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# STANDING AND PUBLIC LAW REMEDIES

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## INTRODUCTION

Since *Brown v. Board of Education*,<sup>1</sup> civil rights remedies have become exceedingly complex.<sup>2</sup> Typically, these remedies benefit an amorphous class and involve affirmative acts to reform the structural and operational details of institutions such as schools, prisons, and hospitals.<sup>3</sup> The object of a civil rights suit is the correction of some public wrong which, if allowed to continue, would further disadvantage a segment of the public, such as a minority group.<sup>4</sup>

Professor Abram Chayes's brilliant discussion of the sharply contrasting features of public and private actions reveals the dominant role of public interests in public actions in contrast to the dominant role of parties in private actions.<sup>5</sup> While the interest of the plaintiff is essential to the prosecution of private actions, the public nature of public actions minimizes the importance of the role played by traditional plaintiffs since their interests are shared by myriad other members of the relevant public. Thus, a new central concern in public actions is whether all interested persons have been given notice and an opportunity to be heard.<sup>6</sup>

The interrelation of claim and remedy causes private action standing to sue to vest in a person whose injuries will be repaired by the relief dispensed.<sup>7</sup> Standing, however, should not be important in public actions because the

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1. 347 U.S. 483 (1954) (Brown I) and 349 U.S. 294 (Brown II) (1955). See generally R. KLUGER, *SIMPLE JUSTICE* (1975).

2. See *Special Project—The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978) [hereinafter cited as *Remedial Process*]; Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

3. See A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 77-98 (1976); D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 3-21 (1977); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Comment, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. PA. L. REV. 1330 (1974); Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1227-50 (1977); Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). These developments are tracked in the Special Project in this issue. See *Remedial Process*, *supra* note 2, at 788-89.

4. For the Court's concern for the scope of relief in school desegregation cases, see *Brown v. Board of Educ.*, 347 U.S. 483, 495 & n.13 (1954).

5. Chayes, *supra* note 3.

6. See Chayes, *supra* note 3, at 1310-12; *Remedial Process*, *supra* note 2, at 870-927.

7. See Chayes, *supra* note 3, at 1290-92; Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961) [hereinafter cited as *Private Actions*]. See also Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961) [hereinafter cited as *Public Actions*].

relief dispensed affects the interests of a scattered and diverse public. Indeed, civil rights actions have been prosecuted by institutional litigators such as the NAACP Legal Defense Fund and the Justice Department, and the relief sought has been in the interest of a class. The naming of an individual as plaintiff is basically a concession to tradition; the named private plaintiff plays little role in financing the lawsuit, participating in the strategic choices, or specifying the relief.<sup>8</sup> Thus, insistence upon compliance with standing rules, designed for the context of private actions, has forced a costly anachronism upon public actions—the doctrine of standing to sue.<sup>9</sup>

The decline in the importance of standing of plaintiffs in public actions and the public nature of public law remedies expose the need for adequate interest representation in the remediation process. The absence of representatives of the interests of members of classes and sub-classes could induce groups with conflicting interests to settle their differences in the proverbial neighborhood school yard.<sup>10</sup> Such representation should be fashioned to democratize remedy planning, negotiation, and implementation. "At the stage of relief in particular, if the decree is to be quasi-negotiated and party participation is to be relied upon to ensure its viability, representation at the bargaining table assumes very great importance, not only from the point of view of the affected interests but from that of the system itself."<sup>11</sup> The problem of determining which interests are worthy of expression in the adjudicatory process is probably as ill-suited for public actions as is the current standing doctrine.<sup>12</sup> Nonetheless, liberal deployment of rules governing class actions and intervention should answer the call for adequate representation in the remediation process.<sup>13</sup>

This Article proposes that the doctrines now associated with standing, because they are not suited to the realities of public law litigation, be abandoned in favor of a more inclusionary use of class action and intervention rules to expand participation in the remediation process. The proposed shift from threshold standing to remediation representation would encourage the development of a jurisprudence of public law remedies. Such a jurisprudence would define the nature of public law remedies, goals, and styles of relief available in public law actions. Inclusionary intervention and class action rules would facilitate the democratic promulgation of first principles in this jurisprudence of remedies.

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8. Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. CHI. L. REV. 742, 753 (1974).

9. See Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Jaffe, *Public Actions*, *supra* note 7, at 1292-96.

10. A provocative discussion of these conflicts is presented by Professor Derrick Bell in his *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482-87, 506-07 (1976).

