Chilling Injuries as a Basis for Standing

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People who feel that a government action inhibits them from exercising their rights of free expression cannot easily challenge the action in federal court. Article III of the Constitution requires that the plaintiff in a federal lawsuit claim to have suffered "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."¹ In *Laird v. Tatum*,² the Supreme Court held that a government action that "subjectively chills" a person from exercising First Amendment speech rights,³ but does not actually prohibit speech, does not "injure" the person within the meaning of Article III standing doctrine, and that federal courts therefore lack the power to hear a case where the only claimed injury is a subjective chill.

This Note contends that, contrary to the Court's decision in *Laird*, the Constitution imposes no barrier to granting standing to plaintiffs who claim chilling injuries,⁴ whether "subjective" or "objective." Rather, the barrier to hearing such claims is prudential.⁵ Courts presented with claims of chill should determine, case by case, whether the claims are sufficient to overcome the policy reasons that underlie the prudential barrier. Courts should also be more willing to face such claims on the merits.

Section I of this Note discusses *Laird* and *Meese v. Keene*,⁶ the two leading cases on chilling injuries as a basis for standing. Section II provides general background on constitutional and prudential barriers to standing, and, in particular, examines the requirement that the plaintiff in a federal lawsuit be injured. Section III uses established principles of standing to demonstrate that a plaintiff suffering chilling injury meets the constitutional requirement. Section IV advances a separate argument to show that existing Supreme Court doctrine recognizes chills as injuries for certain purposes, and argues that they should be so recognized for standing purposes. Finally, Section V identifies the prudential considerations raised by judicial recognition of chilling injuries, and suggests that the

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1. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

2. 408 U.S. 1 (1972).

3. "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend I.

4. The injury that this Note claims a chilling effect causes will be referred to as a "chilling injury." Unless otherwise noted, "chilling injury" refers to a chilling effect that injures First Amendment rights of free expression.

5. On the difference, see *infra* Section II.

6. 107 S. Ct. 1862 (1987).

resulting problems could be resolved if courts would make a preliminary determination of the reasonableness of the plaintiff's chill, and deal with chilling claims more forthrightly on the merits.

I. CHILLING CLAIMS IN THE SUPREME COURT

The First Amendment protects against "abridg[ement]" of the freedom of speech, and a government action that prohibits someone from speaking on pain of criminal sanction is plainly an abridgement. Government action may, however, deter someone from engaging in First Amendment activity without actually prohibiting it. This deterrence is a "chilling effect."⁷

A. *Laird v. Tatum*

In January 1970, an article in *The Washington Monthly* revealed that the United States Army was engaging in surveillance of domestic political activist groups.⁸ Arlo Tatum, a member of such a group, felt that the surveillance, although it did not actually prohibit him from doing anything, deterred him from engaging in expressive and associational activities. He and others sued the Army for chilling their First Amendment freedoms. The Supreme Court held that the plaintiffs lacked standing.

Chief Justice Burger's majority opinion made it clear that the plaintiffs had not surmounted Article III's standing barrier:

"... to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury. . . ." . . . Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions."⁹

The Court's opinion did not say whether the fatal flaw in Tatum's complaint was that it alleged only a chill, or that it alleged only a "subjective" chill. On its face, *Laird* did not foreclose the possibility that a plaintiff

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7. Professor Schauer traces the term "chill" to *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring), where Justice Frankfurter noted the inhibiting effect loyalty oath requirements can have on teachers. Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 685 & n.1 (1978). Within fifteen years, claims of chilling effect had become "ubiquitous." *Zwickler v. Koota*, 389 U.S. 241, 256 n.2 (1967) (Harlan, J., concurring in judgment).

8. For a good summary of the factual background of the case, see Comment, *Laird v. Tatum: The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity*, 1 HOFSTRA L. REV. 244 (1973).

9. 408 U.S. at 13-14 (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937) and *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947)).

alleging an "objective" chill (whatever that is) might be able to invoke federal jurisdiction.¹⁰

The lower courts have reached different conclusions as to what allegations are necessary to support standing on the basis of chill. Some circuits have suggested that no chill can itself be the basis for standing unless it is accompanied by some other, objective injury.¹¹ Others are willing to grant standing if a chill is made "objective" by evidence,¹² but even these courts have widely differing attitudes as to what an objective chill is, and what sort of evidence is needed to show it.¹³

B. Meese v. Keene

The Supreme Court's most recent application of *Laird* concerned the Department of Justice's decision to designate three films by the National Film Board of Canada—two about acid rain and one about the environ-

10. Some courts misconstrue *Laird* to say that the plaintiffs lacked standing only because they could not allege that they themselves were targets of Army investigation. *E.g.*, *Olagues v. Russoniello*, 797 F.2d 1511, 1518 (9th Cir. 1986), *vacated as moot*, 108 S. Ct. 52 (1987). However, although the majority opinion in *Laird* does not explicitly say so, the plaintiffs were targets. *See* 408 U.S. at 26 (Douglas, J., dissenting) ("Respondents were targets of the Army's surveillance."); *see also* *Tatum v. Laird*, 444 F.2d at 954 n.17 (giving details of surveillance).

Some scholars suggest that the plaintiffs in *Laird* lacked standing only because, even though they were subject to Army surveillance, they were not actually chilled by it: They were sufficiently insouciant that they did not curtail their expression just because they were under surveillance. *E.g.*, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 122 (2d ed. 1988). The Court of Appeals did note that the plaintiffs were "sufficiently uninhibited to bring this suit," 444 F.2d at 954 n.17, but found that the Army system of intelligence gathering exercised a "present inhibiting effect" on their speech rights, *id.* at 954 (emphasis in original). The Supreme Court noted that the plaintiffs, at oral argument, "cast considerable doubt" on whether they were in fact chilled, 408 U.S. at 13 n.7, but also found that the chill alleged was insufficient to confer standing, *id.* at 13-14.

The *Laird* opinion continues to bar much court inquiry into the important question of whether police organizations must meet any standard before starting to investigate someone. *See* *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984); Rubin, *The FBI and Dissidents: A First Amendment Analysis of Attorney General Smith's 1983 FBI Guidelines on Domestic Security Investigations*, 27 ARIZ. L. REV. 453, 459-61 (1985); *see also* *F.B.I. Papers Show Wide Surveillance of Reagan Critics*, N.Y. Times, Jan. 28, 1988, at A1.

