separation of powers."³² Unlike references to separated powers in earlier standing cases,³³ O'Connor's opinion explicitly notes that separation of powers concerns do not underlie article III jurisdictional limitations merely in the sense that plaintiffs who lack standing are outside the area of judicial responsibility.³⁴ Rather, the three components of article III standing are themselves to be interpreted in light of "separation of powers principles."³⁵

The *Allen* plaintiffs, for example, were found to have stated no

jury would be redressed. In *Simon*, by contrast, the hospitals might have preferred to give up their tax exemption rather than provide free treatment for indigents, leaving the plaintiff's injury unredressed. See Brief of the NAACP as Amici Curiae in Support of Respondents at 44-46, *Allen v. Wright*, 104 S. Ct. 3315 (1984). Of course, the causation and redressability reasoning in both *Allen* and *Simon* was directly at odds with Congress's theory in granting tax exemptions: the five Supreme Court Justices joining the majority opinions in these cases seem to believe that private parties do not change their behavior to reduce their taxes.

²⁸ See, e.g., *Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980) (upholding standing of respondents to intervene in challenge to interpretation of federal irrigation statute on grounds that application of the statute would lower price of land that respondents sought to purchase, although the plaintiffs could not establish their financial ability to make the purchase); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) (finding sufficiently traceable the claim that increased freight rates would discourage recycling thereby using more natural resources and causing plaintiffs aesthetic harm in their outdoor recreational activities in local wilderness areas).

²⁹ See *supra* note 27.

³⁰ The inconsistency of the Burger Court's application of the injury-causation-redressability sequence is a story often told. See, e.g., Chayes, *supra* note 1, at 14-22; Nichol, *supra* note 25, at 185-213. See generally Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977). Given this inconsistency, there is increasing evidence that lower federal court judges have begun to follow the standing principles as announced but not as applied by the Justices. See, e.g., *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 809-12 (D.C. Cir. 1983); *Community Nutrition Inst. v. Block*, 698 F.2d 1239, 1246-52 (D.C. Cir. 1983).

³¹ See 104 S. Ct. at 3330 n.26.

³² *Id.* at 3325.

³³ See *supra* note 8.

³⁴ Justice O'Connor expressly disagreed with this characterization of her separation of powers analysis in Justice Stevens's dissent. Compare 104 S. Ct. at 3330 n.26 (majority opinion) with *id.* at 3345 (Stevens, J., dissenting).

³⁵ *Id.* at 3330 n.26.

fairly traceable injury in part because the recognition of such injury would "have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action."³⁶ Separation of powers considerations are not to be "considered only under a distinct justiciability analysis,"³⁷ but pervade the standing determination itself. The principle of granting each branch of government wide latitude in conducting its internal affairs "counsels against recognizing standing in a case brought . . . to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties."³⁸ The version of standing set forth in *Allen* thus not only takes the plaintiffs' interest as its focus, but filters that interest through a lens to measure the appropriate role of the federal judiciary in a tripartite system of government. The propriety and consequences of such a hybrid doctrine will be examined in the remainder of this Essay.

A. *The Anomalous Mixture of Standing and Separation of Powers*

The first comment one might make about this infusion of separation of powers analysis is that it departs sharply from standing law as we have come to know it. American law of case or controversy recognizes that jurisdiction in federal courts may be barred for a variety of reasons: a litigant may lack standing; a suit may call for an advisory opinion;³⁹ it may be collusive;⁴⁰ lack subject matter jurisdiction,⁴¹ or run afoul of the political question doctrine.⁴² Only the requirement of standing, however, exclusively evaluates the litigant's interest or stake in the outcome. Decisions spanning at least two decades, including those of the Burger Court until *Allen*,⁴³ have expressed this view of

³⁶ *Id.* at 3329 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

³⁷ *Id.* at 3330 n. 26.

³⁸ *Id.* at 3330.

³⁹ *See, e.g.*, *Muskraat v. United States*, 219 U.S. 346, (1911) (challenge by Cherokee Indians to constitutionality of federal statute affecting division of their lands dismissed as advisory in absence of actual controversy).

⁴⁰ *See, e.g.*, *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339 (1892) (friendly parties may not bring suit to challenge governmentally established railroad fares).

⁴¹ *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 198-204 (1962) (discussing subject matter jurisdiction); *Osborn v. President, Directors, & Co. of the Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (upholding subject matter jurisdiction over suit by federal bank against officers of a state).

⁴² *See, e.g.*, *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring) (vacating and remanding with directions to dismiss Senator Goldwater's challenge to President Carter's termination of United States-Taiwan mutual defense treaty as involving a nonjusticiable political question).

⁴³ *See, e.g.*, *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the contro-

standing.

The modern concept of standing was given its most thorough explanation in *Flast v. Cohen*.⁴⁴ Chief Justice Warren attempted in *Flast* to separate the various strands of jurisdictional inquiry previously grouped under the umbrella of article III. Relying on *Baker v. determination that the gist of standing is whether the plaintiff has the requisite "personal stake in the outcome of the controversy,"*⁴⁵ he separated the question of standing from the justiciability of the claim.⁴⁶ Specifically rejecting the government's claim that taxpayer standing to challenge government expenditures was barred by the separation of powers doctrine, the Court in *Flast* held:

The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wished to have adjudicated. . . .