11. Chayes, *supra* note 3, at 1310.

12. *Id.* at 1310-13.

13. *Id.*

## I. STANDING

Standing remains one of the "most amorphous [concepts] in the entire domain of public law."<sup>14</sup> The Supreme Court attempted to clarify standing in *Baker v. Carr*<sup>15</sup> by defining the standing question as whether the party seeking relief has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."<sup>16</sup> In *Flast v. Cohen*,<sup>17</sup> Chief Justice Earl Warren construed the *Baker v. Carr* conceptualization to mean that "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."<sup>18</sup> Since *Flast*, the Court has attempted to distinguish the standing question from the merits.<sup>19</sup> Yet, the Court's analysis of standing

14. *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 498 (1966) (statement of Prof. Paul A. Freund); see Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 645 n.1 (1973).

*Massachusetts v. Mellon*, 262 U.S. 447 (1923), is a classic example of the confusion which can result from the application of standing doctrines. The Supreme Court, per Justice Sutherland, held that an allegation of interference with states' rights and denial of due process would not qualify a taxpayer for an injunction to stop the appropriation of taxes under a federal statute. Since that momentous decision nearly sixty years ago, courts, the Congress, lawyers, and law professors have continued to disagree over its implications. See *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 465, 467-68 (1966) (statement of Prof. William D. Valente); Dorsen, *The Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit*, 12 BUFFALO L. REV. 35, 48-65 (1962). Several questionable facets of Justice Sutherland's opinion account for this persistent confusion. First, he failed to narrow standing to its proper sphere: whether the specific party before the Court is qualified to trigger judicial review. Instead he wandered aimlessly into a broader universe: whether any taxpayer would be able to obtain judicial review. He stated:

If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.

262 U.S. at 487. Once the inquiry moves beyond the particular party to generalized categories such as taxpayers or citizens, it focuses on the reviewability of the case and not on the standing of the party. Thus, there has been debate over whether *Frothingham* was an article III case or merely a discretionary decision not to exercise review. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 92-94 (1968); Jaffe, *Private Actions*, *supra* note 7, at 302-03.

Justice Sutherland's opinion can also be criticized for its sensitivity to remedies in deciding the question of reviewability. See 262 U.S. at 487 ("interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity").

15. 369 U.S. 186 (1962).

16. *Id.* at 204.

17. 392 U.S. 83 (1968).

18. *Id.* at 99.

19. *But see* Scott, *supra* note 14, at 670, 683-90 ("This view of standing, however, has not always been followed by the courts and disregards another function that the doctrine has served.").

In *Flast*, the Supreme Court held that "a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." 392 U.S. at 105-06. The Court attempted, with only modest success, to draw bright lines around standing. The requisite

reveals that standing is an aspect of the law governing claims for relief;<sup>20</sup> a fortiori standing is an inherent part of the merits.

The Court's rationale for freezing the standing question in its threshold posture is articulated in *Warth v. Seldin*.<sup>21</sup> "The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention."<sup>22</sup> Thus, threshold standing is grounded, in part, in the assumption that standing is a constitutionally compelled limitation on the jurisdiction of federal courts.<sup>23</sup> Since standing is not mentioned in the Constitution, courts base its constitutional status on the historic content implicit in "cases or controversies." Yet, hard research has revealed no historical warrant for this assertion.<sup>24</sup>

Among the prudential justifications for threshold standing is the notion that standing promotes an efficient allocation of access to scarce judicial resources.<sup>25</sup> "Access standing, then, means a judicial determination of whether the nature and extent of the alleged harm to a plaintiff are such as to warrant deciding his case."<sup>26</sup> Experience suggests, however, that, aside from the rule against collusive suits, threshold standing is not an efficient way to allocate access.<sup>27</sup> Perhaps litigation costs more efficiently screen access to the courts; if the plaintiff does not have the minimal personal involvement

"personal stake" is to be established by demonstrating a "nexus" between "the status asserted and the claim sought to be adjudicated." 392 U.S. at 102.

*Flast* anticipated granting standing to ideological or "non-Hohfeldian" plaintiffs to sue on behalf of a public as opposed to private interest. *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970), continued this trend by requiring a two-pronged test: the plaintiff must have suffered "injury in fact," and this injury must have been to an interest within the "zone of interests" protected by the relevant rule of law. In *United States v. SCRAP*, 412 U.S. 669 (1973), the Supreme Court held that a showing of an attenuated "injury in fact" suffered by many people in common was sufficient to establish standing on behalf of an organizational plaintiff suing in a representative capacity.

