THE LINKAGE BETWEEN JUSTICIABILITY AND REMEDIES—AND THEIR CONNECTIONS TO SUBSTANTIVE RIGHTS

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INTRODUCTION

WE customarily think about lawsuits as having three stages. First, at the threshold, the court determines justiciability. Second, if the suit is justiciable, the court rules on the merits. Finally, if the plaintiff prevails, the court determines the remedy.

Sophisticated commentators have, of course, long portrayed this model as oversimplified. In their renditions, hidden judgments about what ought to happen at a later stage sometimes influence determinations one step earlier. For example, numerous writers have argued that views about the merits either do or should determine decisions about justiciability.[1] Indeed, the idea that rulings on

[1] See, e.g., William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 223 (1988); Gene R. Nichol, Jr., Ripeness and the Constitution, 54 U. Chi. L. Rev. 153,

standing often represent concealed judgments on the merits has acquired the status of folk wisdom.[2] Other commentators have argued that concerns about acceptable remedies shape judicial decisions about which substantive rights to recognize: If courts apprehend that the resulting remedies would prove too costly or intrusive, they may refuse to hold that a right exists at all.[3]

In nearly all general accounts of justiciability doctrine, however, decisions about justiciability and decisions about necessary, appropriate, or acceptable remedies remain largely distinct. Protests occasionally sound that anxieties about remedies may have influenced justiciability rulings in particular cases.[4] In a book on remedies, Professor Douglas Laycock has described mootness and ripeness doctrines as partly equitable and therefore presumably remedial in character.[5] But claims such as these are relatively isolated. No systematic study of which I am aware has posited a broad linkage between the entire set of justiciability doctrines—including standing, mootness, ripeness, political question, and so forth—and judgments concerning necessary, appropriate, and acceptable judicial remedies.

This Article will establish such a linkage. More specifically, it will advance two large theses about the relationships among justiciability, remedial, and substantive doctrines. The narrower of these, the Remedial Influences on Justiciability Thesis, asserts that

167 (1987); Cass R. Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432, 1475 (1988); Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1451 (1988).

[2] See, e.g., Erwin Chemerinsky, Federal Jurisdiction § 2.3.1 (4th ed. 2003); Abram Chayes, The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 59 (1982); Gene R. Nichol, Jr., Abusing Standing: A Comment on *Allen v. Wright*, 133 U. Pa. L. Rev. 635, 650–51 (1985); Richard J. Pierce, Jr., Is Standing Law or Politics?, 77 N.C. L. Rev. 1741, 1743 (1999); Mark V. Tushnet, The New Law of Standing: A Plea for Abandonment, 62 Cornell L. Rev. 663, 663–64 (1977).

[3] See Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 678–79 (1983); Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 889–99 (1999).

[4] See, e.g., Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 241–42 (5th ed. 2003) [hereinafter Hart & Wechsler]; Laura E. Little, It's About Time: Unravelling Standing and Equitable Ripeness, 41 Buff. L. Rev. 933, 946–55 (1993); Kellis E. Parker & Robin Stone, Standing and Public Law Remedies, 78 Colum. L. Rev. 771, 781 (1978).

[5] See Douglas Laycock, The Death of the Irreparable Injury Rule 220–22 (1991).

concerns about remedies exert a nearly ubiquitous, often unrecognized, and little understood influence in the shaping and application of justiciability doctrines. In some cases, the Supreme Court, or Justices crucial to the Court's majority, regard the remedy that the recognition of a right would appear to entail as unacceptably costly or intrusive. More rarely, the Court may regard the award of a particular remedy in a particular kind of case as practically necessary if a right is to be enforced successfully at all. According to the Remedial Influences on Justiciability Thesis, when the Supreme Court feels apprehensions about the availability or non-availability of remedies, it sometimes responds by adjusting applicable justiciability rules, either to dismiss the claims of parties who seek unacceptable remedies or to license suits by parties seeking relief that the Court thinks it important to award.

The manifestations of remedial influences on justiciability law take different forms. Some involve trans-substantive rules[6] such as the mandate of standing doctrine that no justiciable lawsuit can exist in the absence of a concrete injury to the plaintiff that a judicial remedy would redress.[7] For reasons that I shall first explain and later criticize, the Supreme Court regards remedies that would intrude on the freedom or discretion of defendants, without redressing what it regards as a "distinct and palpable" injury to the plaintiff,[8] as categorically unacceptable, regardless of the right at issue. In another category of cases, judgments about the unacceptability or occasionally the necessity of remedies explain the development of justiciability rules that peculiarly influence the enforcement of particular substantive rights. For example, the ripeness doctrine imposes requirements in Takings Clause cases that do not apply in First Amendment actions.[9] Finally, anxieties about whether particular remedies would prove too costly or intrusive sometimes

[6] In using this terminology I follow Hart & Wechsler, supra note 4, at 130, and Edward A. Hartnett, The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places, 97 Mich. L. Rev. 2239, 2251 (1999).

[7] See, e.g., Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 180–81 (2000); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

[8] See, e.g., McConnell v. FEC, 540 U.S. 93, 225 (2003) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

[9] See infra notes 180–82 and accompanying text.

lead courts to engage in ad hoc manipulations of justiciability doctrines, especially standing.[10]

Although the Remedial Influences on Justiciability Thesis is bold and important, it is only one aspect of a broader, more important positive thesis that I shall also advance in this Article. The broader thesis, the Equilibration Thesis, holds that courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies.[11] When facing an outcome or pattern of outcomes that it regards as practically intolerable or disturbingly sub-optimal, the Court will adjust or manipulate the applicable law. According to the Equilibration Thesis, however, it will frequently be the case that no unbending principle of law or logic dictates the doctrinal category within which an adjustment will occur. In other words, when the Court dislikes an outcome or pattern of outcomes, it will often be equally possible for the Justices to reformulate applicable justiciability doctrine, substantive doctrine, or remedial doctrine. That the prospect of unacceptable remedies might trigger a change in justiciability rules reveals the sense in which the Remedial Influences on Justiciability Thesis is merely an aspect of the broader Equilibration Thesis: Anxieties about the acceptability of remedies need not necessarily exhaust their influence within the domain of remedial doctrine, but can and frequently do influence justiciability law.

Although my principal ambitions in this Article are to establish the truth and explanatory power of the Remedial Influences on Justiciability and Equilibration Theses, I shall advance a number of critical and prescriptive claims, especially about the specific justiciability doctrines that the Supreme Court has shaped in light of

[10] See sources cited supra note 2.

[11] I adapt the term "equilibration" most directly from the work of Daryl Levinson, supra note 3, at 858, who sees a "symbiotic" relationship between rights and remedies. Id. at 914. In essence, the Equilibration Thesis extends claims of symbiosis in the design of rights and remedies to include justiciability doctrines as well. There are also obvious affinities between the doctrinal equilibration that I identify among types of constitutional doctrine and the search for "reflective equilibrium" in political theory famously described by John Rawls. John Rawls, A Theory of Justice 20–22, 48–53 (1971); see also Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1240 (1987) (describing a search for reflective equilibrium among considerations pertinent to constitutional analysis).

remedial concerns. In principle, there should be no objection to allowing concerns about remedies to influence justiciability doctrines. But not all modes of influence merit equal embrace. In particular, the Court's effort to base standing doctrine on the concept of redressable injury, when coupled with its assumption that what counts as "injury" is a pre-legal, empirical or psychological fact, has created needless confusion. In light of the Equilibration Thesis, courts should ask directly, as a question of law, which plaintiffs should be permitted to sue for which remedies under particular constitutional and statutory provisions. In other words, courts should acknowledge a conceptual relationship between standing and the merits, and they should weigh concerns about the acceptability of remedies in determining which substantive rights to recognize under particular provisions of law.

With standing re-conceptualized in a way that links the question of injury to the existence of legally protected rights or interests, a question would sometimes remain about whether a current *threat* of harm to legally protected interests warrants judicial relief. Again, however, this question permits no sensible trans-substantive answer. Because sound decisionmaking about appropriate remedies requires sensitivity to context, the minimal requirements of standing should be set relatively low, once it is determined that the plaintiff has alleged a threat to legally protected interests, and courts should consider whether to award injunctions—the remedies that have most often triggered concerns about constitutional or practical unacceptability—within the more flexible frameworks of ripeness doctrine and the law of equitable remedies.

Because this Article will advance a mix of large, interconnected positive and normative theses, it has a complex structure. Part I will offer a preliminary statement of the Remedial Influences on Justiciability and Equilibration Theses, relate their claims to previous literature, and identify the doctrinal and conceptual assumptions on which they rest. Part II will further elaborate and systematically defend the Remedial Influences on Justiciability Thesis. Because the Remedial Influences on Justiciability Thesis is an aspect or element of the larger Equilibration Thesis, Part II will also help to provide a crucial foundation for the argument in Part III, which will establish both the validity and the illuminating power of the Equilibration Thesis. Although the Remedial Influences on

Justiciability and Equilibration Theses are positive, not normative, Part IV will offer normative reflections on the states of affairs that the two theses describe. It will maintain that judgments about necessary or acceptable remedies appropriately help to shape justiciability doctrines, but it also criticizes existing law and judicial practice and advances proposals for reform.

I. THE REMEDIAL INFLUENCES ON JUSTICIABILITY AND EQUILIBRATION THESES

A. Background

Every suit in federal court in which the plaintiff ultimately prevails must pass through three stages. First, at the outset, the court ascertains that it possesses jurisdiction.[12] Second, it renders a decision on the merits. Third, the court awards a remedy. Sometimes, as in suits for compensatory damages, the nature of the remedy flows almost automatically from the determination on the merits.[13] Especially in suits for injunctions, however, a significant question will often remain about the precise form of relief to award.[14]

In the literature on federal jurisdiction, it is now commonplace that decisions about justiciability are often a form of decision on the merits.[15] The penetration of merits judgments into justiciability determinations prominently occurs in standing analysis. There are at least two modes of influence. The first arises from a conceptual connection.[16] Most, if not all, of the time, the Supreme Court insists that the standing inquiry differs from merits determinations.[17]

[12] See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93 (1998) (holding that courts must conduct sua sponte inquiries into standing) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278–79 (1977)).

[13] See, e.g., Chayes, supra note 2, at 45.

[14] See id. at 46; Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 49–50 (1979).

[15] See sources cited supra note 2.

[16] See Fletcher, supra note 1, at 232–33 (asserting that whether the plaintiff has suffered an injury is not a factual question but one depending on "the nature and scope of the substantive legal right on which the plaintiff relies").

[17] See, e.g., Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970). The Court is not perfectly consistent on this point, however, and it will occasionally state that the question of standing "is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Warth v. Seldin, 422 U.S. 490, 500 (1975); see also, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004).

Standing, the Court says, depends most importantly on whether the plaintiff has suffered a "concrete injury"[18] that gives her a "personal stake"[19] in the litigation. As is now well recognized, however, the concept of "injury" is amorphous.[20] Accordingly, whether the plaintiff has suffered a judicially cognizable injury is often bound up with the statutory or constitutional provision under which a plaintiff sues. For example, what counts as an actionable injury under the Equal Protection Clause depends on the substantive guarantees that the Equal Protection Clause establishes. Emphasizing the conceptual connections between judicially cognizable injuries and substantive law, Judge William Fletcher has argued (generally persuasively, in my view)[21] that people always have standing to seek redress for violations of their legal rights and that the central standing question is whether particular plaintiffs possess rights under particular statutory and constitutional provisions.[22]

Second, conceptual connections aside, judges notoriously uphold standing with greater frequency when they sympathize with claims on the merits than when they do not. One commentator has gone so far as to assert that lawyers can predict standing decisions "with much greater accuracy if they ignore doctrine and rely entirely on a simple description of the law of standing that is rooted in political science: judges provide access to the courts to individuals who seek to further the political and ideological agendas of judges."[23] Regardless of whether this claim is strictly correct, there is little doubt

[18] E.g., Raines v. Byrd, 521 U.S. 811, 830 (1997).

[19] E.g., id.

[20] See Cass R. Sunstein, What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 186–92 (1992) (identifying "conceptual confusion" surrounding "the metaphysics of injury").

[21] Although I find Judge Fletcher's account generally persuasive, I believe that it requires a small qualification, which I elaborate below, for cases in which plaintiffs seek standing based on a *threatened* rather than past or current violation of their rights. See infra text accompanying note 227.

[22] See Fletcher, supra note 1, at 223–24; see also Lee A. Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief, 83 Yale L.J. 425, 426 (1974) (assimilating the standing inquiry to the question of whether the plaintiff has a right to relief).

[23] Pierce, supra note 2, at 1742–43.

that sympathies regarding the merits sometimes influence standing determinations.[24]

Links between justiciability and the merits also occur within the political question doctrine. In finding that a case presents a nonjusticiable question, courts sometimes rule that a particular constitutional provision confers judicially unreviewable discretion on another branch of government.[25] A decision to this effect is in substance a ruling that the Constitution gives the plaintiff no judicially enforceable right.[26]

Commentators have also detected a penetration of merits concerns into jurisdictional determinations of whether a case is ripe for decision.[27] The contrast between cases presenting facial challenges to statutes under the First Amendment overbreadth doctrine and suits asserting "takings" claims is illustrative:

> [W]hile the first amendment allows citizens to attack regulations that may inhibit their speech even before such regulations have been enforced, the takings clause demands a showing by the challenger that the regulating authority has foreclosed all economically viable options. It is obviously more difficult, therefore, to present a ripe takings claim than a ripe first amendment challenge.[28]

[24] A recent study based on decisions dealing with taxpayer standing found that when the applicable doctrine is clear and effective appellate oversight exists, federal district courts render law-abiding and predictable decisions, but that Supreme Court decisions, which are subject to few institutional constraints, tend to reflect strategic considerations. See Nancy C. Staudt, Modeling Standing, 79 N.Y.U. L. Rev. 612, 616–17 (2004).

[25] See, e.g., Nixon v. United States, 506 U.S. 224, 228–29 (1993) (finding a "textually demonstrable commitment" to the Senate of responsibility to determine the constitutional requirements of an impeachment trial).

[26] See Herbert Wechsler, Principles, Politics, and Fundamental Law 11–12 (1961) ("[A]ll the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation.").

[27] See Hart & Wechsler, supra note 4, at 227–31.

[28] Nichol, supra note 1, at 167.

Because ripeness determinations have an explicitly discretionary element,[29] it also seems likely that judges' readiness to find a dispute ripe may partly reflect their sympathy toward plaintiffs' substantive claims.

Whereas some commentators have persuasively linked justiciability determinations to merits considerations, others have argued that concerns involving acceptable and unacceptable remedies sometimes drive purportedly antecedent judgments about substantive rights. Professor Daryl Levinson has developed the latter thesis with abundant illustrative detail.[30] Among his examples is the Supreme Court's decision in *Washington v. Davis*, which held that racially discriminatory effects do not violate the Equal Protection Clause in the absence of racially discriminatory intent.[31] Levinson writes: "By taking a process-oriented, colorblindness approach to racial equality, the Court has been able to avoid confronting substantive racial inequality and its terribly difficult remedial implications."[32]

Although Levinson's thesis is rich and provocative in its details, at its heart it states a proposition that many would regard as little more than common sense: In determining which claims to uphold on the merits, courts will almost irresistibly tend to peek ahead at the remedial consequences and weigh their acceptability.[33]

When Levinson's arguments are juxtaposed with those of commentators who believe that justiciability rulings are influenced by merits judgments, the result can be portrayed in schematic terms: Whereas numerous commentators argue that decisions at the second (merits) stage influence first-stage rulings on justiciability, Levinson maintains that decisions at the third (remedial) stage affect second-stage judgments on the merits. But the emerging portrait still leaves third-stage judgments about appropriate remedies generally disconnected from first-stage determinations concerning justiciability.

[29] See, e.g., Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967) (making the determination depend not only on the fitness of the issues for adjudication, but also on "the hardship to the parties of withholding court consideration").

[30] See Levinson, supra note 3, at 889–99.

[31] 426 U.S. 229, 247–48 (1976).

[32] Levinson, supra note 3, at 899.

[33] See Gewirtz, supra note 3, at 679.

B. The Connections Drawn

In a nutshell, the Remedial Influences on Justiciability Thesis posits the linkage that previous work connecting remedial concerns to substantive rights and substantive rights to justiciability has failed to establish: Implicit judgments about appropriate judicial remedies exert an important, almost pervasive influence on justiciability doctrines. So stated, the Remedial Influences on Justiciability Thesis asserts an empirical claim about positive law, and a principal goal of this Article is to establish its validity by adducing supporting evidence. I want to emphasize, however, that my claim for the validity of the Remedial Influences on Justiciability Thesis does *not* rest on a logical inference that if remedial concerns influence merits judgments, and merits concerns influence justiciability determinations, then remedial concerns must affect justiciability doctrine through something akin to the transitive property. Frequently, the influence of remedial concerns on justiciability doctrines is much more direct.