. . . The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government.⁴⁷

This view accords with descriptions of standing doctrine offered by prominent academic commentators. Hart and Wechsler's classic work on the federal courts⁴⁸ suggests that the standing inquiry should examine the "nature and sufficiency of the litigant's concern with the subject matter of the litigation, as distinguished from problems of the justiciability—that is, the fitness for adjudication—of the legal questions which he tenders for decision."⁴⁹ It is true, of course, that the history of standing has been profoundly marked by judicial manipula-

versy' as to warrant his invocation of federal court jurisdiction") (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973) (stressing importance of personal injury to litigant in creating standing, because such injury "gives a litigant direct stake in the controversy"); *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972) (standing turns on whether a "party has a sufficient stake in an otherwise justiciable controversy"); *Flast v. Cohen*, 392 U.S. 83, 100 (1968) ("The question whether a particular person is a proper party to maintain an action does not, by its own force, raise separation of powers problems").

⁴⁴ 392 U.S. 83 (1968).

⁴⁵ 369 U.S. 186 (1962).

⁴⁶ *Id.* at 204.

⁴⁷ *Flast*, 392 U.S. at 99-100.

⁴⁸ *Id.*

⁴⁹ P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973).

⁵⁰ *Id.* at 156.

tion to serve unstated ends. Yet the only meaningful consensus to be drawn from the entire standing literature is that the determinative issue is supposed to be "whether [the plaintiff] . . . has a sufficient personal interest,"⁵⁰ and not concern for separation of powers, federalism, or the attractiveness of the claim on its merits.⁵¹ At the jurisdictional stage, separation of powers interests have long been considered the bailiwick of the political question doctrine.⁵²

It is therefore understandable that Justice O'Connor offers little authority for her claim that standing is built on the "single basic idea" of separation of powers.⁵³ She does, however, make three attempts to justify the contention. First, she cites dictum from *Chicago & Grand Trunk Ry. v. Wellman*,⁵⁴ a case that did not concern standing at all.⁵⁵

⁵⁰ Scott, *Standing in the Supreme Court: A Functional Analysis*, 86 HARV. L. REV. 645, 647 (1973) (quoting H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 174 (1953)).

⁵¹ See, e.g., K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 22.04, at 427 (3d ed. 1972) ("The purpose of the law of standing is to protect against improper plaintiffs. That should be its only purpose."); J. NOWAK, R. ROTUNDA & J. YOUNG, JR., *CONSTITUTIONAL LAW* 81 (2d ed. 1983) (standing turns on personal stake); C. WRIGHT, *supra* note 25, § 13, at 62-63 (emphasizing the role of a personal stake rather than justiciability in standing determinations); Scott, *supra* note 50, at 647; Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1726 (1980) (courts should use standing to measure litigant interest, not to introduce separation of powers and other concerns).

It should perhaps be mentioned that Professor Logan has recently suggested that standing requirements be evaluated "from a separation of powers perspective." Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 41. At bottom, however, Professor Logan concludes only that the "generalized grievances" cases such as *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), should be decided on prudential rather than constitutional grounds, and that access should be liberally granted in statutory standing cases. See Logan, *supra*, at 82. Such a model would not interpret the existing standing formulations in light of separation of powers principles as Allen proposes. In fact, since Congress has shown no interest in providing standing for generalized constitutional claims, and since statutory standing is already given the broadest of readings, the Logan formulation appears to add little.

⁵² See *Baker v. Carr*, 369 U.S. at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers."); J. NOWAK, R. ROTUNDA & J. YOUNG, JR., *supra* note 51, at 109-13; C. WRIGHT, *supra* note 25, § 14, at 75 ("[T]he concern underlying the [political question] doctrine is that of separating the proper sphere of federal judicial power from the appropriate spheres of federal executive and legislative power.").

⁵³ See 104 S. Ct. at 3325.

⁵⁴ 143 U.S. 339 (1892).

⁵⁵ See 104 S. Ct. at 3325 (quoting *Wellman*, 143 U.S. at 345). *Wellman* held only that the trial judge did not err in refusing to instruct the jury that the challenged legislation was unconstitutional as a matter of law. The *Wellman* Court noted, however, that the case was brought by friendly parties and warned against collusive suits designed to challenge the constitutionality of legislative acts. See *Wellman*, 143 U.S. at 345.

Second, she uses a quotation from *Flast* torn violently out of context.⁵⁶ Finally, she argues that "both federal and state courts have long experience in applying and elaborating . . . the pervasive and fundamental notion of separation of powers."⁵⁷ This experience would presumably facilitate future determinations when brought to bear on standing doctrine. Non sequitur aside, it might have been more accurate to point out that in few areas of American constitutional law have courts proved more ineffective than in dealing with separation of powers.⁵⁸

Allen's claim, in short, is both new and unsupported. Moreover, as the next section concludes, separation of powers analysis simply cannot be applied to current standing doctrine requirements.

B. *Interpreting Standing Requirements Through Separation of Powers Principles*

If case law and scholarship fail sufficiently to convince you that standing is not a separation of powers doctrine, consider how separation of powers principles might be applied to the various standing tests fashioned by the Burger Court. Recent cases teach that a litigant is required to demonstrate personal injury that is fairly traceable to the actions of the defendant and likely to be redressed by a favorable decree.⁵⁹ *Allen* declares that a court should "rely on separation of powers

⁵⁶ Justice O'Connor writes:

These questions and any others relevant to the standing inquiry must be answered by reference to the article III notion that federal courts may exercise power . . . only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process"

104 S. Ct. at 3325 (quoting *Flast*, 392 U.S. at 97) (interpolations by O'Connor, J.).

Recall that *Flast* held specifically that standing questions do not raise separation of powers principles. See *supra* text accompanying notes 44-47. The sentence quoted by Justice O'Connor actually reads: "[T]he Article III prohibition against *advisory opinions* reflects the complementary constitutional considerations [that] . . . [f]ederal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast*, 392 U.S. at 97 (emphasis added).

⁵⁷ 104 S. Ct. at 3325.