20. See Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139 (1977); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974) [hereinafter cited as *Standing*]; Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863 (1977).

21. 422 U.S. 490 (1975). In *Warth*, several categories of plaintiffs sought declaratory, injunctive, and compensatory relief against members of the Zoning, Planning, and Town Boards of Penfield, a suburb of Rochester, New York. They claimed that Penfield's zoning ordinance effectively excluded persons of low and moderate income from residence in the town, in violation of their federal constitutional and statutory rights. A five-to-four majority held that none of the plaintiffs had standing to sue.

22. *Id.* at 517-18.

23. See *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953) (standing is a "complicated specialty of federal jurisdiction").

24. Berger, *supra* note 9. Professor Davis concluded that "the federal law of standing is a 'specialty of federal jurisdiction' only to the extent that it involves artificialities that the state courts have refused to adopt." 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 210 (1958).

25. *Jenkins v. McKeithen*, 395 U.S. 411, 437 (1969) (Harlan, J., dissenting) (a liberal grant of standing "entirely undermines an important function of the federal system of procedure—that of disposing of unmeritorious and unjusticiable claims at the outset, before the parties and courts must undergo the expense and time consumed by evidentiary hearings").

26. Scott, *supra* note 14, at 670.

27. *Id.* at 673-74.

and adverseness, it is not likely that he would engage in the costly pursuit of litigation.<sup>28</sup>

Another justification for threshold standing is that it screens out parties who would not adequately represent the interests of other aggrieved persons. Rules of standing, however, simply fail to accomplish this task. One plaintiff can be granted standing although he is an inadequate representative of the interests of his class, while another, fully qualified representative is eliminated at the threshold for lack of standing. The courts have no standards for determining which persons or organizations are most representative of the universe of affected interests. As Professor Davis has stated: "The idea deserves a quiet burial. Standing should not depend upon the probable manner in which a party will present a case . . ." <sup>29</sup>

Courts often justify threshold standing by expressing their concern for limiting the judicial power to its proper role in the tripartite federal arrangement. "Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."<sup>30</sup> Although this is a legitimate concern, the role allocation burden is not easily carried by a doctrine which purports to have as its fundamental goal the measurement of the qualifications of the party seeking access. As defined by the courts, "personal stake" is not germane to the question of balance between judicial, legislative, and executive roles.

As an alternative to threshold standing, this Article proposes that the standing question be raised at the remediation stage of litigation.

"[T]he point at which the issue of representativeness [as the basis for standing] becomes most acute is not at the outset of the case, but rather when the remedy or settlement is being formulated. At that time particularly, the interests of those persons who are affected by the challenged government action but who are not before the court could be better protected by adopting, where feasible, some of the class action techniques, such as affording notice and opportunity to intervene to other organizations that are probably interested."<sup>31</sup>

Efficiency in the allocation of judicial resources will come, if at all, in concert with the Court's development of a coherent jurisprudence of remedies.<sup>32</sup>

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28. *Id. Accord*, Monaghan, *Constitutional Adjudication: The Who and When*, 82 *YALE L.J.* 1363, 1397 (1973); Sedler, *supra* note 20, at 885.

29. K. DAVIS, *supra* note 24, § 22.00-4, at 724 (Supp. 1970).

30. *Warth v. Seldin*, 422 U.S. at 500.

31. *Scott*, *supra* note 14, at 681.

32. Professor Charles Alan Wright has asserted that "there is no law of remedies." Wright, *The Law of Remedies as a Social Institution*, 18 *U. DET. L. REV.* 376, 376 (1955). Thus, one would expect a remedy-sensitive court to be reluctant to find standing in cases in which a jurisprudence of remedies has not been prescribed.

Such a jurisprudence, consisting of certain and expeditious penalties for violations, should deter unlawful activities and induce extrajudicial settlements.

## II. STANDING AND REMEDIES

The Supreme Court has recognized the interrelation of standing and remedies in two groups of cases: (1) complex class action cases in which a "benefit-of-the-remedy" test is used;<sup>33</sup> and (2) the *Younger v. Harris*<sup>34</sup> line of cases in which standing and nonintervention produce a "catch-22" effect.