11. *See, e.g.*, *English v. Powell*, 592 F.2d 727, 730 (4th Cir. 1979) (test is whether plaintiff suffers "subjective chill on her first amendment rights and present objective harm"; court considered only job demotion and salary decrease to be objective); *National Conference of Catholic Bishops v. Smith*, 653 F.2d 535, 539-40 (D.C. Cir. 1981) ("Even the 'chilling' of the most protected First Amendment rights of free speech does not create a case or controversy without a 'specific present objective harm or a threat of specific future harm.'" (quoting 408 U.S. at 13-14)).

12. *See infra* note 93 and accompanying text.

13. For instance, in *Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778 (6th Cir. 1983), teachers and students complained that local police forces' sending an undercover officer into classrooms to investigate drug abuse chilled their speech in class. Although the plaintiffs were the specific teachers and students investigated, and although they claimed that open discussion in class had been stifled, the court held they had no standing, because their chill was "subjective" and not "tangible." *Compare id.* with *Olagues v. Russoniello*, 797 F.2d 1511, 1518 (9th Cir. 1986) (suggesting that any person actually investigated could have standing on basis of chill).

Some courts, citing language from *Laird v. Tatum*, claim that a chill is objective only when caused by government action that is "regulatory, proscriptive, or compulsory in nature." *E.g.*, *National Fed'n of Fed. Employees v. United States*, 688 F. Supp. 671, 681 (D.D.C. 1988) (quoting 408 U.S. at 11). Chills caused by police surveillance would not meet this standard. *See* 688 F. Supp. at 681 (source of plaintiffs' fear must be more than knowledge that government is engaged in activity that might produce information that could be used to plaintiffs' detriment).

mental effects of nuclear war—as “political propaganda” within the meaning of the Foreign Agents Registration Act (FARA).¹⁴ FARA and its attendant regulations require that any foreign government’s American agent who wishes to distribute a film so designated must register the film with the Attorney General, insert into its footage a label identifying it as a film so registered, and submit reports showing to whom the film has been disseminated. Barry Keene was a member of the California State Senate who wished to exhibit the films. He was not an agent of any foreign government, and so, according to the Justice Department, FARA imposed no duties on him.¹⁵ Nevertheless, Keene felt that the very fact that the Justice Department had designated the films “political propaganda” chilled him from showing them, and so violated his First Amendment right of free expression.¹⁶ He sued to have FARA declared unconstitutional.

Because FARA did not actually prohibit Keene from expressing himself in any way, it was difficult to see how the Act injured him, other than by chilling his First Amendment rights. This seemed to bring Keene within the scope of *Laird v. Tatum*. Keene therefore commissioned an opinion poll, which showed that people would be less inclined to vote for a candidate who exhibited films designated “political propaganda” by the Attorney General.¹⁷ The poll, he argued, showed that his chill was a real injury, and that he therefore had standing.

The Supreme Court, though it held that Keene had standing, reasoned differently. The Court agreed that Keene “fit[] squarely within” established standing guidelines.¹⁸ However, Keene’s injury was not a chill to his First Amendment freedoms. Indeed, the Court said that “[i]f Keene had merely alleged . . . a chilling effect on the exercise of his First Amendment rights, he would not have standing,”¹⁹ thus suggesting that no allegation of a chill, no matter how “objective,” would itself suffice to confer standing. The Court found instead that Keene’s standing was based on the *reputational* injury that the designation threatened.²⁰ This injury, not the chill, was substantiated by the opinion poll.²¹

Keene’s standing test is fraught with practical difficulty. It seems unlikely that the Court will find a case or controversy whenever someone takes an opinion poll that shows that he might suffer reputational injury

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14. 22 U.S.C. §§ 611-621 (1982). Regulations implementing FARA appear at 28 C.F.R. §§ 5.1-5.801 (1987).

15. The Department claimed that Keene could show the films without registering them, showing their statutory label, or submitting any dissemination reports. *See* Brief for Appellants at 5.

16. 107 S. Ct. at 1867.

17. *Id.* at 1867 & n.7.

18. *Id.* at 1867. The dissent noted its agreement that Keene had standing. *Id.* at 1873 (Blackmun, J., dissenting in part). Hence, the finding of standing was unanimous.

19. *Id.* at 1867.

20. *Id.* at 1867-68.

21. The Court ruled against Keene on the merits. *Id.* at 1869-73.

as a result of government action.²² Although the Court's opinion in *Keene* favorably cites *Laird v. Tatum*, and purports to apply its test, *Keene* may well narrow *Laird*'s effect. The plaintiffs in *Laird* were exposed to far more reputational injury than *Keene*. An opinion poll asking whether people would think less of those under surveillance by the United States Army would surely reveal that such government activity seriously threatens reputations.²³ *Keene* may represent a way around the barrier created by *Laird*.

II. STANDING BARRIERS, CONSTITUTIONAL AND PRUDENTIAL

A. *The Two Standing Barriers*

Standing represents one of the many barriers a plaintiff must overcome to get the merits of her case heard in federal court.²⁴ The barrier consists of two parts. The first derives from Article III's command that the federal judicial power extend only to "cases" and "controversies." This constitutional barrier requires that the plaintiff be injured, in a manner fairly traceable to the defendant, and likely to be remedied by the relief plaintiff requests. The plaintiff must satisfy these requirements as an "irreducible minimum" for standing.²⁵

Plaintiffs who meet this injury requirement then face the second, "prudential" barrier. This consists of a set of judicially created rules that ensure that courts do not decide "abstract questions of wide public significance," which other governmental institutions might be more competent to address, in situations where judicial intervention is unnecessary to protect individual rights.²⁶ The plaintiff must show that her injury is individual, and not merely a "generalized grievance" with the conduct of government;²⁷ the plaintiff must assert that her own rights, not the rights of third parties, protect her against the injury she has suffered;²⁸ and in certain cases the plaintiff must show that she falls within the "zone of interests" of the law whose protection she claims.²⁹

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22. Cf. *Paul v. Davis*, 424 U.S. 693 (1976) (injury to reputation creates no federal cause of action under 42 U.S.C. § 1983 (1982) and Fourteenth Amendment's due process clause). *Keene*'s recognition of standing on the basis of potential reputational injury may be its major contribution to standing doctrine.

23. See *Laird*, 408 U.S. at 25-26 (Douglas, J., dissenting).

24. Standing is an indispensable element of federal jurisdiction over the subject matter of a lawsuit. E.g., *Heckler v. Mathews*, 465 U.S. 728, 737 (1984); *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973). State courts are not bound by federal rules of standing. *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

25. *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982).

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

27. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974); *United States v. Richardson*, 418 U.S. 166, 173 (1974).

