Standing Against Injustice:

An Expanded Vision of Standing Doctrine for Public Law Litigation

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Chapter One: The Problem of Standing

1.1 The City of Los Angeles v. Lyons

In 1976, a black man named Adolph Lyons was pulled over by four white officers of the Los Angeles Police Department. Although he was initially stopped for a burnt-out taillight, a very minor traffic violation, the officers confronted him with their guns drawn. They patted him down to search for weapons and found nothing. Despite his lack of resistance and the absence of any illegal materials, when Lyons lowered his hands, the officers slammed them back onto his head, hurting him with the key ring he had been holding. After Lyons complained about the pain, one of the officers, with no further provocation, placed him in a chokehold and pressed a forearm against his throat, causing him to lose consciousness. By the time Lyons had regained consciousness, he was handcuffed, face down on the ground, and spitting up blood and dirt. Since they had no legitimate grounds for detainment, the police left Lyons with a traffic citation and released him.[1] Today, such an interaction between a black man and white police officers is not especially surprising, and in the 1970s, police brutality was perhaps even more egregious than it is today. In just the single year prior to Lyons's encounter with the police, LAPD officers had killed sixteen people in chokeholds, and twelve of those victims were black.[2] In 1977, Lyons sued the police officers and the city of Los Angeles, arguing that the LAPD's use of chokeholds was unconstitutional under the First, Fourth, Eighth, and Fourteenth Amendments to the Constitution. He sought both temporary and permanent injunctions against the LAPD, which would force them to restructure their policy on chokeholds when officers were not confronted with lethal force. The district court granted the injunction, and the Ninth Circuit later affirmed that outcome. However, in a 5-4 decision, the

[1] Fallon, Richard H. Jr. "Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons." *New York University Law Review* 59, no. 1 (1984), 9-10.
[2] *Ibid*, 10.

Supreme Court reversed the rulings of the lower courts and dismissed Lyons's claim for injunctive relief.[3]

The Court decided that Lyons lacked what is known as Article III standing, a requirement which aims to ensure that anyone who brings a lawsuit to the federal courts has some sort of personal stake in the case.[4] Standing is, in essence, whether a plaintiff is eligible to invoke the jurisdictional authority of the federal courts. The Court's decision in *Lyons* should prompt an unsettling question. If Adolph Lyons, a man who had his constitutional rights violated when he was unnecessarily choked unconscious by police officers, does not have standing to sue the police to stop them from using chokeholds, then who does? If not those of Adolph Lyons, then whose constitutional rights can be protected by the courts?

1.2 Brief Background on Standing Doctrine

To explain how the Court came to its counter-intuitive ruling in *Lyons*, I will first have to explain what exactly standing doctrine is. The concept of standing in American jurisprudence can be traced back to the eighteenth and nineteenth centuries, when courts began feeling the need to define proper parties for different types of lawsuits.[5] These early courts distinguished between public and private rights, conceiving of some areas of litigation as being under the control of the public at large, while other areas were largely under private control. Violations of public rights typically consisted of crimes and misdemeanors, which were thought to be harms against the community in general, rather than simple violations of an individual's rights, and this way of conceptualizing criminal conduct was reflected in most early state constitutions.[6] Justifications for criminal law enforcement appealed to the idea of some common interest in protecting the rights of the public. As an extension of this line

[3] *Ibid*, 5-6.
[4] *Ibid*, 10.
[5] Woolhandler, Ann and Caleb Nelson. "Does History Defeat Standing Doctrine?" *Michigan Law Review* 102, no. 4 (2004), 691.
[6] *Ibid*, 695-696.

of thinking, individual victims of crime could seek compensation through the courts for the private rights that had been violated, but the criminal's punishment from the state was justified by their violation of the public rights of the community. In contrast, civil wrongs such as a breaking a professional contract were thought to be instances where private individuals violated the private rights of other individuals, so litigation of such wrongs was generally placed under private control. In this private, civil litigation context, early American courts "paid close attention to whether the correct parties were before them" when adjudicating; since private rights had been violated, the court only needed to provide relief to the specific individuals who had been injured.[7] One important consequence of this distinction between public and private rights–which will play an important role throughout this thesis–is that, in the view of early American courts, private individuals would not be the correct parties to pursue civil litigation in order to vindicate public rights.

Aside from this historical distinction, current Supreme Court precedent also traces standing doctrine back to Article III of the Constitution, which lays out the powers of the judicial branch of the federal government. Section 2 of this article concerns *justiciability*, outlining which legal issues the federal courts have the constitutional jurisdiction and proper authority to consider. Modern courts have interpreted the first clause of this section as limiting the jurisdiction of the judiciary to lawsuits that can be represented as particular "Cases" or "Controversies."[8] The way that Supreme Court precedent formalizes this clause's constraint on justiciability is by limiting what kinds of plaintiffs are granted standing in federal civil litigation.[9]

As it currently exists, the doctrine that determines whether or not a plaintiff has standing consists of three components:

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[7] *Ibid*, 691.
[8] U.S. Constitution, art. III, sec. 2, cl. 1.
[9] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), 559-560.

1. The plaintiff must be able to prove that they have suffered an *injury-in-fact*, meaning that the injury is a harm to a legally protected interest. This injury must be both (a) concrete and particularized and (b) actual or imminent.
2. The plaintiff must show that there is a clear causal connection between the injury-in-fact and the defendant's conduct that has been brought to the court for review.
3. The court must deem it likely that a favorable decision for the plaintiff would actually redress their injury.[10]

On their face, these conditions might seem reasonable; however, in practice these requirements can make the legal system produce outcomes that seem intuitively incorrect. The current, restrictive vision of standing doctrine prohibits the courts from addressing public law litigation, defined broadly as "lawsuits based on grievances about the content or conduct of policy by a large institution, usually one of government, whose challenged behavior affects large classes of citizens as well as the plaintiff."[11] In the next section, I will provide examples that further explain what public law litigation is and illustrate why its exclusion from the jurisdiction of the federal courts is important.

1.3 Standing and Public Law

The term *public law litigation* refers to a large set of modern civil litigation that cannot be readily represented as a dispute between private citizens over their private rights. This type of litigation includes cases like class actions, lawsuits challenging the lawfulness of government expenditures, and litigation seeking to restructure government institutions such as public schools and police departments.[12] I will discuss the origins and unique historical significance of public law

[10] Legal Information Institute. "Standing." Accessed January 16, 2023. https://www.law.cornell.edu/wex/standing.
[11] Fallon, "Of Justiciability, Remedies, and Public Law Litigation," 1-2.
[12] *Ibid*, 3.

litigation at much greater length in Chapter Three, but first I will describe the two broad categories of public law litigation that are central to the argument of this thesis.

The first important category of public law litigation involves plaintiffs seeking to redress injuries that are not easily definable in traditional terms of concrete financial or physical harm to a specific individual. Rather, these plaintiffs seek to represent the shared interests of many people or even of the public at large "in enforcing lawful conduct by large institutions."[13] In many instances, these interests are valued not for economic reasons, but for political or ideological ones. The second important category includes lawsuits where the remedy that plaintiffs seek from the court would involve reorganizing the policies or structures of a large institution, typically one owned or operated by the government. To better explain these two categories of public law litigation, I will examine some historical examples.

As an example of the first category of public law litigation, I will discuss lawsuits that challenged anti-sodomy laws in the United States. For much of the history of the United States, many state legislatures enacted anti-sodomy laws, which explicitly criminalized sexual conduct between individuals of the same sex. The official criminalization of sodomy provided justification for systematic discrimination against gay Americans in employment, custody disputes, and several other areas of life.[14] Aside from making gay people the targets of violence and harassment, these laws indirectly enabled legal justification for institutional discrimination on the basis of sexual orientation. Legal challenges to anti-sodomy laws fit under the first category of public law litigation because, by the late twentieth century, these statutes were very rarely enforced through arrest or prosecution.[15] Without any official prosecution, the laws were generally thought of as harmless,

[13] *Ibid*, 4.
[14] Leslie, Christopher R. "Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack." *Wisconsin Law Review* 2001, no. 1 (2001), 29-30.
[15] *Ibid*, 29.

despite indirectly enabling pervasive discrimination. For decades, challenges to anti-sodomy laws in the courts failed because standing doctrine insulated such laws from attack. The difficulty in establishing standing for such a lawsuit is that the plaintiff must prove some sort of injury-in-fact, and the standards for showing that such an injury occurred are particularly high. The incidental injuries that come from the discrimination facilitated by anti-sodomy statutes were generally ignored by the courts if the plaintiff had not actually been arrested as a consequence of the law. Since anti-sodomy laws were rarely enforced, this condition eliminated the great majority of potential plaintiffs who could invoke judicial review of such laws.

One might argue that excluding such cases from the courts is acceptable because the most direct avenue for challenging these anti-sodomy laws would be through the legislature. Since such laws were passed by legislative officials, perhaps the public could gather enough political support to encourage those same officials to eliminate them. Unfortunately, doing so was unrealistically difficult for several reasons. First, generating support for such a movement was uniquely dangerous for gay Americans because publicly organizing over gay rights had severe social consequences. Those who mobilized to inspire legislative change would effectively be outing themselves, which was a massive personal risk at the time. This was further exacerbated by the discrimination facilitated by these anti-sodomy laws. Second, once laws are on the books, especially if they do not typically result in prosecutions, legislative inertia will often keep them there. As such, statutes might remain valid even when the majority of current legislators disagree with them.[16] Of course, in many of the state legislatures which did not choose to repeal their anti-sodomy laws, inertia was likely a much smaller motivating factor than legislators' outright disapproval of gay people. Since the legislative officials in generally homophobic areas had no strong incentives to repeal anti-sodomy laws, the only remaining avenue for citizens to challenge those laws was judicial review. Unfortunately, the restrictive

[16] *Ibid*, 33.

definition of "injury" employed in modern standing doctrine made invoking judicial review exceptionally challenging on a procedural level. Since standing is a procedural threshold determination, judges would dismiss challenges to anti-sodomy statutes without ever having to decide whether those statutes were actually unconstitutional. As a consequence of this restrictive vision of standing doctrine, anti-sodomy laws were not declared unconstitutional until the Supreme Court's 2003 decision in *Lawrence v. Texas*, and *Lawrence* was an incredibly rare case where the plaintiff had actually been prosecuted under an anti-sodomy law.[17]

For an example of the second category of public law litigation, I will return to *City of Los Angeles v. Lyons*. When Lyons sued the LAPD, he sought two different kinds of judicial remedies. First, he sought damages, which are direct monetary compensation. Both the lower courts and the Supreme Court agreed that Lyons had standing to sue for damages as his constitutional rights had clearly been violated. The injury-in-fact for this case was the event of Lyons being choked unconscious by an unprovoked police officer. Second, he sought an injunction against the LAPD that would bar the department's police officers from using chokeholds in situations where they were not confronted with any sort of lethal force.[18] The Supreme Court decided that Lyons needed to establish standing for each of these requested remedies separately, and although he obviously had standing to sue for damages, Justice Byron White's majority opinion ruled that Lyons lacked standing to sue for an injunction.[19]

The Court's majority opinion rejected two arguments in favor of Lyons's standing. First, the Court rejected that Lyons's past injury gave him standing to seek injunctive relief. The majority acknowledged that Lyons did, indeed, suffer a past injury sufficient for standing to seek damages. However, this prior injury did not, in the eyes of the majority, give him standing to seek injunctive

[17] Lawrence v. Texas, 539 U.S. 558 (2003).
[18] City of Los Angeles v. Lyons, 461 U.S. 95 (1983), 95.
[19] *Ibid.*

relief.[20] The Court justified themselves in making this distinction by appealing to the concept of *remedial standing*, that the remedy requested by the plaintiff must be able to effectively redress the specific injury which gives the plaintiff standing. The injunction that Lyons requested could not alleviate his past injury, so even the most egregious of prior injuries could not have justified the remedy of the Court declaring an injunction. Second, the Court rejected the argument that there was enough risk of Lyons encountering the Los Angeles police again and being injured in a similar chokehold to satisfy the immediate or imminent injury requirement of Article III of the Constitution.[21] These two arguments illustrate how standing doctrine manages to exclude the second category of public law litigation. The majority opinion argued that a prior injury could not give a plaintiff standing to sue for injunctive relief that could actually prevent the same injury from happening in the future. As such, the concept of remedial standing drastically limits the courts' ability to construct institutional remedies.

The injury-in-fact standard that courts currently use when making standing determinations fails to capture the unique nature of injuries in the public law context. Plaintiffs in public law litigation typically seek redress for injuries that are inflicted on many people by large structures, such as government policy. However, the injury-in-fact standard requires that injuries be "(a) particularized, (b) imminent, and (c) likely to be redressed by a favorable ruling."[22] Harms that affect entire classes of people and cannot be traditionally represented as tangible, particularized injuries to a specific person are known as "generalized grievances."[23] Current Supreme Court precedent surrounding standing holds that generalized grievances are non-justiciable, so public law litigation of the kinds mentioned above are nearly impossible to effectively litigate. Lyons had suffered a

[20] Fallon, "Of Justiciability, Remedies, and Public Law Litigation," 10-11.
[21] *Ibid*, 11.
[22] Wehle, Kimberly L. "Justiciable Generalized Grievances." *Maryland Law Review* 68, no. 1 (2008), 226.
[23] *Ibid.*

particular injury in the past, so an injunction would not directly redress that injury, but the public at large had a generalized grievance because their rights were in serious danger of violation by the LAPD.