The original conception of the "benefit-of-the-remedy" standing test was presented in *Linda R.S. v. Richard D.*<sup>35</sup> In *Linda*, a mother acting for herself, her illegitimate child, and persons similarly situated sought a declaratory judgment that a Texas child support statute was unconstitutional and an order enjoining a local district attorney from refraining to prosecute the father of her child for noncompliance with the statute. Justice Marshall, writing for a five-to-four Court,<sup>36</sup> assiduously followed the prescription of threshold standing:

Before we can consider the merits of appellant's claim or the propriety of the relief requested, however, appellant must first demonstrate that she is entitled to invoke the judicial process. She must, in other words, show that the facts alleged present the court with a "case or controversy" in the constitutional sense and that she is a proper plaintiff to raise the issues sought to be litigated. The threshold question which must be answered is whether the appellant has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."<sup>37</sup>

The plaintiff's injury in fact was deemed insufficient to satisfy the requirements of threshold standing: "To be sure, appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments. But the bare existence of an abstract injury meets only the first half of the standing requirement."<sup>38</sup>

Without specifying whether the additional requirements were constitutionally compelled or prudentially selected, Justice Marshall considered standing to be determined by a benefit-of-the-remedy test: "Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's

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33. See text accompanying notes 35-40 *infra*.

34. 401 U.S. 37 (1971).

35. 410 U.S. 614 (1973).

36. The majority consisted of Chief Justice Burger, Justices Marshall, Stewart, Powell, and Rehnquist. Justices Douglas, Brennan, White, and Blackmun dissented.

37. 410 U.S. at 616 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

38. 410 U.S. at 618.

father. The prospect that prosecution, will, at least in the future, result in payment of support can, at best, be termed only speculative."<sup>39</sup>

The fact that the Court would even consider the impact of relief as a threshold issue is itself significant. Whether a remedy benefits plaintiff depends upon the nature and style of relief granted and the remedial goals selected for protection. In *Linda*, for example, three sets of plaintiffs sought injunctive and declaratory relief. A complex array of factual issues would be needed to decide whether the mother, the child, and the class should obtain and would benefit from these remedies. The Court can therefore be criticized for failing adequately to consider these difficult questions.<sup>40</sup>

The interplay between standing and remedies plays a subtle but significant role in *Younger v. Harris* and its progeny.<sup>41</sup> In these cases, the Supreme Court answered the standing question by holding that one must be the target of a threatened or pending prosecution for violating the challenged statute to have standing to sue.<sup>42</sup> The Court's response to the remediation question was that requests for federal injunctive and declaratory relief from enforcement of an allegedly unconstitutional state statute should not be granted except in unusual circumstances.<sup>43</sup>

In *Younger*, Justice Black, writing for the Court, held that Harris had standing to seek injunctive relief on first amendment grounds to restrain the District Attorney of Los Angeles County from prosecuting him under California's criminal syndicalism statute. Standing was based on the fact that Harris had been indicted and was being prosecuted for violating the challenged act when the federal action was commenced. "He thus has an acute, live controversy with the State and its prosecutor."<sup>44</sup> The Court held, however, that three intervenors lacked standing because they had not been indicted for violating the statute. "[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases."<sup>45</sup>

That the standing prong of the *Younger* doctrine was not to be taken lightly was amply demonstrated in the case of *Boyle v. Landry*,<sup>46</sup> decided on the same day as *Younger*. Black residents of Chicago, who had been arrested and prosecuted under a series of Illinois statutes, sought from a three-

39. *Id.* Speculation that the father would pay, of course, was no less valid than the majority's speculation that he would not pay.

The "benefit-of-the-remedy" test has been reaffirmed in two subsequent decisions. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975).

40. Indeed, a declaration that the statute had been applied in an unconstitutional manner would in all likelihood produce the desired result, prosecution of unwed fathers for non-support. Such a remedy would directly benefit plaintiffs, regardless of compliance by the fathers, since plaintiffs would become compulsory beneficiaries of the statute.

41. See Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

42. See text accompanying notes 44-48 *infra*.

43. Fiss, *supra* note 41, at 1120 n.48; Kennedy & Schooner, *Federal Declaratory and Injunctive Relief Under the Burger Court*, 26 S.W.L.J. 282, 320-29 (1972).

44. 401 U.S. at 41.

45. *Id.* at 42.