⁵⁸ See J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE SUPREME COURT (1980); see also M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY IN THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 37-60 (1982).

The present state of the political question doctrine is a good example of the problems with separation of powers analysis. See, e.g., C. WRIGHT, *supra* note 25, § 14, at 74 ("No branch of the law of justiciability is in such disarray as the doctrine of the 'political question.'"); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 599-600 & 600 n.8 (1976).

⁵⁹ See *Valley Forge Christian College v. Americans United for Separation of*

principles to interpret"⁶⁰ these standards.

At the start, it is far from simple to determine exactly what "separation of powers principles" are. The *Allen* opinion itself offers no meaningful guidance.⁶¹ From other contexts, however, we can conclude that a healthy judicial concern for separation of powers would seek to avoid either intruding upon the work of another branch of government or performing a function that the Constitution allocates to another branch.⁶² Standing tests that require causation and redressability, however, have nothing to do with intrusion or with the allocation of decisionmaking responsibility.

Suppose that the *Allen* plaintiffs had presented a perfect case of causation: the Secretary of the Treasury testified that the IRS procedures were promulgated solely to foster and encourage private discriminatory schools for the purpose of defeating desegregation efforts, and the private schools acknowledged that they could not exist but for the IRS policy. Would the relief requested intrude any less into the workings of the executive branch? The answer is no, and the reason it is no is that the causation requirement has nothing to do with separation of powers. The nature and extent of the interference with a coequal branch of government would not vary.

We may well believe, in such a hypothetical, that judicial intervention would be more justified, but that goes only to the strength of the claim on its merits. "Traceability" (causation) merely attempts to assure that the injury—the essential basis for federal jurisdiction—is somehow related to the allegedly illegal actions of the defendant. Its presence, or absence, is unrelated to intrusion on other branches.

The redressability requirement is similarly unrelated to separation of powers. Had the *Allen* plaintiffs been able to demonstrate that every discriminatory private school in the country would be forced to close its doors if the IRS adopted tougher guidelines, their injuries would undoubtedly have been redressable. Given the existence of truancy laws, integration of the public schools would inevitably increase. The plaintiff's requested injunction, however, would not have been any more or less intrusive. The redressability hurdle insures that the injury that is

Church and State, 454 U.S. 464, 472 (1982).

⁶⁰ 104 S. Ct. at 3330 n.26.

⁶¹ See *infra* text accompanying notes 66-69.

⁶² See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441-46 (1977) (upholding Congressional Act's regulation of the disposition of President Nixon's White House materials against separation of powers challenge because the Act would not disrupt executive branch functions); *Baker v. Carr*, 369 U.S. at 210, 226 (a federal court voting reapportionment suit was justiciable because it did not involve questions decided or to be decided by another branch of government).

the basis for standing will be remedied by the invocation of judicial power. It prevents judicial decrees that have no effect in the real world. Like its counterpart, the causation requirement, redressability is irrelevant to separation of powers.⁶³ It is difficult to imagine, therefore, how one might use "separation of powers principles to interpret" its demands.

In short, the tests formulated by the Supreme Court over the the past quarter-century have been designed to measure the interest of the litigant. The personal injury (or injury-in-fact) standard requires that the plaintiff have something at stake in order to sue. The causation and redressability components insure an adequate relationship between the defendant, the cause of action, and the injury providing the basis for standing. None of these components is logically capable of interpretation through separation of powers principles.

Another possibility exists for interpreting Justice O'Connor's bow toward separated powers. The claim in *Allen* could mean that separation of powers principles should be used to skew the standing determination rather than to interpret its requirements.⁶⁴ Under such a reading, if a case presented both standing and justiciability problems the two could appropriately be combined to defeat jurisdiction—not unlike some notion of cumulative error.⁶⁵ This interpretation, of course, is a

⁶³ As a criterion for standing, "redressability" takes no account of the relative efficacy of possible action by another branch of government. Redressability asks only whether the *judiciary* can construct a useful remedy, not how favorably that remedy compares with hypothetical cures that could be fashioned by another branch.

⁶⁴ Justice Stevens, dissenting in *Allen*, offers this theory as one possible interpretation of the majority's claim. See 104 S. Ct. at 3345-46 (Stevens, J., dissenting).

⁶⁵ The doctrine of cumulative error permits reversal when numerous insubstantial errors are found to have prejudiced a trial even though no single error alone would justify a reversal. See *United States v. Canales*, 744 F.2d 413, 430 (5th Cir. 1984); *Payne v. Janasz*, 711 F.2d 1305, 1315-16 (6th Cir.), *cert. denied*, 104 S. Ct. 552 (1983); *United States v. Berry*, 627 F.2d 193, 200-01 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

Consider two examples. In *Valley Forge*, the Court refused to grant standing to a group of taxpayers challenging the transfer of government property to a religious organization. Justice Rehnquist's opinion in the case expressed concern that an exercise of jurisdiction in the case would affect "relationships between coequal arms of the National Government." 454 U.S. at 473. But why is that the case? Is the decision whether to give property to a religious organization entrusted by the Constitution to the executive branch? *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), in which the Court denied standing in an action based upon the incompatibility clause, in part as the result of separation concerns, raises similar questions. Deciding whether members of Congress can also hold positions in the Armed Forces Reserve hardly seems to endanger the independent working of the United States Congress. In these cases, the Supreme Court could not with candor rule that the challenged decisions represented "political questions." Therefore, under inconsistent and conclusory rationales, the Court ruled that the plaintiffs lacked standing. See *Nichol, Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C.L. Rev. 798, 805-19 (1983). If

far cry from making separation of powers the grounding principle of standing doctrine, which is what the *Allen* majority claims to have had in mind. It also produces equally unsatisfactory results.