28. *Warth*, 422 U.S. at 499. Since the rule against third-party standing is prudential, rather than constitutional, the Court allows exceptions. See *infra* notes 30 & 77-84 and accompanying text.

29. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). The Court recently held that the "zone of interests" test is most usefully understood as a gloss on § 10 of the

The crucial difference between these two types of standing barriers is that a plaintiff lacking constitutional standing has no way to get into federal court: Hearing her case would violate Article III. The prudential standing barrier, however, consists only of rules of self-restraint imposed by courts. Therefore, if a plaintiff satisfies Article III's standing requirements, a court may, in an appropriate case, permit her to advance a claim that a prudential standing rule usually would block.³⁰

B. *The Taxonomy of Injury*

This Note contends that a chilling effect on one's First Amendment rights can constitute an injury sufficient to meet the constitutional standing barrier. To understand whether this is true, one must know what sorts of injuries count for standing purposes.³¹

Early standing cases required that a plaintiff challenging government action show that the action injured a "legal right" of the plaintiff's. In *Tennessee Electric Power Co. v. TVA*,³² for example, a power company challenged the constitutionality of the act creating the Tennessee Valley Authority. The Supreme Court held that the power company lacked standing because the only injury it could show was that the TVA, by coming into existence, would compete with it and possibly cause a competitive loss. This was not an injury for standing purposes, since the company had no legal right to be free from government competition.

In 1970, the Court decided that this test for standing really went to the merits of a case: In order to show standing to sue, one apparently had to show a legal right to win.³³ In *Association of Data Processing Services Organizations (ADAPSO) v. Camp*,³⁴ the Court therefore replaced the legal interest test with the "injury in fact" test. The claim of the plaintiffs in *ADAPSO* was very similar to the claim in *Tennessee Electric Power*. They alleged that new government regulations allowing banks to provide data processing services would hurt them competitively. This time, however, the Court held that a plaintiff injured "in fact" by government action has Article III standing to challenge it, even if the injury did not

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Administrative Procedure Act (APA), 5 U.S.C. § 702 (1982); it serves to delimit the class of plaintiffs who can seek review of agency action under the APA. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 394-400, 400 n.16 (1987).

30. For instance, in *Craig v. Boren*, 429 U.S. 190 (1976), the principal plaintiff's claim became moot while appeal was pending. A secondary plaintiff's claim remained live, and she had sufficient injury to satisfy Article III's standing barrier, but her claim depended on third-party rights. Since the rule against hearing such claims was not constitutionally compelled, and since she continued to press her claim "vigorously and 'cogently,'" the Court held that denying her standing would "serve no functional purpose." *Id.* at 192-94. The Court therefore heard the case.

31. For a more detailed treatment of standing doctrine, see Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984); Burnham, *Injury for Standing Purposes when Constitutional Rights Are Violated: Common Law Public Value Adjudication at Work*, 13 HASTINGS CONST. L.Q. 57 (1985).

32. 306 U.S. 118 (1939).

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

34. *Id.*

invade the plaintiff's legal rights and even though the plaintiff might lose the case on the merits.

Since *ADAPSO*, numerous Supreme Court cases have decided whether a particular plaintiff's claim alleged an "injury in fact."³⁵ The cases have produced no clear definition of the term. The Court itself recently said that injury in fact "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise;"³⁶ courts, in determining whether a plaintiff has standing, must rely on their ability to analogize to previous cases.³⁷

One principle, however, emerges clearly from the cases: The realm of judicially cognizable injuries encompasses injuries other than the economic or bodily injuries that traditionally gave rise to an action at law. Indeed, if "injury in fact" is to have any meaning other than injury to a legal right, it must mean that the plaintiff need show only an injury that is "real and concrete and accepted as such without the need to find that the law protects against it."³⁸ A plaintiff may, for instance, claim injury if a park or pond she uses is threatened by pollution.³⁹ The debasement of one's vote by malapportionment is also an injury that confers standing.⁴⁰ White tenants can sue their landlords for discriminatorily denying apartments in their building to blacks, because this practice injures them by inflicting a "loss of important benefits from interracial associations."⁴¹

Demonstrating injury in fact is the process of demonstrating to the court that something bad has happened to the plaintiff, something sufficiently bad that society should recognize it as an injury. As Professor Burnham puts it, "the post-[*ADAPSO*] 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."⁴² The plaintiff claiming a novel

35. See, e.g., cases cited in *L. TRIBE*, *supra* note 10, at 79-113.

36. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Standing doctrine is further complicated by decisions in which the Court manipulates it for political or ideological reasons, a problem the Justices themselves have noted. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 103 (1978) (Stevens, J., concurring) (suggesting Court found standing only because it wished to deliver advisory opinion concerning constitutionality of Price-Anderson Act).

37. See *Wright*, 468 U.S. at 751-52; see also *L. TRIBE*, *supra* note 10, at 115 ("[N]o general definition of the requirement is truly satisfactory. . .").

38. Burnham, *supra* note 31, at 60; see also *ADAPSO*, 397 U.S. at 158 ("Whether anything in the [statutes in question] gives petitioners a 'legal interest' that protects them against violations of those Acts, . . . are questions which go to the merits . . .").

39. See *Duke Power*; *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

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

41. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-10 (1972).

42. Burnham, *supra* note 31, at 61; see also J. VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 61 (1978). It may seem hollow comfort for a plaintiff to obtain standing to sue on the basis of an injury that violated no legal right of the plaintiff's, since it would then appear that the plaintiff must lose the case. But such a plaintiff has the advantage of being able to challenge the action on other grounds. For example, the plaintiffs in *Duke Power*, after gaining standing on the grounds that the building of a nuclear power plant would injure them by raising the temperature of a pond

sort of injury—as injuries to environmental interests, apportionment power, and interracial association once were—must convince the courts that society should value their loss.⁴³

It is important to realize that the injury in fact test did not supplant the legal rights test, but supplemented it. An “injury in fact” can still consist solely of an invasion of a legal right conferred by the positive law.⁴⁴ Under current doctrine, an invasion of a legally protected right *is* an injury in fact.⁴⁵

III. CHILLING EFFECTS AS INJURIES FOR CONSTITUTIONAL STANDING PURPOSES

When the government takes action that chills people from exercising their rights of free expression, it both violates their legal rights and injures them in fact. The violated legal rights are grounded in the First Amendment. The injury in fact is to America's fundamental value of free expression.

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they used for recreation, were allowed to challenge an Act of Congress limiting the liability of power companies in the event of a nuclear accident. *Duke Power*, 438 U.S. at 62–63.