The practice of procedurally dismissing public law litigation through standing doctrine has extraordinarily high stakes. Professor Steven Winter explains that a "'no-injury' determination is necessarily a 'no-right' determination."[24] Standing is a procedural threshold issue, so if a judge dismisses a lawsuit because the plaintiff lacks standing, the court never actually reaches and provides analysis of the substantive merits of the case. As a result, a judge who circumvents discussion of a case's merits by shutting it down procedurally can functionally deny the existence of a right. In such a situation, the court uses an apparently neutral procedural issue to practically decide the merits of a case without officially doing so. When courts refused to cognize the indirect harms towards gay people caused by anti-sodomy laws as injuries-in-fact, they refused to address the question of whether those laws violated constitutional rights. When the Supreme Court denied Lyons standing to sue for an injunction, even though they conceded that his constitutional rights had been violated, they practically took the stance that they would not protect those rights for the public at large.

1.4 A New Standing Doctrine for Public Law Litigation

In this thesis, I will argue that standing doctrine ought to be expanded so that the judiciary can more effectively engage with public law litigation and protect public rights. The basic structure of my argument is as follows. In Chapter Two, I address the question of why current standing doctrine is so restrictive. The modern form of standing doctrine can be traced back to a set of Supreme Court decisions in the 1980s and 1990s, where the Court shaped Article III standing to satisfy their philosophical concerns over the separation of powers. I reconstruct the arguments of

[24] Winter, Steven L. "The Metaphor of Standing and the Problem of Self-Governance." *Stanford Law Review* 40, no. 6 (1998), 1469.

Supreme Court Justices and legal academics in favor of the current, restrictive vision of standing and provide multiple objections. The aim of Chapter Two is to show that the dominant justification given by proponents of modern standing doctrine does not actually justify the broad exclusion of public law litigation from the realm of judicial consideration. Then, in Chapter Three, I provide a positive argument as to why the courts are, in fact, the correct institutions to address some generalized grievances and public law litigation. I argue that the judiciary occupies the unique role in American democracy of enforcing the Constitution and that in order to fulfill that role in a modern society where bureaucratic institutions have wide-ranging influence over social and economic life, courts must have the capacity to address public lawsuits. Finally, in Chapter Four, I extend the practical implications of my normative arguments and discuss ways that standing doctrine could be reasonably expanded to avoid worries over inappropriate judicial policymaking. Current standing doctrine severely restricts the judiciary's ability to address public law litigation, so I argue that standing should be conceived of as a prudential doctrine that would enable judges to better exercise their discretion in granting standing. I also explain how such a doctrine might be implemented to better capture the nature of the two relevant categories of public law litigation. Current doctrine greatly restricts the reach of the courts, forcing them to stand by in the face of clear injustice. My aim is to articulate how a new, expanded vision of standing doctrine might allow the judiciary to engage with important public law litigation and take public rights seriously.

Chapter Two: Standing and the Separation of Powers

In Chapter One, I introduced the concept of standing and argued that its modern, restrictive application prevents the judiciary from effectively engaging with public law litigation and protecting public rights. The criticisms of standing doctrine that I presented in Chapter One primarily consider the empirical consequences of the current doctrine, focusing on the outcomes of notable cases. However, few of the authors who make such criticisms articulate explicit normative arguments as to why the courts are the correct institutions to protect these rights. In contrast, most proponents of the current form of standing doctrine argue that courts are precisely the wrong institutions for this purpose, and they cite the principle of separation of powers. In the judicial context, this principle means that the courts ought to be especially careful when considering cases that might invite them to intrude upon the duties of the legislative and executive branches, known as the 'political branches' because they are theoretically empowered directly by the populace through the democratic political process.[25] At the federal level, judges obtain their positions through mechanisms that are much less formally democratic, such as appointment by other officials. As a consequence, the judiciary does not depend directly on the traditional political process for its power and is in a unique position to act as a check against the legislative and executive branches of government. However, to preserve the importance of the democratic process, the courts must also be somewhat restrained in the ways they interact with the political branches. Without any limits on the jurisdiction of the courts, judges might be able to overrule the work of legislatures even in inappropriate situations, enforcing their personal political opinions instead of defending the substantive values of the democratic society that indirectly empower them. To avoid such a deeply undemocratic scenario, proponents of the current

[25] Nichol, Gene R. Jr. "Abusing Standing: A Comment on Allen v. Wright." *University of Pennsylvania Law Review* 133, no. 3 (1985), 646.

form of standing doctrine argue that the jurisdiction of the courts should be restricted by limiting what kinds of plaintiffs have standing to sue in federal court.

In this chapter, I will first trace the development of this position in Supreme Court precedent, focusing on two particular cases where the Court explicitly relied on separation of powers analysis to deny plaintiffs' standing. Next, I will reconstruct the philosophical justifications for this analysis given by one of its most impactful proponents, Justice Antonin Scalia. Finally, I will raise two objections to this separation of powers analysis.

2.1 A Brief Legal History of the Separation of Powers and Standing

Standing doctrine has not always been discussed as an important component of the separation of powers. In fact, in 1968, the Court held in *Flast v. Cohen* that questions of standing do not implicate separation of powers concerns. In this case, the plaintiffs cited the Establishment Clause of the Constitution to challenge federal expenditures that would assist denominational schools. In its ruling, the Court decided to grant the plaintiffs standing simply based on their status as federal taxpayers. The majority opinion stated that issues of standing almost never raise separation of powers concerns and that standing doctrine primarily serves to ensure that the conflicts in front of the courts are reasonable for adjudication:

> 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. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be

presented in an adversary context and in a form historically viewed as capable of judicial resolution.[26]

This vision of standing doctrine was quite broad, giving plaintiffs great latitude to bring challenges to government action in front of the courts. However, in the 1980s, the Court's reasoning switched directions, greatly limiting the kinds of injuries that could give plaintiffs standing.

The first opinion that pointed explicitly towards the separation of powers as the guiding interpretive principle of standing doctrine was *Allen v. Wright* in 1984. In this case, Justice Sandra Day O'Connor wrote in the majority opinion that "the law of Art[icle] III standing is built on a single basic idea–the idea of separation of powers."[27] Since the reasoning in this opinion directly references the separation of powers, I will briefly explain some of the facts of the case and the ways that these arguments were employed.

The Internal Revenue Service (IRS) Revenue Procedure 75-50 required that any school applying for tax-exempt status have a publicly available, racially non-discriminatory policy. Additionally, the school would have to annually certify that this policy had truly been followed.[28] This lax standard enabled many private schools to discriminate on the basis of race while benefitting economically from tax-exempt status; they would nominally adopt and publicly certify a non-discriminatory policy without actively implementing it. The plaintiffs in *Allen v. Wright* were parents of black children attending public schools in various districts that were at the time undergoing the process of desegregation. In each of these districts, racially discriminatory private schools had opened their doors around the same time as the implementation of desegregation plans, and the plaintiffs alleged that the IRS's procedures were actively hampering desegregation efforts by providing those discriminatory schools with significant economic advantages. An amicus brief filed

[26] Flast v. Cohen, 392 U.S. 83 (1968), 100-101.
[27] Allen v. Wright, 468 U.S. 737 (1984), 752.
[28] Nichol, "Abusing Standing: A Comment on Allen v. Wright," 638.

by the NAACP illustrated how serious this effect was, noting that in Prince Edward County, Virginia, fewer than 70 white students stayed enrolled in public schools after desegregation plans were implemented, while over 1,300 such students attended the private Prince Edward Academy instead.[29] In 1983, just one year prior, the Supreme Court had held that the IRS could not grant tax-exempt status to racially discriminatory private schools, so this challenge seemed to be a very logical next step.[30]

However, the majority opinion authored by Justice O'Connor held that the plaintiffs lacked standing to bring this suit to court because their injuries could not be clearly traced to the actions and policies of the IRS. She claimed that Article III of the Constitution requires plaintiffs to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[31] The unique line of reasoning in O'Connor's majority opinion is that the Court should conduct its standing analysis in light of separation of powers principles. Specifically, she quoted precedent to argue that the plaintiffs' injuries were not traceable to IRS conduct because recognition of such an injury would "'have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action.'"[32] If the Court were to cognize such an injury and trace it to the conduct of the IRS, the decision might invite future intervention by the judiciary into the work of the political branches. Moreover, O'Connor explicitly ties her reasoning to the separation of powers, writing that the "idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury 'fairly can be traced to the challenged action' of the IRS."[33] While this case was the first that directly linked

[29] *Ibid*, 637-638.
[30] Bob Jones University v. United States, 461 U.S. 574 (1983).
[31] Allen v. Wright, 468 U.S. 737 (1984), 738.
[32] *Ibid*, 760.
[33] *Ibid*, 759.

standing doctrine to separation of powers principles, this relationship was strengthened further in the 1990s.

The current, restrictive vision of standing doctrine was articulated by Justice Antonin Scalia in his majority opinion for the 1992 case *Lujan v. Defenders of Wildlife*. One of the notable consequences of this case is that even if Congress creates a legal right through a statute, the violation of that right may still be insufficient to generate standing if vindicating that right might invite the courts to intervene in the work of the political branches. To examine the ways in which separation of powers concerns motivated the reasoning in this case, I will explain some of the facts of this case and Justice Scalia's arguments in the majority opinion.

Section 7(a)(2) of the Endangered Species Act of 1973 required the Departments of Commerce and the Interior to initiate a consultation process with their respective Secretaries whenever either department funds a project that might threaten an endangered species.[34] However, in 1986, the Department of the Interior changed its regulations, limiting the scope of the Endangered Species Act to actions taken in the United States or on the high seas.[35] The plaintiffs in *Lujan v. Defenders of Wildlife* challenged this geographic restriction, identifying multiple federally funded projects in foreign nations that threatened endangered species which were of special interest to them. Justice Scalia's majority opinion concluded that the plaintiffs' injuries were insufficient to grant them standing. He argued that future intentions to return to those habitats and visit animals are not concrete or imminent enough to be considered relevant individual injuries.[36] He further claimed that the plaintiffs' injuries would not be effectively redressed even if the Court did take action. The plaintiffs had sued the Secretary of the Interior, and Scalia concluded that if the

[34] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), 555.
[35] Nichol, Gene R. Jr. "Justice Scalia, Standing, and Public Law Litigation." *Duke Law Journal* 42, no. 6 (1993), 1143.
[36] *Ibid*, 1143.

Secretary were required to revise the regulation in question and mandate a consultation, other agencies would not necessarily be bound to comply with these rules. Moreover, he noted that federal agency funding typically does not make up a majority of funding for foreign projects.[37] The lower courts in this case had granted the plaintiffs standing because Congress had specifically laid out in the Endangered Species Act that individuals could commence civil suits on their own behalf if any provision of the act was violated. The lower courts considered the consultation process specified by the statute to be a procedural right conferred directly by Congress.[38]

Scalia disagreed with these rulings, arguing that even if Congress had created a public right through a statute, the judiciary should still not enforce it if doing so would invite the courts to infringe on the work of the political branches:

> Vindicating the *public* interest … is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of laws … can be converted into an individual right by a statute that denominates it as such, and that permits all citizens … to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious.[39]

This line of reasoning was a departure from earlier precedent, where the Court had held that the violation of legal rights created by statutes were sufficient to justify standing.[40]

Taken together, these rulings have two implications that tie standing doctrine to the separation of powers. First, Justice O'Connor's opinion in *Allen v. Wright* stated that the conditions for standing ought to be interpreted in light of separation of powers principles. Second, Justice Scalia's opinion in *Lujan v. Defenders of Wildlife* confirmed that separation of powers is the most

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[37] *Ibid*, 1144.
[38] *Ibid*, 1145.
[39] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), 576-577.
[40] Warth v. Seldin, 422 U.S. 490 (1975), 500.

important factor in the standing determination, outweighing even the creation of a legal right through a statute by Congress. Having traced the development of this position through Supreme Court precedent, I will now consider the more philosophical justifications for this separation of powers analysis. Fortunately, in an article that Justice Scalia wrote while he was an appellate judge for the D.C. Circuit, he explained his theory that standing doctrine is an essential component of the separation of powers. In that article, he wrote: "Is standing functionally related to the distinctive role that we expect the courts to perform? The question is not of purely academic interest, because if there is a functional relationship it may have some bearing upon how issues of standing are decided in particular cases."[41] Since Scalia would later shape modern standing doctrine, the theoretical concerns discussed in his article are intimately tied with current law. As such, I will now analyze Scalia's position and make objections to his arguments.

2.2 Justice Scalia's Separation of Powers Argument

Scalia's argument begins with a criticism of the reasoning in *Flast v. Cohen*. The majority opinion in *Flast* stated that issues of standing almost never raise separation of powers concerns because standing doctrine is primarily meant to ensure that the issues in front of the court are reasonably fit for adjudication. In the eyes of the *Flast* majority opinion, cases can be reasonably adjudicated when they are presented in an "adversary context" with parties that will bring as much insight as possible into the matter at hand.[42] The majority in *Flast* came to this conclusion because only the substantive issues that plaintiffs bring to court could seriously invite judicial interference with the political branches, but those questions should be addressed in the merits of the case, not through the procedural step of determining whether the plaintiff has standing.[43] Scalia disagreed with

[41] Scalia, Antonin. "The Doctrine of Standing as an Essential Element of the Separation of Powers." *Suffolk University Law Review* 17, no. 4 (1983), 894.
[42] Flast v. Cohen, 392 U.S. 83 (1968), 101.
[43] *Ibid*, 100.

this reasoning, arguing instead that if all people who have the potential to raise a particular issue are procedurally excluded from invoking their rights in court, then the relevant issue is also excluded. In his view, standing doctrine practically excludes classes of people from bringing certain types of claims to court, so the doctrine of standing does have bearing on the substantive issues that even appear in front of the court.[44]

Scalia also disagreed with the *Flast* majority's idea that standing doctrine primarily serves to ensure that there is sufficient adversary context for the court to effectively adjudicate the cases in front of them. He noted that sometimes the parties who would make the best, most illuminating adversaries have no direct stake in the issue before the court. For example, public interest law organizations like the American Civil Liberties Union and the National Association for the Advancement of Colored People Legal Defense Fund might make wonderful plaintiffs in civil rights cases, but to meet the requirements of organizational standing, they must still tie their arguments to a specific individual's concrete injury.[45] Since the personal injury requirement is a relatively uncontroversial component of standing, Scalia claims that it seems very unlikely that standing primarily serves to ensure an adversary context for the disagreements in front of the court.