Not surprisingly, federal constitutional claims often call into question the validity of actions of another organ of government. By definition, therefore, they raise the specter of judicial intrusion. Most often, however, such cases cannot in good faith be deemed political. If the standing determination may appropriately be "skewed" by separation of powers concerns in such cases, courts will be increasingly tempted simply to deny standing on undisclosed grounds.

Allen itself is an example of such muddled decisionmaking. Although it sets up separation of powers principles as the guiding light for standing, and although it finds that the plaintiffs lack standing, the decision sets forth no meaningful separation of powers analysis. The Court does state that standing "counsels against" granting jurisdiction in cases that attack the internal workings of the executive branch in fulfilling its delegated duties.⁶⁶ In the corresponding footnote, however, Justice O'Connor explains that "our analysis . . . does not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable."⁶⁷ Given that the Court does on occasion indeed countenance substantial judicial "restructuring" of both federal and state administrative frameworks,⁶⁸ this is simply trying to have it both ways.

Had the plaintiffs prevailed, *Allen* itself might have produced substantial separation of powers problems. IRS enforcement policies would have been changed and agency resources reallocated.⁶⁹ In order for the

the plaintiffs in these cases asserted no legally cognizable interest, standing should have been denied. If their claims would have violated separation of powers principles, the political question doctrine should have been invoked. It hardly serves article III analysis, however, to use the standing doctrine to make covert and indefensible political question determinations.

⁶⁶ 104 S. Ct. at 3330. See *supra* text accompanying note 38.

⁶⁷ 104 S. Ct. at 3330 n.26.

⁶⁸ See, e.g., *Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981) (grant of standing to challenge Secretary Watt's use of bidding systems for leasing tracts for mineral exploration and development); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (upholding voter standing to challenge Georgia voting apportionment statute that debased plaintiffs' right to vote in congressional election); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (fifth amendment prohibits executive branch from maintaining a segregated school system).

At the state level, see *Allee v. Medrano*, 416 U.S. 802 (1974) (upholding injunction against unconstitutional law enforcement practices of Texas Rangers); *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, 16 (1971) (school desegregation order).

⁶⁹ The separation of powers concerns in *Allen* were heightened by congressional opposition to the plaintiffs' requested relief. Had the plaintiffs prevailed, the Court not

case to be dismissed as an unjustifiable intervention into the workings of another branch of government, however, the Court would have been forced to explain why some such intrusions are acceptable and others not. By using a hybrid standing analysis rather than the overt separation of powers scrutiny demanded by the political question doctrine, *Allen* was able to avoid such an inquiry. The result of combining standing analysis with separation of powers concerns, apparently, is that neither doctrine is meaningfully addressed.

II. DISSECTING ARTICLE III

Although I have so far described *Allen* as a marked departure from traditional standing doctrine, the case can also be seen as a predictable culmination of the Burger Court's treatment of article III. *Allen* brings separation of powers concerns out of the closet and expressly makes them a part of the standing inquiry. In this sense it is a significant change of direction, for until now even the Burger Court has *claimed* that standing decisions turn on the plaintiff's personal stake. If, however, one studies what the Burger Court has done with article III, rather than what it has said, *Allen* becomes less novel.

Despite protestations to the contrary, standing decisions of the past decade have been heavily influenced by at least four other concerns: separation of powers,⁷⁰ federalism,⁷¹ limits on the exercise of judicial remedial powers,⁷² and the Court's view of the claim on the merits.⁷³

only would have invaded discretionary executive branch procedures but also would have circumvented an explicit congressional stay. *See supra* note 18.

⁷⁰ *See, e.g.,* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976) (court must not "overstep[] its assigned role in our system"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (to adjudicate in the absence of actual injury would "distort the role of the Judiciary in its relationship to the Executive and the Legislature"); United States v. Richardson, 418 U.S. 166, 179 (1974) (supervision of government is a congressional, not a judicial, function); Laird v. Tatum, 408 U.S. 1, 15 (1972) (monitoring of executive branch most appropriately left to Congress).

⁷¹ *See, e.g.,* City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (equitable relief must be limited by federalism concerns); Rizzo v. Goode, 423 U.S. 362, 379 (1976) (same); O'Shea v. Littleton, 414 U.S. 488, 499-502 (1974) (federalism counsels refusal to interfere with state court proceedings).

⁷² *See, e.g.,* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 488-490 (1982).

⁷³ *Compare* Orr v. Orr, 440 U.S. 268 (1979) (standing granted to bring equal protection challenge against state alimony law that only applied to husbands) and Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (generous grant of standing to uphold federal limitation on nuclear power plant liability) with O'Shea v. Littleton, 414 U.S. 488 (1974) (standing denied in challenge to alleged racial discrimination in state court system) and Linda R.S. v. Richard D., 410 U.S. 614 (1973) (standing denied to challenge of child support laws enforced only on behalf of legitimate children).

Allen, in effect, looks to them all. The opinion explicitly embraces separation of powers concerns. Almost casually, Justice O'Connor also argues that the standing decision should be instructed by "determining whether the complaint states a sound basis for equitable relief."⁷⁴ The opinion further implicitly suggests that interests of federalism should play a key role in the standing determination.⁷⁵ Thus it would be less than surprising to learn at some future date that *Allen* has introduced equitable restraint and deference to local government into the standing calculus as well. The final factor listed—the Court's view of the claim on the merits—will likely affect the standing determination as long as judges with strong feelings about substantive claims decide jurisdictional issues. If mixing extraneous factors with standing doctrine were a good idea, *Allen* would be welcome. At least federal judges have now been given explicit direction to do what they must have suspected all along—to deny standing if any aspect of a case seems questionable or disconcerting. I believe, however, that the expansion of standing's umbrella that *Allen* augurs will ill serve article III. Such a blending of analyses will not induce more principled jurisdictional determinations.