43. “[T]he concept of cognizable harm [is not] self-defining. Nor [is] the process of determining harm . . . value-free. . . . In large part, therefore, the Court's recognition of injury . . . depends on its sympathy for and understanding of the loss.” Nichol, *supra* note 31, at 89–90.

44. For instance, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), black and white “testers” asked realtors for housing information. The realtors falsely told the black testers that no housing was available in certain white neighborhoods. When the testers sued, the defendants argued that since the testers were not really planning to *use* the housing information, they were not injured in fact by false information. The Supreme Court held, however, that the black testers had standing. The Fair Housing Act, the Court noted, gives everyone a right to truthful housing information. If this right of the testers was violated, they had standing. *See id.* at 373.

Standing may also exist solely by virtue of the invasion of a right protected by the Constitution. In *Heckler v. Mathews*, 465 U.S. 728 (1984), for example, the plaintiff claimed that a certain federal pension benefit law discriminated against men. The law's severability provision provided that if its discrimination was found unconstitutional, the Court should strike the whole benefit, rather than give it to men as well as women. When Mathews, a man, sued, he claimed that the severability clause was an attempt to deny him standing, for it meant that he could claim no injury that the courts could redress: Even if he won his case on the merits, he would not get the benefit he sought. The Court, however, found that the equal protection clause of the Constitution itself confers a right to equal treatment. Because this legal right was violated, Mathews had standing.

The Court has sometimes been reluctant to find that certain clauses of the Constitution give rise to individual rights, the invasion of which creates standing. *E.g.*, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (incompatibility clause does not give every citizen standing to challenge congressman's membership in reserve army). However, the Court has recognized standing based on violations of constitutional due process rights, voting rights, and the establishment clause. *See Burnham*, *supra* note 31, at 71–94. In addition, the capacity of many constitutional provisions to give rise to standing is obvious. These are generally the provisions that describe personal rights, rather than those that impose structural prohibitions on the behavior of government. For instance, no one would question the standing of someone to object that his Sixth Amendment right to counsel has been violated in a criminal case.

45. For clarity, this Note will use the term “injury in fact” only when referring to the sort of injury that confers standing regardless of whether it invades legal rights. When an injury to legal rights is meant, this Note will always say “injury to legal rights” explicitly.

A. *Chill as Injury to Legal Rights*

The First Amendment's free speech clause grants all Americans the legal right to express themselves through speech, and a loss of this right constitutes a serious injury.⁴⁶ A government action that exerts only a chilling effect on expression, by definition, does not directly and affirmatively prohibit it. Many Supreme Court cases show, however, that actions short of complete prohibitions of protected speech can invade free speech rights. A government-caused inhibition of speech can itself be an injury. Taxation of speech can constitute injury,⁴⁷ for example, as can a requirement that one register before making a lawful speech.⁴⁸ The government defendants in *Bantam Books v. Sullivan*⁴⁹ injured the plaintiffs simply by sending them an official letter suggesting that some of their publications were "completely objectionable for sale . . . for youths," even though no penalties attached to such a letter. In *Lamont v. Postmaster General*,⁵⁰ the Court found that for the government to label certain mail "communist political propaganda," and require its addressees to make a special request in order to receive it, constituted injury. "[A]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda,'" the Court noted.⁵¹

The Court has thus held that even subtle inhibition of speech can injure the legal rights of the inhibited party, for "[i]t is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments."⁵² Moreover, recognition of a chill to constitutional rights as an injury to those rights is not unique to the First Amendment area. In *Thornburgh v. American College of Obstetricians and Gynecologists*,⁵³ the Court struck down a Pennsylvania statute that imposed various procedural burdens on women who wished to exercise their right to obtain abortions. The Court noted that it "consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities. Pennsylvania's reporting requirements . . . pose an unacceptable danger of deterring the exercise of [abortion] right[s], and must be invalidated."⁵⁴

46. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

47. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

48. *Thomas v. Collins*, 323 U.S. 516 (1945).

49. 372 U.S. 58, 62 n.5 (1963).

50. 381 U.S. 301 (1965).

51. *Id.* at 307.

52. *Bantam Books*, 372 U.S. at 66; cf. Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196, 218-20 (1970).

53. 476 U.S. 747 (1986).

54. *Id.* at 767-68 (citations omitted); see also *Shapiro v. Thompson*, 394 U.S. 618 (1969) (state law denying welfare benefits to residents of less than one year's standing unconstitutionally chills right to travel); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 832-40 (1969) (some cases that do not explicitly mention chill are best understood as judicial attempts to remedy chilling injury).

These cases demonstrate that a chilling effect on expression counts as an injury to the legal rights conferred by the First Amendment. As Justice Brennan puts it, "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."⁵⁵ For this reason, the chilled plaintiff has suffered an injury sufficient to confer constitutional standing to sue.

B. *Chill as Injury in Fact*

A chill to free speech injures a value Americans hold dear—the ability to speak out on public issues in a debate that is "uninhibited, robust, and wide-open."⁵⁶ Americans share a "remarkably broad consensus on the kinds of messages the government should leave alone."⁵⁷ Panegyrics to freedom of expression form some of our most respected texts.⁵⁸ When the government inhibits people from speaking, it hurts them in a way our society should notice.⁵⁹

"Chilling effect" is no mere rubric artfully employed by people seeking standing. Government disapproval or surveillance can have a significantly injurious effect on a person's expressive behavior. The author Howard Fast, for instance, commenting on the F.B.I.'s practice of maintaining files on virtually all popular American writers, said, "[t]he terrible thing the F.B.I. did was to destroy social writing in America. . . . The social view of the writer has been terrified out of existence, and that is a great tragedy for American literature."⁶⁰

The Supreme Court has repeatedly shown its concern for this injury. In *Secretary of State of Maryland v. J.H. Munson Co.*,⁶¹ professional fundraisers challenged a Maryland law prohibiting charities from paying a fundraising fee of more than twenty-five percent of the amount raised. The Court noted that the fundraisers, although injured in fact, were attempting to raise third party rights (those of the charities) in their challenge. Nonetheless, the Court granted them standing:

Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment . . . , he will refrain from engaging further in the protected activity. Society as a whole then would be

55. *Lamont*, 381 U.S. at 309 (Brennan, J., concurring).

56. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

57. H. KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 6 (1988).

58. E.g., J.S. MILL, ON LIBERTY ch. 2 (1873), cited in, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964); T. JEFFERSON, The Kentucky Resolutions, in THE COMPLETE JEFFERSON 128 (S. Padover ed. 1943).