Instead, Scalia argues that standing should restrict courts to their "traditional undemocratic role of protecting individuals and minorities against impositions of the majority and [exclude] them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*."[46] In his view, courts serve a very narrow and limited purpose in democratic society; they protect the interests of political minorities, and the concrete injury requirement in standing doctrine separates the right type of plaintiffs from "all the rest of us who also claim benefit of the social contract" and entitle them to "some special protection from the

[44] Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers," 892.
[45] *Ibid*, 891.
[46] *Ibid*, 894.

democratic manner in which we ordinarily run our social-contractual affairs."[47] Since judges at the federal level are often unelected officials, Scalia envisions a very restricted role for the courts. In his view, an institution that is not formally democratic should not be placed in charge of protecting the interests of the majority. Requiring that plaintiffs prove that they have suffered some sort of concrete injury restricts the court from getting involved in issues that concern the interests of the majority. He argues that these kinds of issues do not belong in the jurisdiction of the courts because "[t]here is surely no reason to believe that an alleged governmental default of such general impact would not receive fair consideration in the normal political process."[48] Since the traditional electoral process is intended to represent the interests of the political majority, such issues need not be addressed through non-democratic mechanisms and institutions like the courts.

Having laid out Scalia's philosophical justifications for why questions of standing should be interpreted in light of the separation of powers, I will now raise two objections to this position. First, I will argue that Scalia's arguments take for granted the idea that individuals can always seek meaningful redress for their injuries through the traditional political process, and this assumption is mistaken. Second, I will argue that attempting to interpret standing doctrine with respect to separation of powers principles–as suggested by Justice O'Connor–allows the Court to circumvent thorough analysis of bigger substantive issues present in the merits of a case.

2.3 Scalia's Mistaken Assumption

Scalia makes many compelling arguments about the relationship between standing doctrine and the separation of powers, but his underlying assumption that the political process is always an effective avenue for redressing generalized grievances deserves further scrutiny. The legislature is often quite slow and unresponsive, meaning that individuals alleging unlawful government action

[47] *Ibid*, 895.
[48] *Ibid*, 896.

may not be able to make meaningful change through the political branches. Even Justice Warren Berger, who argued in *United States v. Richardson* that generalized grievances should be left up to the elected branches, characterized the traditional electoral process as "Slow, cumbersome, and unresponsive."[49] When the political process works exactly as intended, voters must still wait until an election year to stem unconstitutional behavior from officials in the political branches of government. However, in practice, voters are frequently uninformed about major issues and often uninterested in the workings of the government that do not directly affect them. If the electorate were perfectly informed and perfectly concerned, then perhaps would-be plaintiffs who share grievances with the majority of the population might be able to garner enough political willpower to make meaningful change through the electoral process. Unfortunately, there are many serious constitutional issues about which the electorate might simply not care.

Scalia acknowledges this objection that the legislature works inefficiently, and he addresses one version of this objection in his writing. He notes that a reasonable reader might interpret his arguments as indicating that, if no minority interests are negatively affected, "'important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of federal bureaucracy.'"[50] Scalia's response to this objection is that this "misdirection" is actually a good thing. In fact, he argues that bad laws getting lost in federal bureaucracy is "one of the prime engines of social change," and he gives the example of Sunday blue laws to make his point.[51] Sunday blue laws restrict certain activities on Sundays in observation of religious Sabbath, and some places in the United States still have such laws on the official books. However, even in places where these laws have been officially repealed, the government had simply stopped enforcing them long before that. In Scalia's view, this is profoundly progressive practice. When the general will of the populace

[49] United States v. Richardson, 418 U.S. 166 (1974), 179.
[50] Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers," 897.
[51] *Ibid.*

turns against a certain law, the legislature does not even have to officially repeal it for it to stop having an impact. Much of the force of this argument relies on the specific example Scalia chose. If one replaces Sunday blue laws with anti-sodomy laws, this argument no longer works. Earlier in Chapter One, I explained that anti-sodomy laws caused serious indirect harm to gay people in the United States even when they were not enforced. However, since they were not enforced, legislatures were incredibly slow to repeal those laws officially, and standing doctrine insulated those laws from being successfully challenged in courts because plaintiffs lacked the concrete injury that would come from having been arrested.[52] In cases like these, the legislature's inadequacy in promptly responding to changes in public opinion entrenches antiquated laws.

Even if the political process functioned perfectly, leaving the protection of majority interests exclusively to the legislative and executive branches would permit unconstitutional behavior from the government. Representative bodies like legislatures are incentivized to condone and reward unconstitutional conduct if a majority of the electorate agrees with them. For example, consider the issues in *Valley Forge Christian College v. Americans United for Separation of Church and State*, a 1982 case in which members of an organization advocating separation of church and state tried to challenge federal gifts to a tax-exempt Christian college. The plaintiffs alleged violations of the Establishment Clause, but they were denied standing because they could not prove they had suffered any sort of concrete injury. If the plaintiffs in this case had followed Scalia's advice and tried to garner political support for their cause, they likely would have been met with a large number of people who agreed with the potentially unconstitutional conduct of the government, perhaps hoping that federal gifts to religious schools would help inculcate their preferred religious values nationwide. If the majority of

[52] Leslie, "Standing in the Way of Equality."

the populace favors unconstitutional conduct, then the political branches are incentivized to condone that behavior, and citizens may have no method of redress.[53]

2.4 Obscuring Substantive Issues with Threshold Questions

In the previous section, I argued that Scalia's arguments about standing doctrine and the separation of powers were based on multiple unfounded assumptions about an individual's ability to seek redress through the traditional political process. In this section, I will argue that interpreting the threshold conditions of standing in light of separation of powers principles may serve to obscure some of the bigger substantive questions present in a case. Professor Gene Nichol puts this idea succinctly: "When other distinct considerations are folded into the standing determination, those very issues escape thorough examination."[54]

To illustrate this idea, I will return to Justice O'Connor's majority opinion in *Allen v. Wright*. In her opinion, she points to the three broadly accepted conditions for a plaintiff to have standing under Article III of the Constitution: that the plaintiff allege some personal injury, that the injury be traceable to the defendant's conduct, and that the injury would likely be redressed by the requested relief.[55] However, none of these conditions can be interpreted in light of separation of powers principles because they have no intrinsic bearing on the separation of powers. To explain why this is the case, I will look at each requirement in the context of the issues in *Allen*. The first condition is that the plaintiff show some personal injury. This condition simply requires that the plaintiffs themselves have something at stake in the case. On its own, as a procedural issue, this has no direct bearing on the separation of powers.[56]

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[53] Treister, Dana S. "Standing to Sue the Government: Are Separation of Powers Principles Really Being Served Note." *Southern California Law Review* 67, no. 3 (1994), 708.
[54] Nichol, "Abusing Standing: A Comment on Allen v. Wright," 652-653.
[55] Allen v. Wright, 468 U.S. 737 (1984), 738.
[56] Nichol, "Abusing Standing: A Comment on Allen v. Wright," 646.

The second condition is that the plaintiffs' injury be fairly traceable to the defendants' conduct. Even if the plaintiffs in *Allen* had managed to construct the perfect case that their injuries were traceable to the actions of the IRS, this would have made no difference as to whether the relief requested would intrude on the jurisdiction of the political branches of government. Consider what might have happened if the Secretary of the Treasury and the heads of multiple private schools had testified that IRS procedures were designed exclusively to benefit discriminatory private schools and circumvent desegregation efforts. The *Allen* plaintiffs' injuries would have been very strongly traceable to the actions of the IRS, but this has no bearing on the separation of powers.[57]

The third condition is that the plaintiff show that judicial action in their favor would actually remedy their injury. If the *Allen* plaintiffs had shown undeniably that tougher IRS guidelines would force every discriminatory private school to close down and help integrate public schools, they would have proven that their alleged injury was redressable. However, as with the traceability requirement, this has no direct bearing on whether the relief requested would invite the judiciary to intrude on the responsibility of other branches. The redressability requirement is a threshold consideration of whether the injury which served as the basis for the plaintiffs' standing could genuinely be remedied through judicial power. Determining what remedy would be appropriate, however, is a substantive issue that concerns the merits of the case.[58] None of these conditions can be interpreted with direct relation to separation of powers concerns. They only have an impact on the separation of powers if the Court decides to combine the threshold questions of standing with more substantive questions based on the merits of the case and the determination of appropriate remedies.

[57] *Ibid.*
[58] *Ibid*, 646-647.

Although this line of reasoning connecting standing doctrine to the separation of powers does not work, it is not the only interpretation of Justice O'Connor's position in the *Allen* majority opinion. Another interpretation is the idea that substantive separation of powers concerns should skew the outcome of standing determinations. However, this raises a new issue. Federal constitutional claims very frequently concern questions of whether other government branches' actions are legitimate. As a consequence, this kind of question often creates the potential for judicial intervention into the work of the political branches. If the court is to carry out its part in the system of checks and balances, these types of interventions cannot all be considered inappropriate uses of judicial power and dismissed procedurally.[59]

This line of reasoning also raises the question of how justifiable intrusions are distinguished from unacceptable ones. Prior to *Allen*, the Court had considered such questions as part of substantive analysis of the merits of the case. For example, the Court's majority opinion in the 1962 case *Baker v. Carr* stated: "The nonjusticiability of a political question is primarily a function of the separation of powers."[60] When a court is asked to interfere with the roles of other branches, the judge can analyze the merits of a case to determine if such intervention would be inappropriate.[61] By subsuming this substantive question into a procedural standing analysis, the *Allen* majority opinion avoids engaging in explicit separation of powers analysis with the type of scrutiny typically demanded of the merits of a case.

2.5 Conclusion

In this chapter, I have first aimed to trace how Supreme Court precedent has connected the modern version of standing doctrine to the principle of separation of powers. In 1984, *Allen v. Wright* posited separation of powers as the guiding interpretive principle in determinations of

[59] *Ibid*, 648-650.
[60] Baker v. Carr, 369 U.S. 186 (1962), 210.
[61] Treister, "Standing to Sue the Government," 704.

standing, and in 1992, *Lujan v. Defenders of Wildlife* elevated this analysis as perhaps the most important consideration for standing. Next, I argued that the philosophical justifications for this position are mistaken. First, they rely too heavily on the assumption that private individuals can always seek meaningful redress through the traditional political process. Second, subsuming big issues such as the separation of powers into the procedural threshold question of whether a plaintiff has standing allows the Court to avoid the thorough discussion and analysis that those substantive questions merit. Therefore, I argue, questions of standing are the incorrect avenue for limiting the judiciary's intrusion into the work of the political branches. Rather, substantive avenues better address concerns over the separation of powers.

The empirical criticisms of standing doctrine that I presented in Chapter One focused on the consequences of the restrictive standing doctrine that grew from the separation of powers analysis. I have argued in this chapter that this type of analysis is flawed and philosophically unjustified; however, that is not enough for the empirical criticisms of standing doctrine to succeed. I still must show that the courts are, in fact, the correct institutions to address public law litigation and protect public rights. Therefore, this will be the subject of Chapter Three.

Chapter Three: Public Law Litigation and the Role of the Courts

In Chapter Two, I responded to the dominant justification for the modern, restrictive vision of standing doctrine: the separation of powers principle. I argued that the reasoning employed by proponents of this view in both political theory and in Supreme Court precedent do not justify using standing doctrine as the avenue for addressing separation of powers concerns, and in fact, folding such worries into the determination of standing actually allows those concerns to escape thorough analysis. However, my arguments in Chapter Two are not enough to provide a normative foundation for the empirical criticisms I outlined in Chapter One. For this, I will need to show that the courts are really the correct institutions for protecting public rights and addressing public law litigation. In this chapter, I will first explore the potential tension between democratic theory and the operation of the courts which should shape any discussion about the role of the courts in American democracy. Next, I will present a framework for thinking about the Constitution of the United States which might ease that tension and provide insight into the judiciary's obligations. Then, I will argue that the courts have certain institutional advantages for enforcing the Constitution and that the courts must engage with public law litigation to respond to modern constitutional claims. Finally, I will examine the implications of these abstract arguments on the more specific issue of standing in public law cases.

