# THE FIRST PRINCIPLES OF STANDING: PRIVILEGE, SYSTEM JUSTIFICATION, AND THE PREDICTABLE INCOHERENCE OF ARTICLE III

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*This Article examines the indeterminacy of standing doctrine by deconstructing recent desegregation, affirmative action, and racial profiling cases. This examination is an attempt to uncover the often unstated meta-principles that guide standing jurisprudence. The Article contends that the inherent indeterminacy of standing law can be understood as reflecting an unstated desire to protect racial and class privilege, which is accomplished through the dogma of individualism, equal opportunity (liberty), and "white innocence." Relying on insights from System Justification Theory, a burgeoning field of social psychology, the Article argues that the seemingly incoherent results in racial standing cases can be understood as unconscious attempts to preserve the status quo. The Article proposes moving "beyond the transcendental nonsense" of standing doctrine and its inevitable replication of economic and racial privilege by completely eliminating all standing limitations to the access of justice.*



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## I. INTRODUCTION

The murky waters of standing doctrine have been criticized for their indeterminacy,[1] political undercurrents,[2] and even "apparent lawlessness."[3] The law of standing ostensibly seeks to ensure that the federal courts entertain only justiciable "cases" and "controversies."[4] The contemporary interpretation of the "cases" and "controversies" language of Article III of the United States Constitution borrows heavily from traditional tort concepts of damage and causation. Accordingly—under the modern standing framework—plaintiffs must demonstrate that they have suffered an injury to a cognizable legal interest and that said injury was caused by the actions of the opposing party.[5] Plaintiffs also must request from the court relief that is capable of redressing the claimed injury.[6]

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[1] *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243 (1984); Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L. J. 997 (1985); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

[2] Richard J. Pierce, *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).

[3] William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988).

[4] U.S. Const. art. III.

[5] *See*, *e.g.*, Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

[6] *Id.* at 475.

The seemingly clear and orderly tripartite framework of Article III standing doctrine nonetheless has spawned widespread and consistent uncertainty.[7] Theoretical justifications for standing doctrine are largely inadequate to reconcile conflicting judicial interpretations of Article III. These theories often rely on an incoherent adherence to a private rights framework for adjudication. The current content of standing law simply cannot be rationalized by reference to classic representational or separation-of-powers theories.

What, then, guides the content and meaning of modern standing law? How can one reconcile disparate judicial interpretations of the meaning of Article III standing doctrine when structural and constitutional arguments fail? This Article argues that the inherent indeterminacy of standing law can be understood as reflecting an unstated desire to protect racial and class privilege, which is accomplished through the dogma of individualism, equal opportunity (liberty), and "white innocence." Relying on insights from System Justification Theory (SJT), a well-respected field of social psychology, this Article argues that the seemingly incoherent results in racial standing cases can be understood as (perhaps) unconscious attempts to preserve the status quo. The Article proposes moving "beyond the transcendental nonsense"[8] of standing doctrine, and its inevitable replication of economic and racial privilege, by completely eliminating all standing limitations to the access of justice.

Part II of this Article will recount the historical genesis of standing doctrine while examining the Court's contemporary interpretation of the standing requirements of Article III. For nearly a quarter of a century following the creation of Article III, the "cases" and "controversies" language of Article III was not interpreted by the courts as imposing any restrictions on justiciability. Rather, federal review of cases was governed solely by the existence of a substantive cause of action.

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[7] *See* Flast v. Cohen, 392 U.S. 83, 99 (1968) (Harlan, J., dissenting) (describing standing doctrine as "one of the most amorphous [concepts] in the entire domain of public law") (citation omitted); Heather Elliot, *The Functions of Standing*, 61 STAN. L. REV. 459, 466 (2008) ("Such unpredictability has generated extensive controversy. Critics have argued that the doctrine is 'incoherent,' is 'manipulable' and permeated with 'doctrinal confusion' . . . . ") (citations omitted).

[8] Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

This section also will review and critique the prominent theoretical and constitutional defenses of Article III standing doctrine. The modern interpretation of the "cases" and "controversies" language of Article III as requiring a showing of injury-in-fact, causation, and redressability is defended largely on separation-of-powers and representational grounds. Part II asserts that the current standing framework does not protect "stakeholder" plaintiffs,[9] despite widely-held beliefs that representational theories ensure that the judicial process is sufficiently representative of the body politic.[10]

Part III of this Article will examine the indeterminate nature of modern standing doctrine. In particular, this section will examine the Court's recent standing jurisprudence in the desegregation, affirmative action, racial discrimination, and racial profiling contexts in order to illustrate the unworkable application of contemporary standing requirements.

Part IV of this Article addresses the seemingly irreconcilable conflict between the Court's broad interpretation of Article III "injury" in cases that are hostile to desegregation and affirmative action efforts with the overly restrictive conception of "injury" applied in cases that seek to promote racial integration or redress racial discrimination. The section relies heavily on insights from SJT to explain how the indeterminacy of standing doctrine can be explained only by an unstated desire to protect racial and class privilege. SJT demonstrates that the Court is cognitively motivated to respond to perceived threats to the status quo by rationalizing the existence of social and racial inequality.

The final section of this Article advocates moving "beyond the transcendental nonsense"[11] of standing and its inevitable replication of economic and racial privilege. The Court must eliminate all vestiges of the current standing framework in order to remove what has proven to be one of the principal barriers to social justice.

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[9] This term, in a standing context, is used to refer to those who stand to gain something or suffer an injury-in-fact as the result of a lawsuit—those who have a direct stake in the litigation's outcome.

[10] Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

[11] Cohen, *supra* note 8, at 812.

## II. STANDING DOCTRINE AND ARTICLE III

The ubiquitous "cases" and "controversies" language of Article III has long been relied upon by the Court to legitimize the narrowing of federal court jurisdiction.[12] The Court has argued that those terms impose strict constitutional limits on federal judicial review and that federal courts lack jurisdiction over cases where the plaintiff lacks a "sufficient stake" in the outcome.[13] However, the current interpretation of Article III as imposing "standing" requirements is neither a natural nor inevitable jurisprudential evolution. Indeed, at the time of this Nation's founding, the law did not recognize limitations on federal judicial review based on notions of "standing."[14] Rather, the ability of plaintiffs to access justice through the federal courts was tied to their ability to articulate a legal right and frame a viable substantive cause of action.[15] Thus, plaintiffs who sufficiently alleged a *prima facie* case could have their rights protected by the courts of the United States.

It is unsurprising that the courts did not feel constitutionally compelled to craft a standing doctrine during this time. After all, the text of Article III itself does not refer to "standing," "injury," or "causation,"[16] and it certainly does not require that federal plaintiffs have a "personal stake"[17] in the outcome of the litigation. Article III, on its face, merely extends the "judicial [p]ower" to a number of specific categories of "cases" and "controversies."[18] Tellingly, the

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[12] *See* U.S. CONST. art. III.

[13] Sierra Club v. Morton, 405 US. 727, 731-32 (1972).

[14] *See e.g.*, Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III,* 91 MICH. L. REV. 163, 170 (1992) (noting that, during the period from the nation's founding until roughly 1920, "there was no separate standing doctrine at all") (internal citations omitted).

[15] *Id.* at 170. In arguing that Article III does not prevent so-called citizen suits on standing grounds, Professor Sunstein states: "No one believed that the Constitution limited Congress' power to confer a cause of action. Instead, what we now consider to be the question of standing was answered by deciding whether Congress or any other source of law had granted the plaintiff a right to sue. To have standing, a litigant needed a legal right to bring suit . . . . If neither Congress nor the common law had conferred a right to sue, no case or controversy existed." *Id.*

[16] *See* U.S. CONST. art. III.

[17] Gratz v. Bollinger, 539 U.S. 244, 260-61 (2003) (requiring plaintiff to have personal stake in outcome of litigation in order to satisfy standing requirement).

[18] U.S. Const. art. III

Court's first reference to "standing" as an Article III limitation did not occur until 1944.[19]

The first whisperings of a standing limitation emerged—somewhat ironically—during the progressive jurisprudence of the New Deal Court. The New Deal Court, led by Justices Brandeis and Frankfurter, sought to "insulate progressive and New Deal legislation from frequent judicial attack" in their steadfast belief that courts should not intervene in democratic processes.[20] During this period, the Court eventually interpreted Article III as incorporating a "legal interest" requirement for plaintiff standing.[21] The "legal interest" requirement thus constitutionalized the prior practice of requiring plaintiffs to demonstrate a connection to a common law right and served to protect the Supreme Court's developing progressive doctrine from challenge by more conservative courts.

The passage of the Administrative Procedure Act ("APA") in 1946 was an important moment in the development of the law of standing.[22] The APA provides that "[a] person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[23] The expansion of federal court jurisdiction over agency actions did not supplant the legal interest requirement of yore. Rather, the passage of the APA was in part an attempt to "codify the developing body of judge-made standing law . . . to recognize standing in three straightforward categories of cases."[24] Those three categories included situations where a plaintiff's common law or statutory legal interest was implicated. Thus, the passage of the APA did not alter the existing rights-oriented standing analysis.

The Burger and Rehnquist courts, however, sought to develop a more restrictive view of standing under Article III over the next few decades by narrowly interpreting plaintiff injuries that conflicted with their burgeoning conservative ideological agendas.[25]

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[19] Sunstein, *supra* note 14, at 170 (citing Stark v. Wickard, 321 U.S. 288, 307-09 (1944)).

[20] *Id.* at 179. *See also* Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1418-25 (1988).

[21] *See supra* note 5 and accompanying text.

[22] *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-59, 701-06 (2006)).

[23] 5 U.S.C. § 702.

[24] Sunstein, *supra* note 14, at 181.

[25] For examples of the Burger Court denying standing to disfavored federal claims, see *Warth v. Seldin*, 422 U.S. 490 (1975), *City of Los Angeles v.*

Accordingly, the Court ultimately incorporated common law tort concepts of injury, causation, and redressability into its Article III standing calculus. The Court's landmark decision in *Association of Data Processing Organization v. Camp* completely displaced the former focus on substantive legal rights, holding that federal court review was limited to only those plaintiffs who could demonstrate an "injury in fact, economic or otherwise."[26] The Court declared that the legal interest test was relevant only to "the merits" of a case, and that the "question of standing [was] different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[27] While this case interpreted standing under the APA, future decisions have clarified that a showing of injury-in-fact is a constitutional standing requirement of Article III.[28]

The current framework for standing thus incorporates the injury-in-fact requirement, while adding causation and redressability to the calculus. Accordingly, today, a plaintiff is constitutionally required to demonstrate that she has (1) suffered an injury-in-fact to a legally cognizable right, (2) where such injury is fairly traceable to the defendant's actions, and (3) the relief requested by the plaintiff is sufficient to redress her injury.[29] While this seemingly compact and

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*Lyons*, 461 U.S. 95 (1983), and *Allen v. Wright,* 468 U.S. 1250 (1984), all discussed *infra*. For examples of the Rehnquist Court denying standing to disfavored claims, see *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (holding that the father of a school-aged child lacked standing to challenge a school district's policy requiring teacher recitation of the Pledge of Allegiance because he could not assert the rights of his daughter), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that the injury alleged by an environmental group, specifically that their ability to enjoy viewing endangered species would be harmed by new government regulations, was too speculative to qualify for Article III standing).