59. Mill specifically notes the "baneful consequences to the intellectual, and through that to the moral nature of man, unless this liberty [of expression] is either conceded, or asserted in spite of prohibition . . . ." J.S. MILL, *supra* note 58, at ch. 3.

60. Robins, *The Defiling of Writers*, 245 NATION 367, 369 (1987).

61. 467 U.S. 947 (1984).

the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.⁶²

The Court also showed sympathy for those chilled from expressing themselves in *New York Times Co. v. Sullivan*.⁶³ Although the Court held that libelous speech may be punished in tort, it also ruled that a public official could not recover against a newspaper for libel unless the newspaper published false and defamatory statements with actual malice. The Court was not applauding libel; it was expressing its concern for those who might refrain from engaging in protected speech for fear of falling into the proscribed category. The Court stressed that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to . . . 'self-censorship.' . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is . . . in fact true . . . ."⁶⁴

These cases show that our society does care about those inhibited from speaking. The ultimate evidence of our concern is the First Amendment itself. This may seem to be double counting, for the argument claims that the cases show both injury to legal rights and injury in fact. But there is no paradox here: a society's positive law shapes, as well as reflects, its non-legal value systems.

This interaction is well illustrated by the gradual recognition of injuries to environmental interests. As one scholar remarks, "One can recall when the courts would have called a plaintiff claiming harm because of the acidification of a stream in a nearby national forest an interloper asserting no injury whatsoever."⁶⁵ Society, however, has become more concerned about damage to the environment. Congress, in 1970, passed the National Environmental Policy Act.⁶⁶ Eventually, courts recognized environmental interests as "important ingredients of the quality of life in our society,"⁶⁷ and granted standing to sue on the basis of injury to them.

The First Amendment both codifies and encourages a view of the ability to speak as an important social value. The Supreme Court's recogni-

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62. *Id.* at 956.

63. 376 U.S. 254 (1964).

64. *Id.* at 279 (quoted in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)); see also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 580-81 (1977) (Powell, J., dissenting) (allowing right of publicity to prevail over First Amendment would lead to self-censorship); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (newspaper cannot be prevented from publishing name of rape victim; allowing right of privacy to prevail would lead to "timidity and self-censorship" on part of newspapers). Mark Yudof provides further discussion of the power of government to affect public discourse. M. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983).

65. Nichol, *supra* note 31, at 89.

66. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347 (1982)).

67. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

tion that government action that induces self-censorship can violate the First Amendment is also a recognition that self-censorship is a harm against which the courts may guard. The ability to speak freely is an "important ingredient of the quality of life in our society." When someone's ability to speak is impaired by government action, that person is injured in fact, and so meets the constitutional test for standing.

C. *The Subjective Nature of Chilling Injuries*

As noted earlier,⁶⁸ *Laird v. Tatum* did not declare that Article III bars the federal courts from hearing any case in which standing rests solely on chilling injury. The case held that a "purely subjective" chill cannot suffice to show injury. The Court tacitly left open the possibility that an "objective" chill could form the basis for standing. In fact, however, there is no constitutional distinction between objective and subjective injuries for standing purposes. Nothing in Article III bars the exercise of federal judicial power in a case where injury is subjective.

Laird v. Tatum did not clarify the difference between objective and subjective chills, and the lower courts have not reached agreement on the meanings of these terms.⁶⁹ The trouble is that courts have used the terms in chilling cases without really defining them. A subjective claim is one about someone's state of mind. An objective claim is one about some worldly condition other than a person's state of mind.⁷⁰

The federal courts are reluctant to allow parties to invoke their jurisdiction on the basis of subjective allegations, even if they are made in good faith. For instance, a federal court will not simply take a plaintiff's word as proof that she has not been made party to a case for the sole purpose of manufacturing diversity jurisdiction.⁷¹ Similarly, a plaintiff's subjective fear of a future suit by the defendant is not sufficient to create jurisdiction under the Declaratory Judgment Act.⁷² In making these decisions, how-

68. See *supra* note 10 and accompanying text.

69. See *supra* notes 11-13 and accompanying text.

70. This usage is reflected in numerous Supreme Court opinions from diverse areas of law. See, e.g., *Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1988) (whether police officer believes search is lawful is subjective; whether reasonable police officer could so have believed is objective); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987) (whether refugee fears persecution is subjective; whether there is clear probability of persecution is objective); *United States v. 50 Acres of Land*, 469 U.S. 24, 35-36 (1984) (market value of land is objective; value to owner because of idiosyncratic attachment is subjective); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 465 n.9 (1982) (intent of voters in limiting school board's power to bus students is subjective; difference between resultant school board authority and normal school board authority is objective).

As these examples show, the question of whether a person actually believes something is subjective, but the question of whether a reasonable person would share that belief is objective. This will be important in Section V. Objectivity should also be distinguished from good faith. A claim is made in good faith when the claimant is not knowingly lying. Good faith is always required of parties in federal court. *FED. R. CIV. P.* 11.

71. *Martinez v. United States Olympic Comm.*, 802 F.2d 1275 (10th Cir. 1986).

72. *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879 (Fed. Cir. 1985), *cert. denied*, 479 U.S. 820 (1986).

ever, courts have not claimed to be following a constitutional command. Principles of sound judicial administration might fully explain the insistence on objective evidence to support jurisdiction.⁷³

With regard to Article III standing, the question is whether Article III itself forbids federal courts to exercise judicial power over a claim of injury if that injury is "purely subjective." The answer is no: Article III allows federal courts to recognize subjective injury in the same way that they recognize other injuries. This is shown most clearly in the desegregation cases.

At one time in our nation's history, the injury felt by blacks who lived in forced segregation from whites was thought to be purely subjective. When blacks complained about a Louisiana law that required them to ride in railroad cars separate from whites (but otherwise supposedly equal in quality), the Supreme Court said,

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it.⁷⁴

The Court accordingly ruled against the plaintiffs.

Sixty years later, the Court again faced a claim that segregation, this time in schools, constituted injury. Significantly, the Court did not alter its position that such injury was subjective. But, citing then-recent cases concerning higher education, it showed far greater sympathy for such injury:

In *Sweatt v. Painter*, . . . this Court relied in large part on "those qualities which are *incapable of objective measurement* but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, the Court . . . again resorted to *intangible considerations* . . . . Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a *feeling of inferiority* as to their status in the community that may *affect their hearts and minds* in a way unlikely ever to be undone.⁷⁵

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73. Indeed, in at least one area, federal courts allow a subjective claim to determine a constitutional element of their subject-matter jurisdiction. State citizenship for purposes of the diversity jurisdiction is determined by domicile, which contains an inherently subjective element, namely, a party's intent to make a certain place her home. *E.g.*, *Mas v. Perry*, 489 F.2d 1396 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974). Courts have generally held that they will accept, or at least give weight to, a party's good-faith allegation of intention. *See* *Lewis v. Splashdam By-Products Corp.*, 233 F. Supp. 47, 49 (W.D. Va. 1964) (plaintiff allowed to claim Illinois domicile, even though he had resided in Virginia for thirty years); *Stifel v. Hopkins*, 477 F.2d 1116 (6th Cir. 1973) (district court erred in refusing to give weight to expressed intention of federal prisoner to make state in which he was involuntarily serving life sentence his home).

74. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

75. *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 493-94 (1954) (citations omitted) (empha-

The injury was still subjective, but the Court found that no obstacle to granting relief.

Brown did not explicitly hold that the subjective injuries discussed were "injuries in fact" supporting standing, for the "injury in fact" test was not created until sixteen years after the *Brown* decision. But the Court did show that there is no fundamental difference, no *constitutional* difference, between a subjective injury and any other: The courts will take cognizance of a subjective injury if societal values have evolved to a point where society does regard the claimed injury as a real one. Article III does not itself forbid judges to hear claims of subjective injuries. The question, as with all injuries, is whether the plaintiffs can convince the courts that something bad has happened to them. In *Brown*, they did, and the Court ordered the segregation ended.⁷⁶

IV. OVERBREADTH DOCTRINE AND CHILLING EFFECTS

Courts need not rely entirely on first principles of standing to conclude that a chilling effect should count as an injury for standing purposes. The First Amendment "overbreadth" doctrine already recognizes chilling effects as injuries for third-party standing purposes. The refusal to recognize them for first-party standing purposes is anomalous.

Overbreadth doctrine is an exception to the normal, prudential standing principle that parties in federal court cannot raise the rights of others as a defense to an action against themselves. In particular, parties cannot normally claim that because a law would be unconstitutional if applied to others, it must not be applied to them. For instance, in *United States v. Raines*,⁷⁷ the United States alleged that various Georgia state election officials violated federal laws prohibiting "any person" from depriving another of the right to vote on account of race. The defendants replied that, as worded, the law reached purely private action, and so exceeded Congress's constitutional powers. Since the defendants were not private actors, the Supreme Court refused to entertain this argument. The Court held that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that . . . its application [to others] might be unconstitutional."⁷⁸

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sis added).

76. *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294 (1955). The *Brown I* Court did consider psychological studies of the likely effects of segregation on the plaintiffs' lives and self-images. See *Brown I*, 347 U.S. at 494 n.11. But, as the quoted language shows, these studies were of subjective effects: They did not change the nature of the injury itself. If Plessy's counsel had presented the Court with a study showing that segregation in public transportation damaged blacks' self-images, the Court would not have granted relief. The difficulty with Plessy's case was not that the Court did not believe that the plaintiffs felt denigrated, but that it did not care. When society began to care about the subjective injury caused by segregation, the Court took judicial cognizance of it.

77. 362 U.S. 17 (1960).

78. *Id.* at 21. *Raines* was a civil case, but its rule applies equally to criminal cases. See, e.g., *Burch v. Louisiana*, 441 U.S. 130, 132 n.4 (1979) (defendant convicted by unanimous six-member

In the First Amendment area, the Supreme Court has recognized a unique exception to this rule. The Court permits a person prosecuted under a statute criminalizing some form of expression to argue that even if his expression is not constitutionally protected, the statute is overbroad; that is, the statute might be used to prosecute the constitutionally protected expression of others. If the defendant succeeds in showing that the statute has the potential to violate First Amendment rights, the court will declare the statute unconstitutional "on its face,"⁷⁹ and the defendant will go free, even though under a narrower statute his speech might have been prohibited. Overbreadth doctrine thus allows a criminal defendant whose constitutional rights have not been violated to raise the rights of hypothetical third parties as a barrier to his prosecution.⁸⁰

The Court has repeatedly explained that this exception to ordinary standing rules rests on the chilling effect of statutes that proscribe expression.⁸¹ If a statute criminalizes both protected and unprotected speech, it will chill people from expressing themselves in protected ways. People will not risk criminal penalties even if they believe that the Constitution would protect them from prosecution. The Court has held that the importance of the First Amendment's freedom of expression to our society dictates that we not allow a chilling statute to remain on the books, for "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . because of the possible inhibitory effects of overly broad statutes."⁸²

The chill an overbroad statute imposes on third parties must therefore be an injury to those parties. What injury justifies setting free a criminal defendant whose constitutional rights have not been violated? It cannot be an injury claimed by the defendant himself. He faces a possible fine or jail term, which is certainly an injury. So, however, does every criminal defendant, and yet, as we have seen, outside the First Amendment context defendants are not permitted to argue that they should go free because

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jury may not complain that statute under which he was convicted unconstitutionally allows conviction by 5-1 vote); *Bateman v. Arizona*, 429 U.S. 1302, 1305 (Rehnquist, Circuit Justice 1976) (person convicted of sodomy may not claim that statute under which he was convicted unconstitutionally prohibits sexual relations between consenting adults, if jury found that his partner did not consent); *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) (person clearly within proscription of criminal statute may not claim that statute is unconstitutionally vague as to others).

79. *E.g.*, *City of Houston v. Hill*, 107 S. Ct. 2502, 2508 (1987).

80. *See, e.g.*, *Coates v. Cincinnati*, 402 U.S. 611 (1971). The Supreme Court later insisted that the statute in question be "substantially overbroad" for the defendant to take advantage of the overbreadth rule. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

81. *See, e.g.*, *Board of Airport Comm'rs v. Jews for Jesus*, 107 S. Ct. 2568, 2571 (1987) (overbroad statute "threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution . . ."); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

82. *Broadrick*, 413 U.S. at 612.

others might be unconstitutionally prosecuted under a statute constitutional as to them. Nor can the criminal penalties that might be imposed on the hypothetical defendants suffice, for those defendants could assert their valid constitutional defenses if they were ever prosecuted. The only injury available to support overbreadth doctrine is the chilling injury to those who would engage in constitutionally protected expression but for their fear of prosecution.