3.1 A Fundamental Tension

Most policy decisions in democratic societies are made by legislatures whose members are directly elected by constituents whom they are meant to represent. The idea that the regular electoral process authorizes representative bodies to make policies on behalf of the people at large is a fundamental component of democratic theory. I will call the proposition that the preferences of the majority of a population should determine policy decisions the principle of *popular control.* Although the United States is not a direct democracy, popular control is still the driving principle behind the

American electoral process. Judicial review, which is the power of the courts to declare the work of the political branches unconstitutional, seems at least facially at odds with the principle of popular control. When a judge declares a law unconstitutional, the legislature cannot simply overrule or alter the decision through a statute. There are slow procedures for the political branches to amend the Constitution, but judicial review is still an immense power for an institution like the judiciary to possess. Judges are typically not elected or otherwise politically accountable, and judicial review enables these unelected individuals to stop elected representatives from governing as they might want.[62]

Although popular control is certainly an important principle in American democracy, the political process is not entirely explained by the preferences of a majority of the population. If policy decisions were completely determined by simple majority rule, then majorities could institute rules that arbitrarily benefit themselves while hurting minorities. Democratic societies typically try to avoid this outcome because they value equality among citizens, even when those citizens are politically in the minority.[63] One of the ways that this value of equality manifests in American democracy is the Constitution's emphasis on certain basic rights for all citizens. The Constitution of the United States includes multiple devices for protecting the interests of political minorities, and a major puzzle of democratic theory and American political organization is how minority rights can be safeguarded in a way that does not flatly contradict the basic principle of popular control and the spirit of democratic theory.[64] Erwin Chemerinsky describes the Constitution as "society's attempt to protect itself from itself" because it enumerates and constructs many protections for political minorities and posits these safeguards as nearly unassailable, even by a majority of the electorate.[65]

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[62] Ely, John Hart. *Democracy and Distrust*. Harvard University Press, 1980, 4-5.
[63] *Ibid*, 76-77.
[64] *Ibid*, 7-8.
[65] Chemerinsky, Erwin. "In Defense of Judicial Supremacy." *William & Mary Law Review* 58, no. 5 (2017), 1465.

John Hart Ely calls the value that the Constitution places in the equal protection of minority interests a commitment to *egalitarianism*, and I will adopt this same terminology in the following arguments.[66] Popular control and egalitarianism are both ideals integral to democracy, but there is at least a surface level conflict between these two principles. Popular control suggests that majorities could simply outvote minorities and systematically exclude them from the benefits of engaging in political society, creating deep inequalities. Conversely, egalitarianism suggests that a policy decision can justly contradict the preferences of the political majority if its implementation would protect minority interests that are being trampled.[67]

Popular control and egalitarianism are important values in American democracy, so the apparent conflict between them seems worrying. In the United States, the practice of judicial review allows the courts to undo certain policy decisions made by the political branches, so resolving this conflict should be central to any discussion of the function of the judiciary in American democracy. Thus, in the next section, I will present a framework for thinking about the Constitution of the United States that might ease this tension, and I will explain its implications for the role of the courts.

3.2 The Constitution and the Duty of Representation

In *Democracy and Distrust*, John Hart Ely argues that popular control and egalitarianism are two different ways of trying to fulfill the deeper, fundamental duty of representation in a democratic society. To examine more thoroughly what this means, I will first explain how the Constitution seeks to preserve egalitarianism by providing protections for minority rights.

The original versions of the Constitution did not explicitly appeal to the idea of equality under the law, but they include at least two strategies to safeguard minority interests from potentially

[66] Ely, *Democracy and Distrust*, 76-77.
[67] *Ibid.*

tyrannical political majorities. First, and most obviously, the Bill of Rights that was ratified almost immediately after the Constitution enumerates a list of things that the federal government may not do to anyone. Ely notes that these protections "turn out to be mainly procedural," but they aim at a standard of equal treatment among citizens.[68] Second, and more subtly, Ely explains that the original Constitution took on a "strategy of pluralism, one of structuring the government, and to a limited extent society generally, so that a variety of voices would be guaranteed their say and no majority coalition could dominate."[69] By this, Ely meant that the Constitution aims to design American society so that effective majorities are typically made up of clusters of cooperating political minorities working towards shared interests. Even if one group could dominate the political process at a very local level, no single interest group would constitute a large enough majority to maintain exclusive control of larger scale politics, such as national elections. The same strategy applies to governmental institutions. The Constitution separates and counterbalances the authority of different institutions to make decisions and to enforce them so that control of one institution does not imply control of the entire political process.[70] This second method of preserving egalitarianism is focused on ensuring a durable set of structures and procedures for the resolution of policy disputes in a society composed of groups with different, but often overlapping, interests.[71]

Unfortunately, these strategies are insufficient to protect minority interests on their own. Regarding the first strategy, no finite list of procedural or substantive entitlements could reliably block every possible way that a destructive political majority might seek to undermine the rights of a minority. Regarding the second strategy, formally pluralistic mechanisms cannot guarantee minority rights either. Even if composed of various different minority groups with shared interests, a majority

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[68] *Ibid*, 79-80.
[69] *Ibid*.
[70] *Ibid*, 80.
[71] *Ibid*, 90-92.

coalition can still dominate the political process. A majority of this kind might still decide to vote for policies that advantage itself to the detriment of some minority group, and the traditional electoral process will not stop such an outcome.[72]

Aside from these two strategies, Ely argues that the most significant way the Constitution ensures egalitarianism is by tying the interests of minorities to the interests of majorities. In large enough democracies where direct voting on every policy issue with every member of the electorate present would be simply unfeasible, people appoint officials to represent their interests. This scheme of representation works because representatives are appointed through the traditional political process. Thus, their personal interests are tied to the interests of the majority of their constituency. Since those two sets of interests are inextricably linked, representatives can be counted on to advance the majority's interests. However, representatives' interests are only tied to the interests of political majorities. If our account of representation stops here, government officials would not have significant institutional incentives to pay attention to the interests of political minorities. This, Ely writes, is why the theory of representation "had to be expanded so as to ensure not simply that the representative would not sever [their] interests from those of a majority of [their] constituency but also that [they] would not sever a majority coalition's interests from those of various minorities."[73]

Ely's argument that the idea of representation should be expanded does not mean that groups which are a minority of the population should never be treated any less favorably than the majority, but rather that they should not be denied what Ronald Dworkin describes as "equal concern and respect in the design and administration of the political institutions that govern them."[74] The Constitution starts from the assumption that majorities will not choose to act counter to their own interests and seeks to structure policymaking processes so that everyone's interest are

[72] *Ibid*, 81-82.
[73] *Ibid*, 82.
[74] Dworkin, Ronald. *Taking Rights Seriously*. Harvard University Press, 1978, 180.

either explicitly or *virtually* represented.[75] The clearest example of the Constitution aiming at a virtual form of representation is the Equal Protection Clause of the 14th Amendment, which prohibits any government entity from denying a person equal protection under the law.[76] The Equal Protection Clause ties the interests of minorities to the interests of the majority because any right, privilege, or benefit granted to the majority of the population cannot be denied to anyone who is not included in that group. While the 14th Amendment may be the clearest example of virtual representation, a vision of virtual representation was at the core of the Constitution from its very beginning.[77] Ely uses the example of the Privileges and Immunities Clause of Article IV of the Constitution, which prevents state legislatures from treating out-of-state individuals any less favorably than residents. Nonresidents are "a paradigmatically powerless class politically" because they have no formal representation in legislative bodies, and the Privileges and Immunities Clause ensures that the fates of outsiders are tied to that of those who do possess political power.[78]

Although the goals of ensuring popular control of the government and preserving the equal protection of minority interests might initially seem at odds, Ely argues that each of these ideals can be understood as "arising from the common duty of representation."[79] The Constitution sets out many protections for the majoritarian political process while tying the interests of the majority to the preservation of minority rights. Constitutional intervention into the regular political process thus should take on a kind of "antitrust" orientation, interfering in the "political market" only when it appears to be "systematically malfunctioning."[80] Ely further describes what this looks like:

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[75] Ely, *Democracy and Distrust*, 100-101.
[76] *Ibid*, 86.
[77] *Ibid*, 82.
[78] *Ibid*, 83.
[79] *Ibid*, 86-87.
[80] *Ibid*, 102-103.

> Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives behold to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[81]

The duty of representation has two components. First, policy decisions should represent the will of the populace. The principle of popular control of the government comes from this broader duty of representation, and the Constitution details various rules and mechanisms for making sure that the will of the majority generally dictates the federal government's policy decisions. Second, minority groups whose preferences are not always directly represented in the electoral process should at least be virtually represented by having their interests tied to the interests of the majority. The democratic commitment to egalitarianism also comes from the broader duty of representation, and constitutional tools such as the Privileges and Immunities Clause and the Equal Protection Clause help accomplish virtual representation.

In this section, I have aimed to show that the Constitution provides ways of fulfilling a broad duty of representation and that this idea of representation helps ease the tension between egalitarianism and popular control. However, just because such a duty of representation exists, it does not explain why an unelected body of powerful officials should enforce the Constitution through something like judicial review. Thus, in the next section I will argue that the courts have certain institutional advantages that make them better entities to implement the safeguards for representation detailed in the Constitution.

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[81] *Ibid*, 103.

3.3 The Courts' Institutional Advantages in Constitutional Interpretation

In the last section, I argued that constitutional protections help fulfill a duty of representation that is essential to American democracy, but without a system of enforcement, those protections are not worth much. Legislative and executive officials are supposed to comply with the Constitution, but this compliance is only guaranteed through enforcement. Discussion of institutional incentives is important because it provides insight into how likely different branches are to uniformly comply with Constitutional obligations out of their own interests. Now, I will put forward two reasons as to why the judiciary is the best institution to enforce those limits.

First, unlike judges, legislative and executive officials are often directly incentivized against complying with the Constitution.[82] The Constitution provides safeguards to ensure that political majorities do not subjugate political minorities. If those rules, which bind the political process, were subject to the traditional political process, then the political branches could overrule them whenever those protections came into conflict with the will of the majority.[83] The interests of representatives in the political branches are tied only to the interests of the majority, so they would be actively disincentivized from vindicating the rights of minorities in these situations. A consequence of this aspect of the political branches is that individuals without political power have no guaranteed access to means of recourse through the legislature or the executive. Chemerinsky uses the examples of prisoners, criminal defendants, and noncitizens to illustrate this point. These classes of individuals generally lack political power because they typically do not have the means to influence the political process in meaningful ways. They usually do not give significant sums of money to political candidates, they are sometimes prohibited from participating in elections by voting, and they are often unpopular among the majority of the electorate. Thus, representatives in the political branches

[82] Chemerinsky, "In Defense of Judicial Supremacy," 1463.
[83] *Ibid*, 1465.

have little, if any, institutional incentive to respect their constitutional rights.[84] While these examples are somewhat drastic, as prisoners are frequently explicitly excluded from the political process, the elected branches are not strongly incentivized to pay attention to any group of people who lack enough political influence to affect their chances of getting reelected.[85] This is why, throughout the history of the United States, many different minority groups have been consistently and continuously subject to discrimination despite technically having the ability to participate in the traditional electoral process.[86]

One might reasonably object that the arguments above show only that the legislative and executive branches ought to be somehow changed in order to align their institutional incentives with the protection of minority rights, not that they are the incorrect institutions for enforcement of the Constitution's protections. However, the fact that officials in the political branches have their interests so strongly tied to the interests of political majorities is essential to the duty of representation. While the duty of representation requires protection of minority interests, it also requires that the will of the majority generally dictate policy decisions. The political branches are strongly incentivized to act as direct representatives of political majorities so that this aspect of the duty of representation can also be fulfilled. Any attempt to change those branches' incentives so as to protect minority interests will at least partially sever officials' individual interests from the interests of the majority. Thus, the institutional mechanism for protecting minority rights should be meaningfully separate from these branches. Additionally, even if it were possible to change the political branches' incentives without severing their interests from majority interests, this would be less desirable on a pragmatic level than using the courts. The judiciary's incentives are already more

[84] *Ibid*, 1463.
[85] *Ibid*, 1464.
[86] Ely, *Democracy and Distrust*, 84.

closely aligned with enforcing the Constitution than those of the political branches, so they are a more practical institution for ensuring virtual representation.

The political branches are disincentivized from enforcing the Constitution when its protections go against the will of a majority, but the judiciary is more insulated from day-to-day political pressures.[87] Its counter-majoritarian nature is strongly reinforced by the method of federal judicial selection. Judges are typically appointed one at a time as vacancies arise, and it is seriously unlikely that any individual administration could possibly appoint a sizable enough proportion of the federal bench so as to dominate the overall judiciary's political views. Some might argue that the judicial appointment process, and thus the courts' independence from the political branches, can be distorted or compromised by the partisan political process. Given that federal judges are appointed by other elected officials, this is a meaningful concern. However, the federal judiciary is such a large body of officials with life appointments, that the likelihood of any single administration dominating judicial appointments is incredibly low. As a consequence, the federal courts tend to reflect many political views, not just the current administration's dominant ideology.[88]

The second reason is that courts are the only institutions actively obligated to substantively address any given individual's complaint. Most lower courts–that is, the trial courts and intermediate appellate courts–must provide some sort of ruling on any case that is properly filed.[89] In contrast, the legislative and executive branches do not have real obligations to hear any given individual's complaint. For instance, recall prisoners, who have no political power. If addressing a prisoner's complaint requires potentially unpopular expenditures, then the legislature does not have strong institutional incentives to expend resources considering it.[90] Additionally, the judiciary is the most

[87] Chemerinsky, "In Defense of Judicial Supremacy," 1468.
[88] *Ibid*, 1466.
[89] *Ibid.*
[90] *Ibid*, 1467.

likely institution to respond to the actual merits of these complaints. There is simply no institutional expectation that the legislature provide any sort of substantive reasoning concerning the merits of an individual's complaint, which is why "Logrolling, vote trading, and the tabling of bills are accepted parts of the legislative process."[91] Courts must write opinions demonstrating that their decisions are not just arbitrary exercises of power. They are required to explain why the values they protect in a decision are constitutionally relevant, how they are embodied in particular legal principles at issue, and how courts below them should apply new rules in specific cases. There are neither laws nor traditions which require the legislative or executive branches to justify their decisions, and even if all of the Supreme Court's decisions are perceived to be products of the specific Justices' ideologies, they must still justify them in legally acceptable terms, and only the judiciary is committed to conforming to precedent.[92] As Chemerinsky explains, "The Constitution's purpose of protecting the minority from the tyranny of the majority is best fulfilled by an institution obligated to listen to the minority."[93] Thus, the judiciary is clearly better suited for enforcing the Constitution than any other branch of government.