[26] 397 U.S. 150, 152 (1970).

[27] *Id.* at 153.

[28] *See, e.g.*, Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-04 (1998); Bennett v. Spear, 520 U.S. 154, 162 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[29] *See, e.g.*, Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982) (stating that "the exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate"). The Court also has articulated a number of sub-constitutional restrictions on federal court review. These additional standing limitations

bright-line tripartite scheme is notoriously rife with ambiguity, bias, and unpredictability,[30] a few basic themes can be gleaned from some of the Court's seminal decisions on standing.

First, the Court regularly has denied standing on the grounds that the claimed injuries were speculative, conjectural, or not tied to the actions of the defendant. While an "actual injury" surely could suffice for standing purposes, the Court has long recited the proposition that there must be a "real and immediate threat" of a prospective injury to satisfy standing.[31] In the seminal, and oft criticized, *Lujan v. Defenders of Wildlife* decision, plaintiffs challenged a policy adopted by the Secretary of the Interior that rendered the Endangered Species Act ("ESA") applicable only to actions occurring within the United States or on the high seas.[32] The section of the ESA relevant to the litigation requires federal agencies to insure that their actions are "not likely to jeopardize the continued existence of any endangered species."[33] The challenged regulation in *Lujan* made that requirement inapplicable to actions by federal agencies in foreign countries.[34]

The plaintiffs, who were members of a national wildlife organization, sued to invalidate the regulation under the citizen-suit provisions of the ESA.[35] One of the plaintiffs alleged that she had "observed the traditional habitat of the endangered nile [sic] crocodile" during her past travels to Egypt, and "intend[ed] to do so again" in the future.[36] Thus, she argued that she "will suffer harm in fact as a result of [the] American . . . role . . . in overseeing the rehabilitation of the Answan High Dam on the Nile."[37] Another

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usually are not argued to be derived from the "cases" and "controversies" language of Article III, but rather reflect various "prudential" concerns. *See e.g.*, *Bennett,* 520 U.S. at 162-63 (zone of interests limitation); *Valley Forge,* 454 U.S. at 473-74 (generalized grievances limitation); Warth v. Seldin*,* 442 U.S. 490, 499 (1975) (restriction on third-party standing).

[30] *See infra* Part III.

[31] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983).

[32] 504 U.S. 555, 557-58 (1992) (citing Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-37a, 1538-44 (1988)).

[33] *Id.* at 558 (quoting 16 U.S.C. § 1536(a)(2)).

[34] *Id.* at 558-59 (citing 50 C.F.R. 402.01 (1991)).

[35] *Id.* at 571-72. The citizen-suit provision of the ESA grants standing to "any person" alleging a violation "of any provision of this chapter." 16 U.S.C. § 1540(g). For a critique of the Court's holding that the citizen-suit provision of the ESA was not a sufficient congressional substitute for the requirements of Article III standing, see generally Sunstein, *supra* note 14.

[36] *Lujan*, 504 U.S. at 563.

[37] *Id.*

plaintiff alleged that she had "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" in Sri Lanka, and would like to do so again in the future.[38]

In a majority opinion authored by Justice Scalia, the Court held that the plaintiffs had failed to satisfy the constitutional requirement of injury.[39] The Court viewed the plaintiffs' allegations of injury as a future "inten[t] to return to the places they had visited before—where they will . . . be deprived of the opportunity to observe animals of the endangered species."[40] So framed, the Court found the allegations of harm to be "pure speculation and fantasy,"[41] thus failing the standing requirement of an injury that is "actual or imminent."[42]

The Court expounded upon the *Lujan* treatment of prospective injury in the *Bennett v. Spear* decision.[43] In *Bennett*, the plaintiffs challenged a biological opinion issued by the Fish and Wildlife Service ("FWS") under provisions of the ESA.[44] The ESA requires the FWS to insure that their actions are not likely to jeopardize the existence of an endangered species.[45] If an agency—such as the FWS—determines that an action in fact may affect a species adversely, they are required to issue a "biological opinion" stating how the action would affect the species and detailing any "reasonable and prudent" alternatives to the action.[46] In this case, the FWS was notified that a water reclamation project might affect two species of endangered fish.[47] Accordingly, the FWS issued a biological opinion stating that reducing the water levels on the affected lakes would avoid jeopardizing the endangered fish species during the operation of the reclamation project.[48] The plaintiffs—

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[38] *Id.* at 563-64.

[39] *Id.* at 564. The Court also held that the requirement of redressability had not been satisfied, in part because "the [federal] agencies generally supply only a fraction of the funding" for the foreign projects, and thus there was no reason to believe that those projects would be suspended if the regulation was invalidated. *Id.* at 571.

[40] *Id.* at 564.

[41] *Id.* at 567.

[42] *Id.* at 560. *See also* Summers v. Earth Island Inst., 129 S. Ct. 1142, 1150-51 (2009) (denying standing on the grounds that an intent to visit forests in the future represented an insufficiently concrete injury).

[43] 520 U.S. 154 (1997) (Scalia, J.).

[44] *Id.* at 157 (citing 16 U.S.C. §§ 1533, 1536).

[45] *Id.* at 158 (citing 16 U.S.C. § 1536(a)(2)).

[46] *Id.* at 158 (citing 16 U.S.C. § 1536(b)(3)(A)).

[47] *Id.* at 159.

[48] *Id.*

two Oregon irrigation districts that receive water from the reclamation project—sued on the grounds that their use of the lakes for "recreational, aesthetic and commercial purposes, as well as for their primary source[] of irrigation water" would be "irreparably damaged" by the actions of the FWS.[49]

The Court began its analysis by reciting the mantra that Article III required injuries to be "concrete and particularized," and not "conjectural or hypothetical."[50] The Court also acknowledged the Government's contention that the plaintiffs did "not necessarily establish (absent information concerning the Bureau's water allocation practices) that *petitioners* will receive less water."[51] Nonetheless, the Court held that the allegations of injury were sufficient to invoke jurisdiction under Article III.[52] The Court stressed that "the manner and degree of evidence required at the successive stages of litigation" is relevant to the analysis of injury.[53] Accordingly, the majority felt that "general factual allegations of injury" made by the plaintiffs during the pleading stage were sufficient to "presume [the] specific facts under which petitioners will be injured."[54]

The *Lujan* and *Bennett* decisions demonstrate just a few of the doctrinal reiterations favored by the Court in its analysis of Article III standing. The tools, slogans, and intonations that standing doctrine has cultivated, however, are insufficient to resolve predictably the critical question of access to justice.

### A. Contemporary Justifications for the Doctrine of Standing

The classic justifications for modern standing doctrine embody two central themes: separation-of-powers and representative democracy. These jurisprudential perspectives purport to impute meaning and purpose to the current standing framework, a necessary task given that the Constitution does not by its terms animate any notion of "standing." Nonetheless, these classic theoretical defenses of standing suffer from well-documented analytical flaws.

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[49] *Id.* at 160.

[50] *Id.* at 167.

[51] *Id.*

[52] *Id.* at 168.

[53] *Id.* at 167-68.

[54] *Id.* at 168. The Court also held that the alleged injury was fairly traceable to the actions of the FWS, given that the issuance of a biological opinion was a "virtually determinative effect" on agency action. *Id.* at 170.

1. Separation-of-Powers Theories

Many regard the current law of standing as an essential limit on the power of an unelected judiciary in a democratic society. The Court's decision in *Allen v. Wright* is widely seen as the paradigmatic example of a separation-of-powers defense of standing law.[55] In *Allen*, the parents of African-American children sued the Internal Revenue Service on the grounds that its policy of providing tax-exempt status to racially-segregated private schools violated their constitutional rights, while simultaneously undermining their children's ability to receive a desegregated public education.[56] In dismissing the action for want of an injury-in-fact or causation for standing purposes, the Court clarified that a central purpose of the Article III justiciability requirements was to ensure a "proper—and properly limited—role of the courts in a democratic society."[57] The Court further elaborated on the reasoning underlying its denial of standing:

> All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.[58]

As many other commentators have noted, the Court nonetheless has failed to connect the constitutional duty to maintain an adequate separation-of-powers with the need to maintain rigid standing requirements.[59] In what ways are the requirements for

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[55] *See* Allen v. Wright, 468 U.S. 737 (1984).

[56] *Id.* at 739-40. For a more thorough examination of the facts and holding of the *Allen* case, see *infra* Part III.A.

[57] *Id.* at 750 (quoting Warth v. Seldin, 442 U.S. 490, 498 (1975)).

[58] *Id.* (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178 (D.C. Cir. 1983)).

[59] *See, e.g.*, Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 96. Professor Siegel states: *Allen v. Wright* is therefore representative of what might be called the *ipse dixit* version of the separation-of-powers theory of justiciability. The Court appeals to an intuitive, incompletely articulated sense that because courts should play a limited role in a democratic society, whatever limits courts must be good and must protect us from excessive judicial power . . . . [H]owever, not every conceivable limitation on judicial proceedings can qualify as a constitutional purpose. We need some explanation

injury-in-fact, causation, and redressability tied to limiting excessive power exercised by "activist courts"? Plaintiffs who satisfy these requirements still can litigate important cases of national concern.[60] By way of example, the Court's infamous decision in the Chinese Exclusion Case,[61] which upheld racial immigration restrictions while establishing the "plenary power" doctrine, was perfectly justiciable, as were the Court's decisions in other influential yet notorious cases such as *Dred Scott v. Sandford*,[62] *Lochner v. New York*,[63] and *Korematsu v. United States*.[64] The standing requirements also did not affect the Court's ability to decide more recent cases of the utmost national importance, such as *Roe v. Wade*,[65] *Griswold v. Connecticut*,[66] *Lawrence v. Texas*,[67] *Parents Involved v. Seattle*,[68] *Bush v. Gore*,[69] or *Citizens United v.*

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of *why* justiciability constraints are so critical to maintaining the proper limits on the judicial role. *Id.* (emphasis added) (footnote omitted).