Overbreadth doctrine thus shows not only that chilling effects are injuries, but that they are injuries of a particularly serious and noteworthy kind. They are so serious that we make an exception to normal standing principles, and allow criminal defendants to go free, in order to protect against chilling injuries to third parties.⁸³ Yet when the third party shows up in court himself as plaintiff and claims chilling injury, the Supreme Court refuses to hear the case, and tells him that he is not even injured. This anomaly should be eliminated: The party actually suffering chilling injury should be allowed to plead his case himself.⁸⁴

V. THE PRUDENTIAL BARRIER TO CHILLING CLAIMS

The preceding arguments do not prove that courts should allow all plaintiffs claiming chill to invoke federal jurisdiction. The federal courts have Article III power to hear such claims, but have wisely declined to open their doors to all of them. A prudential barrier still stands between the chilled plaintiff and her day in court. Courts must decide which claims of chill they should hear.

A. *Sources of the Prudential Barrier*

The reasons underlying the courts' reluctance to hear claims of chill are not difficult to discern. One reason is the possibility of "opening the floodgates" to any plaintiff willing to allege a chilling effect. Many plaintiffs currently thought to be complaining of "generalized grievances" with the conduct of government might in good faith claim some chill to their free

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83. See also *Dombrowski v. Pfister*, 380 U.S. 479 (1965), which held that the chilling effect of statutes prohibiting expression is such a serious injury that, contrary to normal principles of federalism, the federal courts can enjoin the states from bringing prosecutions under them. Although the Court substantially limited *Dombrowski* in *Younger v. Harris*, 401 U.S. 37 (1971), it did not decide that chilling effects should no longer be regarded as injuries. Rather, it decided only that they were not serious enough to overcome the federalism concerns implicated in *Dombrowski* once a state actually begins a prosecution. See 401 U.S. at 54-55 (Stewart, J. concurring) (emphasizing narrowness of holding); see also *Steffel v. Thompson*, 415 U.S. 452 (1974) (federal court may still issue declaratory judgment that state statute is unconstitutional provided no state prosecution is pending).

84. Confronting this argument in a case where such a plaintiff claimed chill, Judge (now Justice) Scalia suggested that in other cases where courts cite chilling effect, chill is "the reason why the governmental imposition is invalid rather than . . . the harm which entitles the plaintiff to challenge it." *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984). But the harm suffered by a defendant in an overbreadth case is his potential jail sentence, and that injury is normally regarded as insufficient to allow a facial challenge to a statute that is valid as applied. Some other injury must justify such a challenge, and this must be the chilling injury to third parties.

speech rights, forcing the government to defend these cases on their merits. For example, the plaintiffs in *Schlesinger v. Reservists*,⁸⁵ who challenged the ability of members of Congress to hold commissions in the armed forces reserve, might have claimed they were chilled from speaking out against the reserves. Requiring the courts to hear all such cases could effectively destroy the constitutional standing barrier.

The other reason for the courts' exercise of prudence is that unquestioning acceptance of subjective claims of chill for standing purposes poses a difficult problem when a court reaches the merits. Depending on one's First Amendment jurisprudence, to say that a chill is a cognizable injury to First Amendment rights may be to decide the merits of the claim. A First Amendment absolutist who accepted subjective chill as injury to First Amendment rights would be hard pressed to avoid automatically striking down the chilling act on the merits. The Supreme Court may therefore be exercising its "passive virtues" by using the standing barrier as a way to get rid of cases involving chilling claims instead of answering the difficult First Amendment questions such cases pose.⁸⁶

The difficulty of these questions may explain the Court's peculiar handling of the alleged chill in *Meese v. Keene*. In the section on standing, the Court found that the term "political propaganda" threatened to cause cognizable injury to Keene's reputation. The Court noted that even though Keene could minimize the risk of such injury by making positive statements about the quality of the films, the need to do this would itself constitute an injury.⁸⁷ Yet when it reached the merits of the case, the Court made the surprising assertion that "the Act places no burden on protected expression."⁸⁸ In support of this, it even noted that if Keene feared the term "propaganda" might prejudice his viewers, he could advise them that the films had not been officially censured.⁸⁹ Somehow, the reputational injury Keene might suffer if he engaged in free expression was serious enough to give him standing, but not to burden his First Amendment rights. The Court could not have indulged in this sleight of hand if it had recognized Keene's chill itself as the injury that gave rise to standing.

B. *Overcoming the Barrier*

1. *Reasonableness*

The circumstances of a particular case may overcome a prudential barrier that would normally bar standing. Courts should examine the facts of each case involving chill to see if they allay the fears on which the pru-

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85. 418 U.S. 208 (1974).

86. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (1962).

87. *Keene*, 107 S. Ct. at 1868.

88. *Id.* at 1871.

89. *Id.*

dential barrier is based. The language of *Laird*, emphasizing the subjective nature of the plaintiff's chill, suggests one test courts could use. Courts might defend their dockets against spurious cases by insisting that a plaintiff allege facts that give the chill an objective basis. The standard for testing a claim of chill would be the standard that rules all such claims in our legal system: the reasonable person test. The trial court would ask whether the challenged governmental action would chill a reasonable person in the way the plaintiff claims to be chilled. This test would divorce the question of the sufficiency of the plaintiff's chill for standing purposes from the legal nature of the chill's cause.⁹⁰

Reasonableness does not make the chill itself objective. No evidence, other than the plaintiff's own testimony, can show that government action *really* chilled the plaintiff. All chills are subjective, but subjective chills can be reasonable or unreasonable. Section III showed that a good-faith allegation of a subjective chill should suffice for Article III standing. As a prudential matter, courts should insist that the plaintiff produce evidence that his chill is reasonable.⁹¹

In the period between *Laird v. Tatum* and *Meese v. Keene*, many lower courts have used such a reasonableness test as the appropriate determinant of standing for claims of chill. As one court put it, "[i]n the years since *Tatum*, courts have struggled to determine when a surveillance system became so intrusive as to create a *reasonable or objective* chill in a plaintiff and therefore present a justiciable controversy."⁹² This lower

90. The test could make a crucial difference in the most important class of unresolved chilling cases, the police surveillance cases. See *supra* note 10.

91. This test may seem to call upon the federal district judge to make nice determinations of reasonableness based on only preliminary information, but it is the test used when any plaintiff seeks a declaratory judgment of her rights. Under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982), such a plaintiff must show that an "actual controversy" exists between her and the defendant. Courts have frequently used a reasonableness test to determine whether there is such a controversy. See, e.g., *Jervis B. Webb Co. v. Southern Sys., Inc.*, 742 F.2d 1388, 1398 (Fed. Cir. 1984) (when seeking declaratory judgment of patent invalidity, plaintiff must show that defendant has "engaged in conduct that created . . . a reasonable apprehension that [the plaintiff] will face an infringement suit . . ."); *Chesney v. Adams*, 377 F. Supp. 887 (D. Conn. 1974) (prison inmate's reasonable fear of being transferred under allegedly unconstitutional statute presents justiciable controversy), *aff'd*, 508 F.2d 836 (2d Cir. 1975). Furthermore, courts must make this determination on a case by case basis. See *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

Significantly, this test is also applied when plaintiffs claim to be chilled by laws that do proscribe expression but that have not yet been applied against them. See *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625 n.1 (1986) ("*Steffel* held that a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy."); *Virginia v. American Booksellers Ass'n, Inc.*, 108 S. Ct. 636, 642 (1988) (plaintiffs had standing because they had "an actual [that is, subjective] and well-founded [that is, reasonable] fear that the law will be enforced against them.").