Of course, there are also potential arguments as to why the courts might not be the proper institution to interpret and enforce the Constitution. First, positing the judiciary as the ultimate interpreter and enforcer of the Constitution gives an unelected body of officials great power, and this might be dangerous even if the purpose of the Constitution is to fulfill the important duty of representation. In Chapter Two, I explained that the dominant justification given by proponents of the restrictive vision of standing was that the courts need to be restrained in how they can interact with other branches of government because judges are not democratically elected, and I described this as separation of powers reasoning. If the judiciary is the supreme enforcer of the Constitution,

[91] *Ibid*, 1468.
[92] *Ibid*, 1472.
[93] *Ibid*, 1467.

then they might make begin to make decisions outside the scope of their duties. However, discussion about separation of powers implies that we already know what power the judiciary should have. Courts should not stray further than their duties, but it cannot simply be assumed that an extremely restrained court best serves the separation of powers. If the courts' role in democratic society is to exercise judicial review when the legislative and executive branches violate the Constitution's protections for minority interests, then commitment to the separation of powers requires that the courts fill that role.[94]

Another objection is that the court needs to preserve its scarce institutional capital in order to continue performing its duties, so it should be especially deferential to the other branches of government. This view is premised on the idea that the judiciary's credibility is extremely fragile and that unpopular decisions create great risk of rendering it powerless and illegitimate. However, from a historical perspective, some of the Court's most controversial rulings over the reapportionment of state legislatures and the desegregation of school systems have actually elevated the judiciary's legitimacy in the eyes of the public over time.[95] Additionally, the courts' main reason for preserving and building institutional capital would be to make sure that they could better enforce the Constitution.[96]

Finally, the judiciary has some self-interest in gradually increasing the scope of its own powers over the long term. Thus, there may be legitimate concerns that the courts will use judicial review to make themselves even more powerful and overstep their role in enforcing constitutional provisions. However, Chemerinsky argues that this problem is not unique to the judiciary, and every branch of government has the same prerogative; this is why the separation of powers is, in fact, very

[94] *Ibid*, 1474.
[95] *Ibid*, 1475.
[96] *Ibid.*

important. In resolving specific constitutional issues, it is therefore preferable to trust an institution with "only long-term interests than one with immediate interests in the outcome of the matter."[97]

The judiciary has institutional advantages in enforcing and interpreting the Constitution, and enforcing Constitutional protections helps fulfill both the ideals of popular control and egalitarianism through representation. The reasoning in this section indicates that the courts are the correct institutions to deal with constitutional claims in general, but it does not explain how generalized grievances and the rights of the public fit into this picture. Justice Scalia's vision of a limited court that deals primarily with defending the rights of specific individuals might even still be consistent with Ely's vision of a representation-reinforcing judiciary. In the next section, I will argue that the rise of public law litigation in federal courts shows that the judiciary must deal with public law if it is to effectively address modern constitutional claims.

3.4 The Rise of Public Law Litigation

In the 1970s, Abram Chayes described a transformation in the types of issues into which federal courts were asked to intervene. For much of the early history of the United States court system, judges mainly dealt with self-contained disputes between private individuals, and lawsuits of this style fit what Chayes called the "traditional model" of litigation.[98] However, since the mid-20th century, civil litigation has increasingly involved plaintiffs' grievances over the administration of public programs and requests to vindicate public policies. This new kind of lawsuit fit into what Chayes called the "public law" model of litigation.[99] Chayes argued that despite this clear change, the Supreme Court led by Chief Justice Warren Burger–notably the same group of Justices who handed down the decision in *Allen v. Wright*, discussed in Chapter Two–continued to deal with the new style

[97] *Ibid*, 1471.
[98] Chayes, Abram. "The Role of the Judge in Public Law Litigation." *Harvard Law Review* 89, no. 7 (1976), 1282.
[99] Chayes, Abram. "The Supreme Court, 1981 Term – Foreword: Public Law Litigation and the Burger Court." *Harvard Law Review* 96 (1982), 4.

of public law litigation as though it fit into the traditional model.[100] To further explain the trend that Chayes noticed, I will start with a description of the "traditional model" of litigation.

In the traditional model, "the lawsuit serves as a vehicle for settling disputes between private parties about private rights."[101] There are five notable features of this conception of the lawsuit. First, the lawsuit is "bipolar," meaning that litigation is treated as a sort of competition between two adversaries with opposite interests.[102] Second, litigation is "retrospective," meaning that the controversy identified in a lawsuit exists entirely within an already completed set of events.[103] Third, rights and remedies are thought of as logically interdependent. The scope of the relief that the courts can provide the plaintiff should be logically derived from the defendant's breach of duty.[104] Fourth, the litigation itself is self-contained, with its impacts limited only to the specific parties of the lawsuit.[105] Fifth, the fact-finding process of the lawsuit is controlled and initiated by the relevant parties alone, and the judge is posited as a sort of detached, neutral arbiter who decides only those legal questions raised by the parties in question.[106]

Since the traditional model accurately described much of the litigation that came before the courts in the earlier history of the United States, it became the received tradition for thinking about the courts.[107] The vision of the judiciary articulated by Justice Scalia, one where judges primarily resolve private disputes and vindicate private rights, certainly fits the traditional model, and some of those assumptions seem to motivate the Scalia arguments I covered in Chapter Two. Subscribing to the traditional view as described above would lead to the conclusion that the courts should not

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[100] *Ibid*, 7-8.
[101] Chayes, "The Role of the Judge in Public Law Litigation," 1282.
[102] *Ibid.*
[103] *Ibid.*
[104] *Ibid*, 1282-1283.
[105] *Ibid*, 1283.
[106] *Ibid.*
[107] *Ibid*, 1282-1283.

address generalized grievances or attempt to protect public rights. There are two reasons for this. First, because the lawsuit is so tightly centered around one particular private dispute, its consequences are also intended to pertain only to its adversarial parties. This considerably limits the scope of the court's power because a judge's decision is only supposed to reach as far as the parties immediately in front of them at the time. Since litigation in this model is conceived of as strictly bipolar, the number of parties before the judge must also remain quite small. If it were truly the case that the scope of litigation should be as narrow as the traditional model indicates, then a properly reasoned judicial ruling should not have major impacts on the rights of those not directly party to a lawsuit.

Second, because rights and remedies are thought to be so tightly interrelated and to follow directly from the defendant's violative behavior, a lawsuit could not result in the type of large-scale relief that might meaningfully safeguard the rights of the public. The judge in the traditional model is a sort of detached officiant, deriving relief logically from the rights violated in the limited event at hand. This picture of a neutral judge, combined with the fact that litigation in this model is only ever retrospective, ensures that the courts' remedies mostly consist in monetary relief.[108] This is almost certainly the view that motivated Justice White's decision in *City of Los Angeles v. Lyons*, where the majority opinion denied injunctive relief because such a remedy would not address the specific violative event that the case is centered around.

Starting in the mid-1950's with the Supreme Court's decisions surrounding desegregation, legal scholars began to notice the style of civil litigation in the federal courts had begun to change form and deviate from the traditional model. Owen Fiss described this new style of case as

[108] *Ibid*, 1287.

"structural reform adjudication," in which the judiciary was tasked with dealing with state bureaucracies.[109] He wrote of this trend:

> Structural reform truly acknowledges the bureaucratic nature of the modern state, adapting traditional procedural forms to the new social reality … Structural reform is premised on the notion that the quality of our social life is affected in important ways by the operation of large-scale organizations, not just by individuals acting either beyond or within these organizations. It is also premised on the belief that our constitutional values cannot be fully secured without effectuating basic changes in the structures of these organizations.[110]

Fiss traced the roots of this form of constitutional litigation to the Supreme Court under Chief Justice Earl Warren and its efforts to enforce their landmark decision in *Brown v. Board of Education*.[111] In the immediate aftermath of *Brown v. Board of Education*, it was clear that segregated schools across the United States did not plan to comply with the landmark ruling. Thus, one year later, the Supreme Court decided a second case titled *Brown v. Board of Education*, laying out rules for schools and ordering them to desegregate "with all deliberate speed."[112] The Court left enforcement of these rules to the lower federal courts, and it frequently reaffirmed its commitment to desegregation. Over the course of many cases, the Supreme Court laid out rules for school faculty desegregation,[113] created new and explicit criteria by which lower courts should judge state governments' desegregation plans,[114] and strongly established that state governments were bound by the Court's decision in *Brown v. Board of Education*, even if they disagreed.[115]

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[109] Fiss, Owen M. "The Supreme Court, 1978 Term – Foreword: The Forms of Justice." *Harvard Law Review* 93 (1979), 2.
[110] *Ibid.*
[111] *Ibid.*
[112] Brown v. Board of Education of Topeka, 349 U.S. 294 (1955), 294.
[113] United States v. Montgomery County Board of Education, 395 U.S. 225 (1969).
[114] Green v. County School Board of New Kent County, 391 U.S. 430 (1968).
[115] Aaron v. Cooper, 358 U.S. 1 (1958).

With desegregation, the courts were tasked with restructuring the large-scale bureaucratic system of organizations that is the public school system. Enforcement of their decision required a fundamental transformation in which judges were the figures reconstructing social institutions. In the older conceptions of the party structure and of the relationship between rights and remedies, the judge was a detached observer who derived remedies logically from the rights that had been violated. However, to enforce desegregation decisions, judges would have to actively construct and engage with a continuous process of relief by reshaping bureaucratic systems in society.[116] In later years, cases of a similar style transferred these lessons to new contexts such as police abuses, humane treatment in prisons and mental hospitals, due process in welfare systems, and other significant public policy issues.[117]

Chayes characterized this type of lawsuit more broadly as "public law litigation," and described the general model into which these cases fit. In the contemporary "public law model" of a lawsuit, the central dispute is not a dispute between two parties, but rather, a grievance about "the content or conduct of policy – most often governmental policy, but frequently the policy of nongovernment aggregates."[118] The party structure is not bipolar; it is sprawling and amorphous in nature, and negotiation and mediation are important and continuous parts of the litigation process.[119] A direct consequence of its differences from the traditional model is that the public law model requires judges to manage much more complicated remedies which have an impact on people who are not party to the lawsuit, and litigation is therefore not as self-contained as it was once considered.[120]

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[116] Fiss, "The Supreme Court, 1978 Term – Foreword: The Forms of Justice," 3.
[117] *Ibid*, 3-4.
[118] Chayes, "The Supreme Court, 1981 Term – Foreword: Public Law Litigation and the Burger Court," 5.
[119] Chayes, "The Role of the Judge in Public Law Litigation," 1284.
[120] *Ibid.*

Chayes argued that the rise of public law litigation was driven by the expansion of the modern administrative state. Bureaucratic government agencies exercise their broadly delegated powers to operate programs with wide-reaching social and economic impacts for many people.[121] When many important structures are controlled and directed by regulations, the assumptions that motivated the traditional model no longer hold. Chayes made this observation in the context of class action lawsuits, but this is true of any type of group litigation where plaintiffs try to represent the interests of the public rather than those of a lone, private individual:

> The class suit is a reflection of our growing awareness that a host of important public and private interactions–perhaps the most important in defining the conditions and opportunities of life for most people–are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions between private individuals. From another angle, the class action responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests, at least in very important aspects.[122]

Modern constitutional claims increasingly take the form of challenges to institutional arrangements and the decisions made by administrative government agencies. Structural reform lawsuits as described by Fiss have become more common as constitutional protections and values are more frequently threatened by state bureaucracy.[123] Due to the bureaucratic character of the modern state, much of the most notable constitutional litigation tends fit the public law model of the lawsuit.

Another way of explaining why constitutional litigation has changed is through the distinction between the private interest and the public interest. On the traditional model of litigation,

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[121] Chayes, "The Supreme Court, 1981 Term – Foreword: Public Law Litigation and the Burger Court," 60.
[122] Chayes, "The Role of the Judge in Public Law Litigation," 1291.
[123] Fiss, "The Supreme Court, 1978 Term – Foreword: The Forms of Justice," 2.

a lawsuit only vindicates the interests and rights of private individuals. The lawsuit is also fully self-contained, meaning that the judge's decision should not have a major impact on people who are not parties to the particular dispute in front of them. In such a situation, members of the public would not have strong personal interests in the outcome of a case. In Chapter Two, I explained that Scalia conceived of courts as addressing only private interests, and vindicating the public's interests would thus be the role of Congress and the executive branch only. The problem with the traditional description of the lawsuit is that it fails to capture the complexity of modern society, as noted by Chayes and Fiss. A private individual may have suffered some harm, and seeking remedy to that specific injury may be their only personal interest. However, the public has an interest in these cases because a judicial decision will have an impact on the rights that everyone has. Every decision leaves behind a precedent which controls all subsequent lower court cases.[124] Thus, thinking of the courts as merely resolving individual suits misses the full picture. In the modern era, institutional arrangements and bureaucratic structures often threaten constitutional values. Since I have argued that courts are the correct institutions to address constitutional claims, they should be able to engage with public law in order to vindicate the public rights that are violated by ongoing, mass injuries.