A. *The Standing Morass*

It is not difficult to argue that the present law of standing is unsatisfactory. Announced principles do not explain even the major cases. Despite the asserted requirement that a litigant demonstrate "distinct and palpable" harm,⁷⁶ the Court does on occasion hear cases in which there is either no injury or no particularized injury.⁷⁷ The fairly traceable requirement has been toughened or relaxed to suit the judicial mood.⁷⁸ The redressability standard has been so aggressively manipulated that one would be hard-pressed to define it.⁷⁹ The "zone of inter-

⁷⁴ 104 S. Ct. at 3330 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)).

⁷⁵ See *id.* at 3324. In fashioning the standing argument, Justice O'Connor took special sustenance from *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), from *Rizzo v. Goode*, 423 U.S. 362 (1976), and from *O'Shea v. Littleton*, 414 U.S. 488 (1974). All three cases were heavily influenced by federalism concerns. See *Nichol*, *supra* note 4, at 98-101; see also *supra* note 71.

⁷⁶ *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

⁷⁷ Particularized harm has not been required in establishment clause cases. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984) (government sponsored Christmas crèche); *Mueller v. Allen*, 103 S. Ct. 3062 (1983) (state tax deduction covering private religious school tuition); *Meek v. Pittenger*, 421 U.S. 349 (1975) (state funds used to purchase books for religious schools); *Flast v. Cohen*, 392 U.S. 83 (1968) (federal funds for religious schools); cf. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (particularized harm need not be shown under statutory grant of standing).

⁷⁸ See *infra* notes 109-11 and accompanying text.

⁷⁹ Compare, e.g., *Leeke v. Timmerman*, 454 U.S. 83 (1981) (denying standing for lack of redressability) and *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26

est" mandate⁸⁰ has often been disregarded—even when it would seem dispositive.⁸¹ Worst of all, the Supreme Court has apparently ignored standing requirements altogether when the Justices have found the merits of a case particularly alluring.⁸² Taken together, the decisions offer little in terms of either principle to explain divergent results or predictability to guide decisionmaking in lower federal courts. Recalling that standing is designed to be a relatively simple and neutral threshold jurisdictional inquiry, it is no overstatement to characterize the Court's treatment as unsuccessful.

In general, the shortcomings of standing doctrine flow primarily from two sources. First, the standards designed by the Court to measure rights of access are extremely malleable. The linchpin of article III, the personal injury requirement, is hardly self-defining. Professor Vining has argued, in fact, that deciding whether a person has suffered judicially cognizable harm is a significant jurisprudential venture likely to produce both "intellectual and moral agonies."⁸³ Metaphysical complexities aside, injury determination has at the very least proved unpredictable. Similarly, causation is a notoriously unwieldy concept. As Professor Chayes has written, the "fairly traceable" standard "can readily be made to vary, if not with the length of the Chancellor's foot, then with the interests and sympathies of shifting configurations of five Justices."⁸⁴ Such open-ended concepts, without judicial elucidation, hardly serve to cabin the jurisdictional inquiry.

Second, the Burger Court has often attempted to fill the gaps in its vague standing guidelines by introducing factors traditionally thought extraneous to the standing inquiry. This reliance on interests that go beyond the scope of the litigant's stake, so energetically endorsed in *Allen*, has been the primary source of the standing doctrine's woes. It

(1976) (same) and *Warth v. Seldin*, 422 U.S. 490 (1975) (same) and *Linda R.S. v. Richard D.*, 410 U.S. 26 (1973) (same) with *Larson v. Valente*, 456 U.S. 228 (1982) (meeting redressability requirement) and *Bryant v. Yellen*, 447 U.S. 352 (1980) (same) and *Orr v. Orr*, 440 U.S. 268 (1979) (same) and *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978) (same).

⁸⁰ The zone of interest requirement is raised where plaintiffs allege a statutory basis for standing. It requires that the plaintiff's harm be within the zone of interests that the statute was designed to protect. See *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970); see also K. DAVIS, *supra* note 51, §§ 22.02-11.

⁸¹ See K. DAVIS, *supra* note 51, § 22.00.

⁸² See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984) (upholding municipal funding for Christmas nativity display); *Mueller v. Allen*, 103 S. Ct. 3062 (1983) (upholding state tuition tax deduction that included religious schools); *Norwood v. Harrison*, 413 U.S. 455 (1973) (enjoining state provision of textbooks to discriminatory private schools).

⁸³ J. VINING, *supra* note 12, at 174.

⁸⁴ Chayes, *supra* note 1, at 19.

can hardly be expected to cure the present inadequacies.

Initially, a review of the Burger Court's attempts to work these extraneous concerns into the standing calculus presents several analytical problems. Standing tests formulated to measure access are logically unrelated, not only to separation of powers principles as discussed above, but to federalism and equitable restraint as well. Whether a litigant is directly injured and whether that injury will be alleviated by the decree of a federal court provide precious little illumination of the appropriate allocations of power between state and federal government. Those cases which have brought the greatest interference with local prerogatives—school desegregation, school prayer, and prison reform, for example—fall easily within the injury-causation-redressability framework.

Neither can legitimate concerns about judicial intervention through injunctive relief against other branches of government be sensibly addressed as questions of standing rather than remedy.⁸⁵ Remedial overreaching may try both judicial resources and administrative or executive patience. Sensitivity to these concerns, however, cannot be measured by the existence or absence of injury and causation. Nor should remedial determinations be made at the threshold jurisdictional stage of the litigation. *Allen*, and other cases seeking to employ the standing rubric to accomplish ends beyond the examination of litigant's interest, use directness of injury as a surrogate to decide the outcome of significantly more complex issues.⁸⁶ The surrogate, however, is logically separate from the interests it is made to measure, and the article III decisionmaking process suffers.