[60] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (holding that capping corporate spending on political advertising violated the First Amendment right to free speech); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a state statute criminalizing homosexual activity was unconstitutional under the Due Process Clause of the Fourteenth Amendment); Roe v. Wade, 410 U.S. 113 (1973) (finding a protected liberty interest in a woman's right to choose to have an abortion and prohibiting state restrictions on that right prior to the third trimester); Miranda v. Arizona, 384 U.S. 436 (1966) (creating the now well-known "Miranda rights" that criminal suspects must be apprised of when taken into custody); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a constitutional "right of privacy" and invalidating a state statute prohibiting the use of contraceptives as a violation of that right when applied to married couples); Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (holding that segregation of public schools violates the Equal Protection Clause of the Fourteenth Amendment); Korematsu v. United States, 323 U.S. 214 (1944) (upholding Executive Order 9066, which authorized the detention of Japanese Americans in internment camps during World War II); Lochner v. New York, 198 U.S. 45 (1905) (holding that a statute imposing a maximum weekly hour requirement violated the liberty interest in the "freedom to contract" in violation of the Due Process Clause of the Fourteenth Amendment); Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581 (1889) (upholding an Act of Congress banning Chinese immigration on the basis of the newly-formed "plenary power" doctrine); Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding that African Americans are not citizens of the United States and thus have no right to sue in the federal courts).

[61] *Chinese Exclusion Case*, 130 U.S. at 599-600.

[62] 60 U.S. 393 (1857).

[63] 198 U.S. 45 (1905).

[64] 323 U.S. 214 (1944).

[65] 410 U.S. 113 (1973).

[66] 381 U.S. 479 (1965).

[67] 539 U.S. 558 (2003).

*Federal Election Commission*.[70] All of these cases arguably satisfied the current tripartite standing test, and yet they are examples of judicial power affecting large segments of society. Therefore, the argument that standing doctrine is necessary to maintain separation-of-powers seems belied by the inherent disconnect between standing's rigid requirements and the Court's constitutional duty to decide important cases of national concern.

2. Representational Theories

One classic defense of standing doctrine relies on the related argument that the standing requirements are necessary to ensure that the judicial process is controlled by plaintiffs with a sufficient stake in the litigation.[71] By restricting relief to those persons most affected by the issues, the standing limitations serve the purpose of maintaining the intrinsic fairness of an adequately representative judicial process. As the Court has explained:

> [T]he courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not . . . . The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them.[72]

The danger in allowing access to so-called "ideological" plaintiffs lies in the *stare decisis* effect of prior litigation. An ideological plaintiff, the argument goes, is more likely to frame a case broadly, which perhaps leads to a poor result that will be potentially binding

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[68] 551 U.S. 701 (2007) (prohibiting the assignment of school seats based on race in order to achieve "racial balance" in public schools). *Parents Involved* will be discussed in greater detail, *infra* Part III.B.

[69] 531 U.S. 98 (2000) (overturning a Florida Supreme Court decision and ordering the suspension of the vote recount during the 2000 presidential election).

[70] 130 S. Ct. 876 (2010).

[71] *See* Sierra Club v. Morton, 405 US. 727, 731-32 (1972) ("the question of standing depends upon whether the party has alleged . . . a 'personal stake in the outcome of the controversy' ") (quoting Baker v.Carr, 369 U.S. 186, 204 (1962).

[72] Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) (citation omitted).

on more traditional plaintiffs.[73] Allowing such unaccountable plaintiffs access to the federal courts, thus, would be unfair to genuinely interested plaintiffs, whose rights may be impacted negatively through the device of *stare decisis*.[74] Therefore, the standing requirements "reflect[] a due regard for the autonomy of those persons likely to be most directly affected by a judicial order."[75]

There are a number of critical flaws with the representational defense of standing doctrine. Initially, it is clear that the existing limitations on standing do *not* prevent litigation from potentially impinging on the rights of genuinely affected non-parties. A case brought by a traditional plaintiff will affect the rights of other genuinely interested parties[76] in the same manner as a case brought by an "ideological" plaintiff. In both instances, the rights of nonparties will be affected through the mechanism of *stare decisis*. Furthermore, there is no valid reason to believe that a traditional plaintiff would indeed tailor her litigation more craftily and narrowly than an ideological plaintiff. It is certainly possible, for instance, that a genuinely affected plaintiff may choose to follow a broadly framed, ideological litigation strategy that potentially would bind the rights of other nonparties. As Professor Jonathan Siegel has observed, "the problem of interested parties who find their rights affected by litigation brought by others is simply intrinsic to our legal system [and] [t]he justiciability requirements do little to avoid it."[77]

A second criticism of the representational defense observes that ideological plaintiffs are easily able to join a genuinely affected group of plaintiffs in litigation, notwithstanding the requirements of standing. Plaintiffs who are deemed to have an ideological interest in a case according to the existing standing framework often can take steps to become interested parties under the eyes of the law. As Professor Cass Sunstein documented long ago, an individual's

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[73] Brilmayer, *supra* note 10, at 309 (noting "there are reasons to doubt whether self-appointed ideological plaintiffs should be presumed to be adequate representatives").

[74] *Id.*

[75] Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982).

[76] Brilmayer, *supra* note 10, at 306-10.

[77] Siegel, *supra* note 59, at 92. Please review Professor Siegel's excellent article for an exhaustive examination and critique of the current theoretical justifications for the justiciability doctrines.

preferences are rarely exogenous to the legal system.[78] Rather, an individual's desires and preferences are often "a function of legal rules," shaped by the existing legal framework.[79] In the case of standing, it is well-established that even so-called ideological plaintiffs can take strategic steps to ensure that the standing requirements are satisfied.[80]

One final criticism of the representational defense, and of standing doctrine more generally, deconstructs the seemingly bright-line distinction between ideological and factual injuries. The historical shift in focus from legal injury to injury-in-fact requires courts to distinguish between purely "ideological" injuries and factual injuries. Allegations of injury that are classified as ideological by a court are dismissed for lack of standing, while claims of injury that appear to be concrete and particularized readily pass constitutional muster.[81] And yet to apply such a seemingly basic distinction, courts inevitably must rely on a normative toolbox of canons to ascertain what injuries should matter for Article III purposes. As Professor Sunstein explains:

> [T]here are reasonably well-established conventions on what counts as an injury, and these conventions tend to disguise the normative judgments and make them seem purely factual. But in every case, the person who brings a lawsuit believes that she has indeed suffered an injury in fact.[82]

The failings of theories based on notions of separation-of-powers and representational democracy to adequately inform standing doctrine is not surprising given the law's inherent indeterminacy. The effort of reconciling the often conflicting and nonsensical standing decisions requires moving beyond classic constitutional theory and towards an acknowledgment of the role

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[78] *See generally* Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

[79] *Id.* at 1137.

[80] *See*, *e.g.*, Siegel, *supra* note 59, at 93 (arguing that one reason "why the justiciability requirements do little to protect the 'most affected' individuals is that ideological plaintiffs may take steps to join the affected group"); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring) (recognizing that the plaintiffs likely could have satisfied the standing requirements by taking the step of purchasing plane tickets or setting definite plans to travel).

[81] *See infra* Part III.

[82] Sunstein, *supra* note 14, at 189.

that ideology, race, and social inequality play in judicial decision-making.

## III. THE INDETERMINACY OF STANDING DOCTRINE

The indeterminate nature of standing doctrine is well-documented.[83] Scores of scholars have decried the incoherence and sophistry that dominate standing doctrine.[84] It is claimed that standing law—and its 'worthless generalizations'[85] —is but a tool for judges to "provide access to the courts to individuals who seek to further the political and ideological agendas of judges."[86] Furthermore, standing doctrine is a "conceptual mistake"[87] resembling a "word game played by secret rules."[88] Empirical studies have borne out these intuitions, establishing that the law of standing is malleable and that outcomes are shaped by the ideological preferences of individual judges.[89]

The charge that the law itself is inherently indeterminate also necessarily informs our understanding of the ideological nature of standing law.[90] The claim of indeterminacy extends from the

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[83] *See, e.g.*, David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79 (2004); Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009); Siegel, *supra* note 59; Sunstein, *supra* note 14.

[84] *See supra* note 83 and accompanying text.

[85] Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such.").

[86] Pierce, *supra* note 2, at 1743.

[87] Sunstein, *supra* note 14, at 167.

[88] Flast v. Cohen, 392 U.S. 83, 129 (1967) (Harlan, J., dissenting).

[89] *See*, *e.g.*, Fletcher, *supra* note 3, at 224-50; Sunstein, *supra* note 14, at 168-97; Pierce, *supra* note 2, at 1758-63; Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 338-40 (2002); *see also* Gregory J. Rathjen & Harold J. Spaeth, *Denial of Access and Ideological Preferences: An Analysis of the Voting Behavior of the Burger Court Justices, 1969-1976,* W. POL. Q., Mar. 1983, at 71; C.K. Rowland & Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, J. POL., Feb. 1991, at 175; Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004) (acknowledging that standing decisions are often based on the judges' personal ideologies, yet arguing that standing doctrine is predictable when clear precedent and judicial oversight exist).

[90] *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243 (1984); Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985); Clare Dalton, *An Essay in the Deconstruction of*

classic realist critique that the law cannot be applied mathematically in a formalistic fashion, but rather is molded by complex social forces.[91] It follows from this realist observation that legal rules rarely, if ever, dictate a particular result: "[L]egal reasoning is indeterminate and contradictory. By its own criteria, legal reasoning cannot resolve legal questions in an 'objective' manner; nor can it explain how the legal system works or how judges decide cases."[92] The observation that traditional legal reasoning is subject to both the limits of language and the whims of judicial preference renders the law and legal theory "infinitely manipulable"[93] and, thus, indeterminate.[94]

The purpose of this section, then, is to extend the indeterminacy critique by examining recent cases involving racial and class inequality in the affirmative action, desegregation, integration, and racial profiling contexts. Situating the critique in the inequality context provides an opportunity to decode the values and principles influencing judicial decision-making through the use of a critical race methodology. For the purposes of the indeterminacy analysis, it is useful to break the case law discussion into two categories: (a) those cases involving alleged racial injuries to non-white plaintiffs, and (b) those cases involving alleged racial injuries to white plaintiffs. A doctrinal comparison of these cases demonstrates that the Court adopts an unnecessarily narrow conception of injury and causation in racial claims of non-white plaintiffs, while alternatively applying an unnecessarily broad conception of injury and causation in cases involving the racial claims of white plaintiffs.[95]

A. Of Black Injuries, Desegregation, and Profiling

The law of standing has been remarkably consistent in its treatment of injuries by non-white plaintiffs in cases that implicate

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*Contract Doctrine*, 94 YALE L.J. 997 (1985); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984). *See also supra* note 1 and accompanying text.

[91] *See, e.g.*, Cohen, *supra* note 8, at 812 ("Valuable as is the language of transcendental nonsense for many practical purposes, it is entirely useless when we come to study, describe, predict, and criticize legal phenomena.").

[92] Singer, *supra* note 90, at 6.