As the drivers of social and economic arrangements have evolved, the traditional model of the judiciary has come to be an inaccurate depiction of what is needed in modern civil litigation to provide real solutions. The courts should still be the institutions that provide these solutions because they have institutional advantages over the other branches. Having established that public law litigation is needed for courts to fulfill their role in American democracy, I will now examine the implications of these arguments on standing doctrine in cases involving generalized grievances.

[124] Chemerinsky, "In Defense of Judicial Supremacy," 1473.

3.5 Implications for Standing

In *United States v. Richardson*, Chief Justice Burger stated: "In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."[125] However, the arguments raised in this chapter indicate that there are many such cases where the legislature is actively disincentivized from vindicating constitutional rights. Leaving enforcement of the Constitution to the political process would give the political branches the opportunity to circumvent the protections it provides. The Court's current, restrictive vision of standing means that in public law litigation, no one has any form of recourse.[126] This is directly at odds with the arguments provided in this chapter. As Chemerinsky puts it: "The appropriate, and indeed the most important, role of the federal courts is to enforce the Constitution. When jurisdictional doctrines facilitate that role, they give the federal judiciary its proper degree of authority."[127] Although it may be good for the courts to defer to the political branches in many instances, that deference should be reflected in the merits of the courts' decisions, not in procedural and jurisdictional restrictions that stop the judiciary from even considering constitutional claims.[128]

3.6 Conclusion

In this chapter, I have sought to provide positive reasons as to why the courts are the correct institutions to address generalized grievances and protect public rights. In American democracy, the political branches are controlled by majorities, but the Constitution provides protections for minority interests by tying them to the interests of the majority. Because the judiciary is insulated from political pressures, it has certain institutional advantages over the political branches in

[125] United States v. Richardson, 418 U.S. 166 (1974), 179.
[126] Chemerinsky, "In Defense of Judicial Supremacy," 1477.
[127] *Ibid*, 1493.
[128] *Ibid*, 1494.

enforcing the Constitution. The legislature and the executive are sometimes incentivized to ignore the Constitution, but this is much less likely to be true for unelected judges who are obligated to respond to every constitutional complaint. As bureaucratic, administrative agencies increasingly drive social and economic change, the courts must engage with public law litigation and the public interest in order to fulfill their role in enforcing the Constitution. Therefore, procedural limitations like standing should not stop the courts from addressing generalized grievances and protecting public rights when they are the only institution left that is not disincentivized from doing so.

These normative arguments provide a foundation for the empirical criticisms of standing doctrine in Chapter One. The many instances where the courts have refused to resolve constitutional rights violations because standing doctrine procedurally prohibited them from doing so are not just counterintuitive outcomes; they are unjust, and they are failures of the legal system to live up to the goals of democratic theory. However, knowing that the current version of standing doctrine is flawed does not, on its own, lead to any conclusion about how it can be changed for the better. Therefore, in Chapter Four, I will explore different suggestions for how standing doctrine could be improved in practice.

Chapter Four: An Expanded Vision of Standing Doctrine

In Chapter Three, I argued that the courts must be able to engage with public law litigation in order to fulfill their role in American democracy, which is enforcing the Constitution. Current standing doctrine frequently excludes plaintiffs who are suing over generalized grievances or who are seeking judicial relief that would create structural change, such as injunctions, from the federal courts. Therefore, for the judiciary to meaningfully engage with public law litigation, standing doctrine must somehow be expanded so that the courts can resolve constitutional claims that do not fit neatly within the traditional, private rights model of litigation. However, the expansion of standing doctrine cannot be as simple as just doing away with threshold questions about standing altogether.

In Chapter Two, I noted that proponents of the current, restrictive vision of standing doctrine are motivated largely by concerns over the separation of powers. Without limits on the judiciary's jurisdiction, judges could pick issues at will and declare popular legislative statutes or executive policies unconstitutional. Since federal judges are not elected, an overly powerful judiciary could pose a significant threat to democracy. While I aimed to show in Chapter Two that these separation of powers concerns do not necessitate the complete exclusion of generalized grievances from the court's jurisdiction, these concerns are still a compelling reason as to why judges should not be able to adjudicate just any issue. Threshold questions of standing might be able to help set boundaries on the judiciary's proper role without being as restrictive as the modern doctrine entails. Thus, rather than entirely doing away with standing, I aim to explore potential changes to current standing doctrine that might resolve some of the issues that it has created.

In this chapter, I will consider ways that standing doctrine could be expanded to allow the courts to more effectively address public law litigation and protect public rights. First, I argue that standing should be conceived of as a prudential doctrine, which would give judges greater discretion

in allowing cases into court and enable them to further develop legal doctrines. Next, I explain how the current, overly restrictive definition of "injury" could be broadened to include harms which do not meet traditional thresholds for concreteness or tangibility. Finally, I show that the standard of remedial standing is flawed and that questions about the appropriateness of certain remedies should be considered when a judge reaches the merits of a lawsuit, not during a procedural determination such as standing.

4.1 Prudential Doctrine and Judicial Discretion

Standing doctrine limits judges from fulfilling their proper role in American democracy because it restricts their discretion in cognizing injuries and creating remedies. Mark Gabel explains that Scalia's majority opinion in *Lujan v. Defenders of Wildlife* was the first decision to explicitly link the exclusion of generalized grievances from the jurisdiction of the courts to Article III of the Constitution. Since, on his view, courts are only constitutionally authorized to resolve private disputes, attempts to vindicate public rights and interests would be outside of their constitutional jurisdiction as granted by Article III.[129] A doctrine that is thought to be mandated directly and absolutely by the Constitution is known as a constitutionalized doctrine, and such doctrines tend to greatly reduce the bounds of judicial discretion. Scalia's constitutionalization of denying standing in cases involving generalized grievances limits judicial flexibility in two ways. First, it strongly binds lower courts so that all other judges are, at least officially, barred from hearing generalized grievance claims because they are proscribed by the Constitution.[130] Second, constitutionalization also limits the flexibility of the Supreme Court itself to make decisions in cases where plaintiffs have made a generalized grievance claim. Since the current version of standing doctrine is treated as though it were compelled by the Constitution, the Court has to meet a much higher threshold of justification

[129] Gabel, Mark. "Generalized Grievances and Judicial Discretion." *Hastings Law Journal* 58, no. 6 (2006), 1343-1346.
[130] *Ibid*, 1342.

to change or eliminate it. Existing precedent ties exclusion of public law litigation from the courts to Article III of the Constitution, and the relevant portions of the Constitution have not changed since then, so the Court must provide especially compelling reasoning to account for any modifications of the doctrine. This aspect of constitutionalized doctrines tends to "freeze the current canons in place" and slow down their evolution.[131] When standing is denied in generalized grievance cases as a matter of constitutional requirement, as it is under current doctrine, there is no room for the judiciary to effectively address these harms, construct effective remedies, and engage with public law litigation.

To give judges the opportunity to exercise their discretion in considering such harms, standing doctrine would need to be conceived of as a *prudential* doctrine. Prudential justiciability doctrines are limits on the exercise of the federal courts' jurisdiction that are self-imposed by the judiciary, rather than directly mandated by the Constitution. Such doctrines give judges more room to exercise their own discretion. Before Scalia's decision in *Lujan*, judges would frequently treat standing as a prudential doctrine, and they would engage in much more flexible inquiry to determine whether plaintiffs could invoke their rights in federal court. For example, one of the common components of prudential standing doctrine was the "zones of interests" inquiry, which considered whether the interest that the plaintiff sought to protect could reasonably be placed within the "zone of interests" intended to be protected or regulated by the statutory or constitutional provision at issue.[132]

One might worry that enabling greater judicial discretion might promote results-oriented adjudication. If standing determinations are more subjective in nature, judges might be invited to impose their personal preferences onto the law, using imprecisely defined generalized grievances

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[131] *Ibid.*

[132] Bayefsky, Rachel. "Psychological Harm and Constitutional Standing." *Brooklyn Law Review* 81, no. 4 (2016), 1602.

inappropriately as opportunities to dictate policy. This seems to be the major worry that motivated Justice Scalia's own reasoning.[133] While the democratic intuitions behind this worry are compelling, they do not justify a restrictive and inflexible standing doctrine for two reasons.

First, the same intuitions that fuel worries over the potential for judicial policymaking should cause concern about lower court judges excluding whole classes of lawsuits from judicial consideration, as they often do under the current doctrine. Since standing is a constitutionalized doctrine, courts at every level are bound to consistently follow, and this includes judges in the lower courts who often preside over a case alone. Standing doctrine is a threshold issue, meaning that judges are supposed to make decisions about standing before they begin considering all of the detailed facts of the case, which are known as the merits. When judges fold larger substantive issues into procedural threshold determinations such as standing, they do not have to justify their reasoning with the same specific factual analysis and depth. This line of reasoning is similar to the objection I raised against Justice O'Connor's position on standing and the separation of powers in Chapter Two. Since current standing doctrine errs on the side of exclusion, judges in the lower courts–often just one individual on any particular case–make important decisions about plaintiffs' rights without full analyses of the merits of their cases. Cases that are dismissed procedurally and never reviewed by the higher, appellate courts are functionally decided by the rule of one lower court judge. This exercise of judicial authority should be just as concerning as the potential for lower court judges to engage in inappropriate policymaking.

One might respond to this objection by noting that some plaintiffs successfully appeal their cases to be heard by higher courts. After all, if this were not true, then there would be no extant Supreme Court precedent that gives guidance on making standing determinations. However, even if some plaintiffs succeed, the damage from a restrictive, constitutionalized doctrine has already been

[133] Gabel, "Generalized Grievances and Judicial Discretion," 1364.

done. Lawyers will advise plaintiffs not to bring cases to court if current precedent indicates they have no chance at being granted standing, and large public interest law organizations have to struggle and strategize over how they can gain organizational or representational standing on behalf of their clients.[134] Inflexible, restrictive standing doctrine forecloses the possibility for many different types of plaintiffs and harms to be considered by judges at all. A plaintiff who was denied standing by a lower court judge might not have their appeal accepted by a higher court because standing doctrine is too inflexible for there to be any room for the appellate court to reverse the lower court's decision. The same intuitions that cause worries about a lack of judicial transparency or accountability in rendering decisions should motivate at least as much skepticism over the possibility that lower court judges can essentially decide cases procedurally, without reference to the merits of the lawsuit.

Second, the judges most commonly granting standing and constructing institutional remedies in public lawsuits would be lower court judges, and their decisions could be reviewed by appellate courts afterwards to determine whether their rulings were appropriate or justified. Judicial construction of remedies based on the merits of a case typically occurs during the first instance that a case is reviewed by the courts, so district court judges will most often be the ones choosing how judicial relief proceeds.[135] Appellate judges could review such decisions and determine whether or not the lower court judges were justified. From the perspective of the skeptic from earlier, this inclusion of possible plaintiffs and harms should be less troublesome than the current doctrine's exclusion. I will expand on this point further in Section 4.3 of this chapter, where I discuss the construction of remedies in greater depth.

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[134] Robertson, Marc. "No Matter The Cause, 'Public Interest' Groups Merit No Shortcuts On Standing To Sue." *Forbes*, April 26, 2018. https://www.forbes.com/sites/wlf/2018/04/26/no-matter-the-cause-public-interest-groups-merit-no-shortcuts-on-standing-to-sue/.
[135] Fallon, "Of Justiciability, Remedies, and Public Law Litigation," 41.

Even without considering the two reasons above, the manner in which modern standing doctrine limits the judiciary's ability to engage with public law litigation is unacceptable, and this concern is more central to the judiciary's proper role in American democracy than worries over inappropriate judicial policymaking are. I argued in Chapter Three that the judiciary has certain features which make it the best institution to fulfill the vital democratic role of responding to constitutional claims. One of those features is that the courts are obligated to address any individual complaint that is properly filed to them. Since the role of the courts is to address constitutional and statutory claims which could not otherwise be meaningfully redressed or considered, doctrine concerning who can and cannot invoke their rights in court should err on the side of inclusion. In the previous chapters, I have argued that current standing doctrine, which greatly limits judicial discretion, is underinclusive; it prohibits judges from substantively engaging with a variety of harms that the political branches are actively disincentivized from alleviating themselves. The practical upshot of my normative arguments thus far is that standing doctrine should be conceived of as a prudential doctrine, allowing judges more discretion to address the merits of important cases such as those involving public law litigation. In the following two sections, I will consider two specific ways that standing doctrine could be expanded for judges to better exercise their discretion.

4.2 Expanding the Definition of "Injury"

In Chapter One, I explained that public law litigation can be thought of as falling into two broad categories, and current standing doctrine poses different problems for each category. The first category involves plaintiffs whose injuries cannot be easily made to fit within terms of economic loss or other tangible harms typically recognized by law. Such plaintiffs aim to invoke the power of the judiciary to represent broader, collective interests in lawful conduct by large institutions.[136] Modern standing doctrine excludes these plaintiffs from seeking judicial relief because the threshold for an

[136] *Ibid*, 4.

injury being sufficiently "concrete" and "particularized" is very high. The second category includes lawsuits which would create structural change in government entities, such as injunctive decrees to alter the policies or structure of a government institution.[137] Remedial standing–the idea that plaintiff can only have standing if the particular remedy they seek would actually be likely to redress their specified injury–often excludes this type of public lawsuit from full judicial consideration. In this section, I will focus on the first category of public lawsuits and consider how standing doctrine might be expanded to better address them, and I will examine the second category in Section 4.3 of this chapter.