Standing analysis, therefore, is not the only casualty of such interdoctrinal confusion. *Allen* is, in reality, a separation of powers decision that employs no separation of powers analysis. Similarly, *City of Los Angeles v. Lyons*,⁸⁷ in name a standing decision, turns primarily on the propriety of injunctive relief, without employing careful remedial analysis.⁸⁸ *Rizzo v. Goode*⁸⁹ and *O'Shea v. Littleton*⁹⁰ are federalism decisions masquerading under the standing heading.⁹¹ They contribute little to our understanding of federalism principles. When other

⁸⁵ See Fallon, *supra* note 4, at 22-47, 74.

⁸⁶ Cf. Fallon, *supra* note 4, at 72 ("[T]he availability of an injunction, as well as the form of injunctive relief, should depend on a calculus more complex than that employed by *Lyons*.").

⁸⁷ 461 U.S. 95 (1983).

⁸⁸ See *id.* at 111-12.

⁸⁹ 423 U.S. 362 (1976).

⁹⁰ 414 U.S. 488 (1974).

⁹¹ See Nichol, *supra* note 4, at 98-101; see also *supra* note 71.

distinct considerations are folded into the standing determination, those very issues escape thorough examination.

B. *Distortions of Injury, Causation, and Redressability*

The harm that cases blending various justiciability concerns inflict upon standing doctrine is, of course, more direct. Consider, for example, the three cornerstones of the standing inquiry: injury, causation, and redressability. Each reflects the results of judicial tampering designed to serve interests other than measurement of the litigant's personal stake in the controversy. The most extreme fluctuations in the Court's decisions accepting or rejecting various asserted harms have resulted from judicial attempts to include analysis of separation of powers, federalism, or equitable restraint concerns. This tampering has, in turn, contributed heavily to the incomprehensibility of the present standing doctrine. The injury component of standing is particularly vulnerable to distortion. In *Lyons*, police applied a nearly fatal chokehold to a black youth stopped for a minor traffic infraction. Lyons sued to enjoin continued use of the chokehold, but was denied standing. The Supreme Court expressed concern—as part of its standing determination—that such lawsuits would push federal remedial powers beyond acceptable bounds and interfere with local prerogative.⁹² Lyons was found to have asserted no cognizable injury.

By contrast, consider the harm found to be sufficient in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.⁹³ Law student environmental activists brought suit to enjoin the Interstate Commerce Commission from approving higher freight rates without conducting an environmental impact study. The students alleged that higher rates would discourage recycling, thereby increasing the consumption of natural resources and harming the plaintiff's aesthetic and recreational interests in hiking and camping in the forests surrounding the District of Columbia.⁹⁴ Can one reasonably argue that Lyons's continuing fear of the Los Angeles police practices that almost killed him once was not as distinct and palpable a harm as that suffered by the students in *SCRAP*?

More striking is a comparison of *Trafficante v. Metropolitan Life Insurance Co.*⁹⁵ with *Warth v. Seldin*.⁹⁶ The plaintiffs in *Trafficante*,

⁹² See *Lyons*, 461 U.S. at 112.

⁹³ 412 U.S. 669 (1973).

⁹⁴ *Id.* at 675-76.

⁹⁵ 409 U.S. 205 (1972).

⁹⁶ 422 U.S. 490 (1975).

who brought suit pursuant to the Fair Housing Act of 1968,⁹⁷ achieved standing based upon injury to their right to the "benefits from interracial association."⁹⁸ Three years later, in *Warth*, various residents of Penfield, New York, brought an action based upon constitutional rather than statutory grounds.⁹⁹ Although they alleged injury identical to that suffered by the *Trafficante* plaintiffs,¹⁰⁰ the claim was held not judicially cognizable. The Supreme Court distinguished *Trafficante* because of the existence of the Fair Housing Act. A statutory grant of standing does indeed alleviate concerns over separation of powers.¹⁰¹ But is article III analysis well served when injury to the same interest is judicially cognizable on one occasion but not on the next?

Finally, consider *United States v. Richardson*.¹⁰² The litigants in *Richardson* complained that the CIA's refusal to publish its budget violated the accounts clause.¹⁰³ The Burger Court easily dismissed the claim as a mere "generalized grievance" that failed to meet the injury standard.¹⁰⁴ Yet had there been a statute mandating disclosure, such as the Freedom of Information Act, injury to that statutorily created interest would almost certainly have provided a basis for standing.¹⁰⁵ The Court's concern for separation of powers,¹⁰⁶ therefore, led it to the surprising conclusion that a constitutionally imposed freedom of information obligation could not support an injury claim, but that a statutory obligation could.¹⁰⁷ Other injury-distorting examples abound.¹⁰⁸ It is

⁹⁷ 42 U.S.C. § 3610(a) (1982).

⁹⁸ 409 U.S. at 210. See also *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (upholding standing for same injury).

⁹⁹ The plaintiffs alleged that Penfield's zoning ordinances effectively barred low and middle income individuals from obtaining housing in the town, thus abridging the plaintiffs' first, ninth, and fourteenth amendment rights and violating 42 U.S.C. §§ 1981-1983 (1982).

¹⁰⁰ See 422 U.S. at 512.

¹⁰¹ But see *McClure v. Carter*, 513 F. Supp. 265, 271 (D. Idaho) (even explicit congressional grant of standing cannot establish jurisdiction if controversy lies outside article III), *aff'd mem. sub nom.* *McClure v. Reagan*, 454 U.S. 1025 (1981).