[93] *Id.*

[94] *Id.* at 24 ("[T]he legal theories advanced to justify our rules and institutions are indeterminate. The same theories could be used to justify very different sorts of institutions and very different rules.").

[95] The terms "racial claims" and "racial injuries" refer broadly to cases involving allegations of racial discrimination.

racial inequality. In the desegregation, integration, and racial profiling contexts, the Court has narrowly construed the concepts of injury, causation, and redressability to deny attempts to undermine the racial status quo.

An early test of the Court's modern standing framework involved litigation challenging exclusionary residential zoning practices. In *Warth v. Seldin*, various plaintiff groups challenged the zoning restrictions of the small upstate New York town of Penfield.[96] The plaintiffs—consisting of taxpayers, residents, low-income individuals, and homebuilders—alleged that the zoning restrictions violated their constitutional rights by effectively excluding low-income, often non-white, persons from residing in the town.[97] The Court dismissed the plaintiffs' claims on standing grounds. First, the Court rejected the taxpayer group's claim that the town's refusal to build low-income housing caused their neighboring town of Rochester to provide more housing of that type, resulting in higher taxes for property owners.[98] The Court viewed this injury as merely "conjectural," finding that "the line of causation between Penfield's actions and such injury [was] not apparent from the complaint."[99]

The Court similarly dismissed the claims of the Penfield residents, who argued that the town's exclusionary zoning policy deprived them "of the benefits of living in a racially and ethnically integrated community."[100] According to the Court, the claimed injury was simply not judicially cognizable—even though a different set of plaintiffs prevailed on a very similar claim under the 1968 Civil Rights Act in a previous case.[101] The Court also did not find the injury of the low-income set of plaintiffs—the inability to find affordable housing in Penfield—to satisfy Article III, as the plaintiffs could not demonstrate "a substantial probability that they would have been able to" reside in Penfield absent the zoning policy.[102] Finally, the court rejected the claims of the homebuilders on the grounds that the injury was prospective.[103]

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[96] Warth v. Seldin, 422 U.S. 490 (1975).

[97] *Id.* at 493.

[98] *Id.* at 496-97.

[99] *Id.* at 509.

[100] *Id.* at 512.

[101] *Id.* at 512-14 (distinguishing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972)).

[102] *Id.* at 504.

[103] *Id.*

Neither precedent nor the requirements of Article III, however, warranted the rigid interpretations of injury and causation adopted by the Court in *Warth*.[104] The harms suffered by the *Warth* plaintiffs could have been found justiciable if the Court had followed its precedent in the *Trafficante* case, which allowed standing based on injuries linked to the "benefits of interracial association."[105] The Court's unnecessarily stringent view of causation in *Warth* also has not comported with the Court's other decisions on standing. In *Bennett v. Spear*, for instance, the Court quite generously "presum[ed] the existence of injury-in-fact and causation based on the averments made in the complaint."[106] The allegations of harm and causation made in *Warth* clearly could have been "presumed" sufficient under the lax framework employed in *Bennett*.[107]

The Court again adopted a harsh construction of the requirements of standing in *Allen v. Wright*.[108] *Allen* represents an effort to further the desegregation mandate of *Brown v. Board of Education*[109] by eliminating federal tax benefits to racially discriminatory private schools. Following *Brown*, scores of white parents pulled their children out of integrating public schools in order to enroll them in racially exclusionary private schools.[110] While these private schools actively encouraged and benefited from "white flight,"[111] the federal Internal Revenue Service ("IRS") at the time nonetheless extended tax-exempt status to many such schools in contravention of its own stated policy.[112] Accordingly, a group of parents of black children enrolled in desegregating public schools filed a national class action suit against the IRS. The Court framed

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[104] *See infra* Part III.B; *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[105] *Trafficante*, 409 U.S. at 209-10.

[106] *See* Bennett v. Spear, 520 U.S. 154, 168 (1997) (construing the allegations of injury and causation contained in the complaint to "presume" justiciability).

[107] *See id.*

[108] Allen v. Wright, 468 U.S. 737 (1984).

[109] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[110] Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980).

[111] Viviva Pierre & Madeline Herbert, *Beyond* Brown*: Louisiana Lawyer Discusses the East Baton Rouge Desegregation Suit and its Relation to* Brown v. Board of Education, SPECTRUM MAGAZINE, Apr. 2004, at 15.

[112] *Allen*, 468 U.S. at 743. The court noted, "[t]he IRS denies tax-exempt status under §§ 501(a) and (c)(3) of the Internal Revenue Code, 26 U.S.C. §§ 501(a) and (c)(3) . . . to racially discriminatory private schools." *Id.* at 740.

the alleged injuries as consisting of (1) stigmatic harm and denigration due to the ongoing government aid provided to racially discriminatory schools, and (2) a diminished ability to receive an education in a racially integrated school.[113]

The Court held that the first injury—which they alternatively interpreted as a request for the Government to avoid violating the law—was not judicially cognizable based on precedent.[114] According to the Court, the plaintiffs had not adequately alleged a "concrete" injury since their children had never been excluded from any of the racially discriminatory schools. Under this construction, the Court would require parents to subject their children to racial exclusion from a private school before finding the existence of a sufficiently particularized injury-in-fact.[115] The second injury alleged by the parents was also rejected as too "abstract" and "speculative" to satisfy Article III's rigid standing requirements.[116] In particular, the Court found it to be "entirely speculative" whether the remedy sought would "have a significant impact on the racial composition of the public schools," and that the plaintiffs thus could not establish that the acts of the IRS were fairly traceable to a diminished ability to attend a desegregated school.[117]

The injuries complained of in *Allen* could have been found justiciable if the Court adopted the broad construction of injury and causation applied in cases seeking to vindicate the interests of white plaintiffs to not be subject to race-conscious programs.[118] The

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[113] *Id.* at 754, 756.

[114] *Id.* at 755.

[115] *Id.* at 756 (The Court believed that a finding of injury under the facts would "transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' " (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973))).

[116] *Id.* at 756, 758.

[117] *Id.* at 758-59.

[118] *See infra* Part III.B; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (holding that white medical school applicant granted standing did not have to establish that the affirmative action policy was the but-for cause of his denial of admission and that the state has a legitimate interest in considering race in admissions, but it must be narrowly tailored and only one of many factors in a competitive process); Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993) (where contractors association challenged city ordinance giving preference to minority-owned businesses, petitioner had shown injury-in-fact because of the city's imposed barrier to obtain a benefit and need not prove that it would have obtained the benefit but for the barrier); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that plaintiff need not allege that it would have benefited but

injury in *Allen*, thus, could have been framed expansively as "the opportunity to have a desegregation process unaffected by unlawful incentives for white flight"[119] by using the same contrived logic that buttresses the Court's anti-affirmative action and desegregation cases.[120]

The Court also has strictly interpreted the limits of the standing requirements in racial profiling cases. In *City of Los Angeles v. Lyons*, the Court dismissed a case seeking injunctive relief for injuries stemming from police misconduct.[121] The dissent by Justice Marshall inimitably summarizes the unchallenged facts of the case:

> [Adolph] Lyons [an African-American male] was pulled over to the curb by two officers of the Los Angeles Police Department (LAPD) for a traffic infraction because one of his taillights was burned out. The officers greeted him with drawn revolvers as he exited from his car. Lyons was told to face his car and spread his legs. He did so. He was then ordered to clasp his hands and put them on top of his head. He again complied. After one of the officers completed a pat-down search, Lyons dropped his hands, but was ordered to place them back above his head, and one of the officers grabbed Lyons' hands and slammed them onto his head. Lyons complained about the pain caused by the ring of keys he was holding in his hand. Within five to ten seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and

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for the discriminatory classification that gave preference to minority-owned businesses to receive standing and that equal protection claims under both the Fifth and Fourteenth Amendments require strict scrutiny analysis); Gratz v. Bollinger, 539 U.S. 244 (2003) (granting lead plaintiff standing because she had been denied undergraduate admission and holding that an admissions policy that made race the decisive factor was unconstitutional); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 1, 551 U.S. 701 (2007).

[119] Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 50 (1993).

[120] *See infra* Part IV.B.

[121] City of Los Angeles v. Lyons, 461 U.S. 95, 95 (1983).

> defecated. He was issued a traffic citation and released.[122]

Notwithstanding the disturbingly routine nature of the case,[123] the majority dismissed the action for lack of standing on the grounds that Lyons could not demonstrate "a sufficient likelihood that [he] would again be stopped and subjected to the unlawful use of force to constitute a case or controversy."[124] The Court simply could not fathom the "incredible assertion" that police officers might again racially profile and physically assault Lyons sometime in the future.[125] In the eyes of the majority, the injury claimed by Lyons was too speculative to constitute a justiciable case or controversy.[126]

The harms arising from racial profiling, however, are clearly not "speculative" to the individuals who are the targets of such policies. Such an indifferent understanding of the physical, emotional, and dignitary injuries suffered by non-white victims of

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[122] *Id.* at 114-15 (Marshall, J., dissenting).

[123] *See, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 277-85 (1999) (citing data from New Jersey, Maryland, and Ohio that reveals the prevalence of racial profiling in traffic stops). Specifically, Harris refers to studies conducted by Dr. John Lamberth, which revealed that 73.2% of those stopped and arrested in New Jersey were African American despite the fact that only 13.5% of the cars on the road had an African American driver or passenger. *Id.* at 279 (citation omitted). Similar studies in Maryland and Ohio have produced virtually indistinguishable results. *Id.* at 280-85 (citations omitted).

[124] *Lyons*, 461 U.S. at 111.

[125] *Id.* at 106 (stating that they cannot agree that the "odds" that Lyons not only would be stopped for a traffic violation again but also would be subjected to a chokehold without any provocation whatsoever are sufficient to make out a federal case for equitable relief).

[126] The *Lyons* case has not been the only case to rigidly interpret injury and causation in the racial profiling context. *See, e.g.*, Chavez v. Ill. State Police, 27 F. Supp. 2d 1053 (N.D. Ill. 1998) (dismissing racial profiling case brought by non-white motorists on the grounds that the injury was too speculative and that there was not a sufficient likelihood that the non-white motorists would be pulled over by the police again on the basis of race); Kirkland v. Morgievich, Civ. No. 04-1651, 2005 U.S. Dist. LEXIS 33808 (D.N.J. Dec. 16, 2005) (same); *see also* Curtis v. City of New Haven, 726 F.2d 65, 68 (2d Cir. 1984) (plaintiff lacked standing to challenge use of mace by police); Davis v. City of Aurora, 705 F. Supp. 2d 1243 (D. Colo. 2010) (plaintiff lacked standing to challenge racial profiling policy which led to unlawful detention); Jones v. Bowman, 664 F. Supp. 433, 438-39 (N.D. Ind. 1987) (holding that plaintiff lacked standing to enjoin police officers from performing strip searches); John Does 1-100 v. Boyd, 613 F. Supp. 1514, 1529 (D. Minn. 1985) (holding that plaintiffs lacked standing to challenge continuing practice of anal cavity searches of prisoners).

police violence demonstrates the wholly subjective nature of the standing analysis. The Court in *Lyons* failed to recognize the extremely high incidence of racial profiling against minorities[127] in its causation analysis, as well as the fact that "the use of racial profiling by law enforcement authorities in the United States has long been permitted and encouraged, if not expressly authorized, by U.S. constitutional law."[128] It seems that the injuries in *Lyons* would have been regarded as justiciable had the Court applied the more generous standing framework that it employed in other cases.