In both stating and supporting the Remedial Influences on Justiciability Thesis, I need to be clear about its relationship to the Equilibration Thesis, which holds that courts, and especially the Supreme Court, attempt to achieve an overall alignment of justiciability, substantive, and remedial doctrines that yields an optimal pattern of results; that when confronted with sub-optimal patterns, the Court will adjust the applicable law; but that it will frequently be an open choice whether to make the adjustment within justiciability, substantive, or remedial law. The Remedial Influences on Justiciability Thesis is an *aspect* of the broader Equilibration Thesis, and evidence supporting the former also supports the latter. Judgments about the shape and the application of justiciability doctrines, in common with judgments about merits and remedial doctrines, emerge from a tripartite process of equilibration in which judges, and especially Supreme Court Justices, attempt to bring doctrines governing justiciability, substantive rights, and judicial remedies into the most attractive overall alignment.

When a concern about remedies leads a court to reassess the currently prevailing doctrinal alignment, an adjustment can obviously occur within remedial doctrine, as the traditional, sharply dif-

ferentiated, three-stage model of a lawsuit would suggest.[34] Or courts can respond to the prospect of remedies that they deem unacceptable through the definition or redefinition of substantive rights. As a third option, however, as the Remedial Influences on Justiciability Thesis maintains, the judicial accommodation can exhibit itself in either the re-shaping or the application of justiciability rules.

C. Underlying Assumptions

Within the account that I offer, justiciability, substantive, and remedial doctrines enjoy partial or limited autonomy from one another. Once the doctrines are established, they have at least partly separate identities that not only shape our perceptions of, but actually help to define, legal reality. At the same time, however, there is often no necessary connection between the considerations that lead a court to alter the existing equilibrium of justiciability, merits, and remedial doctrines and the identity of the doctrine that the court will choose to revise.

This claim obviously depends on definitional assumptions, but my assumptions are wholly conventional and intended to be uncontroversial. In referring to justiciability doctrines, I mean those doctrines developed by courts to give content to Article III's limitation of federal jurisdiction to the adjudication of "cases" or "controversies."[35] Many involve proper parties—what Professor Henry Monaghan has termed the "who" of public law litigation.[36] Of these, standing possesses the greatest practical importance. Others involve timing—the "when" of adjudication. In crude terms, ripeness

[34] Under the doctrine of *Younger v. Harris*, for example, federal courts must dismiss suits seeking injunctions against pending state criminal prosecutions because prosecutions are important state functions with which the Supreme Court thinks lower federal courts should not interfere. 401 U.S. 37, 53 (1971). Doctrines of sovereign and official immunity similarly restrict and often bar the award of damages remedies against government and official defendants, largely based on concerns that damages awards could have untoward effects on important public interests. See Douglas Laycock, Modern American Remedies 456–57 (2d ed. 1994).

[35] See U.S. Const. art. III, § 2; see, e.g., Chemerinsky, supra note 2, §§ 2.1–2.6 (treating the prohibition against advisory opinions and the doctrines of standing, ripeness, mootness, and political question as involving "justiciability"); 1 Laurence H. Tribe, American Constitutional Law 311–464 (3d ed. 2000) (same).

[36] See Henry P. Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1364 (1973).

doctrine excludes some lawsuits as premature,[37] while mootness screens out other others as no longer proper for decision after changes in the facts that once framed an actionable dispute.[38] Finally, the political question doctrine stands by itself. Although this doctrine comprises numerous strands, its core elements exclude certain issues as unfit for judicial resolution.[39]

Beyond the threshold justiciability requirements loom "merits" issues about the substantive rights, if any, possessed by parties presenting justiciable claims. The Supreme Court recurrently distinguishes merits issues from those involving justiciability (or other elements of jurisdiction) and insists that courts determine merits issues only after upholding justiciability.[40]

Finally, conventional legal thought recognizes a category of remedies issues distinct from both justiciability questions and substantive rights. Remedial issues are those bearing on the availability of particular forms of relief for parties who have presented justiciable claims and whose rights have been violated.[41]

When justiciability, merits, and remedial doctrines are identified in these conventional terms, rights are distinguishable from remedies. The right to be free from unreasonable searches or seizures, for instance, stands independent of the diverse remedial mechanisms through which it might be enforced—including damages, injunctions, and the exclusionary rule. Justiciability issues can also be distinguished from questions involving the substantive rights that people have, at least in some cases. For example, although I have rights under the Fourth Amendment, I may have no standing to demand judicial enforcement of them, or my suit for an injunction may be unripe.

Just as my analytical framework assumes that justiciability, substantive, and remedial doctrines enjoy partial autonomy, it also assumes—again in reliance on conventional legal understandings—that we can sometimes, perhaps typically, make separate assess-

[37] See generally Hart & Wechsler, supra note 4, at 217–43 (discussing ripeness).
[38] See generally id. at 199–216 (discussing mootness).
[39] See Chemerinsky, supra note 2, § 2.6.1.
[40] See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93 (1998).
[41] According to the leading casebook on the subject, "[a] remedy is anything a court can do for a litigant who has been wronged or is about to be wronged." Laycock, supra note 34, at 1.

ments of the wisdom of those doctrines based largely on criteria that are distinctively appropriate to the respective categories. But it also assumes that concerns conventionally associated with any one category—whether that of remedies, merits, or justiciability—can influence judgments about what the law ought to be within another category.

To begin, consider a case involving substantive rights under the Fourth Amendment and the remedy afforded by the exclusionary rule. Suppose that I have a remedial concern: I think the exclusionary rule too costly to be justified because it allows too many dangerous criminals to escape punishment. Now suppose that, knowing the exclusionary rule will apply, I oppose an expansive substantive definition of the Fourth Amendment that I would have supported if the exclusionary rule did not exist. In the way that I shall use the term, this would count as a case in which concerns about unacceptable remedies—involving anxiety about too many criminals being released onto the streets (rather then becoming eligible to sue for damages, for example)—would influence a judgment on the merits.

The flow of influence can run in other directions. For example, substantive judgments can affect determinations about appropriate or acceptable judicial remedies. Suppose that plaintiffs bring an action challenging the constitutionality of a partisan gerrymander under the Equal Protection Clause.[42] Initially, I may think that it would be possible for courts to identify constitutional violations but that any judicial remedy would have unacceptably partisan implications: There are myriad ways in which constitutionally permissible voting districts might be drawn, and any choice among them would confer partisan advantage.[43] Suppose, however, that reflection persuades me that the underlying right is an exceptionally important one, which politicians are unlikely to respect, and that the need to vindicate the right ultimately justifies the award of judicial remedies, notwithstanding the hazards they present. In this case, merits concerns involving the existence and importance of a substantive right would affect a judgment about the necessity or acceptability of the remedy.

[42] See, e.g., Vieth v. Jubelirer, 541 U.S. 267, 271 (2004).

[43] Cf. id. at 292 (plurality opinion) ("The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for courts to say when a violation has occurred, *and to design a remedy*.") (emphasis added).

To take a final example, suppose that, even after my conversions to supporting the exclusionary rule and to believing that injunctive remedies for partisan gerrymanders are constitutionally and practically acceptable, I believe that injunctions restructuring police departments to ensure greater observance of constitutional rights are likely to prove disastrous in practice.[44] Suppose then that plaintiffs bring a suit alleging that they have suffered Fourth Amendment violations at the hands of a local police department in the past and that they fear more violations in the future. The plaintiffs seek an injunctive remedy. If, in reflecting on this case, I conclude that the courts should develop strict standing, mootness, and ripeness requirements as a way of limiting judicial intrusions into the management of police departments, the case would illustrate the influence of remedial concerns on a judgment about appropriate justiciability rules.

In all of the examples I have presented, as in many real cases that I shall discuss below, it could be objected that, as an analytical matter, it is ultimately impossible to distinguish remedial from merits from justiciability concerns. If, as the Equilibration Thesis maintains, the driving aspiration in each case is to get the optimal overall alignment of justiciability, substantive, and remedial doctrines, then all of the judgments discussed above might be thought to involve the overall package of rights, remedies, and justiciability, and no apprehension of unacceptability, for example, could be assigned other than arbitrarily to the category of distinctively *remedial* unacceptability. Although I have considerable sympathy for this view, it is too far removed from the normal operating assumptions of legal discourse to provide a useful framework for explaining how courts develop and apply legal doctrines. Despite the force of the analytical objection, I shall therefore assume that judges and other participants in legal debates begin with rough categorical divides among their concerns involving the substantive merits of a legal issue, the requirements of justiciability, and appropriate remedies. These divides are provisional, and sometimes they may blur at the edges, but they function as important starting points for legal analysis.

[44] For discussion, see infra note 248 and accompanying text.

II. THE REMEDIAL INFLUENCES ON JUSTICIABILITY THESIS

This Part elaborates, qualifies, and then applies the Remedial Influences on Justiciability Thesis. After first exploring the kinds of remedial concerns that influence the Supreme Court's decisions about justiciability, it identifies the three principal ways in which remedial concerns manifest themselves in justiciability doctrine, then refines and qualifies the statements of the Remedial Influences on Justiciability Thesis that I have offered thus far. A concluding Section demonstrates not only the thesis's validity, but also its illuminating power, by applying it to leading justiciability doctrines such as political question, standing, mootness, and ripeness.

A. The Types of Remedial Concerns That Influence Justiciability

The concerns or judgments about judicial remedies that help to shape justiciability doctrine divide into two general categories. First, some justiciability doctrines screen out cases presenting demands for remedies that the Supreme Court regards as practically or constitutionally *unacceptable*, typically due to their anticipated costs or intrusiveness. Second, a number of important exceptions to otherwise applicable justiciability doctrines reflect judicial judgments that particular remedies are *necessary* as a practical matter for constitutional guarantees to be enforced effectively.

To be sure, judgments of remedial necessity are obviously influenced by, and sometimes cannot be wholly distinguished from, merits judgments about the existence and importance of particular substantive rights. Indeed, even judgments of remedial unacceptability may be conditioned on a determination that the underlying right is not sufficiently important to warrant a remedy that might be acceptable if another right were at stake. These are important points, encompassed by the Equilibration Thesis, that help explain how and why courts might seek an acceptable overall equilibration of justiciability, merits, and remedial doctrines. Nevertheless, the fact remains that the considerations shaping legal judgments sometimes present themselves conventionally or phenomenologically in remedial terms. Some judicial remedies would be too costly or intrusive to count as acceptable, whereas others commend themselves as practically necessary. What is more, justiciability doctrines broadly, if not pervasively, reflect these concerns.

1. Anxieties about Unacceptable Remedies

Concerns that particular remedies would be constitutionally or practically unacceptable divide into two subcategories that appear on the surface to represent polar forms of excess. At one extreme, the Supreme Court disfavors, and crafts justiciability doctrines to avoid, remedies that it regards as excessively costly or intrusive. At the other extreme, the Court deems judicial remedies to be unacceptable if they likely would prove ineffectual. Where no effective remedy could issue, a dispute is nonjusticiable. Upon closer examination, the seemingly polar anxieties turn out to be more complexly interrelated than appearances suggest.

a. Cost or Intrusiveness of Remedies as a Basis for Limiting Justiciability

A number of justiciability doctrines reflect anxieties that the remedies sought by plaintiffs, if granted, would prove excessively costly, intrusive, or otherwise practically or constitutionally objectionable. One illustration involves the political question doctrine, under which courts sometimes take the difficulty of fashioning remedies expressly into account in determining whether a dispute is justiciable.[45]

An even more important illustration of the relevance of remedial concerns to justiciability doctrines involves the Supreme Court's use of standing rules to avoid the award of remedies that would effect unacceptable intrusions on decisionmaking by executive officials—a point perhaps implicit in the Supreme Court's portrayal of its standing requirements as an effort to work out the implications of the constitutional separation of powers.[46] An especially vivid example of this use of standing comes from *City of*

[45] See, e.g., Vieth v. Jubelirer, 541 U.S. 267, 292 (2004); Nixon v. United States, 506 U.S. 224, 236 (1993); cf. Louis Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597, 622–23 (1976) (arguing that the political question doctrine is an "unnecessary, deceptive packaging of several established doctrines" including those establishing the ability of courts to "refuse some (or all) remedies for want of equity").

[46] See Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3."); Allen v. Wright, 468 U.S. 737, 750–51 (1984).

Los Angeles v. Lyons.[47] After being stopped for a traffic violation, Adolph Lyons was subjected to a life-threatening chokehold by Los Angeles police, allegedly as part of a policy that had caused the death of sixteen people within the previous eight years. When Lyons responded with a federal civil rights action in which he sought both damages and injunctive relief, the Supreme Court allowed the suit for damages, but it held that he lacked standing to sue for an injunction. According to the Court, by the time that Lyons filed his suit, he no longer suffered any continuing injury that equitable relief could redress, and it was "no more than speculation" that he faced a sufficient current threat of being choked by the police again.[48] Although he could seek damages for his past injury, the potential threat of future harm was not sufficiently likely to warrant standing to seek an injunction.[49]

The Court's decision to uphold Lyons's standing to sue for damages, but not for an injunction, reveals volumes. In assessing whether an injunction could issue under traditional equitable principles, the Court said expressly that "[r]ecognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws . . . ."[50] It is hard not to believe that similar concerns about the peculiar intrusiveness of injunctive remedies influenced the Court's disparate rulings with respect to standing. Damages were a less intrusive and, therefore, more acceptable remedy than an injunction, and the Court's standing analysis reflected this distinction.

The connection between standing and remedies that emerges from *Lyons* has far broader relevance. Standing issues almost never arise in suits for damages.[51] By contrast, standing and other

[47] 461 U.S. 95 (1983).
[48] Id. at 108–09.
[49] Id. at 105, 109.
[50] Id. at 111–12.
[51] Cf. Texas v. Lesage, 528 U.S. 18, 21 (1999) (per curiam) (holding that a rejected applicant challenging an affirmative action program had established "no cognizable injury warranting [damages] relief" when it was undisputed that he would not have been admitted in the absence of the program, even though an applicant would have standing to sue for injunctive relief based simply on "the inability to compete on an equal footing") (citation omitted). For discussion, see Ashutosh Bhagwat, Injury Without Harm: *Texas v. Lesage* and the Strange World of Article III Injuries, 28 Hastings Const. L.Q. 445, 453–54 (2001).

justiciability issues occur with relative frequency in suits for injunctions—the cases in which concern about the acceptability of remedies tends to be greatest, partly for reasons involving the courts' doubtful competence to engage in prospective regulation of complex institutions and partly for reasons involving federalism and the separation of powers.[52] As *Lyons* illustrates, even when a court can decide a claim on the merits (and potentially award damages), there may be a further concern about the acceptability of injunctive remedies, and that concern may manifest itself in justiciability doctrine.[53]

Although I shall offer many more examples below of cases in which courts shape justiciability doctrines in light of concerns about the practical unacceptability of injunctive remedies, before moving on I want to emphasize the conceptual point that apprehensions about the unacceptability of remedies can be, and often are, distinct from the acceptability of a court deciding an issue on the merits. Some of the clearest illustrations come from doctrines of sovereign and official immunity, which sometimes block plaintiffs from obtaining damages in suits against governments and their officials.[54] Although the Supreme Court regards injunctions as less acceptable than damages in some contexts (including that of *Lyons*), in other contexts it allows suits for injunctions where actions for money damages—which could threaten the public fisc[55] or deter able candidates from accepting public office[56]—would be barred.[57] Doctrines of sovereign and official immunity thus reflect a judgment that damages remedies are unacceptable, even when there is

[52] See, e.g., William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 637, 644–45 (1982); Paul J. Mishkin, Federal Courts as State Reformers, 35 Wash. & Lee L. Rev. 949, 964–65 (1978); Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 674–75 (1978).

[53] *Lyons*, 461 U.S. at 109; see also Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

[54] See Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1779–87 (1991).

[55] See, e.g., Alden v. Maine, 527 U.S. 706, 750 (1999).

[56] See Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[57] See Laycock, supra note 34, at 456–57.

no objection to resolving underlying issues of legal rights and obligations in suits for injunctions.[58]

b. Minimally Effective Remedies as a Requirement of Justiciability

Whereas some elements of justiciability doctrine reflect anxieties about judicial remedies that would be excessively intrusive, others express the judgment that a wholly ineffectual judicial remedy should be deemed equally unacceptable. For a dispute to be justiciable at all, a court must be satisfied that, if the plaintiff were to prevail, it could grant a remedy that would (1) cause or forestall action by the defendant and (2) thereby leave the plaintiff better off than he or she would have been without judicial intervention. This demand for effective remedies helps explain the prohibition against advisory opinions.[59] The demand for effective remedies is also evident in the prong of standing doctrine that requires plaintiffs to show a "redressable" injury[60] and in the demand of mootness doctrine that the plaintiff retain a "personal stake"[61]—which in essence means a redressable injury—throughout the duration of litigation.[62]

[58] See Laycock, supra note 5, at 77–78; cf. Pamela S. Karlan, The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983, 53 Stan. L. Rev. 1311, 1329 (2001) (noting that "the Court may have replaced one array of constraints on state action with another, perhaps even more intrusive, set" since "[i]t is by no means clear that enforcing rights injunctively is categorically more protective of a state's sovereignty than enforcing them through damages actions").