46. 401 U.S. 77 (1971).

judge federal district court an injunction and declaratory judgment that the statutes were invalid. The court upheld the validity of all the statutes except one. An injunction was issued to restrain the enforcement of the invalid statute. The only issue on review before the Supreme Court involved the validity of the judgment regarding the one statute deemed invalid. The Court held that "the allegations of the complaint in this case fall far short of showing any irreparable injury from threats or actual prosecutions under the intimidation statute or from any other conduct by state or city officials."<sup>47</sup> Plaintiffs lacked standing because "[n]ot a single one of [them] had ever been prosecuted, charged, or even arrested under the particular intimidation statute which the court below held unconstitutional."<sup>48</sup>

*Younger* and *Boyle* thus created a "catch-22" effect for the plaintiff seeking an injunction against enforcement of allegedly unconstitutional state criminal statutes. One plaintiff—Harris—did cross the bar of standing, only to be stopped by the invalidity of the requested remedy. Thus, for Harris, the grounds sufficient to give standing—the existence of a live controversy in the form of a pending prosecution—proved to be precisely the basis for denying the relief requested.

Remedies, whether subsumed under the rubric of standing or federalism, should be decided at the remediation stage.<sup>49</sup> Public law remediation in particular involves a complex set of fact-finding procedures. Threshold standing, whether granted or denied, does violence to the public interest in public law remediation by cutting off inquiry in advance of an informed judgment concerning public law remedies and by giving the false impression that a party with standing has interests different in kind and degree from those of others in the affected public.

Threshold standing does violence to the need for democracy in the remediation process, the need for devising remedies in accordance with the desires of all interested persons.<sup>50</sup> In this regard, standing principles are as unfit for complex public law litigation as traditional contract law is for the modern world of mass produced and mass merchandized standard form contracts.<sup>51</sup> The central issue in public law litigation should be whether the members of the affected public were given adequate notice and a fair opportunity to participate in the decision-making process.

Absentee interests, as well as the interests of the parties, are affected by

47. *Id.* at 80.

48. *Id.* at 80-81.

49. The appropriate procedure and complexity of remedy issues were presented in *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

The *Brown* Court's effort is appealing not only because of the structural division of the right-remedy analysis, but also because of the Court's appreciation of the variety of remedial styles and goals available.

50. For descriptions of the competing interests in *Norwalk CORE v. Norwalk Bd. of Educ.*, 298 F. Supp. 208 (D. Conn. 1968), see Bell, *supra* note 10, at 505-11; Chayes, *supra* note 3, at 1296 n.71.

51. See G. GILMORE, *THE DEATH OF CONTRACT* (1974); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529-30 (1971).

public law remedies. Such interests and those of named plaintiff and his attorney often conflict.<sup>52</sup> In *Calhoun v. Cook*,<sup>53</sup> several associations of black parents clashed over the proper remedy of school desegregation in Atlanta, some favoring and others opposing busing. Such conflicts have raised difficult questions about the adequacy of class representation and the obligation of class attorneys to represent the interests of absentee members of the class.<sup>54</sup>

Most class actions for damages are settled and many continuing reform oriented injunctions are negotiated.<sup>55</sup> Thus, a named plaintiff would need a crystal ball to predict accurately how a not-yet-negotiated remedy will benefit him. Yet, under current standing doctrine, the plaintiff must show that he is likely to be benefited by the relief requested.<sup>56</sup>

Standing rules obfuscate the grounds upon which representatives of the relevant public should be considered proper plaintiffs. In *Linda R.S. v. Richard D.*<sup>57</sup> and *O'Shea v. Littleton*,<sup>58</sup> the Court tested qualifications of class representatives to sue by considering their personal nexus to the case. But, in *Rizzo v. Goode*,<sup>59</sup> the Court chose to examine the extent of an alleged injury suffered by the class despite the fact that the class representative's injury was not sufficient to satisfy standing tests. Subsequently, in *Simon v. Eastern Kentucky Welfare Rights Organization*,<sup>60</sup> the Court in bold dictum stated that the class action "adds nothing to the question of standing."<sup>61</sup> Nonetheless, *Rizzo* may be viewed as allowing standing for a class

52. *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1552 (1976).

53. 362 F. Supp. 1249 (N.D. Ga. 1973), *aff'd*, 522 F.2d 717 (5th Cir. 1975).

54. See Bell, *supra* note 10.

55. *Developments in the Law—Class Actions*, *supra* note 52, at 1373-74.

56. See note 39 and accompanying text *supra*.

57. 410 U.S. 614 (1973).