Standing doctrine is too restrictive in its definition of "injury," frequently excluding serious harms from judicial consideration. Here, I will examine lawsuits challenging anti-sodomy laws in the United States as examples of the first category of public law litigation. Even though anti-sodomy laws rarely resulted in prosecution, they indirectly enabled various harms–both traditionally tangible ones and somewhat less tangible ones–against gay people in the United States. I will argue that because those kinds of harms, in contexts outside of challenges to anti-sodomy law, could be safely cognized without inviting undemocratic judicial overreach, granting standing for such harms in general would be feasible.

In Chapter One, I explained that stringent definitions for the kind of concrete injury required to generate standing powerfully insulated anti-sodomy laws from successful legal challenge for decades. Anti-sodomy laws were only declared unconstitutional in 2003 with *Lawrence v. Texas*, and this was one of the incredibly rare instances where the plaintiff had actually been arrested for violating the law.[138] Before then, federal and state courts refused to grant standing in challenges to criminal anti-sodomy laws because they conflated the concepts of injury and prosecution. Federal

[137] *Ibid*, 4-5.
[138] Lawrence v. Texas, 539 U.S. 558 (2003).

courts typically require prosecution or some credible threat of prosecution as a necessary condition for granting standing to challenge criminal laws.[139] However, this requirement failed to capture the circumstances surrounding anti-sodomy laws because such laws created and enabled serious harms even without official prosecution by the government. In particular, Professor Christopher Leslie identified injuries such as employment discrimination, custody discrimination, the chill of sexual expression and speech related to homosexuality, and homophobic stigma as stemming from anti-sodomy laws.[140] In fact, even before *Lawrence v. Texas*, there was existing precedent indicating that such injuries could, on their own, be sufficient to generate standing. The courts just did not cognize these effects as injuries because they were one step too far removed from official prosecution under anti-sodomy laws. To illustrate the kind of harm that anti-sodomy laws caused, I will further expand on employment discrimination.

Anti-sodomy laws allowed employers to systematically discriminate against gay workers when hiring. Employers justified their discrimination by arguing that they could not legally be forced to hire criminals, and the courts extended this reasoning to hold that since the government had criminalized homosexual conduct, discrimination against gay people was legally permissible.[141] Adverse employment decisions are, by themselves, typically sufficient to constitute the kind of concrete injury-in-fact required by federal courts for standing, and both state and federal courts have confirmed this holding in various contexts.[142] Unfortunately, in the context of cases challenging anti-sodomy laws, state and federal courts frequently discounted such injuries. In *State v. Morales*, the Texas Supreme Court fully accepted that employers had used Texas sodomy laws as a justification to exclude gay job applicants. However, the Court ultimately held that the plaintiffs lacked standing,

[139] Leslie, "Standing in the Way of Equality," 86.
[140] *Ibid*, 69.
[141] *Ibid*, 70.
[142] *Ibid*, 72-73.

ruling that they needed to have suffered an irreparable injury to their property rights in order to justify the Court using its authority to invalidate an unconstitutional law.[143] Since employment discrimination is usually a sufficiently tangible injury to warrant standing, the Court should have been able to grant plaintiffs standing to challenge anti-sodomy laws when they could prove such laws led to this kind of discrimination. Even without official prosecution, criminal anti-sodomy statutes still created harms that could have been reasonably cognized as injuries without inviting judicial overreach.

While injuries such as employment discrimination and custody discrimination are relatively tangible harms which are commonly recognized by the courts in contexts outside of challenges to anti-sodomy laws, less tangible injuries like stigma should also be taken seriously by federal courts. Anti-sodomy laws were rarely enforced because their official existence was meant to serve a primarily symbolic purpose, codifying same sex relationships as criminal. Leslie writes: "The primary goal is stigmatization, not incarceration."[144] Some courts have recognized this brand of state-endorsed stigma as a form of injury in the context of racial discrimination. In *Smith v. City of Cleveland Heights*, a black plaintiff was granted standing to challenge a city's racial steering policies on account of the harm inflicted upon him by the police's categorization of him as racially inferior.[145] The spirit of recognizing racial stigma as injury extends even further back to *Brown v. Board of Education.*[146] Courts could have potentially applied a similar understanding of injury in the context of anti-sodomy laws, granting standing to challenge such laws on the grounds of the pernicious stigma they promoted. The fact that both traditionally concrete harms such as employment discrimination and less tangible harms such as stigma are successfully cognized as injuries in contexts other than anti-

[143] State v. Morales, 869 S.W.2d 941 (Tex. 1994).
[144] Leslie, "Standing in the Way of Equality," 94.
[145] Smith v. City of Cleveland Heights, 760 F.2d 720 (6th Cir. 1985), cert. denied 474 U.S. 1056 (1986).
[146] Leslie, "Standing in the Way of Equality," 96.

sodomy law challenges indicates that granting standing for such harms more generally could allow for their judicial consideration without severely endangering democracy.

In the past, the Supreme Court has frequently carved out narrow exceptions to recognize intangible, non-economic injuries as sufficient to justify standing. In particular, the Court has cognized harms such as those "to aesthetical and conservational interests, a 'spiritual stake in First Amendment values,' [and] the 'inability to compete on equal footing,'" along with stigma as just mentioned above.[147] Conceiving of standing as a prudential doctrine, judges could use existing, narrowly defined exceptions as models to develop jurisprudence about other intangible injuries. The advantage of prudential justiciability doctrines over constitutionalized doctrines is that courts can refine their analysis over time. By considering the factual context of a particular case, a judge can determine whether a plaintiff is "more or less proximate, closer or further in relationship, and so on" with regard to prior decisions made by other judges.[148] This approach would allow standing doctrine to evolve, reducing the potential for arbitrary, biased decision making in the process.

As an example of how judges might exercise discretion to develop standing doctrine, Professor Rachel Bayefsky suggests a framework for cognizing intangible psychological harms, defined as "mental or emotional suffering or distress."[149] She argues that the concept of psychological harm unifies many of the different exceptions that the Supreme Court has already carved into current standing doctrine, since the harmful nature of those exceptional injuries seems to come substantially from their psychological effects on plaintiffs.[150] In fact, a component of the harm suffered by plaintiffs affected by even economic or physical harms may also be partially psychological. For instance, a practice of paying female employees a lower wage than male

[147] Bayefsky, "Psychological Harm and Constitutional Standing," 1557-1558.
[148] *Ibid*, 1620.
[149] *Ibid*, 1565.
[150] *Ibid*, 1558.

employees certainly inflicts a sort of economic harm, but it also reflects a broader view of women's qualifications that is humiliating and hurtful.[151] While the law does not currently recognize a broad concept of psychological harm as sufficiently concrete injury to justify standing, specific psychological and emotional injuries are frequently recognized by courts. Intentional Infliction of Emotional Distress (IIED) and Negligent Infliction of Emotional Distress (NIED) claims are premised on the idea of psychological injury, and courts sometimes award monetary damages based on emotional or psychological distress.[152] Because judges can compare factual contexts between plaintiffs and consult with a body of precedent dealing with similar situations, IIED and NIED claims can be reasonably adjudicated without fears of overly aggressive judicial intervention. Treating standing as a prudential doctrine would encourage precedents to form so that judges could more effectively address injuries less tangible than traditional economic or physical injuries, and the framework of psychological harms serves as an example of what judges might be able to do if not limited by a restrictive, constitutionalized standing doctrine.

A skeptic, motivated by worries over inappropriate judicial policymaking, might object that a concept like psychological harm is too broad and ambiguous to serve as a concrete injury because it would confer standing upon a nearly limitless number of claims. To illustrate this, consider the psychological harms relevant to desegregation efforts.[153] Someone denied the opportunity to attend a public school due to a policy of racial segregation would likely suffer significant psychological harm, at least partially in the form of having to engage with public stigmatization of their racial identity. Granting such a person standing to challenge the policy of segregation is intuitively quite reasonable. However, without a framework for discriminating between psychological harm claims, judges might not know how to distinguish between the previous situation and someone else who experiences

[151] *Ibid*, 1593.
[152] *Ibid.*
[153] *Ibid*, 1560.

deep emotional harm from being denied the opportunity to attend a racially segregated public school. The prospect of granting this second person standing to challenge desegregation policies in court is much less intuitively appealing, even though their emotional injury does not necessarily seem less real or concrete.

Despite this objection, simple limits and tests could establish a framework for distinguishing between different psychological harms. For example, Bayefsky suggests a rule that cognizable psychological harms must come from the invasion of an interest that is already legally protected. The emotional injury of someone protesting desegregation policies does not come from the invasion of any sort of legally protected interest; in fact, the psychological harm is caused by the proper application of constitutionally mandated legal protections. As such, this person's injury would not be sufficient to confer them standing. In determining whether to grant a plaintiff standing on the basis of a psychological harm, courts could inquire if the behavior which caused that harm violated a provision of the Constitution–such as the Equal Protection Clause or the Establishment Clause–or a relevant statute.[154] Such a rule, in combination with judges considering the factual circumstances of each case and exercising their discretion in granting standing would ensure the gradual development of a doctrine that can successfully distinguish between different types of psychological harms. The inquiries and analyses required for this development would not always be easy, but they would also not be unprecedented: prudential standing doctrine used to successfully include somewhat ambiguous inquiries concerning the "zones of interests" protected by a statute or constitutional provision.[155]

Now returning to the categories of public law litigation, I have claimed that the restrictive definition of "injury" present in current standing doctrine excludes cases in the first category, which

[154] *Ibid*, 1601.
[155] *Ibid*, 1601-1602.

involve plaintiffs whose harms do not fit the traditional bounds of tangible injury. In the last two sections, I have argued that conceiving of standing as a prudential doctrine, enabling greater judicial discretion, would allow judges to expand the notion of injury and engage with the merits of more claims, and the framework of psychological harm serves as an example of how judges might do that. I have also argued that expanding the definition of "injury" is normatively justified because courts should err on the side of including rather than excluding potential constitutional claims in order to fulfill their role in American democracy. In the next section, I will consider how standing doctrine could be expanded to enable the courts to better address cases in the second category of public law litigation.

4.3 Rejecting Remedial Standing

The second category of public law litigation involves lawsuits which seek remedies that would create structural change in large institutions, often public entities. The concept of remedial standing is what ultimately excludes these cases from judicial consideration. To illustrate how standing doctrine bars this style of structural litigation, I shall return to the case of *City of Los Angeles v. Lyons*, which I first mentioned in Chapter One.

The majority opinion in *Lyons* actually did grant that Lyons had suffered an injury-in-fact when the LAPD officers put him in a chokehold. This injury was sufficient to give him standing to seek damages in the form of monetary compensation. However, in a jurisprudential move not commonly seen before this decision, the Court's majority opinion decided to disaggregate its standing determinations for Lyons's different requested remedies.[156] Lyons was not only seeking monetary damages; he was also seeking an injunction on the LAPD regarding their chokehold policy. While considering this second requested remedy, the Court decided that an injunction would not alleviate Lyons's prior injury of being choked by the police officers. He, as an individual, was

[156] Fallon, "Of Justiciability, Remedies, and Public Law Litigation," 11.

also not uniquely likely to be choked by police officers in the future, so there was no imminent threat to his constitutional rights in the near future. Therefore, the majority argued, Lyons did not have standing to sue for an injunction.[157]

The standard of remedial standing laid out by this decision essentially requires that any judicial relief requested by a plaintiff be likely to actually redress the injury upon which standing was initially predicated. If standing doctrine includes a condition that the specific remedy requested directly redress a particularized injury, injunctive relief is almost certainly precluded in any case based on institutional wrongs from some time in the past. Past injuries simply cannot be relieved by future changes in policy. Such a standard is meant to ensure that judges do not overstep the boundaries of appropriate judicial intervention or intrude too severely on the work of the political branches. The reasoning motivating the adoption of the remedial standing requirement is closely tied to the separation of powers. The Court's majority opinion in *Lyons* based its decision on the idea that whenever federal courts are invited to enjoin the behavior of other state authorities, they should exercise extreme restraint.[158] As I showed in Chapter Two, this line of reasoning does not justify or necessitate the overly restrictive vision of standing that exists today, and it does not on its own justify an inflexible exclusion of injunctive relief or structural litigation.

The practice of preemptively denying the possibility of injunctive relief ignores that institutional reform is sometimes necessary for enforcing the Constitution. In Chapter Three, I argued that as bureaucratic government agencies increasingly drive change in social and economic life, modern constitutional claims frequently take the form of challenges to institutional arrangements. Remedies in the contemporary public law model of litigation cannot be logically derived from a plaintiff's injuries in the same way that they could under the older, private rights

[157] *Ibid.*
[158] *Ibid*, 11-12.

model of litigation. By ruling out injunctive judicial relief procedurally, the remedial standing standard overprotects defendants and diminishes the courts' "sensitivity to particularity, and with it important, concrete dimensions of constitutional rights."[159]

For guidance on how standing doctrine might be changed so that the courts can better address the second category of public law litigation, I will first turn to Justice Thurgood Marshall's dissent in *Lyons*. Justice Marshall claimed that by establishing a concrete injury-in-fact, Lyons had shown that the Court had proper jurisdiction over his whole case, including his requests for both monetary relief and injunctive relief. Marshall further noted that there was no established precedent for disaggregating standing determinations for each of Lyons's requested remedies.[160] The consequence of his arguments is that the Court should have waited to ask any questions about whether the injunction against the LAPD should have been granted until they had begun to consider the merits of the case. When considering the full factual circumstances and the merits of the case, the Court could have engaged in a substantive analysis of the intrusiveness of the injunction and the specific context of the defendant's conduct.