[59] See Thomas Healy, The Rise of Unnecessary Constitutional Rulings, 83 N.C. L. Rev. 847, 897 (2005) (ascribing the prohibition against advisory opinions to an "effect principle" under which "courts may issue only rulings that will have some effect on the parties . . .")

[60] See, e.g., Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

[61] See, e.g., Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 189–92 (2000) (discussing the requirement of a personal stake in both standing and mootness doctrine); DeFunis v. Odegaard, 416 U.S. 312, 316–17 (1974) (asserting "the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them'" and dismissing a suit as moot on the ground that "in no event will the status of [the plaintiff] be affected by any view this Court might express on the merits") (citation omitted).

[62] See Healy, supra note 59, at 897–98 (noting that standing and mootness doctrine predicate justiciability on the potential that judicial rulings will have an "effect" on the parties).

c. The Sometime Elusiveness of a Golden Mean

On the surface, the concerns about remedies that are unacceptably intrusive and about those that are ineffectual might appear to reflect apprehensions about opposing vices of excess, one involving remedies that do too much and the other involving remedies that do too little. In fact, the two concerns frequently overlap in cases in which a plaintiff seeks an injunction that would almost certainly alter a defendant's behavior, and would thereby alleviate threats and attendant psychological injuries experienced by some members of the public, but would not necessarily relieve any current material injury or any reasonably likely future material injury to the plaintiff who brought the lawsuit. *City of Los Angeles v. Lyons* illustrates this paradigmatic state of affairs.[63] Part of the Supreme Court's expressed worry was that an injunction would not redress any current injury to Adolph Lyons. Just as clear, however, was the Court's anxiety that an injunctive remedy, although it would have been effective in averting future injuries to other members of the public, would have intruded excessively on the management of the city's police department.

What, then, was the precise nature of the remedial concern that led the Court to deny Lyons's standing to seek an injunction? Was it that an injunction (in comparison with money damages) would be ineffectual? That it would be too intrusive? Or some combination of the two? I shall return to this question below.

2. Justiciability to Accommodate Felt Needs for Remedies

If worries about unacceptable remedies sometimes lead to restrictive justiciability doctrines, the practical desirability of judicial remedies may explain various exceptions to those doctrines that permit the adjudication of otherwise nonjusticiable claims. Perhaps the most potent example emerges from third-party standing doctrine, which usually denies, but sometimes authorizes, the award of remedies to parties whose personal rights have not been violated.[64] First Amendment overbreadth doctrine, which sometimes permits litigants to obtain relief on the ground that a statute would be un-

[63] 461 U.S. 95, 111–12 (1983).

[64] See Hart & Wechsler, supra note 4, at 170–80.

constitutional as applied to other parties not before the court, furnishes another, closely related example of a context in which the perceived desirability of remedies shapes justiciability rules.[65] In the absence of remedies for parties whose own rights are not at stake, the courts fear that actual right-holders would be chilled from exercising their rights or that constitutional guarantees would go unenforced.[66]

B. Varieties of Remedial Influence

Although I have staked a claim that concerns about necessary and unacceptable remedies broadly influence justiciability doctrines, I have not yet attempted to chart the ways in which they make their influence felt. Remedial concerns manifest themselves in justiciability doctrine in at least three ways.

1. Trans-substantive Rules

Trans-substantive justiciability rules reflect determinations that particular remedies would be unacceptable unless specified conditions are satisfied, regardless of the substantive right at issue. Examples come from the redressable injury requirements of standing and mootness doctrine. On a nearly categorical basis, the Supreme Court has determined that injunctive remedies are unacceptable unless they would likely redress a current injury suffered by the plaintiff (even if the injunction would avoid harms to others).[67]

2. Doctrines Peculiarly Affecting the Enforcement of Particular Substantive Rights

In other cases, remedial concerns shape justiciability doctrines that govern only a defined category of claims to enforce particular constitutional rights. The most obvious example comes from the political question doctrine. Sometimes relying specifically on the

[65] See infra notes 151–62 and accompanying text.

[66] See generally Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247, 278–95 (1988) (discussing the judicial provision of "deterrent remedies" designed more to prevent official misconduct than to rectify harms to their beneficiaries).

[67] See, e.g., Warth v. Seldin, 422 U.S. 490, 499 (1975).

difficulty of fashioning relief, the Supreme Court has held that claims under particular constitutional provisions are nonjusticiable because they are committed to other branches or because there are no judicially manageable standards for resolving them.[68] Another example comes from First Amendment overbreadth doctrine and related doctrines that permit plaintiffs to have statutes declared facially invalid and thus wholly unenforceable.[69] In effect the Supreme Court grants plaintiffs standing to enforce some constitutional guarantees—but not others—by arguing that a statute would be unconstitutional as applied to parties not before the court.

3. Ad hoc Doctrinal Manipulation

A final mode by which remedial concerns influence determinations of justiciability is, for want of a better term, ad hoc manipulation. Many observers believe the manipulation of justiciability doctrine to be rampant.[70] Virtually no one thinks it nonexistent. Sometimes manipulation occurs because a court wants to avoid resolving a hard constitutional issue on the merits.[71] But sometimes it seems clear that what a court wants to avoid is not so much the substantive issue in a case as the remedy that resolution of the issue would trigger—particularly if the requested remedy is an injunction that would interfere with sensitive, discretionary decisionmaking.[72]

C. Relation to Other Considerations

In advancing the Remedial Influences on Justiciability Thesis, I do not claim that concerns about necessary and appropriate remedies explain every element or application of justiciability doctrine. Other considerations play a role. Nonetheless, no theory that ignores remedial concerns can explain all aspects of justiciability law.

[68] See infra notes 91–102 and accompanying text.

[69] See infra notes 151–62 and accompanying text.

[70] See, e.g., sources cited supra note 2.

[71] See Richard H. Fallon, Jr. & Paul C. Weiler, Firefighters v. Stotts: Conflicting Models of Racial Justice, 1984 Sup. Ct. Rev. 1, 7–8 (1985).

[72] A number of controversial Supreme Court decisions denying justiciability fit this paradigm. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983); Rizzo v. Goode, 423 U.S. 362, 378–79 (1976); O'Shea v. Littleton, 414 U.S. 488, 498–99 (1974).

1. Historic Limits

Notions of necessary and unacceptable judicial power obviously have historical foundations. One function of justiciability doctrines is to define the judicial role within the constitutional separation of powers. In the view of some courts and commentators, the doctrines identifying justiciable cases both should, and substantially do, reflect historic understandings. Justice Frankfurter argued that the only disputes justiciable in federal court were those that could have been heard in the courts of Westminster in the eighteenth century.[73] Justice Harlan worried that allowing "unrestricted public actions," or adjudication of disputes equally affecting the interests of large groups of citizens in maintaining governmental adherence to legal norms, would "go far toward" transforming the federal courts into "the Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention."[74] Views of this kind loosely coalesce to support a "dispute resolution" or "private rights" model of constitutional adjudication in which justiciability doctrine adheres closely to historic understandings of the role of courts in resolving disputes.[75] According to this model, justiciability rules should generally restrict judicial involvement to controversies in which a defendant has caused distinct and palpable injury to economic interests or other rights protected at common law.[76]

[73] See Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J.); see also Robert J. Pushaw, Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 Cornell L. Rev. 393, 458–63 (1996) (arguing that modern justiciability doctrines derive largely from the inventions of Justice Frankfurter, who relied on flimsy historical evidence in claiming that early constitutional understandings sharply limited judicial interference with the political branches).

[74] Flast v. Cohen, 392 U.S. 83, 130 (1968) (Harlan, J., dissenting).

[75] See Hart & Wechsler, supra note 4, at 67–68; see also Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?, 102 Mich. L. Rev. 689, 691 (2004) (arguing that the foundations of modern standing doctrine lie in a historical distinction between "public" and "private" rights).

[76] I do not mean to endorse the historic accounts advanced by proponents of the private rights model in all of its particulars. See, e.g., Raoul Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L.J. 816, 827 (1969) (maintaining that when the Constitution was adopted, "the English practice" on which American practice was modeled sometimes allowed "strangers to attack *unauthorized action*"); Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1396–97 (1988) (arguing that before the twentieth century, courts granted relief whenever the forms of action provided a remedy, and that some of the prerogative writs allowed suits by persons without a personal

The private rights model, which seeks to limit judicial power by enforcing historically rooted notions of a justiciable lawsuit, possesses continuing resonance.[77] But historical practice is not the sole determinant of modern justiciability doctrines, as demonstrated most vividly by developments often grouped under the rubric of public law litigation. Among the factors that have exerted pressure for less restrictive justiciability doctrines is the increase in governmental regulation, which has generated a perceived need for judicial oversight of administrative power. Initially in response to statutes authorizing judicial review, by the 1940s the Supreme Court had upheld the standing of persons lacking rights protected at common law to represent the "public interest" in statutory enforcement.[78]

In ways that the Equilibration Thesis attempts to model, substantive expansions of constitutional rights have also forced compromises of the private rights model. For example, the Supreme Court's one-person, one-vote cases[79] and its decisions recognizing broadly shared rights to freedom from government action that violates the Establishment Clause[80] necessarily predicate standing on interests different from those historically protected at common law. In the quest for a doctrinal equilibrium that is acceptable overall, acknowledgments of justiciability sometimes flow almost necessarily from recognition of rights. Similarly, changed understandings of the nature of constitutional rights have required adjustments in the law of justiciability. Whereas constitutional rights were once understood mostly as "shields" against governmental coercion, in the twentieth century they increasingly came to be viewed as "swords" authorizing injunctive relief that inevitably entailed judicial intrusion into executive and legislative decisionmaking.[81]

stake); cf. Woolhandler & Nelson, supra note 75, at 691 (arguing that although history does not determine modern justiciability doctrine in all of its particulars, historical practice does not reveal modern justiciability doctrine as groundless).

[77] See Hart & Wechsler, supra note 4, at 71–72.

[78] See, e.g., Scripps-Howard Radio v. FCC, 316 U.S. 4, 15 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476–77 (1940).

[79] See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964).

[80] See, e.g., Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 224–25 (1963) (holding public school prayer unconstitutional).

[81] See Hart & Wechsler, supra note 4, at 69–70.

When juxtaposed with accounts that emphasize the importance of historic understandings in determining justiciability doctrines, the Remedial Influences on Justiciability Thesis functions as an important corrective. Together, the Remedial Influences on Justiciability and the Equilibration Theses help to explain why modern law has moved beyond the private rights model in many respects: Recognition of new rights and the felt imperative to award novel remedies have forced adjustments in justiciability law.[82] Doctrines governing rights, remedies, and justiciability must be brought into an acceptable alignment, and when both substantive rights and perceived needs for judicial remedies expand, the pressure of those developments exerts itself within the law of justiciability. At the same time, the Remedial Influences on Justiciability Thesis, which holds that concerns about constitutionally and practically *unacceptable* remedies influence the shape of justiciability doctrine, helps to explain many limits on justiciability that the Supreme Court continues to enforce. Claims to remedies that courts regard as constitutionally or practically unacceptable are frequently barred, not only by expressly remedial doctrine, but also by doctrines governing standing, ripeness, and so forth.

2. Functional Desiderata of Sound Adjudication

In designing and applying justiciability doctrines, courts undoubtedly strive to procure the functional desiderata of sound adjudication.[83] Courts have long taken for granted that concrete facts help sharpen issues for decision.[84] This consideration underlies the demand of standing doctrine that plaintiffs assert a concrete, palpable injury. It also helps to explain ripeness doctrine, especially in its application to challenges to broad governmental policies, the ef-

[82] A textbook example comes from the juxtaposition of *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923), which denied taxpayer standing to challenge a federal spending program as beyond Congress's power, with *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968), in which the Warren Court upheld federal taxpayer standing to challenge a federal appropriation under the Establishment Clause. See Hart & Wechsler, supra note 4, at 127–28 (associating *Frothingham* with the private rights model and *Flast* with a competing public rights model).

[83] Richard H. Fallon, Jr., Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of *Lyons*, 59 N.Y.U. L. Rev. 1, 51 (1984).

[84] See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

fects of which may not yet have manifested themselves. The demand for a concrete injury may reduce an amorphous and therefore intractable dispute to more definite and manageable proportions. The Supreme Court has also said repeatedly that demanding that the parties have a "personal stake" in litigation elicits the benefits of adversary presentation of evidence and argument.[85] A desire to attain these benefits finds expression in standing, ripeness, and mootness doctrine, as well as in the longstanding prohibition against collusive litigation.[86]

Clearly, however, the presence of sharply defined facts and concrete adversaries will not always suffice for justiciability, particularly in contexts in which requested injunctive or declaratory relief threatens to be practically or constitutionally unacceptable. Concerns about remedial acceptability, as modeled by the Remedial Influences on Justiciability Thesis, thus supplement, rather than supplant, justiciability requirements designed to establish the functional prerequisites of sound adjudication.

3. Constitutional Avoidance

The Supreme Court frequently proclaims its adherence to a doctrine of "constitutional avoidance."[87] In a famous articulation, this doctrine holds that courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."[88] It lies beyond question that a number of justiciability doctrines further, and are designed to promote, interests in constitutional avoidance.[89]

Significantly, however, interests in avoiding unacceptable remedies are sometimes distinct from interests in avoiding unnecessary

[85] Id.

[86] See, e.g., United States v. Johnson, 319 U.S. 302, 305 (1943) (quoting Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

[87] See generally Hart & Wechsler, supra note 4, at 85–90.

[88] Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944).

[89] See Allen v. Wright, 468 U.S. 737, 752 (1984) (asserting that "questions . . . relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity'") (citation omitted); Healy, supra note 59, at 922–23; see also Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 304 (1979) (arguing that the "restraint" achieved by standing doctrine involves the allocation of judicial power among courts over time).

decisions of constitutional issues on the merits, as *Lyons* again illustrates. Even though a court could rule on the substantive validity of the police department's chokehold practices in adjudicating Lyons's claim for damages, concerns about the acceptability of an injunctive remedy led the Supreme Court to deny Lyons's standing to seek an injunction.

Some further theory is needed, too, to explain the myriad contexts in which modern constitutional doctrine eschews avoidance[90] and, for example, grants standing to third parties to assert the rights of others not before a court. The Remedial Influences on Justiciability Thesis provides at least a partial explanation by emphasizing the pertinence of felt needs for judicial remedies to ensure that certain rights receive effective vindication in practice, even when decision of the underlying issues is not strictly necessary to vindicate the personal rights of the parties before the court.

D. Further Qualifications

The Remedial Influences on Justiciability Thesis is admittedly less sharply defined and falsifiable than a theory ideally would be. First, I cannot state robustly independent criteria for identifying unacceptable remedies. History gives some guidance, but it does not always control. As the burgeoning of public law litigation in the twentieth century illustrated, courts have to weigh diverse considerations that do not yield themselves to any clear formula in determining which remedies are acceptable and which not. As a result, assertions that particular doctrines reflect concerns about

[90] A strict policy of avoidance would call for the harmfulness of alleged errors to be decided at the threshold before a court had made the potentially avoidable determination whether a constitutional violation had occurred at all. Under harmless error rules and analogous doctrines, however, courts sometimes decide constitutional issues first, and then determine whether identified violations should be deemed harmless. See, e.g., Lockhart v. Fretwell, 506 U.S. 364, 369 n.2 (1993) ("Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed."). An even more extreme departure from the avoidance canon comes in cases in which governmental officials, who are sued for damages in their official capacities, claim the defense of "qualified immunity," under which they will generally escape liability unless they violated "clearly established" federal rights. When an official asserts an immunity defense, the Supreme Court has directed lower courts to decide first whether a plaintiff has stated a valid constitutional claim and, if so, only then to determine whether the plaintiff's rights were "clearly established" at the time of the alleged violation. See Saucier v. Katz, 533 U.S. 194, 200 (2001).

unacceptable remedies cannot always be supported by rigorous proofs. Argument necessarily takes the form of appeal to informed intuition.

Second, there will be many cases in which one cannot wholly separate concerns about the acceptability of remedies from concerns about the acceptability of recognizing asserted rights. Distinguishing remedial from substantive considerations may be especially difficult in cases in which courts deny justiciability based on worries that no possible remedy would be both effective and practically acceptable. If no possible remedy would be acceptable, then the recognition of a new constitutional right would probably not be acceptable either. Even in such cases, focus on remedial implications may play a crucial role in driving the substantive decision, but substantive and remedial concerns are not sharply distinct.

Third, the Remedial Influences on Justiciability Thesis is diffuse. As I have noted, remedial concerns manifest themselves in justiciability doctrine in diverse ways—sometimes in trans-substantive rules that apply regardless of the right being claimed, sometimes in doctrines that govern the justiciability of some substantive claims but not others, and sometimes through doctrinal manipulation. In addition, as the Equilibration Thesis emphasizes, not every concern about the unacceptability of remedies reveals itself in justiciability doctrine at all. Accordingly, it is impossible to say that justiciability doctrines systematically track judgments about acceptable remedies.