The results in these three cases neither were predictable nor followed from reason based on the existing framework. The Court's narrow interpretation of injury and causation in these cases runs counter to established precedent and indicates either outright disregard or contempt for the racialized injuries suffered by non-white plaintiffs. A doctrinal comparison of these outcomes to those in other cases involving the racialized injuries of white plaintiffs will illustrate further the indeterminacy of standing doctrine in race-based cases.

B. Of White Injuries, Innocence, and Merit

While the Court has adopted a rigid interpretation of the requirements for standing in cases brought by non-white plaintiffs suffering injuries based on racial inequality, the Court has relied on a much looser interpretation of injury and causation in cases brought by white "victims" of race-based remedial admissions, employment, and desegregation programs.

The Court's decision on standing in *Regents of University of California v. Bakke*[129] paved the way for constitutional challenges to affirmative-action and other race-conscious remedial programs. In *Bakke*, the plaintiff, Alan Bakke, challenged the affirmative action policy at the medical school of the University of California at Davis. The Court found the case to be justiciable, even though it was undisputed that Bakke could not demonstrate that he would have been admitted to the school in the absence of the challenged

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[127] Melissa Whitney, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263, 264 (2008) (noting that Bureau of Justice statistics released in 2005 demonstrated that minority drivers were three times as likely as white drivers to be stopped by the police and searched).

[128] Kevin Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* United States v. Whren *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1006 (2010).

[129] 438 U.S. 265 (1978).

policy.[130] In fact, it was almost assured that Bakke would *not* have been admitted to the school, regardless of the existence of the policy. The Court acknowledged as much, noting that Bakke's faculty interviewer had given him a very low interview score, and that his "application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed [Bakke had a score of 468]."[131] Nonetheless, the Court determined that Bakke's case satisfied the requirements of Article III standing. The Court limited its analysis to a single footnote in a fractured plurality opinion.[132] Rejecting the contention from various *amici* that the case lacked standing due to Bakke's admitted inability to establish either causation or redressability, the Court broadly reframed the injury as being denied the abstract opportunity to "compete for all [of the available] places in the class, simply because of his race."[133]

The decision to grant standing in this case, however, conflicted with the Court's narrow construction of standing in its other cases. The Court in *Bakke*, for instance, relied on its recent decision in *Warth v. Seldin* as precedent for its holding on standing.[134] However, as previously noted, the Court in *Warth* utilized a much narrower conception of injury-in-fact, causation, and redressability than it applied in the *Bakke* case. The *Warth* precedent alone indicates that the case should have been dismissed on standing grounds since Bakke's injury was "conjectural," and because the Court itself acknowledged that Bakke could not establish a causal link between his denial of admission and the race-based policy.[135] Bakke was clearly unable to demonstrate that there was "a substantial probability" of admission but for the race-based policy.[136] The Court in *Bakke*, however, avoided this clear dictate of precedent by broadly interpreting the injury claimed by Bakke. Rather than frame the injury as being denied admission due to his race—which is how Bakke framed the injury in his complaint—the Court re-envisioned the injury as being forced to compete in a race-based application process. By doing so, the Court was able to claim that the mere existence of such a race-based policy could give rise to

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[130] *Id.* at 280 n.14 (stating "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing").

[131] *Id.* at 276-77.

[132] *See id.* at 280 n.14

[133] *Id.*

[134] *Id.* (citing Warth v. Seldin, 422 U.S. 490 (1975)).

[135] *See id.* at 270.

[136] *See id.*

an injury within the meaning of Article III.[137] Under the *Bakke* construction of standing, "it seems sufficient that the plaintiff somehow believes that a program has harmed him, even if, in fact, it has not," in order to establish a justiciable theoretical loss.[138]

After retreating to a narrower construction of injury in *Allen*,[139] the Court reinvigorated its convoluted *Bakke* logic to allow standing in a series of cases brought by white plaintiffs challenging affirmative-action policies intended to benefit underrepresented minorities. In both *Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville*[140] and *Adarand Constructors, Inc. v. Pena,*[141] the Court refused to require proof that the white plaintiffs would have been awarded construction contracts if the set-aside remedial programs did not exist. In fact, the lower court in *Northeastern* dismissed the case on the grounds that the plaintiffs could not make such a showing,[142] as past precedent required. In these cases, however, the Court disingenuously sidestepped the demands of *stare decisis* by reconfiguring the claimed injuries as "being forced to compete in a race-based system."[143] Once again, the harms alleged in these cases were merely theoretical and abstract—the type of "injuries" regularly held to be non-justiciable in other contexts. As Professor Nichol succinctly observes, "the Court apparently thinks that concrete, particularized harm is less essential in cases alleging that government programs impermissibly benefit racial minorities. In such situations, rigorous standing requirements do not apply."[144]

The Court continued to display a sympathetically lenient view of standing in the seminal University of Michigan affirmative action cases. In *Gratz v. Bollinger*, for instance, the Court held that a prospective white student—Patrick Hamacher—had standing to

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[137] Sunstein, *supra* note 14, at 203.

[138] Nichol, *supra* note 89, at 311.

[139] *See infra* Part IV.A.

[140] 508 U.S. 656 (1993).

[141] 515 U.S. 200 (1995).

[142] Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 951 F.2d 1217, 1219 (11th Cir. 1992); *see also* Warth v. Seldin, 422 U.S. 490, 516-17 (1975); Allen v. Wright, 468 U.S. 737, 746 (1984); City of Los Angeles v. Lyons, 461 U.S. 95, 111(1983).

[143] Ne. Fla. Chapter of Associated Gen. Contractors of Am., 508 U.S. at 656, 666 (an injury-in-fact exists "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group").

[144] Nichol, *supra* note 89, at 311-12.

challenge Michigan's affirmative action policy.[145] In seeking injunctive relief, precedent required Hamacher to establish a "real and immediate" threat of a future injury.[146] The majority found that Hamacher had satisfied this requirement even though he never applied to transfer after being initially rejected.[147] Given the fact that Hamacher had graduated already from a neighboring college, he lacked the intent to transfer to the University of Michigan.[148] Thus, it would appear that the existing precedent and interpretation of the injury requirement would compel the Court to find that Hamacher's claim of future injury must be dismissed as conjectural and hypothetical.[149] The Court, however, gave short shrift to the clear deduction that Hamacher lacked a "personal stake" in the outcome. Rather, the Court strangely reasoned that "whether Hamacher 'actually applied' for admission as a transfer student [was] not determinative" of the standing issue since Hamacher may have possessed a past intent to apply to the college if the admissions policy was eliminated.[150]

The broad construction of injury and causation enjoyed by plaintiffs challenging affirmative action policies also has extended to white parents challenging public school desegregation plans. In *Parents Involved in Community Schools v. Seattle School District 1*, the Court entertained claims that the desegregation plans adopted by the Seattle, Washington, and Louisville, Kentucky, school systems violated the constitutional rights of white children denied admission to the public school of their future choosing.[151] The desegregation plans in question allowed children to enroll freely in neighborhood schools without regard to race. The consideration of race became relevant only when a popular school became "oversubscribed" under the Seattle plan or if a school became racially imbalanced under the Louisville plan.[152] The parents alleged an injury under these plans stemming from the possibility that their children someday would try to enroll in either an oversubscribed or a racially imbalanced school, and that those students may be denied admission based on race.[153]

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[145] 539 U.S. 244, 260-61 (2003).

[146] *Id. See also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[147] *Gratz*, 539 U.S. at 260-61.

[148] *Id.* at 286 n.5 (Stevens, J., dissenting).

[149] *Id. See also Lujan*, 504 U.S. at 560.

[150] *Gratz*, 539 U.S. at 260-61.

[151] 551 U.S. 701 (2007).

[152] *Id.* at 710-11.

[153] *Id.* at 718.

When the author of this Article teaches standing to the students in his Federal Courts course, he often assigns a more detailed factual summary of the *Parents Involved* decision to use as a classroom exercise. The students invariably have concluded—based on their analysis of the seminal standing cases reviewed during the semester—that the plaintiffs in *Parents Involved* have not satisfied the standing requirements of Article III. These students—quite bright and engaged for their part—confidently proclaim that standing fails on these facts since the claimed injury is merely speculative and conjectural, in the same vein of the *Lujan* and *Allen* decisions. However, these students are quickly disabused of their enchantment for the law of standing when they are informed that the Court found that this case *satisfied* the requirements for standing.

Relying on a very broad interpretation of the alleged injury, the Roberts Court found that the white parents had standing in *Parents Involved.* The injury, according to the Court, remains even if the plaintiffs' children never decide to apply to a school subject to a desegregation plan, or even if those children apply but are not denied admission to the school of their choosing.[154] Thus, the Court did not frame the injury as an actual or "real and immediate threat" of a denial of admission based on race.[155] Rather, the Court relied on its past anti-affirmative action standing decisions to conceive of the injury broadly as "being forced to compete in a race-based system that may prejudice the plaintiff."[156] Framed as such, the Court found little trouble in identifying an injury sufficient for Article III purposes.

The framework that the Court established to adjudicate issues of standing does not readily explain or justify results in these cases. The analysis of standing in cases claiming racial harms to white plaintiffs suffers from an overly broad visualization of injury-in-fact, causation, and redressability. In contrast, the analysis of standing in cases presenting injuries to non-white plaintiffs challenging structures of racial inequality fails due to an unnecessarily narrow interpretation of the standing requirements. The indeterminacy plaguing standing doctrine, however, does not fully explain the Court's protection of economic and racial privilege.

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[154] *Id.* at 718-19.

[155] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 758 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 583 (1992).

[156] *Parents Involved*, 551 U.S. at 719 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 212 (1995) and Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993)).