With respect to Justice Marshall's vision of standing, a prudential doctrine would have great advantages over the current, constitutionalized standing doctrine. Remedial standing analysis is quite inflexible, and judges may need to engage in more careful factual consideration than such a threshold analysis would allow. If substantive doctrine concerning appropriate injunctive remedies were allowed to develop, judges could exercise their discretion to gradually craft useful injunctive remedial principles.[161] As the needs of legal and political culture evolve, judicial decision making

[159] *Ibid*, 74.
[160] *Ibid*, 12.
[161] *Ibid*, 45.

should change to better address them. Such a scheme of adjudication might seem more complex, but I argue that it is a requirement for a functioning democracy.[162]

The skeptic from earlier in this chapter might be suspicious of my suggestion that judges fully reject the standard of remedial standing. This skeptic is concerned about judges inappropriately using cases in the second category of public law litigation as opportunities to restructure large institutions and government policy. Although I responded to some of these worries in Section 4.1 of this chapter, the skeptic might object to the way that I have described judicial construction of institutional remedies. I noted that public law remedies would typically be constructed or chosen by the lowest level court, often the district court. On its face, this feature of remedy construction seems to upend the traditional judicial hierarchy and diminish the importance of appellate review. To illustrate why, I must first explain the traditional judicial hierarchy.

In most cases, higher level courts have the greatest authority when deciding a case; they are supposed to decide broader, theoretical "questions of law" while district courts decide more particular "questions of fact."[163] Fact-finding happens most extensively at the district court level, so these lower courts are likely to achieve much greater familiarity with the full context of a case than any appellate court. This institutional advantage makes lower courts the best bodies to choose particular remedies in a public lawsuit, but it also poses a complication for traditional judicial hierarchy and appellate control because higher courts will not be able to assess the facts of a case as reliably as the lower courts.[164] Appellate courts typically grant district courts *remedial discretion*, meaning that those lower courts are relatively insulated from reversal on their choices of specific remedies.[165] This would not pose much of a problem for cases which only involve private rights

[162] *Ibid*, 75.
[163] Hinkle, Robert L. "Appellate Supervision of Remedies in Public Law Adjudication." *Florida State University Law Review* 4, no. 4 (1976), 439.
[164] *Ibid*, 440.
[165] Fallon, "Of Justiciability, Remedies, and Public Law Litigation," 41.

because lower court judges would be constructing relatively simple remedies. However, in the context of public law litigation, remedy construction is a much more involved process, and it is one of the most important aspects of a judge's decision. If appellate courts grant the same kind of remedial discretion to lower courts in public law litigation as they do in other kinds of litigation, then individual judges at the lower levels will have a much wider latitude to engage in the type of unsupervised judicial policymaking that worried our skeptic in the first place.

However, even though appellate courts are not best equipped to propose public law remedies, they can still engage in extensive review of district court cases and prevent inappropriate judicial overreach. Appellate courts can supervise district court decrees in public law litigation by engaging in a full particularistic review of the appropriateness of a remedy. An example of this type of review appears in *Hartford-Empire Co. v. United States*, an antitrust case in which the district court had issued a very complex remedial decree which imposed various conditions on the defendants' businesses. The Supreme Court's majority opinion in the case undertook a paragraph-by-paragraph review of the lower court's decree, analyzing its various provisions and making substantive changes.[166] Since then, there have been multiple instances outside of antitrust law where the Court has engaged in particularistic review of lower courts' decrees, including both cases where the lower court's decree went too far and where the lower court's decree did not go far enough.[167] Even though appellate courts do not have the same command of the facts as district courts, they are still capable of this kind of extensive review. Their input in considering public law remedies is especially valuable because appellate courts adjudicate cases in many different areas, developing a broader outlook than the district courts and a better understanding of overall policy objectives.[168] Particularistic review of this kind would allow appellate courts to craft useful remedial principles that

[166] Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).
[167] Hinkle, "Appellate Supervision of Remedies in Public Law Adjudication," 435-437.
[168] *Ibid*, 442.

guide and constrain lower courts, ultimately adding greater legitimacy to the overall process of remedy construction.[169] Thus, I argue that, in spite of the skeptic's concerns over inappropriate judicial policymaking, judges should reject the standard of remedial standing. The practice of appellate review would safeguard against individual judges imposing their policy preferences without scrutiny or supervision.

In the modern context, courts must be able to engage with public law litigation to effectively respond to constitutional claims and thus fulfill their role in American democracy. Doing that sometimes requires fashioning judicial relief that meaningfully interferes with the work of other government entities, even if such relief could not be logically derived from the broadly defined injuries that a plaintiff has suffered. Although lower court judges are best equipped to create public law remedies, appellate courts can constrain them and further develop remedial doctrine through particularistic review of lower court decisions. Therefore, remedial standing, which generally forecloses the possibility of injunctive relief, should not be a threshold consideration for the jurisdiction of the courts. Rather, courts should reason about the appropriateness of particular remedies when considering the merits of the case, not while answering procedural threshold questions such as standing.

4.4 Conclusion

In this chapter, I have aimed to explore how modern standing doctrine could be made less restrictive in order to allow the judiciary to more effectively engage with public law litigation. The normative arguments from Chapter Three establish that the courts are the proper institutions for dealing with generalized grievances; in fact, sometimes they are the only institutions not disincentivized from enforcing constitutional provisions. The extension of these arguments is that judges need greater discretion in granting standing than the current, constitutionalized doctrine gives

[169] Fallon, "Of Justiciability, Remedies, and Public Law Litigation," 45.

them. Courts fulfill the democratic duty of representation by redressing constitutional claims even when the political branches do not have strong incentives to do so, and judges should err on the side of including more claims in the realm of judicial consideration. Thus, standing should be conceived of as a prudential doctrine, self-imposed by the judiciary, rather than inflexibly mandated by the Constitution.

The idea of treating standing as a prudential doctrine can be realized in two ways, corresponding to the two broader categories of public law litigation. First, judges can exercise discretion in cognizing intangible injuries as sufficient to grant standing. Courts would have the flexibility to address public lawsuits where the plaintiffs' injuries, while serious, are not as particularized or concrete as current doctrine requires. Challenges to anti-sodomy laws in the United States serve as an example of precisely how an overly restrictive conception of injury can leave people who have been clearly injured without any realistic form of redress. Allowing judges greater discretion to consider different plaintiffs' factual contexts while making standing determinations would give those plaintiffs opportunities for judicial relief and enable courts to gradually develop doctrine concerning intangible harms. Second, judges should leave questions about remedial efficacy out of the procedural standing determination. Disaggregating standing determinations for different requested remedies and pinning each to a narrow and particularized injury, like the Court in *Lyons* did, greatly diminishes the possibility of injunctive relief. However, courts sometimes need to be able to initiate institutional reform in order to take constitutional protections seriously. Questions about the appropriateness of remedies that aim at restructuring large institutions are important, but they require greater analysis of a case's substantive merits than a procedural standing determination can or should capture. These suggestions illustrate what an expanded vision of standing doctrine, one that enables the judiciary to fulfill its proper role in American democracy, might look like.

Conclusion

Standing doctrine determines who can invoke their rights in the federal courts. Questions of standing are critical because the jurisdiction of the judiciary has wide-ranging impacts. The current, restrictive vision of standing excludes many people who have been seriously harmed from seeking judicial relief for their injuries. The argument of this thesis is that standing doctrine ought to be expanded so courts can more effectively engage with public law litigation, but the ideal which motivates this argument can be put more simply. Courts are supposed to provide opportunities for individual people to secure protection of their rights, even when the political branches do not have institutional incentives to guard them. Therefore, courts should err on the side of being more, rather than less, inclusive of which harms merit judicial consideration. This position is distinct from claiming that the courts should actively redress all of those injuries; rather, I would argue that there are more injuries and potential remedies which deserve to be, at minimum, taken seriously on their merits in a court of law than current doctrine allows.

Chapter One introduces the ways that standing doctrine counterintuitively excludes important injuries and potential judicial remedies, primarily focusing on two examples: unsuccessful challenges to anti-sodomy laws in the U.S., and the Supreme Court's majority opinion in *City of Los Angeles v. Lyons*. Anti-sodomy law challenges exemplify the first broad category of public law litigation, lawsuits involving plaintiffs whose harms do not meet the strict threshold for traditional injury-in-fact. The refusal of various courts to cognize the injuries suffered by gay plaintiffs–including both relatively concrete harms like employment discrimination and more intangible harms like stigmatization–as sufficient to confer standing insulated unconstitutional anti-sodomy laws from successful challenge for decades. Only in 2003, in one of the extremely rare cases where a gay man had been arrested on account of such a law, did a legal challenge to anti-sodomy laws succeed at a high level. The plaintiff's situation in *City of Los Angeles v. Lyons* serves as an example of the second

category of public law litigation, lawsuits seeking remedy in the form of institutional or structural reform. The Court's majority opinion in *Lyons* held that even a plaintiff whose constitutional rights had obviously been violated by state policy, as the Court admitted, did not have standing to seek an injunctive decree that would actually change the policy which had violated their rights.

These outcomes seem, on their face, to be remarkably unjust, but the concept of standing has been present in legal decision making for centuries. Chapter Two begins to describe the philosophical reasoning that shaped standing doctrine into its current form. Proponents of a restrictive vision of standing see the doctrine as a way of fulfilling the separation of powers principle. By design, the judiciary is a counter-democratic body that serves as a backstop for the behavior of the political branches, which are more directly accountable to the traditional democratic process. From the perspective of separation of powers, unelected but powerful judges are dangerous because they can invalidate the outcomes of formally democratic procedures without having to respect the will of the populace. Thus, proponents argue, the jurisdiction of the courts must be severely limited so that judges do not impose their policy preferences on the nation inappropriately. This reasoning is not solely limited to academic discussion of the orle of the judiciary; the architects of modern stay standing doctrine cite the separation of powers principle frequently in their legal opinions. Justice Sandra Day O'Connor, with *Allen v. Wright* in 1984, and Justice Antonin Scalia, with *Lujan v. Defenders of Wildlife* in 1992, built the separation of powers principle into their standing analyses, determining the behavior of lower courts for decades to come. I argue that there are two problems with using the separation of powers principle to justify a restrictive vision of standing. First, such an argument relies too heavily on the assumption that individuals can always redress their needs through the traditional political process, an assumption that frequently fails in practice. Even in an ideal world where every citizen was perfectly informed and concerned about political affairs and the legislature was perfectly responsive to constituents' desires, individuals would still need to wait two

years, on the lower end, to seek relief. Additionally, even in such a world, legislatures would be disincentivized from safeguarding the rights of political minorities when doing so would be unpopular. Second, folding big issues like the separation of powers into a procedural threshold question like standing only enables the Court to avoid the thorough discussion and analysis that those issues deserve.

Since Chapter Two argues that the separation of powers justification for restrictive standing doctrine and the exclusion of public law litigation fails, Chapter Three outlines a positive argument as to why the courts are, in fact, the right institutions to deal with such lawsuits. The courts have institutional advantages over the political branches in enforcing constitutional protections of minority interests. Most notably, the courts are not actively disincentivized from protecting minority interests against the will of a hostile political majority. These advantages make the judiciary the best body to address constitutional claims, and doing so is the proper role of the courts in American democracy. For much of the history of the United States, constitutional claims could be primarily represented in the form of private disputes between discrete, private parties. However, in the modern world bureaucratic, administrative agencies drive social and economic change, and their decisions have a wide impact on whole classes of people. New constitutional claims increasingly take the form of injuries created by policy, and civil litigation often features a less discrete party structure that could not be represented under the old model. Modern standing doctrine reflects an outdated vision of a powerfully restrained judiciary that deals only with the vindication of private rights in private disputes, but today, courts must engage with public law litigation and the public interest in order to fulfill their role in enforcing the Constitution.

The normative arguments from Chapters Two and Three indicate that standing doctrine must be expanded if the judiciary is to fulfill its duties in American democracy. Chapter Four seeks to examine some suggestions for a more just vision of standing doctrine, one that takes public law

litigation seriously. I argue that standing doctrine should be conceived of as a prudential doctrine, allowing greater judicial discretion in granting standing for injuries less tangible than traditional economic or physical harms. This concept of prudential standing could be realized in multiple different ways, so I return to the categories of public law litigation outlined in Chapter One. First, with regard to cases where plaintiffs' injuries do not meet current the current threshold of concreteness or particularity for injury-in-fact, judges could exercise their discretion about whether to grant standing for such injuries rather than uniformly denying them. Courts could use existing, narrowly defined exceptions for injuries such as IIED and NIED claims as models to base their analysis, and consideration of each plaintiffs' factual circumstances would gradually create a more reliably and predictable doctrine. Second, with regard to cases where plaintiffs seek remedies that would restructure or reform institutions, judges should leave questions about remedies to consideration of the merits of the case. In the modern, public law model of civil litigation, logically deriving remedies from injuries at the outset of a case is outdated. Judges can play a more active role in constructing judicial relief, and having substantive, merits-based analyses of requested remedies will better develop doctrine than procedural standing determinations.

The arguments of Chapter Four show that an expanded vision of standing doctrine is plausible, and the arguments of Chapters Two and Three indicate that such an expanded vision is normatively required for American democracy. Rights are only meaningful insofar as they can be protected, and in public law litigation, the courts are the best institutions to protect the constitutional rights of the public. Standing doctrine should reflect this fact and enable the judiciary to fulfill its duty: protecting public rights.

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