If, however, one is prepared to accept the limited precision that the nature of the subject permits, the thesis that justiciability doctrines are deeply influenced by concerns about judicial remedies seems almost self-evidently true—even if it has seldom been stated expressly.

E. Demonstration Through Application

With the Remedial Influences on Justiciability Thesis now having been elaborated, the next challenge is to establish its empirical validity, and simultaneously demonstrate its illuminating power, by examining particular justiciability doctrines in greater detail and by identifying their responsiveness to concerns about necessary and acceptable remedies.

1. Political Question

In determining whether a dispute constitutes a nonjusticiable political question, the Supreme Court regularly recites a test first laid out in *Baker v. Carr*:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[91]

In administering these criteria, the Court sometimes takes remedial considerations expressly into account in holding that disputes under particular constitutional provisions present nonjusticiable political questions. In *Nixon v. United States*, though formally deciding that responsibility for determining the requirements of an impeachment trial was "textually demonstrabl[y] commit[ted]" to the Senate, not the judiciary, the Court cited "the difficulty of fashioning relief" as a consideration that "counsel[ed] against justiciability."[92] This difficulty had obvious reference to constitutionally and practically acceptable remedies. No insurmountable awkwardness would have attended a ruling that simply set aside the Senate's judgment of conviction[93] and awarded back pay or directed the continuing payment of an impeached official's salary.[94] The concern involved the constitutional or practical unacceptability of a judicial order to reinstate an official that the House had impeached and the

[91] Baker v. Carr, 369 U.S. 186, 217 (1962).
[92] 506 U.S. 224, 229, 236 (1993).
[93] See id. at 236.
[94] Cf. Powell v. McCormack, 395 U.S. 486, 549–50 (1969) (rejecting various justiciability challenges to an action seeking a declaration of entitlement to back pay by a former member of the House of Representatives whom the House had voted to exclude from his seat during a prior session).

Senate had convicted, especially since "opening the doors of judicial review . . . would 'expose the political life of the country to months, or perhaps years, of chaos'" in the case of a presidential impeachment.[95]

Whereas concerns about acceptable remedies sometimes lead to determinations that all claims alleging a particular constitutional violation are nonjusticiable, in other cases political question rulings depend directly on the remedy that a plaintiff seeks. A comparison of *Gilligan v. Morgan*[96] with *Scheuer v. Rhodes*[97] illustrates how the nature of the requested relief can influence justiciability. Both cases arose from an incident in which members of the Ohio National Guard killed a number of civilians at Kent State University. In *Gilligan*, in which members of the Kent State student government sought an injunction ordering changes in the Guard's supervision and organization, the Court invoked the political question doctrine. Chief Justice Burger's opinion found virtually all of the *Baker* criteria to be satisfied, but it emphasized the absence of judicially manageable standards.[98] In *Scheuer*, by contrast, the Court ruled that *Gilligan* did not preclude suits for damages by the victims' estates.[99] The difference between the cases lay in the nature of the relief that the parties sought: The Court apparently regarded damages as less practically and constitutionally problematic than injunctive relief.

2. Standing

Although the Supreme Court has not articulated the requirements of standing doctrine with perfect consistency, it almost invariably states three demands attributable to Article III:

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and

[95] *Nixon*, 506 U.S. at 236 (citation omitted); see also Vieth v. Jubelirer, 541 U.S. 267, 287–88 (2004) (finding challenges to partisan gerrymanders nonjusticiable due to the absence of "judicially manageable" standards, including standards for fashioning an acceptable judicial remedy).

[96] 413 U.S. 1 (1973).

[97] 416 U.S. 232 (1974).

[98] *Gilligan*, 413 U.S. at 10 (noting that "it is difficult to conceive of an area of governmental activity in which the courts have less competence").

[99] See *Scheuer*, 416 U.S. at 249.

> particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[100]

The Court has frequently deployed the first and third of these requirements—involving injury and redressability—to address remedy-based concerns.

a. The Injury Requirement

Despite its centrality in modern standing jurisprudence, the concept of injury is notoriously elusive, especially as applied to "noneconomic injuries."[101] A representative contrast illustrates some of the difficulties. In *Allen v. Wright*, parents of black public school children complained that government officials subjected them to "stigmatic injury, or denigration" by failing to enforce laws denying tax benefits to racially discriminatory private schools.[102] Deeming the asserted injury too "abstract," the Supreme Court denied standing.[103] By contrast, the Court upheld standing in *Heckler v. Mathews*, in which male plaintiffs challenged a provision of the Social Security Act under which women received higher benefits than men.[104] Because a severability clause provided that women should receive the same lesser awards as men if a court found the disparity unconstitutional, the plaintiffs could achieve no material benefit from a decision in their favor.[105] The Court upheld standing nonetheless, based on the notion that the disparate treatment injured the men by "perpetuating 'archaic and stereotypic notions.'"[106]

Distinctions such as this are too thin to carry much credibility. When the Court denies claims to standing such as those in *Allen* while upholding claims such as those in *Heckler*, it makes "a judgment based not on any fact" of injury that is discernible through

[100] Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 180–81 (2000).
[101] See, e.g., Heckler v. Mathews, 465 U.S. 728, 739 (1984).
[102] 468 U.S. 737, 753–54 (1984).
[103] Id. at 755–56.
[104] 465 U.S. at 735.
[105] Id. at 734, 736–37.
[106] Id. at 739–40 (citation omitted).

empirical or psychological inquiry, but on other considerations.[107] As others have emphasized, it seems likely that the Supreme Court's central, underlying concern in cases such as *Allen* and *Mathews* involves the substantive merits of the plaintiffs' underlying claims.[108] In *Mathews*, the Equal Protection Clause gave the plaintiffs a right to challenge a law that distinguished on the basis of sex and accorded them less favored treatment. In *Allen*, by contrast, it is at least more doubtful that the Equal Protection Clause gave one party the right to challenge government officials' nonenforcement of the tax laws against someone else.

But the question whether plaintiffs have a substantive right inevitably bleeds into questions about constitutionally and practically acceptable remedies. In *Mathews*, the Court was asked to enjoin the direct enforcement by government officials of a facially discriminatory law. In *Allen*, by contrast, the Court was asked to grant an injunction intruding on the executive's traditional discretion about whether and how to enforce the law, not against the plaintiff but against the public generally. Justice Scalia has argued repeatedly that injunctions compelling the executive to enforce the law against third parties represent unconstitutional interferences with the President's power to "take Care that the Laws [are] faithfully executed."[109] Regardless of whether this categorical claim ultimately deserves to be accepted,[110] injunctions directing the executive to enforce the law against third parties raise distinct, sometimes troublesome issues—potentially dispositive in the mind of

[107] Sunstein, supra note 20, at 189.

[108] See, e.g., Fletcher, supra note 1, at 239 ("The essence of a standing inquiry is thus the meaning of the specific statutory or constitutional provision upon which the plaintiff relies . . . .").

[109] U.S. Const. art. II, § 3; see, e.g., Fed. Election Comm'n v. Akins, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting); Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992); see also Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 894 (1983) (arguing that standing law should exclude courts from the "undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*"). For critical commentary, see Gene R. Nichol, Jr., Justice Scalia, Standing, and Public Law Litigation, 42 Duke L.J. 1141, 1142–43 (1993).

[110] Cf. Sunstein, supra note 1, at 1471 (terming the Take Care Clause "a duty, not a license" and finding "no usurpation of executive prerogatives in a judicial decision" enforcing the President's duty).

Justice Scalia as well as other Justices—involving practically and constitutionally acceptable remedies.[111]

If remedial concerns are present, as Justice Scalia has argued that they should be, the amorphous character of the concept of injury makes it almost inevitable that those concerns will sometimes penetrate the Court's standing analysis, especially in cases involving non-economic injuries in which the only plausible remedy will be an injunction.[112] For Justices who believe an injunctive remedy to be practically unacceptable, an obvious solution to the looming remedial dilemma is to determine that the plaintiff has not shown an injury in fact.

Whereas the plaintiffs in *Mathews* and *Allen* brought suit directly under the Constitution, in recent years some of the largest battles over standing doctrine's injury requirement have involved congressional efforts to authorize "citizen suits" to enforce federal statutes such as environmental laws.[113] Sometimes the supporting theory holds that plaintiffs possess standing because Congress has "creat[ed] legal rights, the invasion of which" constitutes injury.[114] Sometimes the notion is that Congress merely "elevat[es] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[115] In either case, it seems clear that disputes about judicially cognizable injuries are a surrogate for larger concerns rooted in anxieties about unacceptable remedies.

In the case of suits to enforce the environmental laws, there is often no question about Congress's authority to impose duties on

[111] The Supreme Court has resisted suits seeking to compel enforcement of the law against third parties in other contexts, most notably through its insistence that agency decisions not to take enforcement action are discretionary and thus not generally reviewable under the Administrative Procedure Act. See Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).

[112] See Douglas Laycock, The Triumph of Equity, 56 Law & Contemp. Probs. 53, 64 (1993) (noting that because the value of non-economic rights is often impossible to quantify, the only plausible remedy in suits to enforce non-economic rights will often be an injunction).

[113] Compare Sunstein, supra note 20, at 209–33 (defending citizen suits) with Harold J. Krent & Ethan G. Shenkman, Of Citizen Suits and Citizen Sunstein, 91 Mich. L. Rev. 1793, 1806 (1993) (contending that congressional interest in law enforcement is an insufficient basis for overriding considerations of political accountability, which are implicit in Article II).

[114] See *Lujan*, 504 U.S. at 578 (citation omitted).

[115] Id.

private parties not to engage in air and water pollution.[116] Congress also possesses undoubted power to authorize enforcement actions by the government. In suits by the government, courts characteristically make no inquiry into injury.[117] If the injury requirement is either waived or given a lax interpretation in enforcement actions brought by government officials, why not also in cases brought by private parties pursuant to statutory authorization?

The answer must be that some of the Justices either see, or for instrumental reasons want to maintain, a constitutional distinction between public remedies and private remedies—that is, between remedies available to public law enforcement officials and remedies available to private citizens.[118] There are at least two related reasons why the distinction between public and private enforcement might matter. One involves liberty:[119] The availability of private suits would increase the likelihood that enforcement actions will occur and, as a result, would cause more potential defendants to refrain from conduct in which they would otherwise engage. The other concern involves the separation of powers.[120] If enforcement actions proliferate, the sphere of judicial involvement in private activity obviously expands. What is more, the transfer of enforcement authority from public officials to private attorneys general may diminish the practical significance of historic executive prerogatives to determine whether, how, and when to enforce the law.[121]

[116] Sometimes, of course, there can be a question. See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001).

[117] See Hartnett, supra note 6, at 2246–48 (arguing that the standing of the United States in criminal prosecutions demonstrates that individual injury cannot be an Article III requirement for standing).

[118] See Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 205 (2000) (Scalia, J., dissenting) (insisting that Article III will not permit Congress to "convert an 'undifferentiated public interest' into an 'individual right' vindicable in the courts") (citation omitted). See generally Woolhandler & Nelson, supra note 75, at 691, 703 (arguing that Article III courts historically distinguished between public and private actions, and followed a general principle against private enforcement of public rights).

[119] See Woolhandler & Nelson, supra note 75, at 732–33.

[120] See, e.g., Hartnett, supra note 6, at 2256–57.

[121] See Krent & Shenkman, supra note 113, at 1794. As Krent and Shenkman indicate, this view coheres with the so-called "unitary executive" thesis, which holds that any person or officer exercising traditionally executive authority must be accountable to the President. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 544 (1994). For contrary views about the original understanding and sensible contemporary policy, see, for example,

Concerns about the acceptability of judicial remedies under particular federal statutes may interconnect with concerns about the constitutional or practical acceptability of recognizing that Congress can create a genuine, personally enforceable right on the merits. There are some cases, however, in which concerns about unacceptable remedies influence at least some Justices' views about standing even when congressional power to create substantive rights would otherwise be unquestioned. *Federal Election Commission v. Akins* furnishes an example.[122] The Federal Election Campaign Act ("FECA") imposes a number of obligations on "political committees," including a requirement to file information with the Federal Election Commission ("FEC").[123] The Act also authorizes "any party aggrieved" by Commission action to sue in court.[124] Believing that the FEC had wrongly failed to classify a particular group as a "political committee" subject to regulatory and filing requirements, Akins sued to challenge the Commission's action. In an opinion by Justice Breyer, the Supreme Court upheld Akins's standing based on the "injury in fact" that he suffered through his inability to procure information.[125] If the FEC had classified the disputed group as a political committee, the Court assumed, the organization would have complied with the filing obli-

Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1810–11 (1996); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 2–3 (1994). For the specific argument that the authorization of citizen suits does not interfere with presidential prerogatives under the separation of powers, see Sunstein, supra note 20, at 212–13, 231 n.300.

[122] 524 U.S. 11 (1998).

[123] See id. at 14.

[124] See id. at 19.

[125] Id. at 20–21. The "strongest argument" against standing, Justice Breyer wrote, was that Akins's injury was "only a 'generalized grievance'" shared equally by all citizens, for "the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." Id. at 23. He concluded, however, that cases in which the Court had denied standing to assert generalized grievances were ones in which "the harm at issue" was "of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'" Id. (citation omitted). "[I]nformational injury," he determined, was "sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts." Id. at 24–25.

gations applicable to political committees, and Akins thus would have had access to valuable information.[126]

Justice Scalia dissented, protesting that if the inability to obtain information is an injury, it is an injury suffered equally by all citizens and therefore insufficiently "particularized" to satisfy Article III.[127] Significantly, he based this judgment partly on a conclusion about what he regarded as the unacceptable consequences of treating a deprivation of information as an actionable injury. According to him, the Court's ruling puts it "within the power of Congress to authorize any interested person to manage (through the courts) the Executive's enforcement of any law that includes a requirement for the filing and public availability of a piece of paper."[128] To Justice Scalia, this was an intolerable result. "'To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty,'" which is the duty of enforcing the laws, he wrote.[129] He continued, "This is not the system we have had, and is not the system we should desire."[130]

To the extent that Justice Scalia's claim has bite, that bite depends on the specific nature of the relief at issue in *Akins*—an order effectively requiring the FEC to enforce the law against third parties. If the inability to procure information could not constitute injury, Congress could not confer a right to sue for access to information already possessed by the government under the Freedom of Information Act, as the Supreme Court, without dissent from Justice Scalia, has repeatedly assumed that it can.[131] Even in *Akins*, the force of Justice Scalia's protest would decline, if not disappear entirely, if Congress had created a right to damages rather than injunctive relief. If Congress gave citizens a statutory right to have the government enforce the law for their benefit, but specified that

[126] Id. at 21.
[127] Id. at 34–35 (Scalia, J., dissenting).
[128] Id. at 36 (Scalia, J., dissenting).
[129] Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992)).
[130] Id. at 37.
[131] See, e.g., Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (ruling on the merits without adverting to any standing issue); Dep't of Justice v. Julian, 486 U.S. 1 (1988) (same).

the only remedy for violation would be damages, for which Congress also appropriated funding, it would be harder for Justice Scalia or others to argue that Congress had infringed on executive prerogatives than it is in cases (such as *Akins*) in which Congress has authorized injunctive relief directly compelling executive officials to enforce the law.

In sum, in deploying standing doctrine's notoriously pliable injury requirement, the Supreme Court and its individual Justices frequently shape their rulings in light of concerns about unacceptable remedies. There is also reason to believe that the allure of the injury requirement, for the Justices, lies partly in the opportunities that it affords them to respond to remedy-based anxieties.

b. The Redressability Requirement

As I have noted already, the linkage of justiciability doctrine to concerns about necessary and acceptable remedies is evident on the face of the "redressability" prong of the standing test.[132] The first anxiety involves judicial judgments not coupled with effective remedies. Courts wish not to appear impotent. A judgment not accompanied by an effectual remedy would risk that appearance. In addition, continuing concerns about the role of electorally unaccountable courts in a political democracy provide independent reasons for courts to avoid gratuitous constitutional pronouncements.

A second, subtler concern arises from the types of remedies that have paradigmatically occasioned redressability issues. In the Supreme Court, redressability issues have come up most frequently when plaintiffs sue for injunctions directing government officials to enforce the law against third parties. In *Linda R.S. v. Richard D.*, the mother of an out-of-wedlock child sued state officials whose policy was to bring prosecutions for non-support only against the fathers of legitimate children.[133] In *Simon v. Eastern Kentucky Welfare Rights Organization*, persons unable to afford medical care brought suit against Treasury Department officials challenging their failure to require hospitals to provide indigent care in order to qualify for tax benefits.[134] *Allen v. Wright* involved an action by

[132] See supra notes 60–62 and accompanying text.
[133] 410 U.S. 614 (1973).
[134] 426 U.S. 26 (1976).

parents of black public school children against officials of the Internal Revenue Service, alleging that the officials had not met their obligations to deny tax-exempt status to racially discriminatory private schools.[135] (Although the Court held in *Allen* that the stigma alleged by the plaintiffs did not constitute an injury at all,[136] it found that the plaintiffs had pleaded a separate, cognizable injury in the loss of the benefits of a racially integrated education,[137] and it thus confronted the question whether this latter injury was redressable.) In each of these cases, the plaintiffs asserted that an injunction directing the defendants to enforce the law would change the behavior of third parties and thereby redress the plaintiffs' injuries—nonreceipt of child support payments in *Linda R.S.*, inability to obtain medical care in *Simon*, and loss of the benefits of an integrated education in *Allen*. In each case the Court denied standing.[138] According to the Court, it was not sufficiently likely that the requested relief would prove causally effective in changing the behavior that proximately caused the plaintiffs' injuries.