## IV. THE FIRST PRINCIPLES OF MODERN STANDING DOCTRINE

The failure of structural theories of justiciability to give purpose and meaning to the law of standing, coupled with the doctrine's remarkable indeterminacy, inexorably leads to one question: What is guiding the content of standing jurisprudence? Phrased differently, what are the social forces, values, and principles that influence judicial decision-making on standing issues? As has been discussed, the Court's standing jurisprudence indicates hostility to the rights and injuries of non-white plaintiffs, while displaying sympathy for the rights and injuries of white plaintiffs. As Professor Nichol observes:

> Minority plaintiffs, poor litigants, unwed mothers, black prisoners, and indigent patients get the harshest treatment in injury law. Their burdens are higher, their barriers more substantial. They must prove greater consequential harms, must show closer causation links, and must surmount greater redressability hurdles. Article III determinations are driven neither by text nor history. They favor the powerful. They disadvantage the powerless. And in the process, they don't explain why they do so.[157]

The one predictable aspect of the Court's standing doctrine thus appears to be the protection of racial and economic privilege.[158]

### A. Social Justification Theory, Privilege, and Threats to the Status Quo

The conclusion that standing doctrine submits to the demands of privilege is supported by the findings of social psychology. System Justification Theory ("SJT"), a well-respected and empirically-tested field of social psychology, posits that "people are motivated to accept and perpetuate features of existing social arrangements, even if those features were arrived at accidentally, arbitrarily, or unjustly."[159] The central premise of SJT therefore follows the classic Marxian view that members of the elite class have

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[157] Nichol, *supra* note 89, at 333.

[158] *See id.*

[159] Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1124 (2006).

an ideological interest in preserving current social structures.[160] While members of the subordinated class have an interest in subverting the social system, this interest is sublimated by an internalized "false consciousness" that cloaks inequality while legitimizing the status quo.[161]

SJT incorporates these insights in an effort to analyze the social tendency to rationalize the status quo and perceive existing legal, social, economic, and political arrangements as "fair and legitimate."[162] According to numerous empirical studies, individuals are motivated to justify the status quo for several reasons, including a "cognitive-motivational need to believe in order, structure, closure, stability, predictability, consistency, and control."[163] Additionally, studies have demonstrated that "there are social norms that serve to uphold system-justifying responses and punish system-challenging responses."[164] Those daring few who challenge system expectations and stereotypes are met with public backlash and ridicule.[165]

The tendency to engage in system-justification depends, to varying degrees, on both situational and dispositional factors.[166] These tendencies will be activated to the extent that a person feels the need to reduce uncertainty and system threat, or when the status quo is directly or indirectly challenged.[167] Perhaps unsurprisingly, studies in SJT have demonstrated that individuals with conservative

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[160] *See generally* Anthony Paul Farley, *The Colorline as Capitalist Accumulation*, 56 BUFF. L. REV. 953 (2008).

[161] *See generally id.*

[162] John T. Jost & Orsolya Hunyady, *Antecedents and Consequences of System-Justifying Ideologies*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 260, 260 (2005).

[163] Aaron C. Kay et al., *Panglossian Ideology in the Service of System Justification: How Complementary Stereotypes Help Us to Rationalize Inequality*, 39 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 305, 308 (2007).

[164] *Id.*

[165] *Id.* (citing studies).

[166] John T. Jost et al., *System Justification as Conscious and Nonconscious Goal Pursuit*, *in* HANDBOOK OF MOTIVATION SCIENCE 591, 592 (James Y. Shah & Wendi L. Garner eds., 2008) [hereinafter Jost et al., *Goal Pursuit*]. *See also* Blasi & Jost, *supra* note 159, at 1138; John T. Jost et al., *Shared Reality, System Justification and the Relational Basis of Ideological Beliefs*, 2 SOC. & PERSONALITY PSYCHOL. COMPASS 171, 172 (2007) ("[P]eople defend and bolster the legitimacy of the societal status quo following exposure to various manipulations of system threat, including exposure to . . . crises of legitimacy or stability in society.").

[167] *See* Blasi & Jost, *supra* note 159, at 1123.

viewpoints are more likely to express system-justifying attitudes than individuals with a self-described progressive or liberal viewpoint.[168]

The appeal of system justification is straightforward: It provides a coping mechanism for persons confronted with systemic inequality by 'reducing anxiety and uncertainty.'[169] This finding is similar to the psychological concept of "cognitive dissonance," which holds that people suffer from psychological tension when confronted with ideas that conflict with their own beliefs.[170] As the author of this Article has stated previously in the reparations context: "Confronting privilege creates cognitive dissonance by acknowledging that benefits and advantages received were not necessarily the result of merit and hard work, while exposing the deeply held values that have supported privilege."[171] Indeed, the "potential psychic damage to privilege holders forces most to ignore and suppress alternative explanations for their status that depart from the assumption of naturalness and neutrality."[172] Therefore, holders of privilege have a strong motivation to express system-justifying attitudes, as "[a]cceptance of traditional distinctions tend to reduce cognitive dissonance."[173] The palliative function of system justification that SJT identifies thus maps neatly onto the critical observation of the role that cognitive dissonance plays in the maintenance of privilege.[174]

Studies in SJT also have established that individuals faced with system threat "may not even be aware of the extent to which

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[168] *Id.* at 1126.

[169] *Id.* at 1141.

[170] *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

[171] Christian B. Sundquist, *Critical Praxis, Spirit Healing and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659, 675-76 (2003).

[172] Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work, in* WOMEN'S STUDIES, IN POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22, 23 (Leslie Bender & Dana Braveman eds., 1995). *See also* James Thuo Gathii & Greg Mandel, *Cost-Benefit Analysis Versus the Precautionary Principle: Beyond Cass Sunstein's Laws of Fear*, 2006 U. ILL. L. REV. 1037, 1049 n.53 (2006) (noting that the presence of cognitive dissonance encourages people to take steps to eliminate the psychological conflict, often by changing their preferences or beliefs).

[173] Sunstein, *supra* note 78, at 1147.

[174] The palliative function of system justification "provides a simple and easy way of meeting a variety of psychological needs. Threats to the legitimacy or stability of the system, on the other hand, may elicit feelings of anxiety, uncertainty, and dissonance concerning one's role in the larger system." Jost et al., *Goal Pursuit*, *supra* note 166, at 598.

they are privileging the status quo and resisting change."[175] Such attitudes are "especially likely to be manifested implicitly rather than explicitly" given that "some forms of system justification efforts are not normatively acceptable, such as stereotyping of and discrimination against low-status groups."[176] The conclusion that system-justifying attitudes are often unconsciously expressed tracks the critical observation that discriminatory racial attitudes are often the product of unconscious processes.[177]

### B. From the Descriptive to the Normative: SJT, Critical Theory, and the Law of Standing

The insights provided by SJT are invaluable to understanding the indeterminacy that has come to define standing doctrine. The concepts within SJT provide the necessary empirical tools to deconstruct and analyze the privileging effects of standing law. The subjective structure of standing law encourages the expression of system-justifying attitudes and norms, and it also accounts for the varying interpretations of injury, causation, and redressability adopted by the Supreme Court.

The issues of racial and economic inequality faced by the Court, including affirmative action, desegregation, integration, and racial profiling, surely qualify under SJT as actual or perceived "system threats" challenging the status quo. The Court's anti-affirmative action and desegregation jurisprudence provides a salient example. The policies involved in those cases posed threats to the legitimacy of the system by exposing pervasive inequality and discrimination in the distribution of resources, education, and employment. These situational antecedents can in turn trigger a cognitive-motivational need to utilize system-justifying schemas—such as meritocratic, fair market, or "social dominance"

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[175] Jost et al., *Goal Pursuit*, *supra* note 166, at 596 (citing "several studies" that have confirmed the "unconscious operation of system-justifying biases").

[176] *Id.*

[177] *See, e.g.*, Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes."); Donna Young, *Racial Releases, Involuntary Separations, and Employment at Will*, 34 LOY. L.A. L. REV. 351, 398 (2001) (noting that "the courts have been unable to properly address the 'unconscious' component of racism").

ideologies—in order to justify inequality and rationalize the status quo.[178]

Exposure to such system distortions can lead to tears in the shroud of false consciousness that can be mended only through rationalization of existing inequality and resistance to changes in the status quo.[179] These psychological processes often—but certainly not always—occur at an unconscious level. They can lead decision makers to suppress alternative explanations of inequality that conflict with their particular worldview in order to avoid the psychic pain of recognizing privilege. In particular, studies have demonstrated that the process of rationalization is often marked by the tendency to "accept meritocratic explanations for inequality and to blame individuals rather than systems for the existence of poverty."[180]

The reduction of cognitive dissonance is enabled by the indeterminate nature of the standing requirements. As we have seen, the determination of injury, causation, and redressability are "normative endeavors," informed by the "sense of unity and identity" of the decision maker.[181] A recognition of the language of "transcendental nonsense"[182] employed by the Court in its standing decisions accounts for the hostility shown to injuries claimed by non-white plaintiffs challenging racial inequality. The Court simply cannot empathize with injuries and claims that conflict with its colorblind view of the world. The Court's narrow construction of injury, causation, and redressability in these cases alleviates the psychological distress caused by its being confronted with images of privilege and inequality. Simply put, the Court finds solace in viewing challenges to racial hierarchy as fantastical conjecture having little bearing to "real-world" injuries-in-fact.

For example, the harms alleged by the plaintiffs in *Lyons* posed a strong threat to the status quo appearance of race neutrality

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[178] *See* Jost & Hunyady, *supra* note 162, at 260-61.

[179] *Id.*

[180] Tom R. Tyler & John T. Jost, *Psychology and the Law: Reconciling Normative and Descriptive Accounts of Social Justice and System Legitimac*y , *in* SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 816 (A.W. Kruglanski & E.T. Higgins eds., 2007) (citations to corroborating studies omitted). The reduction of cognitive dissonance also is often accompanied by a belief in free-market ideology and the perception that market-based outcomes are efficient and fair. *Id.*

[181] *See, e.g.*, JOSEPH VINING, LEGAL IDENTITY: THE COMING AGE OF PUBLIC LAW 171 (1978); Fletcher*, supra* note 3, at 221-23 (1988); Nichol, *supra* note 89, at 322-24.

[182] *See Cohen*, *supra* note 8, at 812.

by exposing widespread practices of racial profiling.[183] A recognition of these injuries as "real" and "concrete" conflicted with the Court's belief in colorblindness and equal opportunity—that law-abiding individuals are generally treated equally by law enforcement, without regard to race.[184] In other words, it conflicted with the belief, that the system is just and fair, and that racism is a mere aberration rather than a systemic flaw.[185] The Court resolved the cognitive dissonance created by this ideological conflict by narrowly construing the standing requirements as preventing "speculative" allegations of systemic failure.[186] To view pervasive racism and police mistreatment of black men as a speculative and "discrete practice" is to view racial discrimination as aberrational and non-threatening to the status quo.