¹⁰² 418 U.S. 166 (1974).

¹⁰³ U.S. CONST. art. I, § 9, cl. 7 ("[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published . . .").

¹⁰⁴ 418 U.S. at 176-77.

¹⁰⁵ Cf. *id.* at 204-05 (Stewart, J., dissenting) (arguing that in dismissing the case for lack of injury, the majority would be bound to deny even a congressionally authorized obligation such as the Freedom of Information Act because those denied information would still lack the injury required for article III standing).

¹⁰⁶ See *id.* at 179 (cases such as *Richardson* would transform our governmental structure into "an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in the federal courts").

¹⁰⁷ See *id.* at 178 & n.11.

¹⁰⁸ See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Laird v. Tatum*, 408 U.S. 1 (1972). Compare *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) with

clear, however, that the Supreme Court has offered its most aberrant injury rulings in cases in which the standing principle was manipulated to serve other justiciability concerns.

The causation or "fairly traceable" requirement has been most distorted in similar circumstances. In deferring to separation of powers interests in *Allen*—and on other occasions when the Court preferred to avoid a decision on the merits—the Court has converted the causation component into an anachronistic demand for specific pleading.¹⁰⁹ Normal pleading presumptions are inverted and the Court appears to read the complaint with "antagonistic eyes."¹¹⁰ In other cases, however, where a statutory grant of standing has swept away separation of power concerns, the Court has found article III requirements perfectly consistent with post-World War II concepts of notice pleading.¹¹¹

Baker v. Carr, 369 U.S. 186 (1962). The antiwar activist plaintiffs in *Schlesinger* claimed a violation of the incompatibility clause, U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."), by members of Congress who simultaneously held commissions in the armed forces. As injury, the litigants alleged harm to their ability to achieve effective, nonbiased representation in Congress, especially with regard to questions about the Vietnam War. In the denial of standing, Chief Justice Burger attempted to distinguish the suit from voting reapportionment cases. He described the allegations in *Baker* as based upon "concrete injury to fundamental voting rights, as distinguished from the abstract injury in nonobservance of the Constitution." 418 U.S. at 223 n.13. The Chief Justice was quite sure, however, that to grant standing would have posed a grave threat to the appropriate separation of powers. See 418 U.S. at 223.

But why was the action in *Schlesinger* characterized as "abstract," while a reapportionment plaintiff's injury was deemed to be "concrete"? If concreteness turns on the impact upon the plaintiff then the cases appear analogous. Both represent attempts to alleviate intangible impediments to a citizen's ability to be heard in the legislature. Moreover, the reapportionment plaintiff's right has been described as "fundamental." Since *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973), it has been understood that "fundamental rights" are those either explicitly or implicitly protected by the Constitution. Under that definition, the right asserted in *Schlesinger* under the incompatibility clause is at least as fundamental as the right presented in *Baker*.

¹⁰⁹ The *Allen* majority ruled that the complaint contained no allegation that the tax benefits received by private segregated schools "make an appreciable difference in public-school integration." 104 S. Ct. at 3328. In dissent, Justice Stevens was unable to understand the majority's reading of the complaint "unless the Court requires 'intricacies of pleading that would have gladdened the heart of Baron Parke.'" *Id.* at 3343 n.2 (Stevens, J., dissenting) (quoting Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1305 (1976)). Justice Brennan, in his dissent, quoted extensively from the plaintiff's complaint, leaving one hard pressed to justify the majority's ruling. See *id.* at 3336-37 (Brennan, J., dissenting).

Similar inversions of normal notice pleading presumptions can be found in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45-46 (1976); *Warth*, 422 U.S. at 508.

¹¹⁰ *Warth*, 422 U.S. at 518 (Douglas, J., dissenting).

¹¹¹ For example, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court refused to dismiss a claim based upon harm to the "benefits of interracial associations" even though the complaint did not establish that the defendants' conduct

Neither the plaintiff's personal stake nor the directness of the line of causation can explain these results.

The redressability hurdle has also been raised or lowered to meet unspoken demands. The standard generally demands a showing that the plaintiffs' injury is "likely"¹¹² to be or exhibits a "substantial likelihood"¹¹³ of being redressed by the requested relief. However, when the Court has been especially concerned about interference with federal administrative prerogative, the language of the standard has been changed to demand a showing that the "relief will remove the harm."¹¹⁴

More important, this standard, like injury and causation, has also been inconsistently applied to accomplish nonstanding ends. To avoid interfering with local prosecutorial discretion, the Court concluded in *Linda R.S. v. Richard D.*¹¹⁵ that a criminal sanction is not likely to affect private behavior.¹¹⁶ Both *Allen*¹¹⁷ and *Simon v. Eastern Kentucky Welfare Rights Organization*¹¹⁸ effectively presume that private actors are not substantially likely to alter their behavior in order to obtain tax-exempt status. These surprising results may reflect understandable judicial hesitancy to interfere with the workings of executive agencies. But when the treatment of redressability in these cases is compared with its relatively lenient applications on other occasions,¹¹⁹ the

had anything to do with the neighborhoods in which the plaintiffs lived. *Id.* at 376-77. Pointing to "liberal federal pleading standards," the Court found dismissal on the pleadings "inappropriate" absent further factual development. *Id.* at 377-78.

Similarly, in *Bryant v. Yellen*, 447 U.S. 352 (1980), plaintiffs were allowed to contest a ruling on irrigation rights, claiming harm to their ability to purchase land, even in the absence of specific pleadings concerning their financial ability to buy the property. 447 U.S. at 367 n.17. *But cf. Warth*, 422 U.S. at 504-07 (denying standing in part because plaintiffs did not allege their ability to purchase homes in exclusionary zoning suburb).