As I have noted already in discussing the injury prong of the Supreme Court's standing test, cases in which plaintiffs ask courts to order officials to enforce the law against third parties raise sensitive questions about practically acceptable, and sometimes about constitutionally permissible, judicial remedies.[139] To say that questions are raised is of course not to say how they should ultimately be answered. Nevertheless, it bears notice that injunctions mandating law enforcement against third parties threaten to interfere with the sensible enforcement priorities of officials possessing limited time and resources. Injunctions also could intrude on traditional, frequently justifiable exercises of enforcement discretion.

Apparently motivated by concerns such as these, the Supreme Court enforced the redressability requirement with great stringency during the 1970s and 1980s, but its approach has softened in recent years, as illustrated by *Federal Election Commission v. Akins*, in which the plaintiffs sought to require the FEC to enforce

[135] 468 U.S. 737 (1984).
[136] Id. at 753–54.
[137] Id. at 756–57.
[138] See *Linda R.S.*, 410 U.S. at 619; *Simon*, 426 U.S. at 28, 42; *Allen*, 468 U.S. at 757–59.
[139] See supra notes 109–12 and accompanying text.

the FECA's reporting requirements against a political organization not party to the lawsuit.[140] Once the Court had determined that a deprivation of information constituted an injury sufficient for standing, a redressability issue remained, but the Court treated it as easily resolved: If the FEC required a third party to file publicly available reports, the third party would clearly do so, and the plaintiffs would receive the information that they sought.[141]

Because redressability followed almost automatically in *Akins* from the (more controverted) determination that the deprivation of information constitutes a judicially cognizable injury, it is hard to tell what, if anything, the Court's decision bodes for other cases.[142] Perhaps the Court will continue to deploy the redressabil-

[140] 524 U.S. 11 (1998); see supra notes 122–31 and accompanying text. Although *Friends of the Earth v. Laidlaw Environmental Services (TOC)*, 528 U.S. 167 (2000), did not involve a suit to compel government officials to enforce the law against third parties, it provides another example of the diminished stringency of the redressability requirement. In it the Court upheld a provision of the Clean Water Act authorizing citizen plaintiffs to seek money penalties payable to the government. In an opinion by Justice Ginsburg, the Court ruled that "the civil penalties sought by [the plaintiffs] carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [the plaintiffs'] injuries by abating current violations and preventing future ones . . . ." Id. at 187. Dissenting, Justice Scalia, joined by Justice Thomas, argued that the majority's reasoning was inconsistent with *Linda R.S.*: "The principle that 'in American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another' applies no less to prosecution for civil penalties payable to the State than to prosecution for criminal penalties owing to the State." Id. at 204 (Scalia, J., dissenting) (citation omitted). In response, the majority contended that *Linda R.S.* was distinguishable, both because criminal prosecutions occupy a "special status" and because the prosecution and possible incarceration of a delinquent father "would scarcely remedy the plaintiff's lack of child support payments." Id. at 188 n.4. Justice Scalia also raised, but purported not to address, the question of whether citizen suits for penalties payable to the government violate Article II by depriving the Executive Branch of enforcement discretion. See id. at 209–10 (Scalia, J., dissenting). In a concurring opinion, Justice Kennedy also noted that Article II questions, which had not been considered by the court of appeals or briefed by the parties, were "best reserved for a later case." Id. at 197 (Kennedy, J., concurring).

[141] Fed. Election Comm'n v. Akins, 524 U.S. 11, 25 (1998).

[142] Among other things, statutory cases such as *Akins* could be distinguished from cases such as *Linda R.S.*, in which plaintiffs sue directly under the Constitution, on the ground that congressional authorization helps to alleviate separation of powers concerns that would otherwise arise. See *Akins*, 524 U.S. at 26 (rejecting an argument that standing should be denied by citing congressional authorization of judicial review); cf. Flast v. Cohen, 392 U.S. 83, 131–32 (1968) (Harlan, J., dissenting) (maintaining that "[a]ny hazards to the proper allocation of authority among the three branches

ity requirement as a bar to suits seeking to compel executive officials to enforce the law; perhaps not. There can be little doubt, however, that some of the animating concerns in the Court's enforcement of its redressability requirement involve the constitutional and practical acceptability of judicial remedies compelling executive officials to enforce the law against parties not before the court.

3. Third-party Standing, Defendants' Standing, and Facial Challenges

The Supreme Court has established a bar to third-party standing as a prudential requirement or rule of self-restraint, partly rooted in policies of constitutional avoidance: "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[143] The prohibition against third-party standing is frequently honored in the breach. Although the "Court purports to disfavor assertions of third-party rights, [it] in fact almost routinely permits them upon finding (i) some sort of 'relationship' between the litigants . . . and those whose rights they seek to assert and (ii) some sort of impediment to third-parties' effective assertion of their own rights."[144] *Bush v. Gore*, a case in which the Court did not even advert to the third-party standing is-

of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President").

[143] Warth v. Seldin, 422 U.S. 490, 499 (1975).

[144] Hart & Wechsler, supra note 4, at 175–76; see Kowalski v. Tesmer, 543 U.S. 125, 130 (2004) (quoting Powers v. Ohio, 499 U.S. 400, 411 (1991)). In my view, many of the cases that the Supreme Court describes as involving third-party rights are actually first-party cases. See Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1326–27 (2000). Under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), every potential defendant in a criminal or civil case has a personal right not to be sanctioned except pursuant to a constitutionally valid rule of law. In light of this "valid rule" requirement, distinctions between first- and third-party standing disappear in all cases in which actual or potential defendants challenge the constitutional validity of rules of law under which they face potential sanctions. See id. at 1363. For earlier articulations of similar views, see Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 299 (1984); Robert Allen Sedler, The Assertion of Constitutional Jus Tertii: A Substantive Approach, 70 Cal. L. Rev. 1308, 1329 (1982).

sue, provides a partly representative example.[145] Although presidential candidate George W. Bush was not himself a Florida voter, the Court allowed him to assert the rights of Florida voters who had supported him to have their ballots counted fairly under the Due Process and Equal Protection Clauses.

Concerns about practically unacceptable and necessary remedies help, respectively, to explain both the prudential rule against third-party standing and the exceptions that sometimes threaten to engulf that rule. In cases in which a right holder affirmatively chooses not to assert his or her right, to grant a remedy to a third party would often disrespect the autonomy of the right holder, who may affirmatively prefer to leave the right unenforced.[146] For that reason, to allow the award of a remedy at the third party's request would be unacceptable.

If this concern about the practical acceptability of remedies underlies the general rule of no third-party standing, considerations involving the practical *necessity* of remedies help to drive the exceptions. In the classic case of third-party standing, a litigant claims "that a single application of a law both injures him and impinges upon the constitutional rights of third persons."[147] If the actual right holder would face an impediment to litigation, an entrenched exception to the third-party standing bar establishes that a court must permit a remedy to the party before it in order for the underlying substantive right to be meaningful in practice.[148]

A parallel analysis applies to First Amendment overbreadth doctrine and to similar rules authorizing "facial" challenges to the validity of statutes.[149] Although subject to a large and possibly growing number of exceptions, the normal presumption of constitutional law is that statutes are "severable" (or, synonymously,

[145] 531 U.S. 98 (2000) (per curiam).

[146] See Brilmayer, supra note 89, at 313.

[147] Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 424 (1974).

[148] Among the many twists of *Bush v. Gore*, 531 U.S. 98, it is not clear that the individual voters whose rights were asserted by George Bush would have had standing to challenge the criteria by which other people's ballots were counted. See Hart & Wechsler, supra note 4, at 177–78. If so, Bush may have been the only party who could have sued successfully to enforce the rights that the Court found to be at stake.

[149] See Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853, 867–68 (1991).

"separable"): Even if a statute has unconstitutional components or would be unconstitutional as applied to particular facts, the unconstitutional elements or applications can be severed from the valid ones and the valid ones enforced.[150] Under the presumption of separability, parties normally cannot resist the enforcement of a statute on the ground that it would be unconstitutional as applied to others, but only as it applies to them.

The Supreme Court has repeatedly characterized First Amendment overbreadth doctrine as an exception to this general rule:

> Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.'[151]

As this formulation testifies, the doctrine's rationale appeals once again to the perceived necessity of a broad remedy: Absent a declaration that a statute is wholly invalid and unenforceable, constitutionally protected speech, possessing "transcendent value to all society," might be chilled.[152]

Despite the Supreme Court's repeated assertions, some commentators have resisted the notion that First Amendment overbreadth doctrine operates through a relaxation of standing rules.[153] According to Professor Monaghan, for example, First Amendment overbreadth doctrine is more aptly described as a substantive rule of constitutional law that limits the presumption of statutory sepa-

[150] See Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 250 (1994); Gillian E. Metzger, Facial Challenges and Federalism, 105 Colum. L. Rev. 873, 877 (2005); Henry P. Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 7.

[151] Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 574 (1987) (quoting Brockett v. Spokane Arcades, 472 U.S. 491, 503 (1985)).

[152] Gooding v. Wilson, 405 U.S. 518, 521 (1972); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 846 (1970) (terming concern for chilling effect "the dynamo of the overbreadth doctrine").

[153] See, e.g., Monaghan, supra note 150, at 3 (finding the core of overbreadth doctrine not in standing to assert third-party rights, but in a right of litigants "to be judged in accordance with a constitutionally valid rule of law"); Sedler, supra note 144, at 1318.

rability:[154] A statute challenged under the First Amendment cannot be presumed separable unless a court, when first applying it, can articulate a construction saving it from substantial overbreadth.[155] As a technical matter, Monaghan may be right: First Amendment doctrine may embody a substantive rule limiting the presumption of statutory separability. Even if so, however, characterization of First Amendment overbreadth doctrine as a standing rule captures important truths. First Amendment overbreadth doctrine permits a party before the court to object to a statute on the ground that it would be unconstitutional as applied to absent parties.[156] It also represents a judgment about the necessary and appropriate scope of constitutional remedies—namely, a judgment that the remedy of facial invalidation, which becomes available once the presumption of separability is rejected, is necessary to avert an unacceptable chilling of First Amendment rights.

A similar analysis applies in other cases in which the Supreme Court permits facial challenges. Although the presumption of severability normally dictates that statutes can be invalidated only as applied, some doctrinal tests impose limits on severability and thus invite rulings of facial invalidity.[157] In all such cases, the Court's development of a doctrinal test that limits severability reflects a judgment that the remedy of facial invalidation is necessary or appropriate to avert the chill of constitutional rights.[158]

4. Mootness

No less than standing rules, mootness doctrine reflects anxieties about appropriate judicial remedies. The Supreme Court once characterized mootness as "the doctrine of standing set in a time frame."[159] Specifically, it said that "[t]he requisite personal interest that must exist at the commencement of the litigation (standing)

[154] See Monaghan, supra note 150, at 3–4.

[155] See id. at 29–30.

[156] See *Jews for Jesus*, 482 U.S. at 574 (quoting *Brockett*, 472 U.S. at 503).

[157] See Fallon, supra note 144, at 1351–52; Marc E. Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 367–69 (1998).

[158] See Fallon, supra note 144, at 1352.

[159] Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997) (citations omitted).

must continue throughout its existence (mootness)."[160] Recently the Court has retreated from that formulation by acknowledging that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."[161] Nevertheless, the demand for a continuing personal stake remains as a condition of justiciability.[162]

Almost self-evidently, mootness doctrine makes justiciability depend on judgments about the appropriateness or acceptability of particular remedies after the cessation of conduct that once caused injury.[163] Virtually never does mootness bar suits for damages. Where harm has occurred, damages remain an acceptable remedy.[164] By contrast, the Court has determined that the costs of injunctive relief (and nearly all other remedies) are categorically unwarranted when offending conduct has ceased and there is no sufficient threat of its resumption.[165] Insofar as the mootness test differs from the standing requirement, the difference is justified because it is less clear that a remedy would be inappropriate or unacceptable as a practical matter where conduct has occurred once and might resume.

Significantly, however, mootness doctrine is famously ridden with exceptions.[166] Unsurprisingly, several of the exceptions appear

[160] Id.

[161] Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 190 (2000).

[162] Interestingly, the Supreme Court appears specifically to have characterized mootness doctrine as an aspect of the Article III case or controversy requirement for the first time in *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964). In *Honig v. Doe*, 484 U.S. 305, 331–32 (1988) (Rehnquist, C.J., concurring), Chief Justice Rehnquist argued that such a view of the Court's mootness doctrine was mistaken, that mootness doctrine rested on policy judgments, and that the Court could develop exceptions on policy-based grounds. In a dissenting opinion, Justice Scalia disagreed, based substantially on his reading of a pair of cases from the 1890s. See id. at 339 (Scalia, J., dissenting) (discussing Mills v. Green, 159 U.S. 651 (1895); California v. San Pablo and Tulare Ry. Co., 149 U.S. 308 (1893)). For a defense of the view that mootness should be treated as a discretionary doctrine rather than as a dictate of Article III, see Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 Harv. L. Rev. 603, 636–51 (1992).

[163] See Laycock, supra note 5, at 220 (terming mootness an equitable as well as a justiciability doctrine).

[164] See City of Los Angeles v. Lyons, 461 U.S. 95, 105, 109 (1983).

[165] See id. at 109.

[166] See, e.g., Erwin Chemerinsky, Constitutional Law 114–27 (2d ed. 2002).

to reflect judgments about the practical necessity of making judicial remedies available. One important exception applies to cases involving wrongs that are "capable of repetition, yet evading review."[167] In cases within this category, the Supreme Court plainly wishes to enable rulings on the merits of unresolved, sometimes important issues, but a decision that could not be backed by a remedy would constitute a forbidden advisory opinion.[168]

Remedial interests lay even more squarely at the forefront of *City of Erie v. Pap's A.M.*[169] After a state court enjoined enforcement of Erie's anti-nudity ordinance, the city sought Supreme Court review. By the time the case reached the Court, the nude-dancing establishment that brought the challenge had closed, but the Court upheld justiciability nonetheless. In finding the case not moot, the Court cited a number of factors, prominently including the city's continuing inability to enforce its ordinance due to the injunction issued by the state court.[170] According to the Court's majority, the interest in relieving the city from that prohibition, if it were constitutionally unjustified, supported a holding that the case was not moot, despite the absence of any continuing personal stake on the part of the plaintiff.[171] In other words, an interest in remedying the harm to the city from a possibly erroneous judicial decision warranted an exercise of jurisdiction, even though under the normal rules the case would have been moot.

5. Ripeness

Concerns about remedies also exert significant influence in the shaping and application of ripeness doctrine. In a now classic formulation in *Abbott Laboratories v. Gardner*, Justice Harlan wrote that the "basic rationale" of ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative

[167] Roe v. Wade, 410 U.S. 113, 125 (1973) (quoting S. Pac. Term. Co. v. ICC, 219 U.S. 498, 515 (1911)).

[168] See infra notes 183–91 and accompanying text (discussing advisory opinions).

[169] 529 U.S. 277 (2000).

[170] Id. at 288 (noting that the city suffered "an ongoing injury because it [was] barred from enforcing" its public nudity prohibitions).

[171] Id.

policies."[172] He added that "[t]he problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[173]

In applying the *Abbott Labs* formula, courts need to assess the fitness of issues for adjudication in light of whether the facts have ripened sufficiently to permit the crafting of an acceptable remedy. Remedial issues often loom especially large when plaintiffs seek not a simple injunction against enforcement of a statute, but a broad decree mandating reforms in the structure or policies of an institution such as a police department. In a suit seeking injunctive relief against allegedly discriminatory practices by police and prosecutors, *O'Shea v. Littleton* thus observed specifically that considerations bearing on justiciability "obviously shade into those determining whether the complaint states a sound basis for equitable relief."[174] Indeed, Professor Laycock has written that ripeness simply *is* an "equitable" or remedial as well as a jurisdictional doctrine.[175]

Anxieties about excessively intrusive remedies also underlie the ripeness holdings in decisions that make it difficult for plaintiffs whose own conduct is not being directly regulated to challenge administrative programs or regulations prior to specific applications. For example, in *Lujan v. National Wildlife Federation*, in which the plaintiffs complained about a government policy of allowing increased mining on public lands, Justice Scalia's majority opinion expressed wariness of "wholesale" attacks on administrative programs and concluded that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review" prior to "some concrete action applying the regulation to the claimant's situation."[176]

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[172] 387 U.S. 136, 148 (1967).