The system justification discourse on standing doctrine also explains why the Court is willing to embrace cases brought by white plaintiffs seeking to maintain the status quo of race neutrality and professed post-racialism. The Court reduces the cognitive costs implicit in any confrontation of privilege by striking down race-regarding measures in the name of equal opportunity, meritocracy, and colorblindness. Rationalization of the status quo leads to empathy for members of the dominant group, whose allegations of injury are re-interpreted by the Court as efforts to dispel threats to the status quo. Therefore, the Court invokes the system-maintaining ideologies of equal opportunity, colorblindness, white innocence, meritocracy, and individualism to inform its standing analysis, as well as to rationalize the conclusion that otherwise speculative and hypothetical injuries satisfy the justiciability requirements.

For instance, the Court's decisions in *Bakke* and *Parents Involved* clearly demonstrate the Court's readiness to act on system justification motives in order to protect the status quo. The plaintiff in the *Bakke* case sought to eliminate a serious threat to the system—race-regarding admission policies that sought to remedy current and past discrimination and stem the rising tide of inequality. The affirmative action policy at issue conflicted with numerous

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[183] City of Los Angeles v. Lyons, 461 U.S. 95, 98 (1983).

[184] *See id.* at 108 (holding that "it is untenable to assert, and the complaint made no such allegation, that strangleholds are applied by the Los Angeles police to every citizen who is stopped or arrested regardless of the conduct of the person stopped").

[185] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 7 (2001) (noting that a basic tenet of critical race theory is that "racism is ordinary, not aberrational").

[186] *Lyons,* 461 U.S. at 109.

"system-justifying ideologies,"[187] such as a belief in meritocracy,[188] individualism, a fair market,[189] natural economic and racial inequality,[190] colorblindness, equal opportunity, and social dominance.[191] As noted earlier,[192] it was undisputed in *Bakke* that the plaintiff could not demonstrate that he would have been admitted to the medical school at UC-Davis but for the existence of the remedial admissions policy.[193] Despite the speculative and hypothetical nature of Bakke's "injury," which otherwise the Court would have deemed as non-justiciable under precedent, the Court sympathized with the discrimination facing "disadvantaged whites"[194] and permitted the attempt to preserve the status quo. The Court rationalized its finding of standing by re-framing the injury as a threat to the status quo of equal opportunity.[195]

The seemingly benign framework of equal opportunity was invoked by the Court as an antecedent to system justification.[196] As the author of this Article has contested previously,

> The story of equal opportunity [holds that] the paradigm of equal opportunity is a truly objective, neutral, and fair method to allocate educational, employment, and political resources to members of society, without regard to race, class, gender, or ethnicity. The ideal of equality assumes the possibility of an objective measure of merit under which individuals' abilities and performances may be evaluated. Accordingly, through the creation of a baseline that presupposes the inherent sameness of all people and disregards systemic discrimination as a fallacy, any social and economic inequality that exists is said to be legitimate because it

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[187] Jost & Hunyady, *supra* note 162, at 261 tbl.1.

[188] *Id.* (belief that "[t]he system rewards individual ability and motivation, so success is an indicator of personal deservingness").

[189] *Id.* (belief that "[m]arket-based procedures and outcomes are not only efficient but are inherently fair, legitimate and just").

[190] *Id.* (belief that "[e]conomic inequality is natural, inevitable, and legitimate; economic outcomes are fair and deserved").

[191] *Id.* (belief that "[s]ome groups are superior to others; group-based hierarchy is a good thing").

[192] *See supra* Part III.B.

[193] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 267-77 (1978).

[194] *Id.* at 276.

[195] *See id.* at 280, n.14 (reframing the injury as being denied the opportunity to "compete for all . . . places in the class, simply because of his race").

[196] *See* Jost & Hunyady, *supra* note 162, at 261.

> purportedly reflects the natural results of deficient personal choices.[197]

In using the rhetoric of equal opportunity, the Court's re-framing of the injury is a veiled attempt to preserve existing patterns of inequality.[198] The Court uses ideological language to translate the injury from one involving a mere denial of admission to one implicating the fairness of the social system as a whole. The former injury was clearly conjectural, yet the latter framing of the injury appeared to the Court to constitute a real and concrete threat to the status quo. The Court found standing through a process of rationalization in its effort to ease the guilty pangs of conscience that comes with viewing inequality.

The Court's decision in *Parents Involved*[199] similarly relied on system-justifying ideologies to uphold standing by broadly reframing the alleged injuries. The plaintiffs in that case sought to undo the desegregation plans adopted by schools in racially segregated cities. The alleged injury was clearly speculative and conjectural under precedent. It merely alluded to the possibility that the plaintiffs' children *may* someday try to enroll in the desegregating schools, and that those students *may* also be denied admission under the plan.[200] However, the Court viewed these harms as threats to the status quo and its underlying ideologies of individualism, colorblindness, and meritocracy. The Court was enamored with individual stories of "white innocence" and equal opportunity during its analysis[201] and

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[197] Christian B. Sundquist, *Equal Opportunity, Individual Liberty, and Meritocracy in Education: Reinforcing Structures of Privilege and Inequality*, 9 GEO. J. ON POVERTY L. & POL'Y 227, 228-29 (2002).

[198] *Id.* at 229. ("I disagree with the conception of equal opportunity as an objective, neutral, natural, and fair principle that enables social minorities to progress in society, limited only by their own ability and free choices. Rather, equal opportunity is an intricate fabrication intended to preserve the status quo and language of the dominant culture through reliance on popular, yet mythical, norms of individualism, sameness, and neutrality.").

[199] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 1, 551 U.S. 701 (2007).

[200] *Id.* at 718-19. The "complaint sought declaratory and injunctive relief on behalf of Parents Involved members whose elementary and middle school children '*may be* denied admission to the high schools of their choice when they apply for those schools in the future.' " *Id.* at 718 (emphasis added). The Court still granted standing, finding that "[t]he fact that it is possible that children of group members will not be denied admission to a school based on their race . . . does not eliminate the injury claimed." *Id.* at 718-19.

[201] *See supra* note 200 and accompanying text. Professor Thomas Ross has argued that concepts of white innocence, even if unintentional, pervade the American court system as exemplified by legal rhetoric affording

strove to find a way to uphold the "private choices" of white parents to live in racially segregated neighborhoods.[202] Using system-justifying ideological tools, the Court reframed the claimed injury as a response to the systemic threat of desegregation.[203]

C. The First Principles of Standing Law

The law of standing appears to be intelligible only through the schema of privilege. The tripartite standing framework developed by the Court is an attempt to demarcate the often times nebulous space between ideological discourse and objective legal thought. The legitimacy of standing law derives in part from a denial of the political contingency of the representational metaphors upon which it relies.[204] The interpretation of the injury-in-fact, causation, and redressability tropes is inevitably value-laden, normative, and system-justifying. The foundational first principles of standing doctrine thus are characterized by a belief in the legitimacy and fairness of the existing distribution of social resources:

1) perpetuation of the existing structures of racial, economic, and social privilege in maintenance of the status quo, and

2) distortion and rationalization of images of inequality through the use of metaphorical ideological devices.

Recognition of these foundational principles provides an unfortunate determinacy to the law of standing that was previously

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whites a lack of culpability and simultaneously abstracting black disadvantage to an impersonal level, thereby denying the full humanness of blacks. Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 3-4 (1990).

[202] *Parents Involved*, 551 U.S. at 736 ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.") (quoting Freeman v. Pitts, 503 U.S. 467, 495 (1992)).

[203] *See id.* at 719 ("[O]ne form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff, an injury that the members of Parents Involved can validly claim on behalf of their children.") (internal citations omitted).

[204] Professor Gary Peller observes that "[l]egal thought distinguishes from open-ended ideological discourse by implicitly denying the contingency of the representational metaphors, such as the public/private or fact/value distinctions, on which its persuasiveness depends. When these background structures are taken as that 'which goes without saying,' they work as metaphysical assumptions about the world." Peller, *supra* note 1, at 1154.

lacking and which could not be accounted for by the traditional normative justifications for standing doctrine. The guiding principles of standing law are granted normative power through the invocation of various system-justifying modalities: individualism and the reification of private rights, equal opportunity and the victimology of white innocence, colorblind constitutionalism and post-racialism, and meritocracy and free market ideology.[205]

There is an additional limitation on standing law, which is based on the principle that the process of system justification will not be activated if it is within the interest of the dominant social group to redefine the status quo.[206] This limitation on standing doctrine tracks both the psycho-legal concept of "interest convergence" and SJT's theory of "inevitable change." The concept of "interest convergence" was first developed by Professor Derrick Bell and posits that the interests of the subordinated class in reducing or eliminating inequality will be accommodated only when they converge with the interests of the elite class.[207] This theory is similar to SJT's finding that system justification tendencies are avoidable if a change in the status quo appears to be inevitable.[208] As Professor Jost notes, "[a]lternatives to the status quo may be derogated when they are considered improbable, but they may become much more attractive as their probability of success increases."[209]

A basic formula can describe the interplay between the concepts. The likelihood of a judge expressing system-justification tendencies in order to preserve the status quo condition of privilege (LP) depends on an assessment of the judge's level of cognitive dissonance (CD) balanced against the persuasive power of the alternative account for inequality (AA). Breaking down the components further,

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[205] *See generally* Jost & Hunyady, *supra* note 162, at 261.

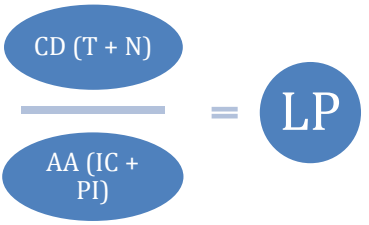
[206] *See infra* Part III.

[207] *See generally* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1993).

[208] *See* Jost et al., *Goal Pursuit*, *supra* note 166, at 600.

[209] *Id.*

> **LP** (likelihood of preserving privilege) = **CD** (level of cognitive dissonance) [perceived system threat (**T**) + dispositional need for structure and order (**N**)] / **AA** (persuasive power of the alternative account) [level of interest convergence (**IC**) + perceived inevitability of system change (**PI**)], or




The above formulaic expression of the likelihood of a court expressing system justifying attitudes is not a backdoor attempt to resurrect a new legal formalism.[210] Rather, a visual account of the various factors that are relevant to system justification helps to clarify the steps that can be taken to reduce or eliminate the propensity of judges to shape their decisions in an effort to protect the status quo. Advocates *could* attempt to downplay the court's perception of system threat (T) in a given case. Advocates *could* try to persuade a court of the inevitability of system change (PI), arguing that it is within the interest of the dominant group to redefine the status quo (IC). However, it is unrealistic that advocates could achieve substantive change by playing within the rules of a hopelessly flawed legal framework.

## V. BEYOND THE "TRANSCENDENTAL NONSENSE" OF STANDING

The failings of standing doctrine cannot be resolved by modifying the existing framework, redefining terminology,[211] focusing on legal injury rather than factual injury,[212] making a

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[210] *See, e.g.*, Thomas C. Grey, *Langdell's Orthodoxy,* 45 U. PITT. L. REV. 1, 13 (1983) (recounting Christopher Columbus Langdell's view of law as a science).