58. 414 U.S. 488 (1974). *O'Shea* is a radical expression of the remedy-standing nexus. Nineteen individuals commenced an action in federal district court for themselves and on behalf of a class of persons who resided in Cairo, Illinois. An assortment of state and local criminal justice officials were nominal defendants. The plaintiffs sought an injunction to prevent the state and local officials from continuing to engage in "intentional racial discrimination in the performance of their duties, by which the state criminal laws and procedures are deliberately applied more harshly to black residents of Cairo and inadequately applied to white persons who victimize blacks, to deter respondents from engaging in their lawful attempt to achieve equality." *Id.* at 491. Plaintiffs alleged that named judicial officers engaged in illegal bondsetting, sentencing, and jury-fee practices. The Court rested its conclusion that article III was not satisfied on the ground that "the claim against petitioners alleges injury in only the most general terms." *Id.* at 495. Justice White made no effort to hide his sensitivity to remedies: "The foregoing considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief . . ." *Id.* at 499. The Court then proceeded to reach the merits even though it had held that plaintiffs lacked standing.

Justice White's admission that the standing question "shades into" the remedies question is an understatement. Standing and remedies are tightly intertwined—a fact that should give the Court pause in its willingness to allow standing to be severed procedurally from the remediation stage of litigation. Rhetorical standards now associated with standing (personal stake, injury in fact, zone of interest, and the like) could guide the Court in deciding what quantity and quality of remedy should be dispensed, a decision that would be reached at the remediation stage.

59. 423 U.S. 362 (1976).

60. 426 U.S. 26 (1976). See *Developments in the Law—Class Actions*, *supra* note 52, at 1466-71.

61. 426 U.S. 26, 40 n.20 (1976).

representative to be based on injuries to the class as a whole.<sup>62</sup> While an explicit adoption of this standard would be consistent with the public nature of public law actions and would abate the confusion currently surrounding standing in class actions, it would not reflect the interrelationship between standing and public law remediation since it does not factor into the analysis the extent to which negotiations for settlement have been conducted democratically.

Traditional standing requirements effectively circumvent the negotiation-settlement remediation process. In *National Urban League v. Office of the Comptroller of the Currency*,<sup>63</sup> eleven civil rights organizations sued four federal agencies for failing to adopt appropriate procedures to prevent race and sex discrimination in home mortgage lending. Three of the agencies entered into a settlement agreement after lengthy negotiations with the plaintiffs. These agencies agreed to adopt examination and enforcement procedures designed to alleviate racial discrimination by home mortgage lenders subject to federal regulation. The fourth agency, the Federal Reserve Board, refused to settle, claiming that its existing supervisory policies prevented unlawful discrimination. The Board's motion for summary judgment was granted on the ground that the Urban League neither had standing in its own right nor as a representative of injured members. The court's finding of lack of standing was based on the absence of injury in fact and a causal connection between the injury asserted and the relief sought. These traditional tests were applied despite the fact that plaintiffs had expended substantial amounts of money and energy pressing, negotiating, and settling its claims with the agencies.

Standing presents a continuing threat to democratically negotiated remedies. In *Rizzo v. Goode*,<sup>64</sup> two groups of class plaintiffs sought an injunction against the Mayor of Philadelphia and various police supervisory officials to compel them to end the "assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers . . . directed against minority citizens in particular and against all Philadelphia residents in general."<sup>65</sup> Upon finding that police officers had violated constitutional rights with such frequency that "they cannot be dismissed as rare, isolated instances,"<sup>66</sup> the federal district court directed the defendants to draft a comprehensive plan for processing civilian complaints. Although plaintiffs and defendants arrived at a remediation plan satisfactory to all parties,<sup>67</sup> the Supreme Court suggested that plaintiffs lacked standing to sue. Instead of focusing on standing to sue, the Court should have scrutinized the remediation process to determine whether all interests were represented in the negotiations. Given

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62. See *Developments in the Law—Class Actions*, *supra* note 52, at 1469-70.

63. 78 F.R.D. 543 (D.D.C. 1978).

64. 423 U.S. 362 (1976).

65. *Id.* at 366-67.

66. *Id.* at 369 (quoting Council of Organizations on Philadelphia Police Accountability and Responsibility (COPPAR) v. Rizzo, 357 F. Supp. 1289, 1319 (E.D. Pa. 1973)).