[173] Id. at 149.

[174] 414 U.S. 488, 499 (1974); see also Hart & Wechsler, supra note 4, at 238–39, 239 n.1, 241–42 (noting the Supreme Court's importation of anxieties about remedies into determinations of justiciability in *O'Shea* and other suits seeking injunctive relief).

[175] Laycock, supra note 5, at 220.

[176] 497 U.S. 871, 891 (1990); see also Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 728 (1998) (holding unripe an environmental group's challenge to a resource-management plan); Reno v. Catholic Soc. Servs., 509 U.S. 43, 66 (1993) (holding as

Significantly, however, the Court stands readier to uphold the ripeness of challenges to administrative regulations that are brought by regulated parties than to entertain pre-enforcement lawsuits by the intended beneficiaries of federal statutes.[177] At least in part, this disparity appears to reflect differential anxiety about the remedies being sought. Courts routinely enjoin the direct enforcement of statutes and regulations that interfere with private liberty. By contrast, judges remain uneasy about ordering administrative agencies to enforce the law against parties not before the court, partly due to concerns about the enforcement discretion of the executive branch.

A final respect in which ripeness doctrine responds to remedial considerations involves its express attention to "the hardship to the parties." In weighing hardship, a court takes account of the urgency of a plaintiff's need for an immediate judicial remedy.[178]

In emphasizing the relevance of remedial concerns to ripeness determinations, I do not mean to imply that other considerations play no important part. Beyond doubt, the ripeness inquiry focuses partly on the functional requisites of effective adjudication. Even if plaintiffs confront a threat sufficient to confer standing, a dispute may remain "too 'ill-defined' to be appropriate for judicial resolution until further developments ha[ve] more sharply framed the issues for decision."[179] In some cases, ripeness issues may also blend with merits inquiries into whether infringement of a right, as defined by existing substantive doctrine, actually has occurred. In *Williamson County Regional Planning Commission v. Hamilton Bank*, for example, the Supreme Court held that a challenge to zoning regulations under the Takings Clause was not ripe because

unripe challenges to regulations that withheld benefits from the plaintiff class but imposed no penalty on them).

[177] See *Lujan*, 497 U.S. at 891; see also Jerry L. Mashaw, Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability, 57 Law & Contemp. Probs. 185, 235–36 (1994).

[178] Compare Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 81–82 (1978) (overcoming various jurisdictional objections, including ripeness, based partly on "prudential considerations") with Poe v. Ullman, 367 U.S. 497, 501–02, 507 (1961) (finding a challenge to a state statute forbidding distribution or use of contraceptives unripe where there had been only one prosecution in 80 years and "contraceptives [were] commonly and notoriously sold in Connecticut drug stores").

[179] Hart & Wechsler, supra note 4, at 224 (quoting United Pub. Workers of Am. (CIO) v. Mitchell, 330 U.S. 75, 90 (1947)).

the plaintiff had not instituted inverse condemnation proceedings or applied for variances.[180] In essence, the Court's rulings establish that no taking can be imputed until a defendant has foreclosed all other avenues of relief.[181] Ripeness and the merits may similarly intertwine in First Amendment cases, in which a finding of unripeness may imply that a challenged statute is not unconstitutionally overbroad and thus can be resisted successfully (if at all) only "as applied."[182] It should be clear, however, that remedial considerations are important too.

6. Advisory Opinions

It is extremely difficult (and perhaps impossible) "to state necessary and/or sufficient conditions for the identification of advisory opinions lying beyond the judicial power under Article III."[183] Among the difficulties, the prohibition cannot encompass all judicial pronouncements that are not strictly necessary to resolve a live dispute between adverse parties, for federal courts issue unnecessary pronouncements with startling regularity: dicta, alternative holdings, and so forth.[184] According to one prominent account, the two central categories of forbidden advisory opinions comprise "[a]ny judgment subject to review by a co-equal branch of government" and "[a]dvice to a co-equal branch of government prior to the other branch's contemplated action."[185] One reason to hold disputes within these categories nonjusticiable is the likely absence of the functional desiderata of effective adjudication. Relevant facts may not yet have emerged; adversary positions may not have congealed. But remedy-based considerations may also be relevant. When the judicial branch is asked to give advice, subject to review by another branch or prior to its having acted, courts occupy a sub-

[180] 473 U.S. 172, 186 (1985); see also San Remo Hotel, L.P. v. City and County of San Francisco, 125 S. Ct. 2491, 2506 (2005) (discussing ripeness in takings claims under *Williamson County*). Significantly, however, four Justices in the *San Remo* case called for a reconsideration of the Court's ripeness ruling in *Williamson County*. See *San Remo Hotel*, 125 S. Ct. at 2510 (Rehnquist, C.J., O'Connor, Kennedy, & Thomas, JJ., concurring).

[181] See Hart & Wechsler, supra note 4, at 229; Nichol, supra note 1, at 167.

[182] See Hart & Wechsler, supra note 4, at 228.

[183] Id. at 81.

[184] See id.

[185] See Lee, supra note 162, at 644.

ordinate posture. Especially at the beginning of the republic, the judiciary needed to establish an independent status that might have been threatened if the President or Congress could have impressed the courts into advisory service.[186] In that context, insistence that the justiciability of a lawsuit depended on a potential award of relief that would effectively determine the conduct of the parties served as an important mark of independent, co-equal judicial authority.[187]

The assumption that effective remedies are a necessary component of Article III cases or controversies helps to explain the one-time uncertainty about whether declaratory judgment actions fell within the prohibition against advisory opinions.[188] One question was whether the declaratory judgment jurisdiction required definite facts, concrete adverseness, and the other historical and functional requisites of justiciability.[189] Another, however, involved the constitutional sufficiency of the declaratory remedy. The Supreme Court resolved that question in *Aetna Life Insurance Co. v. Haworth*, which concluded flatly that in conferring federal jurisdiction, "the Congress is not confined to traditional forms or traditional remedies."[190] Subsequent courts and commentators have buttressed that determination by emphasizing that federal courts,

[186] The prohibition against advisory opinions traces to some of the Supreme Court's earliest decisions. See Hayburn's Case, 2 U.S. (2 Dall.) 409, 411–13 (1792); 3 The Correspondence and Public Papers of John Jay 488–89 (Henry P. Johnston ed., Burt Franklin 1970) (1890), *reprinted in* Hart & Wechsler, supra note 4, at 78–79.

[187] See *Hayburn's Case*, 2 U.S. (2 Dall.) at 411 (noting that for courts to issue opinions that could be "revised and controuled [sic] by the legislature, and by an officer in the executive department" would be "radically inconsistent with the independence of that judicial power which is vested in the courts"). Interestingly, the English courts—which were a model for the federal judiciary in other respects—routinely granted advisory opinions. See Stewart Jay, Most Humble Servants: The Advisory Role of Early Judges 10–50 (1997) (arguing that eighteenth century English judges had power to issue advisory opinions). Neither the constitutional text nor the history of its drafting reveals any clear prohibition against advisory opinions. See id. at 57–76.

[188] See Hart & Wechsler, supra note 4, at 82–84.

[189] See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242–44 (1937) (upholding federal declaratory judgment jurisdiction and emphasizing that the dispute before it "calls[] not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts").

[190] Id. at 240.

where necessary, generally can enforce their declaratory judgments by awarding injunctive relief.[191]

III. THE EQUILIBRATION THESIS

Although I have repeatedly invoked the Equilibration Thesis—which holds that justiciability, substantive, and remedial doctrines are substantially interconnected and that courts frequently face a choice about which doctrine to adjust in order to achieve acceptable results overall—I have not yet attempted to demonstrate its validity. Because the Equilibration Thesis is both broad and loosely formulated, it would be impossible to prove its truth in any rigorous sense. Nevertheless, strong evidence supports it. Indeed, when the support that I adduced for the Remedial Influences on Justiciability Thesis in Part II is put together with other scholars' demonstrations—summarized in Section I.A—that judicial rulings on justiciability are often interconnected with substantive judgments and that remedial concerns frequently influence rulings about substantive rights, little more needs to be said to establish that courts seek an alignment of justiciability, substantive, and remedial doctrines that produces good overall results, rather than viewing these doctrines as driven by sharply distinguishable constitutional and practical values.

My argument on behalf of the Equilibration Thesis proceeds in three steps. First, I shall summarize the support for the Equilibration Thesis that emerges both from the conjunction of prior, well-known literature and from the arguments advancing the Remedial Influences on Justiciability Thesis that I made in Part II. The evidence furnished by these sources constitutes the most important ground for embracing the Equilibration Thesis, though I shall state the relevant points somewhat summarily in order to avoid undue repetition of what either others or I have said already. Second, I shall sketch the intuitive psychological case, which is wholly consistent with the empirical evidence, that courts that care about practi-

[191] See, e.g., Steffel v. Thompson, 415 U.S. 452, 478 (1974) (White, J., concurring) ("The statute [authorizing federal declaratory judgments] provides for '[f]urther necessary or proper relief . . . against any adverse party whose rights have been determined by such judgment,' 28 U.S.C. § 2202, and it would not seem improper to enjoin local prosecutors who refuse to observe adverse federal judgments.").

cal consequences would practice doctrinal equilibration with the aim of achieving the best overall package of justiciability, substantive, and remedial doctrines. Third, I shall illustrate the Equilibration Thesis's explanatory power by discussing the Supreme Court's decisionmaking patterns in suits against the government and its officials.

A. Evidence from the Literature

The empirical case in favor of the Equilibration Thesis begins with two propositions—both briefly stated in Section I.A—that I take to be well established by prior literature. The first is that judicial rulings concerning justiciability frequently reflect, are influenced by, or otherwise constitute judgments about a plaintiff's substantive legal rights. As I noted earlier, abundant evidence supports this proposition. Some is conceptual: What counts as an injury for purposes of standing doctrine frequently depends on a substantive determination concerning the protections that particular rights confer;[192] the ripeness of a claim often turns on what must be proved to establish a substantive violation of the right in question;[193] although courts frame political question rulings as involving justiciability, such judgments in essence hold that a plaintiff has no judicially enforceable substantive right;[194] and so forth. Other evidence that views about the desirability of recognizing rights on the merits influence justiciability determinations is more irreducibly empirical: As numerous commentators have recognized, judges who are hostile to claims on the merits are less likely to uphold standing to assert those claims than are judges who are more favorably disposed.[195]

The second proposition supporting the Equilibration Thesis, which is also well established by the literature and resonates perhaps even more strongly with common sense, is that judicial apprehensions about practically necessary and acceptable remedies influence rulings concerning substantive rights. In crude terms, when courts are troubled about the remedial implications of upholding a

[192] See supra notes 107–08 and accompanying text.
[193] See supra notes 179–82 and accompanying text.
[194] See supra note 92 and accompanying text.
[195] See supra notes 15–24 and accompanying text.

substantive claim, they can and sometimes do respond by declining to recognize the substantive right at all, as is argued most fully in a recent, well-known article by Professor Levinson.[196]

Against the background of scholarly literature showing that judicial concerns about the merits influence justiciability rulings and that apprehensions about remedies influence merits determinations, my Remedial Influences on Justiciability Thesis fills in the third leg of the triangle formed by connections among justiciability, substantive, and remedial doctrines by establishing a linkage between remedial concerns and justiciability holdings. When my arguments in Part II are added to prior demonstrations by others, robust support then exists for each of three propositions suggesting that judges do not view issues involving justiciability, the merits, and available remedies in isolation from one another, but instead seek to bring rulings on justiciability, the merits, and remedies into an optimal or at least acceptable equilibrium: Merits judgments influence justiciability rulings; remedial apprehensions influence holdings on the merits; and remedial concerns also influence the shaping of justiciability doctrines.

B. The Intuitive Case

Underlying and supporting my arguments about the interconnected nature of justiciability, substantive, and remedial doctrines is an intuition, which I expect to be broadly shared, that courts that care about practical consequences—as all courts presumably do—would make decisions within formally distinct doctrinal categories with an eye toward creating the best overall body of law. From a practical point of view, the significance of rights obviously depends heavily on surrounding justiciability and remedial doctrines.[197] To take the most extreme case, a right without any remedies would possess dramatically less value than a right that courts will enforce with the full complement of normally available remedies. The

[196] See Levinson, supra note 3, at 889–99.

[197] Cf. Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 458 (1897) ("[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; —and so of a legal right.").

more extensive and potent the enforcement mechanisms, the more valuable a right becomes.[198]

The value of substantive rights depends equally clearly on justiciability doctrines, which define the threshold conditions for procuring judicial enforcement. To return to an example discussed earlier, Adolph Lyons and all other citizens of Los Angeles had rights not to be subjected to police chokeholds outside the most exigent circumstances, but their rights were less valuable in the absence of standing to seek injunctive remedies than they would have been if the courts had upheld Lyons's standing and granted an injunction or other anticipatory relief.

What is true about the value of rights is also true of their social costs. Upholding rights can be costly to the government or to the public as a whole. Think, for example, of rights that make it difficult for the government to acquire proof of criminal conduct and to convict and punish the perpetrators. Plainly, the social costs of recognizing rights decrease as the available mechanisms for enforcing those rights become less effective, either because applicable doctrines withhold remedies or because appeals to the courts are deemed nonjusticiable.

With both the value and the costs of rights depending on surrounding justiciability and remedial doctrines, it only stands to reason that the Supreme Court (or indeed any court) would assess particular doctrinal rules in light of their contribution to the composite package of rights and enforcement mechanisms. The intuitive case supporting the Equilibration Thesis rests on this apprehension; and the importance of the intuition lies in its relation to the empirical evidence that courts do not make determinations of justiciability, substantive rights, and available judicial remedies in abstraction from one another, but instead with an eye toward achieving desirable results overall. With the total package of justiciability, substantive, and remedial doctrines being what matters most from a practical point of view,[199] it becomes much more plausible than not to believe—consistent with the empirical evidence—that courts make their decisions with the composite in mind, as the Equilibration Thesis holds that they do.

[198] See Levinson, supra note 3, at 874.
[199] See id. at 919.

C. An Illustrative Example: Suits Against the Government and Its Officials

Although the Equilibration Thesis is too broad-ranging for me to attempt any systematic demonstration of its fruitfulness, a vivid example of its illuminating power emerges from the set of justiciability, substantive, and remedial doctrines applicable in suits against the government. Justiciability questions frequently arise in governmental litigation. Apart from questions about whether the plaintiff has alleged a constitutional violation on the merits, suits against the government and its officials typically implicate complex doctrines of sovereign and official immunity that limit available remedies.[200] Other remedial doctrines, including those restricting equitable remedies, apply as well.

As I have noted already, courts that want to expand substantive rights typically also will want to effect needed adjustments in remedial and justiciability doctrine to make those rights effective. The Warren Court generally followed this pattern. As it recognized new substantive rights, it also adjusted justiciability doctrines to permit suits for enforcement. *Baker v. Carr*, which rejected dire protestations that the federal courts must stay out of political thickets and upheld the justiciability of challenges to the apportionment of state legislatures, furnishes one well-known example.[201] *Flast v. Cohen*, which broadened standing to sue to enforce the Establishment Clause, stands as another.[202] The Warren Court also upheld, or at least paved the way for, the remedial innovations that have characterized "public law" and especially "structural" litigation.[203]

The Warren Court, however, did not always advance simultaneously on all fronts. Sometimes, to make substantive innovation acceptable, the Warren Court made equilibrating adjustments in remedial doctrine. *Brown v. Board of Education* affords the classic

[200] See generally Hart & Wechsler, supra note 4, at 944–1072 (discussing sovereign immunity and related issues and doctrines), 1112–41 (discussing official immunity).

[201] 369 U.S. 186, 187–88 (1962).

[202] 392 U.S. 83, 85, 88 (1968).

[203] See generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976) (discussing remedial issues that differentiate public law litigation from traditional litigation); see also Fiss, supra note 14, at 2.

example.[204] The Court declared a socially revolutionary right to desegregated public education but, fearing that immediate implementation would prove politically unpalatable, decreed that enforcement need not occur immediately, but only with all deliberate speed.[205] Operating within the law of remedies, the Warren Court also denied retroactive application to a number of its boldest criminal procedure decisions. If the price of decisions such as *Miranda v. Arizona*[206] and *Mapp v. Ohio*[207] had included the invalidation of all convictions obtained without the newly recognized guarantees, the Court would likely have judged its substantive rulings practically unacceptable and therefore impossible to render.[208]

Whereas the generally liberal Warren Court frequently adjusted justiciability and remedial doctrines to permit the effective enforcement of newly recognized substantive rights, the more conservative Burger and Rehnquist Courts tended to favor more restrictive positions within all three doctrinal categories.[209] But more selective equilibration is also clearly visible in some areas. Without overruling liberal decisions, a more conservative Court often attempted to reduce the social costs of the underlying rights (and thus also their ultimate value) by introducing or stiffening justiciability or remedial doctrines that impede judicial enforcement. As many of the cases discussed in Part II indicated, the Burger Court made particularly aggressive use of justiciability doctrines, especially standing, to block suits seeking remedies that it thought likely to be excessively costly or intrusive.[210] The Burger Court also relied on innovative deployments of equitable abstention doctrines, located within the law of remedies, to limit federal enforcement of constitutional rights.[211]

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[204] 347 U.S. 483 (1954).