[211] *See* Susan Bandes, *The Idea of a Case*, 42 STAN L. REV. 227, 230 (1990) (arguing that standing law should shift from an individualistic, private rights model to a public law model that focuses on adjudicating constitutional questions).

[212] Sunstein, *supra* note 14, at 166 (arguing that the "relevant question is [not whether there was an " 'injury-in-fact,' but] whether the law—governing

distinction between private and public rights,[213] instituting a presumption favoring the plaintiff's claim of injury,[214] or relaxing the requirement of injury-in-fact.[215] The convoluted doctrine that evolved from the Court's disingenuous interpretation of "case" or "controversy" must be forsaken completely. Merely modifying the requirements of standing will do little to guard against privilege and political decision-making. Instead, the entire language of standing must be removed from the judicial toolbox.

A number of well-regarded academics have suggested altering the framework to account for privilege by creating a presumption in favor of standing.[216] This proposal would eliminate the existing set of standing rules, requiring only that the plaintiff demonstrate a "real adversity" with the defendant and a reasonably "concrete" factual record.[217] A court still would be able to deny standing in certain situations, when "strong reasons are brought to bear against its exercise."[218] According to its proponents, the benefits of this approach lie in its potential to restrain ideological decision-making through a relaxation of the injury-in-fact requirement.[219]

While the privilege-constraining aims of this approach are certainly laudable, it does not appear that this modified standing test would do much to eliminate ideological decision-making. The "presumption" approach does not address the psychological triggers of system-justifying judicial behavior, nor does it remove the use of

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statutes, the Constitution, or federal common law—has conferred on the plaintiffs a cause of action"); *see also* Fletcher, *supra* note 3, at 812.

[213] F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 275 (2008) ("[R]equiring a showing of factual injury in private rights cases is ahistorical and actually undermines the separation of powers by preventing the courts from guarding rights and by limiting Congress's powers to create rights.").

[214] Nichol, *supra* note 89, at 338, 339-40 (arguing that "[t]he injury inquiry should embrace a significant presumption in favor of the plaintiff's claim of harm").

[215] Siegel, *supra* note 59 (advocating for a reform of standing law by relaxing standards).

[216] Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1705-07 (1980); Nichol, *supra* note 89, at 305, 339.

[217] Tushnet, *supra* note 216, at 1706.

[218] Nichol, *supra* note 89, at 339.

[219] *Id.* ("A generous predisposition towards finding injury would also go far to dismantle the artificial categories of injury that have rendered the Court's standing jurisprudence one of the most manipulated, result-oriented arenas of constitutional law.").

ambiguous standards and language from the standing calculus. How does one decide which cases satisfy the presumption and which do not? What guidelines should a court apply in determining whether to invoke the discretionary exception to reject standing? Under this approach, it is easy to envision the possibility of ideologically-based denials of standing on the purported grounds that the plaintiffs failed to proceed either because they failed to generate a sufficiently "concrete" factual record or because "strong policy reasons" militate against standing.[220] By exchanging one malleable standard for another, the proposal merely changes the language used to rationalize decisions on standing that privilege white victims.

Another notable approach to standing reform argues that the issue of standing should be linked to the substantive merits of a case.[221] Relying on observations that the current standing framework is a mere proxy for the Court's ideological view of the merits of a case, the "substantive" approach argues that the test for standing instead should be based entirely on the presence of a judicially-cognizable legal injury.[222] In particular, this approach advocates that the courts should defer to congressional determinations of statutory standing.[223] The proposal acknowledges that a substantive test for standing will not eradicate political decision-making completely, [224] but that this approach would reduce the potential for judicial mischief by barring courts from making normative-based standing decisions. The substantive approach ties the standing analysis to the presence of substantive constitutional, statutory, and common-law rights.

This proposal suffers from the familiar failings of normative interpretation and linguistic ambiguity. By linking standing to the determination of substantive rights, the proposal merely replaces

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[220] *See* Staudt, *supra* note 89, at 672-73. Professor Staudt relies on empirical data to conclude that the presumption approach to reform would not constrain political decision-making in the standing context.

[221] *See* Fletcher, *supra* note 3, at 223; Cass R. Sunstein, *Informational Regulation and Information Standing:* Atkins *and Beyond*, 147 U. PA. L. REV. 613, 616-17 (1999).

[222] Fletcher, *supra* note 3, at 229 (arguing that the question of whether a plaintiff has a "legal right to judicial enforcement of an asserted legal duty . . . should be seen as a question of substantive law").

[223] Sunstein, *supra* note 14, at 191 ("whether an injury is cognizable should depend on what the legislature has said").

[224] *Cf.* Sunstein, *supra* note 221, at 616-17 (arguing that, with respect to cases involving standing to obtain information, "the question of standing is for congressional rather than judicial resolution . . . . If Congress creates a legal right to information and gives people the authority to vindicate that right in court, the standing question is essentially resolved.").

one kind of indeterminacy with another. The interpretation of constitutional and statutory substantive rights has long been rife with inconsistency and normativity. The tremendous judicial discretion involved in the analysis of constitutional and statutory language gives rise to ideological game-playing and system rationalization. The interpretation of language deemed to be "ambiguous" is often dependent on the application of contested and conflicting canons of construction, which themselves often represent a particular ideological position. Even when the law is not ambiguous, courts often find reason to go beyond the plain meaning of language in order to advance a particular political agenda.[225] As Professor Staudt has noted, "[d]eferring to substantive law . . . does not foreclose judicial discretion."[226] By relying on a false substantive-procedural distinction, the substantive approach simply does not lead us out of the mire of incoherence.

If the principal reform proposals are lacking, then how should we change the law to account for its tendency to promote privilege normatives? How can we modify the law to reduce or eliminate the system-justifying tendencies of judges? The answer lies in not merely changing the standing inquiry, but in eliminating it altogether. Standing doctrine is mandated neither by the text nor the history of Article III. It consists of a subjective set of criteria that can be manipulated by perceptions of system threat to rationalize inequality and deny access to justice to those at the "bottom of the well."[227] The law of standing cannot be modified to eliminate privilege, as the language of access necessarily is imbued with political meaning. The words and phrases used to convey the notion of standing—whether in its original or reformed position—are infinitely malleable and veil the operation of privilege. The privileging aspects of standing are rarely recognized or "seen" by the courts, as privilege itself is shaped by societal norms deemed neutral and objective by the dominant group. The law of standing nonetheless serves to normalize privilege and rationalize existing social inequality. [228] Thus, the concept of standing must be discarded in its entirety.

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[225] For instance, consider the "cases" and "controversies" language of Article III. *See* U.S. CONST. art. III. The language can be given a clear and unambiguous interpretation that does not give rise to a constitutional requirement of standing.

[226] Staudt, *supra* note 89, at 680.

[227] BELL, *supra* note 207.

[228] Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible*, *in* PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 7-24 (Stephanie Wildman et al. eds., 1996) (arguing

## VI. CONCLUSION

Professor Derrick Bell once implored that we should look to "the bottom of the well" in judging law: If a law does not benefit the most disadvantaged of society, it should be rejected.[229] Accordingly, the law of standing should be rejected. Standing requirements only serve to rationalize existing inequality while masking the reproduction of privilege. The evaluation of redressable legal injuries is necessarily a value-laden and subjective process, which is influenced by the social position, past experiences, and worldview of individual judges.

The Court has demonstrated, in the affirmative action and desegregation contexts, a willingness to wield the submissive sword of standing to cut down threats to the status quo and privilege. As the empirical findings of System Justification Theory demonstrate, the Court often invokes the law of standing to rationalize and normalize system-justifying responses to perceived system threats. The Court denies standing routinely in cases advancing the rights of non-white plaintiffs, as the Court myopically sees the injuries claimed as too speculative and disconnected from the experiences of individual justices to qualify for judicial review under Article III.[230] Conversely, the Court strains to locate "injuries" in cases involving the racialized claims of white plaintiffs, even when such claims would seem to be insufficient for Article III review under prior case law.[231] Therefore, the law of standing, for these and other reasons, is widely acknowledged as being hopelessly incoherent. The infamous indeterminacy of standing law, however, can be provided some coherence once it is acknowledged that judicial decision-making is heavily influenced by perceived threats to the racial status quo. The Court's standing jurisprudence in cases involving racial injuries is therefore determinable and predictable not by precedent or the language of Article III, but by the nature and extent of the perceived system threat. To put it bluntly, the Court is as likely to minimize the injuries of plaintiffs seeking to challenge racial inequality, as it is to generously construe the injuries of plaintiffs seeking to preserve existing structures of racial hegemony (e.g., segregation, discrimination, profiling).

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that privilege appears as part of the normal fabric of daily life and becomes a world to which those without privilege must adjust.).

[229] *See generally* BELL, *supra* note 207.

[230] *See supra* Part III.A.

[231] *See supra* Part III.B.

Reform proposals focused on massaging the language of standing requirements, while nonetheless retaining "standing" as a limit to justiciability, are not sufficient to mediate the system-justifying preferences of the courts. The language of standing doctrine is simply too malleable and value-laden to be co-opted for the inapposite purpose of defeating privilege. Rather, standing doctrine as a whole must be eliminated as a barrier to social justice and the ability of the non-privileged to assert substantive rights. There is simply no constitutional justification for retaining the embattled requirement of standing as a limit on federal court access.

Moreover, the sky will not fall once standing limitations are eviscerated, counter to the expected claims of defenders of the existing legal framework. Our federal court system operated smoothly for nearly two hundred years before our understanding of "cases" and "controversies" became clouded with unworkable tort concepts like "injury-in-fact," "causation," and "redressability."[232] While the federal judiciary may find themselves short an arrow in their quiver of justiciability, there are still many procedural tools remaining to dispose of meritless and fantastical claims.[233] Additionally, courts still will be free to resort to a multitude of prudential, sub-constitutional mechanisms to promote efficient judicial review.[234] The practical result of eliminating standing from the justiciability calculus, thus, would not be to open the "floodgates" inappropriately to federal judicial review, but rather to expand federal court access for non-white litigants seeking judicial protection of important constitutional and statutory rights. As Justice Brennan implored in his dissent in *McClesky v. Kemp*, we must not continue to retain a flawed framework of constitutional adjudication out of a "fear of too much justice."[235]

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[232] *See supra* Part II.

[233] For instance, federal courts have the power to entertain motions for dismissal and summary judgment. *See* FED. R. CIV. P. 12(b)(6) & 56.

[234] *See supra* note 29 and accompanying text (noting several prudential, sub-constitutional standing limitations, including the zone of interests test, the generalized grievances limitation, and restrictions on third-party standing).

[235] 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).