67. 423 U.S. at 371-73.

the presence of adequate representation, the negotiated remedy should be allowed to stand. At that juncture, rejection of the negotiated remedy because of the failure to satisfy mechanical standing rules must be read as a plea for undemocratic, standard-form adjudication.

Standing rules unreasonably delay the remediation process. Even the strictest conception of injury in fact may be satisfied in public actions by finding the member of the affected public whose injuries satisfy standing requirements. Thus, *Sierra Club v. Morton*<sup>68</sup> wound its way through the courts to the Supreme Court where the Sierra Club was found to lack standing. Yet, on remand from the Supreme Court, the plaintiffs easily satisfied the injury in fact requirements.<sup>69</sup>

Standing deters the development of a coherent jurisprudence of public law remedies. Public law adjudication breaks sharply with the traditional model of adjudication.<sup>70</sup> Yet, the rules of standing, born in the traditional, binary form of litigation, have been imposed upon the public, multiple party model. The tendency to stay with the traditional is understandable. Nonetheless, the surface simplicity of familiar doctrines masks the submerged complexities of public law remediation.<sup>71</sup> Indeed, standing is an effective device for delaying the inevitable confrontation between the Supreme Court and its obligation to prescribe a jurisprudence of public law remedies.<sup>72</sup> Many of the standing cases suggest that the Court fears the consequences of continuing, injunctive relief. The Court, however, should recognize that threshold standing has outlived its usefulness in public law litigation and should squarely face the issues posed by public law remediation.

### CONCLUSION

In conclusion, the doctrine of standing is ill-equipped to respond to the realities of modern federal litigation. The process of selecting proper parties to participate in public law adjudication must be guided by principles which promote rather than retard the development of a jurisprudence of public law adjudication. Such principles must therefore be responsive to the dominating characteristic of public law litigation: sprawling and amorphous parties seeking to vindicate constitutional or statutory policies.<sup>73</sup>

Public law adjudication would be well served by "private attorneys general" empowered to press claims in the public interest.<sup>74</sup> If litigation would

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68. 405 U.S. 727 (1972).

69. 348 F. Supp. 219 (N.D. Cal. 1972).

70. See Chayes, *supra* note 3, at 1282-84, 1302-04.

71. See *Flast v. Cohen*, 392 U.S. 83, 94 (1968) (Warren, C.J.) (cases and controversies have an "iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government").

72. See text accompanying notes 68-69 *supra*.

73. Chayes, *supra* note 3, at 1284.

74. The concept of the private attorney general was articulated by Judge Frank in *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *dismissed as moot*, 320 U.S. 707 (1943): "[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to

result in the enforcement of an important right affecting the public interest and a significant benefit would be conferred on a large class of persons, the plaintiff should be allowed to sue despite failure to satisfy traditional standing requirements. Capacity to sue in public law litigation would be determined by considering the societal importance of the public policy vindicated by the litigation, the number of people who would benefit from the action, and the necessity for private enforcement.<sup>75</sup>

The proper role of the judiciary in the tripartite federal government and efficiency in the allocation of access to judicial remedies could be guarded by reliance on the standards for determining whether claims qualify for relief.<sup>76</sup> The law of remedies has a long and familiar tradition of denying relief to persons whose relations to the case are deemed insufficient.<sup>77</sup> Centuries of experience in dispensing remedies should guide the courts in deciding whether parties are eligible for obtaining injunctions, damages, and restitution. Equitable remedies have exacted higher access standards by requiring that aspirants establish irreparable harm as a prerequisite to obtaining relief. The dominant role of equitable remedies in public law adjudication enhances the control traditional rules of equity should have in guiding the court in its selection of cases suitable for adjudication. As experience in the administration of public law remedies grows, requirements for obtaining relief should evolve to accommodate the need for public advocacy by private persons.

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vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorneys General." A private attorney general may sue to prevent violations of federal fair housing laws. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

75. Guidance in applying the private attorney general standard could come from federal and state statutes which allow public interest litigants to receive attorneys' fees. See Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. §1988 (1976); McDermott & Rothschild, *The Supreme Court of California, 1976-1977—Forward: The Private Attorney General Rule and Public Interest Litigation in California*, 66 CALIF. L. REV. 138 (1978).

76. Albert, *Standing*, *supra* note 20, at 426.

77. See S. THIO, *LOCUS STANDI AND JUDICIAL REVIEW* 1-5, 79-216 (1971).