[205] Brown v. Board of Education (II), 349 U.S. 294, 298–301 (1955).

[206] 384 U.S. 436 (1966).

[207] 367 U.S. 643 (1961).

[208] See Fallon & Meltzer, supra note 54, at 1734.

[209] See generally Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. Chi. L. Rev. 429 (2002) (charting the development of remedial as well as substantive doctrines protecting judicial federalism).

[210] See Chayes, supra note 2, at 10–26.

[211] See Hart & Wechsler, supra note 4, at 1213–58 (discussing the development and extension of the abstention doctrine associated with *Younger v. Harris*, 401 U.S. 37 (1971)).

At least intermittently, the Rehnquist Court also followed a strategy of using justiciability and remedial doctrines to reduce what it regarded as the social costs of rights that it was not prepared wholly to reject. In a series of controversial decisions, it expanded the doctrine of state sovereign immunity, which generally precludes plaintiffs from enforcing constitutional rights against the states through suits for money damages.[212] The Rehnquist Court also gave broad constructions to official immunity doctrines that protect government officials from personal liability for wrongs committed in the course of their employment.[213]

When the practices of both liberal and conservative Supreme Courts are viewed in conjunction, the overall pattern is thus at least consistent with, and I would say is illumined by, the Equilibration Thesis: As a formal matter, the Court treats justiciability, substantive, and remedial doctrines as distinct, but its decisions about how to frame those doctrines are by no means cabined off from one another. To the contrary, the Court formulates and adjusts the formally separate doctrines with the aim of achieving the package or alignment that is most attractive overall.

IV. NORMATIVE REFLECTIONS

The Doctrinal Equilibration and Remedial Influences on Justiciability Theses are both positive, not normative, yet both invite normative reflection. The most basic question triggered by the Equilibration Thesis is highly general: Is it normatively desirable for courts to try to reach an optimal alignment of substantive, justiciability, and remedial doctrines, rather than treating decisionmak-

[212] See, e.g., Alden v. Maine, 527 U.S. 706, 712 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996).

[213] See, e.g., Wilson v. Layne, 526 U.S. 603, 617 (1999) (strictly enforcing the requirement of qualified immunity law that plaintiffs can recover only by demonstrating a violation of "clearly established" rights). But cf. Hope v. Pelzer, 536 U.S. 730, 739–41 (2002) (finding a violation of clearly established law despite the absence of a close factual similarity between existing precedent and the challenged official conduct).

A very similar pattern holds in the domain of criminal procedure rights. Although the Burger and Rehnquist Courts have left many and perhaps most of the substantive rights recognized by the Warren Court largely intact, see Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2466, 2503 (1996), they have dramatically reduced the available remedies for police violations of declared constitutional norms. See id. at 2504.

ing within each category as self-contained? The Remedial Influences on Justiciability Thesis invites more specific comment, addressing the wisdom of particular justiciability doctrines that reflect concerns about necessary and unacceptable remedies.

A. General Reflections on Doctrinal Equilibration

As my observations concerning the intuitive plausibility of the Equilibration Thesis may have signaled, that the Supreme Court would aim to achieve an optimal alignment of justiciability, substantive, and remedial doctrines, and that concerns about the acceptability of outcomes might manifest themselves in any of these domains, should be unobjectionable as long as the Court reckons candidly[214] and persuasively with such legally pertinent considerations as constitutional and statutory language and judicial precedent.[215] From a normative perspective, it is more important that the prevailing package of justiciability, substantive, and remedial doctrines should produce good results than that the determinants of those results should be sorted into any particular category. To be clear, this is not a suggestion that courts should decide cases without attention to legal niceties. On the contrary, it is an affirmative claim about the kind of legal analysis in which courts, especially the Supreme Court, should engage when framing or adjusting doctrinal rules. If the Court determines that a plaintiff (in a case such as *Allen v. Wright*, for example) does not deserve to prevail, and must choose whether to frame its conclusion in terms of standing, substantive, or remedial doctrine, the Court should adopt the framework that would most perspicuously guide future analysis and produce the best outcomes in lower court decisions.[216] The same analysis should apply when a court determines that it should ex-

[214] See David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731 (1987).

[215] See Fallon, supra note 11, at 1240–43.

[216] Cf. Richard A. Posner, Economic Analysis of Law 563 (6th ed. 2003) (arguing that in framing procedural rules, judges should seek to strike the optimal balance between error costs and administrative costs as anticipated burdens on courts, parties, and witnesses); David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 193 (1988) (noting that courts in framing rules routinely "try to strike the optimal balance" among considerations that include but are not limited to minimizing "error costs").

pand the protections afforded by the prevailing package of substantive rights and available enforcement mechanisms.

Against this argument, it might be objected that the clearest *possible* lines should be drawn between justiciability, substantive, and remedial doctrines—and similarly between the kinds of considerations that respectively influence them—in order to serve important instrumental purposes involving the correct definition and optimal enforcement of rights. Intimations of this view emerge from debates in which those seeking broad definitions and enforcement of constitutional and statutory guarantees have frequently pursued a divide-and-conquer strategy that insists upon sharp distinctions among justiciability, substantive, and remedial doctrines and, relatedly, among the kinds of considerations that appropriately shape them. In pursuit of this strategy, proponents of broad definitions of rights first distinguish standing—the justiciability doctrine of foremost practical importance—from the question whether the plaintiff has a right to sue on the merits.[217] When standing requires injury alone, more plaintiffs may surmount the initial barrier of justiciability and survive to press their substantive claims in the sympathetic posture of an admittedly injured party. Champions of expansive definitions of rights have similarly sought to exclude concerns about acceptable remedies from determinations of justiciability and rulings on the merits.[218] If this separation can be enforced, judgments about acceptable remedies will occur only after plaintiffs have established the doubly sympathetic posture of injured parties whose rights have been violated.

Although I once sympathized with this position, I now find it unconvincing. To begin with, the instrumental argument that I have just sketched for maintaining sharp distinctions among justiciability, substantive, and remedial doctrines begs the question whether expansive definitions of rights are actually desirable. Some are, but others are not. Furthermore, even if it could be assumed that the best doctrinal structure would include expansive definitions and aggressive judicial enforcement of rights, the instrumental argument for sharply separating justiciability, substantive, and remedial

[217] See, e.g., Ass'n of Data Processing Serv. Orgs. v. Camp. 397 U.S. 150, 153 (1970); Flast v. Cohen, 392 U.S. 83, 99–100 (1968); Chayes, supra note 2, at 15.

[218] See, e.g., Little, supra note 4, at 937.

doctrines—and for similarly separating the considerations properly influencing them—would now seem to me to be unpersuasive for three combined reasons. First, as I emphasized in Part III, remedial limitations on the enforcement of rights may often be crucial to getting expansive definitions of protected rights in the first place.[219] Second, when the courts are unsympathetic to claims or rights, the sharp separation of justiciability, substantive, and remedial doctrines does not necessarily conduce to the aggressive judicial enforcement of legal norms at all, but instead makes it possible for judges to fight rear-guard actions against judicial enforcement (after they have lost on the merits) by raising objections based on justiciability and remedial doctrines. Third, even if remedial concerns and remedial doctrines could be sharply segregated from merits and justiciability doctrines, courts that were so minded could deploy expressly remedial doctrines just as effectively as justiciability law to cut off litigation at the outset, as illustrated by sovereign and official immunity doctrines and by the abstention doctrine tracing to *Younger v. Harris*, which requires federal courts to dismiss suits seeking injunctions against pending state criminal prosecutions.[220]

B. Reflections on Current Justiciability Doctrines as Influenced by Remedial Concerns

Just as there should be no normative objection to courts openly seeking to achieve the optimal balance of merits, justiciability, and remedial doctrines as long as they deal responsibly with such legally pertinent considerations as the constitutional text and judicial precedent, there should be no categorical resistance to courts allowing judgments about necessary and unacceptable remedies to influence their framing of justiciability rules. It obviously does not follow, however, that the Supreme Court has chosen wisely in allowing remedial concerns to affect justiciability doctrines in the particular ways that it has. Overall, the Court tends to do better when it crafts rules that link justiciability to the substance of particular rights than when it establishes rigidly trans-substantive requirements. The Court should also abandon the ad hoc manipula-

[219] See, e.g., John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 79–80 (1998).

[220] 401 U.S. 37, 41 (1971).

tion of justiciability doctrine, a discreditable practice that a proper alignment of rights, justiciability, and remedial doctrines would render unnecessary.

1. Limitations Designed to Avoid Practically Unacceptable Remedies

The Supreme Court has erred in attempting to address problems involving unacceptable remedies through a trans-substantive rule denying standing unless the requested remedy would likely alleviate a current injury to the plaintiff. As others have emphasized, the fundamental difficulty with the Court's standing jurisprudence inheres in the concept of injury, understood in empirical terms not dependent on the nature of the particular right that a plaintiff asserts.[221] The malleability of the injury requirement contaminates every prong of the standing test, for whether a defendant has caused an injury to the plaintiff and whether a particular remedy would redress that injury depend on how the injury is defined.[222] In *Allen v. Wright*, for example, if the plaintiffs' feelings of stigma and denigration had counted as an injury, then the defendants would have been causally responsible and relief against them would have afforded redress.[223] In *Linda R.S.*, if the plaintiff's injury had been defined as a reduced likelihood of receiving child support, then the defendants' non-enforcement of support obligations would have caused that reduced likelihood and an injunction addressed to the defendants would have alleviated it.[224] The Court probably would not have accepted these proposed reformulations, but the grounds for rejection prove difficult to explain in terms of injury when the question of injury is conceived—as the Court most often conceives it—as one of empirical or psychological fact. In cases in which whites have challenged affirmative action programs, the Court has routinely upheld standing without any showing that the plaintiffs would have obtained the ultimate benefits that they wanted, such as a government contract or admission to a university, even in the

[221] See, e.g., Fletcher, supra note 1, at 229–34; Sunstein, supra note 20, at 186–92.
[222] See, e.g., Sunstein, supra note 1, at 1464–69.
[223] 468 U.S. 737 (1984).
[224] 410 U.S. 614 (1973).

absence of affirmative action.[225] In these cases the Court apparently believes that the white plaintiffs' reduced likelihood of receiving benefits counts as an actionable injury, caused by the defendants and redressable by judicial relief.[226]

Given the difficulties of any approach to standing with the concept of injury at its analytical core, I agree with Judge Fletcher's central insight that the standing inquiry is often inseparable from the merits,[227] though I would frame my position slightly differently from his. In my view, a properly defined standing inquiry would have two parts. First, it would ask Judge Fletcher's question whether the substantive law gives the plaintiff a right against the defendant on the facts alleged. If so, standing analysis that was sensibly addressed to problems of practically unacceptable remedies should also include a second component, asking whether violations that are merely threatened, rather than actual, possess sufficient immediacy to warrant further judicial inquiry.

Both *Allen* and *Linda R.S.* illustrate the pertinence of the first, merits-based aspect of my proposed, reformulated standing analysis. The question in each case would be whether the Equal Protection Clause gave the plaintiffs a right to have the defendant officials enforce the law for their benefit against third parties.[228] In this inquiry, concerns about injury would not disappear, but they would be reformulated to make explicit their irreducibly legal or constitutional dimension, involving what appropriately *counts* as an injury for purposes of the definition and enforcement of particular constitutional rights.

If standing inquiries were linked to substantive determinations in this way, considerations involving acceptable judicial remedies would continue to exert a potent influence as part of a well-

[225] See, e.g., Gratz v. Bollinger, 539 U.S. 244, 266–68 (2003); Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 279–81 & n.14 (1978).

[226] See *Associated Gen. Contractors*, 508 U.S. at 666.

[227] Fletcher, supra note 1, at 223.

[228] Under current law, the question of whether the plaintiff has standing is antecedent to, but does not generally preclude the need for, inquiry into whether the plaintiff has asserted a cause of action or legal right to relief. This is brought out in cases in which the crucial issue is whether plaintiffs with standing have an implied cause of action, either under the Constitution, see, e.g., Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971), or under a federal statute, see, e.g., Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

structured effort to achieve the best overall alignment of substantive, remedial, and justiciability doctrines. For example, in considering whether the Equal Protection Clause gives private parties a right to have officials enforce the law in particular contexts, or standing to sue officials for failing to do so, much would turn on the practical and constitutional acceptability of the judicial remedies that the right, if recognized, would likely entail. Again, however, concerns about acceptable remedies would influence standing more on a right-specific than on a trans-substantive basis. In other words, concerns about acceptable remedies would bear most importantly on judicial decisions about whether to uphold particular claimed rights to sue under particular provisions of law. If, for example, private citizens erected a religious display on public property that was not a public forum available for private exhibits, and if public officials allowed the display to remain undisturbed, then offended citizens should be able to sue the officials for injunctive relief—ordering them either to remove the display or to require its sponsors to do so—in order to protect values underlying the Establishment Clause.[229] In view of the substantive right at stake, this limited intrusion on officials' presumptive enforcement discretion would not be unacceptable. By contrast, the plaintiffs in *Allen v. Wright* probably had no actionable right under the Equal Protection Clause to have Treasury officials enforce the tax laws against third parties.

If standing analysis proceeded on these more right-specific terms, questions about which provisions of law create which rights to sue (or give rise to judicially cognizable injuries) would remain difficult and divisive. The principal immediate benefits would register in enhanced honesty and clarity of analysis. Almost immediately, for example, it would become clear that the central consideration in cases in which Congress purports to create private rights to sue involves the constitutional and practical acceptability of the remedies that accompany such rights, sometimes including injunc-

[229] Cf. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 793 (1995) (finding no Establishment Clause violation where officials permitted the Ku Klux Klan to place a Latin cross on public property but had also allowed other private displays and thus created a public forum).

tions compelling governmental officials to enforce the law against third parties.[230]

With the focus on the acceptability of private remedies, it also would become evident that demands for "concrete" or "palpable" injury—as the Court currently understands those terms—are, at best, very crude surrogates for concerns involving encroachment on executive branch prerogatives under Article II. *Lujan v. Defenders of Wildlife*, in which the plaintiffs sought an injunction compelling executive officials to enforce the Endangered Species Act ("ESA"), offers a good illustration. In an opinion by Justice Scalia, the Court found that the plaintiffs lacked standing: Because they had made no definite plans to travel to areas inhabited by Nile crocodiles and leopards, they had suffered no concrete injury arising from those species' threatened demise.[231] If, however, "a plaintiff with a plane ticket can sue under the ESA without offense to Article II," then there is bite to Professor Sunstein's claim that "it makes no sense to say that Article II is violated if a plaintiff lacking such a ticket initiates such a proceeding."[232]

To say this is not to suggest that the remedial anxieties at work in *Lujan* were wholly groundless. If concerns persist that injunctive remedies might be unacceptable on the facts of *Lujan* or of similar cases, thought should focus more precisely on why and when injunctions directing executive officials to enforce the law or others to abide by it (in suits brought by private parties) are troublesome. One possible view would be that the Constitution flatly mandates that executive officials retain enforcement discretion, either as a source of political power in the pull and tug among the branches of government[233] or as a safeguard of individual liberty.[234] As a doctrinal matter, however, this position has suffered repeated re-

[230] Cf. Hartnett, supra note 6, at 2256 (arguing that when Congress authorizes suits to vindicate the Constitution under Article I, the hardest remaining constitutional questions arise under Article II, not Article III).

[231] Lujan v. Defenders of Wildlife, 504 U.S. 555, 563–64 (1992).

[232] Sunstein, supra note 20, at 213.

[233] See Morrison v. Olson, 487 U.S. 654, 712 (1988) (Scalia, J., dissenting) (terming prosecutorial discretion "one of the natural advantages the Constitution gave to the Presidency" that, accordingly, cannot be eliminated by Congress).

[234] Cf. Clinton v. New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

buffs,[235] and in my judgment deservedly so. Its categorical formulation is too strong. Although there may be good reasons to respect executive discretion in many contexts, when constitutionally valid laws create plain duties, the Take Care Clause should not provide a shield for executive disobedience. What is more, private suits to enforce duties owed to the plaintiffs are the historical norm, not the exception.