92. *Alliance to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1048 (N.D. Ill. 1985) (emphasis added). Those courts that subscribe to this theory have variously referred to a sufficient chill as "reasonable," *id.*, "objective," *id.*, or "well-founded," *American Booksellers*, 108 S. Ct. at 647. Of course, not all courts currently adopt this approach. See *supra* notes 11-13 and accompanying text.

court experience has elucidated the test by revealing factors a court will consider in determining whether a claim of chill is reasonable.⁹³

Meese v. Keene offered a particularly attractive opportunity for the Supreme Court to adopt the reasonableness standard, because the plaintiff had taken pains to amass evidence of the reasonableness of his chill. Not every plaintiff, however, need be as energetic as Keene. The cases between *Laird* and *Keene* show that the courts are capable of judging the reasonableness of a claim of chill without the aid of an opinion poll.

2. *Approaching the Merits*

The difficulty of dealing with chilling effects on the merits is a question of substantive First Amendment law, and courts should approach it on that basis. As noted above, the Supreme Court has held that the First Amendment bars some government action that discourages but does not prohibit speech.⁹⁴ But the Court has never suggested that every chilling effect, however slight, is forbidden; it has always employed some balancing of governmental interests against the chilled activity.⁹⁵ This seems correct: Government activity that places no actual restrictions on expression surely raises different constitutional concerns than activity that explicitly regulates or proscribes expression.⁹⁶ Were this not so, almost any government activity would be vulnerable to First Amendment challenge, for there is always some reluctance to criticize the government.⁹⁷

93. For example, when police surveillance consists only of collection of publicly available information and attendance at public meetings, a court typically finds no reasonable chill, *see, e.g.*, *Philadelphia Yearly Meeting of Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1337-38 (3d Cir. 1975), but reasonable chill is often found when police actually infiltrate private meetings, *see Handschu v. Special Servs. Div.*, 349 F. Supp. 766 (S.D.N.Y. 1972). Courts have considered whether the government singled out an individual plaintiff for unusual surveillance, or simply performed a routine security check, *see Clark v. Library of Congress*, 750 F.2d 89, 94-95 (D.C. Cir. 1984), the possible adverse effects that being under surveillance might have on the plaintiff's employment, *see Socialist Workers Party v. Attorney Gen.*, 419 U.S. 1314, 1319 (Marshall, Circuit Justice 1974); *Clark*, 750 F.2d at 93, and the effect government action might have on the plaintiff's reputation, *see Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979), *vacated on other grounds sub. nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). No one factor is dispositive, but courts use all of these factors as indicia of the reasonableness of a chill.

Although a reasonableness test may require the district court to hear evidence, it need not lead to a full trial. A recent District of Columbia case details the procedures a district court should use. *Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987).

94. *See supra* text accompanying notes 47-52.

95. *See Note, supra* note 54, at 822-24. The Court has also used balancing when the plaintiff's activity falls outside the most traditional forms of expression. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), plaintiffs who wished to stage a sleep-in protest challenged a regulation that prohibited sleeping in a public park. The Court recognized that overnight sleeping in connection with a demonstration may be "expressive conduct protected to some extent by the First Amendment." *Id.* at 293. Yet, after balancing the plaintiff's First Amendment interest against the government's interest in maintaining the park, it upheld the regulation.

96. Even in cases where speech is prohibited, the Court has never held all speech to be absolutely protected. *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (balancing of speech rights against national security interests).

97.

[T]o say that a regulation is unconstitutional because it has a chilling effect on protected activ-

If the Supreme Court had been willing to apply a balancing test in *Meese v. Keene*, it could have recognized chill as Keene's true injury, and yet held that chill alone, in the absence of any formal proscription on expression, was insufficient to warrant striking down FARA. Instead, the Court was forced to deny that FARA placed any burden on expression at all. By recognizing the difference between chill and other types of First Amendment injury, the Court could have explained its opinion more candidly.⁹⁸

VI. CONCLUSION

Laird v. Tatum created significant limits on the power of citizens to challenge government actions that have important effects on their expressive activities but fall short of actual proscriptions. *Meese v. Keene* may represent a way around the barrier created by *Laird v. Tatum*. If the Supreme Court does no more than treat seriously its holding that opinion polls showing potential reputational harm can form the basis for standing, then many currently excluded plaintiffs may have access to court.

The creation of this new access has not, however, been without cost in doctrinal confusion. The Supreme Court's characterization of the reasons why plaintiffs claiming chills to their rights might lack standing to do so could still prevent consideration of the merits of many worthy claims. By reconceptualizing the standing barrier to chills as prudential rather than constitutional, the Court could allow appropriate chilling claims to be heard, while not opening the floodgates to wholly meritless litigation.

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ity is to say virtually nothing at all. What we must look for is some way of determining under what circumstances the inevitable chilling effect becomes great enough to require judicial invalidation of legislative enactments . . . .

Schauer, *supra* note 7, at 701.

98. Using this sort of balancing approach in a First Amendment context does have familiar dangers. In many contexts, the Court has extended a constitutional right from an area where it is more or less absolute to an area where the Court felt it appropriate to balance the right against a government interest. This balancing approach may later invade the area previously thought to provide absolute protection. *See, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967) (extending Fourth Amendment protections from home to unfamiliar contexts); *Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987) (applying balancing tests formulated in these contexts to conclude that probationer's home may be searched without warrant or probable cause). This Note's suggestion of balancing in chilling cases should not be taken as suggesting that balancing is appropriate in cases where speech is actually prohibited; that should be a separate question. But it is a question to be decided on the merits, not by distorting standing doctrine.

Some commentators applaud the Supreme Court's use of justiciability doctrines to avoid difficult substantive questions. *E.g.*, A. BICKEL, *supra* note 86. In rejecting that view, this Note contends that the country would be better served by judicial candor. *See* G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 178-81 (1982); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 578-79 (1985).

For suggestions as to how courts should handle the merits of chilling claims, see Schauer, *supra* note 7.