¹¹² *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 474-75 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth*, 422 U.S. at 501)); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 262 (1977) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

¹¹³ *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 75 n.20 (1978).

¹¹⁴ See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976) (quoting *Warth*, 422 U.S. at 505).

¹¹⁵ 410 U.S. 614 (1973).

¹¹⁶ *Id.* at 618.

¹¹⁷ 104 S. Ct. at 3328-29 ("[I]t is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies.").

¹¹⁸ 426 U.S. 26, 42-43 (1976).

¹¹⁹ See, e.g., *Bryant v. Yellen*, 447 U.S. 352 (1980); *Orr v. Orr*, 440 U.S. 268 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978); see also *Nichol*, *supra* note 25, at 206-13.

conclusion that standing turns on judicial whim seems almost unavoidable.

While using the standing doctrine to serve other justiciability goals, the Court continues to leave "core" standing issues unredressed. If, for example, a number of factors appear to cause a litigant's injury, including the allegedly illegal acts of the defendant, must the plaintiff prove with the certainty that *Simon* and *Warth* seem to require that this suit will remove her harm? In a complex world where government action pervades private decisionmaking, it may often be difficult to establish with certainty what has caused an injury or what will assure its removal. A standing requirement that demands certitude would reflect a significant value determination that it is more important to avoid gratuitous adjudications than to leave governmentally caused injuries unredressed. In other contexts, the Supreme Court has invalidated government action that merely contributed to a litigant's injury.¹²⁰ Do subsequent developments in standing doctrine now forbid such results? If answers to these and similar are to be provided, the Court must begin to treat the standing doctrine as significant in its own right—rather than as a tool to be manipulated to accomplish unexplained goals.

C. *Standing at the Brink*

The key to constructing a comprehensible standing doctrine is to keep it close to home. Standing doctrine was designed to measure the litigant's stake. It serves as a poor surrogate either for defining the role of the federal judiciary or for covert rulings on the merits. If a case threatens the appropriate separation of powers, it should be dismissed; but it should be dismissed under a doctrine that considers such intrusion as its decisive factor—that is, the political question doctrine. If a claim threatens to embroil the federal courts in matters more appropriately left to local decisionmakers, then it should be dismissed on federalism grounds. The plaintiffs should not be sent home under the fiction that they have no stake in the controversy. If an action poses the danger

¹²⁰ See, e.g., *Norwood v. Harrison*, 413 U.S. 455 (1973); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Peterson v. City of Greenville*, 373 U.S. 244 (1963). All these cases involved racial discrimination.

Standing's unanswered questions are perhaps too numerous to mention. Examples that merit attention, however, include the following: When and why is specific pleading of causation demanded? Why are some intangible constitutional claims (for example, separation of church and state) "generalized grievances," while others (for example, vote dilution in reapportionment cases) "distinct and palpable" harms? Or why is my subjective desire that the government comply with the Constitution intangible, while my subjective desire that the government protect the environment in national parks is tangible?

of injunctive overreaching, that danger can best be avoided at the remedial stage. It is hardly necessary to deny jurisdiction. If the Supreme Court dislikes the substance of the claim presented, it should either deny certiorari or dismiss the claim on its merits. *Allen*, in short, moves standing doctrine in the wrong direction.

It may well be, however, 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. And what a remarkable set of values the standing doctrine has been forced to serve.

The Burger Court has raised the toughest standing hurdles in cases in which minorities have challenged exclusionary zoning practices,¹²¹ patterns of police brutality,¹²² and judicial¹²³ or administrative¹²⁴ bias. Poverty plaintiffs have been barred from challenging the discriminatory enforcement of child support obligations,¹²⁵ and the tax-exempt status of hospitals that deny them emergency medical services.¹²⁶ Litigants seeking to prevent government from contributing valuable property to a religious organization¹²⁷ and to force public disclosure of the CIA budget¹²⁸ have similarly fallen before an aggressive standing doctrine.

On the other hand, standing requirements have been eased in cases sustaining the constitutionality of the federal subsidy for the nuclear power plant industry,¹²⁹ upholding Secretary Watt's offshore leasing policy,¹³⁰ affirming the propriety of tuition tax credits to private schools,¹³¹ and condoning government support for chaplains¹³² and

¹²¹ See *Warth v. Seldin*, 422 U.S. 490 (1975).

¹²² See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Rizzo v. Goode*, 423 U.S. 362 (1976).

¹²³ See *O'Shea v. Littleton*, 414 U.S. 488 (1974).

¹²⁴ See *Allen*, 104 S. Ct. 3315.

¹²⁵ See *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

¹²⁶ See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

¹²⁷ See *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464 (1982).

¹²⁸ See *United States v. Richardson*, 418 U.S. 166 (1974).

¹²⁹ See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978).

¹³⁰ See *Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981).

¹³¹ See *Mueller v. Allen*, 103 S. Ct. 3062 (1983).

¹³² See *Marsh v. Chambers*, 103 S. Ct. 3330 (1983). *Marsh* involved the liberal use of standing to obtain a conservative result. The Court granted taxpayer standing to challenge a governmentally funded chaplaincy, see *id.* at 3332 n.4., then upheld the chaplaincy. See Nichol, *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C.L. REV. 798, 815-16 (1983).

Christmas crèches.¹³³ One could perhaps be forgiven for confusing standing's agenda with that of the New Right.

¹³³ See *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984). The Burger Court has generously granted standing only in cases where plaintiffs have raised statutory grounds for standing. This exception accounts for the only recent cases reaching more liberal results. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (racial discrimination in housing); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 164 n.15 (1978) (protection of endangered species).