Another possible position—which may be implicit in arguments that would allow standing to a plaintiff with a plane ticket but not to a plaintiff lacking a ticket in cases such as *Lujan*—would be that private injunctive remedies can be tolerated unless they become too numerous. On this view, allowing injunctions to plaintiffs who can show imminent injuries (as defined by pertinent legal standards), but not to others, might serve a crude but nevertheless defensible rationing function.[236]

To cite just one more possibility, one might conclude that the acceptability of a private remedy compelling government officials to enforce the law or others to obey it varies from context to context. Perhaps most obviously, courts might determine that statutorily unauthorized injunctions directing officials to enforce the law against third parties are seldom if ever acceptable for reasons involving the historic division of power among the branches of government.[237] Statutorily authorized suits would then stand on a different footing, and some might seem wholly unproblematic as an exercise of Congress's "necessary and proper" power under Article I.[238] Even on a view that broadly acknowledged congressional power, however, a need for line-drawing might remain. For example, a statute effectively authorizing citizens to litigate third parties' tax liability might raise privacy and other concerns that a statute

[235] See, e.g., Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998) (upholding an authorization of private suits to compel action by the FEC); *Morrison*, 487 U.S. at 696 (upholding a statute mandating the appointment of special prosecutors and limiting presidential authority to supervise their decisionmaking).

[236] Cf. Krent & Shenkman, supra note 113, at 1823 (arguing that when Congress allows private enforcement, it must delimit standing to a class of citizens who share a particularized injury).

[237] See Flast v. Cohen, 392 U.S. 83, 130 (1968) (Harlan, J., dissenting) (maintaining that "public actions" brought to vindicate public rights threaten to "alter the allocation of authority among the three branches of the Federal Government").

[238] See id. at 131–32.

licensing private attorneys general to enforce the environmental laws might not.[239]

In rehearsing this litany of possible positions, I do not wish to endorse any concrete proposal for resolving questions about the permissibility of federal statutes authorizing private enforcement, whether through direct suits against private parties or actions to enjoin public officials to enforce the law. My only aim is to suggest that courts often would do better to frame standing rules—which in this dimension are closely conceptually interconnected with the question whether the plaintiffs possess valid legal rights—in light of remedial concerns better appraised at the right-specific than at a trans-substantive level.

Cases such as *City of Los Angeles v. Lyons*[240] present the second issue properly subsumed under the heading of standing, involving whether the threatened violation of a right possesses sufficient immediacy to justify further judicial inquiry and potentially a judicial remedy. In *Lyons* no one doubted that police administration of chokeholds would violate the Constitution in many circumstances. Dispute centered instead on whether the alleged risk of illegal conduct was large enough to warrant standing. With respect to the second aspect of standing inquiries as much as the first, it seems misguidedly reductionist to frame the inquiry in trans-substantive terms, such that standing could be established in any and all contexts if but only if some uniform quantum of risk existed—a chance of one in five, or one in ten, or one in a hundred or a thousand—that the defendant would actually violate the plaintiff's rights in the near future. The judgment should be qualitative, not quantitative, and should vary with the nature and severity of the violation that the plaintiff alleges.

In all cases involving threats of future illegality, however, the threshold for standing should be set relatively low. In such cases, a worry may sometimes exist that the requested remedy would not prove effectual, but often the greater concern will be that injunctive relief would prove too costly or intrusive relative to the good that it would likely accomplish. Though real, this worry calls for

[239] See Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 46 (1976) (Stewart, J., concurring).

[240] 461 U.S. 95 (1983).

finer grained inquiries than are sensibly assigned to standing doctrine, at least if standing is to retain any distinctive identity differentiating it from other justiciability and remedial doctrines.

With the standing bar set relatively low for suits seeking injunctions based on threatened future misconduct, the Court could address anxieties about unacceptable remedies by giving greater prominence to, and more finely shaping on a right-specific basis, other available doctrines that would permit courts to conduct a reasoned, open weighing of the hazards as well as the potential benefits of an injunctive decree. One pertinent doctrine is ripeness. In one of its dimensions, ripeness is an expressly prudential or equitable doctrine[241] pursuant to which courts assess not only whether they have sufficient facts to rule on the merits, but also whether they can foresee the future adequately to craft an appropriate remedy.[242] Because neither of these questions will always permit clear, categorical answers, judicial determinations of ripeness also depend on the "hardship to the parties of withholding court consideration."[243]

The other pertinent doctrine, which lies unequivocally within the law of remedies, is that of equitable discretion. The Supreme Court has relied so reflexively on trans-substantive justiciability doctrines, especially standing, to address the hazards of practically unacceptable remedies that it has often ignored the potential role of equitable doctrines as an aspect of doctrinal equilibration. By long tradition, however, courts possess a discretion to weigh considerations of public and private interest in determining whether to award equitable remedies[244] and, in appropriate cases, to withhold relief that would be necessary to alleviate anticipated future violations of substantive law.[245]

O'Shea v. Littleton[246] and *City of Los Angeles v. Lyons*,[247] two cases in which the plaintiffs sought injunctions against alleged pat-

[241] See Laycock, supra note 5, at 220; Nichol, supra note 1, at 155–56.

[242] See Hart & Wechsler, supra note 4, at 224 (quoting United Pub. Workers v. Mitchell, 330 U.S. 75, 90 (1947)).

[243] Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967).

[244] See, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305, 312–13 (1982).

[245] See David S. Schoenbrod, The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy, 72 Minn. L. Rev. 627, 636 (1988).

[246] 414 U.S. 488 (1974).

[247] 461 U.S. 95 (1983).

terns of police misconduct, exemplify contexts in which an explicit balancing of public and private interests would appropriately occur if the Supreme Court reformulated standing doctrine in the way that I have suggested and relied more on doctrines such as ripeness and equitable discretion to confront the hazards of unacceptable remedies. With the question framed in terms of ripeness or equitable discretion, judicial intrusion into the running of police departments, as of other complex governmental institutions, clearly has the potential to do harm as well as good.[248] Judges are far from omni-competent. It is only realistic, not cynical, to acknowledge that no practically desirable, or even acceptable, injunctive fix exists for every legal and constitutional shortfall. Especially when plaintiffs ask courts to assume detailed managerial or oversight responsibilities, rather than simply to bar discrete illegal acts, the prospect must at least be contemplated that judicial involvement might do more harm than good.

[248] Although the Supreme Court's decisions in *O'Shea* and *Lyons* largely closed the door to private suits seeking structural injunctions directing the reform of police departments, in 1994 Congress enacted a statute, 42 U.S.C. § 14141, that authorizes the Attorney General of the United States to seek such relief based on "reasonable cause to believe" that officials have engaged in a "pattern or practice" of unconstitutional conduct. Barbara E. Armacost, Organizational Culture and Police Misconduct, 72 Geo. Wash. L. Rev. 453, 526, 527 (2004). Although the Justice Department has filed relatively few cases, several commentators have rendered favorable judgments on the resulting decrees. See, e.g., id. at 528–30; Debra Livingston, Police Reform and the Department of Justice: An Essay on Accountability, 2 Buff. Crim. L. Rev. 815, 820 (1999); Samuel Walker, The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context, 22 St. Louis U. Pub. L. Rev. 3, 51–52 (2003).

Beyond literature specifically addressing structural decrees framed to remedy police misconduct, a large body of literature more generally addresses the capacity of courts to achieve beneficial results through injunctive intervention in the operation of governmental institutions, and much of that literature is critical. See, e.g., Ross Sandler & David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government 139–61 (2003); Paul J. Mishkin, Federal Courts as State Reformers, 35 Wash. & Lee L. Rev. 949, 949–51 (1978); Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 661–64 (1978). To say the least, however, the literature does not speak with a single voice. For much more positive assessments of actual and potential judicial performance in cases involving "structural injunctions" or other dramatically intrusive forms or relief, see, for example, Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State 13–14 (1998); Fiss, supra note 14, at 2–5; Myriam E. Gilles, Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, 100 Colum. L. Rev. 1384, 1385–87 (2000).

Without attempting to parse the historical record to assess whether the Supreme Court ruled correctly in *O'Shea* and *Lyons*, my own instinct is to emphasize that the two cases were materially different: Whereas the plaintiffs in *O'Shea* sought far-reaching structural relief, Adolph Lyons's complaint was relatively narrowly targeted on police chokeholds.[249] An injunction in *Lyons* would thus have posed fewer unforeseeable risks to important public interests than the relief requested in *O'Shea*. Even if not dispositive, considerations of this kind deserve to count within an equitable calculus.[250]

Among the benefits that the Supreme Court could achieve through greater reliance on ripeness and equitable doctrines to address anxieties about practically unacceptable remedies, largely as a substitute for the role currently played by standing, is greater transparency and integrity of analysis. As noted above, it is widely perceived that the Court manipulates the injury and redressability prongs of standing. Once justiciability rules have been established, whether in trans-substantive or doctrine-specific terms, their ad hoc manipulation is a confusing and cynicism-inducing practice that courts ought to abandon. If courts are troubled about unacceptable remedies, they should be willing to say so openly and to shoulder the responsibility for withholding injunctive relief within a framework that calls for a weighing of public and private interests.

As the examples of *O'Shea* and *Lyons* will signal, open discussions about appropriate injunctive remedies might sometimes prove painful and divisive. Remedies inherently involve a jurispru-

[249] See Fallon, supra note 83, at 71. I do not mean to suggest that structural relief should never be appropriate in response to suits alleging patterns or practices of police misconduct, but only that there is less reason for judicial hesitation when plaintiffs seek less rather than more intrusive relief.

[250] An equitable calculus would slightly diminish the authority of appellate courts, which can wield the tool of standing doctrine to deny the necessary predicate for federal remedial intervention at any stage of litigation, relative to lower courts. Trial court remedial orders normally are reviewable only for abuse of discretion. See Chayes, supra note 2, at 55. Appellate courts would, however, retain significant oversight authority under the principle (the application of which is not always plain in suits for structural relief) that the scope of the remedy must be linked to the scope of the violation. See Fiss, supra note 14, at 46–50. In addition, ripeness is a jurisdictional doctrine that authorizes de novo review by appellate courts.

dence of second-best.[251] Exacerbating the painful, awkward character of the discussion, the parties who are relegated to second-best may come disproportionately from the racial minorities and other disadvantaged groups that have the greatest need for judicial protection. It seems a fair guess, however, that these groups would fare no worse under an open balancing of public and private interests than under a regime in which courts manipulatively deny standing.[252]

Thinking about mootness should proceed along similar lines. Like standing, mootness doctrine has concepts of injury and redressability at its center. Again as with standing, the notion of injury makes sense only in doctrine-specific terms, involving the rights that particular constitutional and statutory provisions create and thus, derivatively, what will count legally as injury to those rights. The ideal of a completely trans-substantive mootness doctrine is therefore unattainable. Even apart from the definition of actionable injuries, the concerns that bear on the appropriateness of judicial relief against those who have engaged in past wrongdoing are radically diverse.[253] Mootness doctrine, which already is notoriously exception-ridden, should retain its capacity to respond to fine differences in fact patterns.

In contrast with standing and mootness doctrine, the trans-substantive justiciability rule barring advisory opinions seems to

[251] See Barry Friedman, When Rights Encounter Reality: Enforcing Federal Remedies, 65 S. Cal. L. Rev. 735, 737 (1992); Gewirtz, supra note 3, at 587.

[252] Cf. Chayes, supra note 2, at 57 ("The losers [in standing cases] are unwed mothers looking for child support and blacks, other minorities, and the poor . . . ."); Girardeau Spann, Color-Coded Standing, 80 Cornell L. Rev. 1422, 1423, 1495–96 (1995) (arguing that the Supreme Court's standing decisions form a "racially suspicious" pattern).

[253] Among the pertinent considerations are these:

> (i) an actual course of conduct, even if past, continues to frame litigation in a factual context and thereby focus judicial decisionmaking; (ii) the unlawful causation of a past injury deprives a defendant of any moral entitlement to freedom from judicial intervention; (iii) since a defendant who has caused wrongful conduct would otherwise remain free to repeat it, a judicial decision forbidding such conduct is not an advisory opinion in any objectionable sense; and (iv) there is an important public interest in protecting the legal system against manipulation by parties, especially those prone to involvement in repeat litigation, who might contrive to moot cases that otherwise would be likely to produce unfavorable precedents.

Hart & Wechsler, supra note 4, at 204.

me a defensible one, all things considered. As I argued above, the prohibition against advisory opinions probably reflects the historic anxieties of a fledgling judiciary.[254] Many state courts furnish legal advice to other branches of government without compromising their efficacy in resolving fully ripened disputes between adverse parties.[255] More pertinent today, however, is that the prohibition against advisory opinions has emerged as the symbolic embodiment of the Article III "case or controversy" requirement and that it appears to do little harm.[256] No ample justification would exist for abandoning the long-settled rule that forbids advisory opinions by Article III courts.

2. Adjustments to Accommodate Felt Needs for Remedies

Doctrines that adjust otherwise applicable justiciability rules in response to perceived needs for judicial remedies are often distinguished by a fine line, at most, from rules of substantive constitutional law designed to protect constitutional values that courts could not otherwise enforce effectively. To recur to an example discussed above, it is plausible to characterize First Amendment overbreadth doctrine, which the Supreme Court terms a standing rule, as a rule of substantive constitutional law.[257] But little hinges on the distinction. Courts design many constitutional doctrines to promote protective or prophylactic purposes.[258] If it is constitutionally acceptable for courts to craft substantive doctrines to serve strategic aims, it should be no less normatively acceptable for courts to pursue the same ends through exceptions to justiciability rules, as long as those exceptions do not threaten core historical or functional requirements of Article III.[259]

[254] See supra notes 186–87 and accompanying text.

[255] See Helen Hershkoff, State Courts and the "Passive Virtues": Rethinking the Judicial Function, 114 Harv. L. Rev. 1833, 1851–52 (2001) (extolling state courts' advisory opinion practice).

[256] See Chemerinsky, supra note 2, at 56.

[257] See supra notes 153–55 and accompanying text.

[258] See Strauss, supra note 216, at 195; see also Levinson, supra note 3, at 903.

[259] See Fallon, supra note 144, at 1364. Among other things, rules that adjust justiciability doctrines to accommodate felt needs for judicial remedies may also appear in a different, normatively more acceptable light once it is recognized that justiciability doctrines are often straitened, rather than expanded, in response to anxieties that other remedies would prove practically or constitutionally unacceptable.

To say that it is acceptable in principle for courts to relax justiciability rules to facilitate practically necessary remedies is obviously not to say that any particular relaxation is justified. The need for particular remedies to vindicate particular rights needs to be judged on a right-by-right basis, often through a process of doctrinal equilibration.

CONCLUSION

This Article has advanced two important positive theses involving the relations among justiciability, merits, and remedial doctrines. The first and narrower of these, the Remedial Influences on Justiciability Thesis, makes claims about the specific influence of concerns about acceptable remedies on the law of justiciability. To a large and previously unrecognized extent, judgments about the constitutional and practical *unacceptability* of remedies help to shape the requirements of justiciability doctrines including standing, mootness, ripeness, and political question. These doctrines recurrently and designedly operate to exclude from federal court suits in which plaintiffs seek remedies that the Supreme Court would regard as excessively costly or intrusive. In addition, felt practical *needs* for remedies in order for constitutional guarantees to be enforced effectively explain a number of exceptions to otherwise applicable justiciability doctrines including mootness and third-party standing. Sometimes, I have argued, remedial concerns exhibit themselves in trans-substantive justiciability rules (such as a purportedly across-the-board requirement that standing requires a redressable injury to the plaintiff); sometimes in doctrines peculiarly affecting the enforcement of particular substantive rights; and sometimes through doctrinal manipulation.

Although the Remedial Influences on Justiciability Thesis is important in its own right, it is only an aspect or application of a second, broader thesis that I have also advanced in this Article—the Equilibration Thesis. The Equilibration Thesis holds that the Supreme Court does not craft justiciability, substantive, and remedial doctrines in relative isolation from one another, but instead strives for an optimal overall equilibrium. When confronted with the prospect of a result or pattern of results that it deems unacceptable, the Court will respond by making an adjustment designed to bring about a new, better doctrinal alignment, but the choice about

which doctrine to adjust is often optional, not a matter of legal necessity. For example, the Court may respond to an apprehension that substantive rights are too broad by curbing available remedies or by limiting standing. When confronting the prospect of awarding remedies that it deems practically unacceptable, the Court may of course adjust applicable remedial doctrine, but it may also, alternatively, redefine the underlying substantive right in narrower terms or raise the justiciability threshold for enforcing the right.

Although the Article's boldest claims have been positive, I have also offered normative assessments of the states of affairs that both the Doctrinal Equilibration and Remedial Influences on Justiciability Theses describe. In broadest terms, I have maintained that it is constitutionally permissible and normatively appropriate for courts, especially the Supreme Court, to view justiciability, substantive, and remedial doctrines as components of an integrated package and to seek an optimal balance among them, rather than viewing each in isolation. I have also argued that it is in principle unobjectionable, and sometimes affirmatively desirable, for the Court to shape justiciability rules in light of concerns about practically unacceptable, and occasionally practically necessary, judicial remedies.

In assessing the specific justiciability rules that the Supreme Court has crafted, however, I have advanced a number of sharp criticisms and prescriptions for reform. Although the Court's remedy-based concerns are often valid, its doctrinal formulations too often overshoot their marks. The Court would do better to frame more justiciability requirements in right-specific terms, so that the demands of standing—like the criteria for ripeness, for example—would vary with the particular right that a plaintiff seeks to enforce.