Limiting Virtual Representation in *Headwaters Inc. v. United States Forest Service*: Lost (Opportunity) in the Oregon Woods?

Laura Evans*

In *Headwaters Inc. v. United States Forest Service*, the Ninth Circuit reversed a lower court finding of claim preclusion due to virtual representation of the plaintiffs in a prior case, thus allowing a citizen suit challenging the Forest Service's decision to allow logging in national forests in Oregon and California to advance. Although this decision appears to promote environmental interests, analysis of the case reveals an important negative impact on civil procedure doctrine. The Ninth Circuit interpreted Supreme Court precedent broadly to reject preclusion by virtual representation, furthering the implicit policy of allowing every person to have a "day in court." The court supported its policy-based decision with a seemingly straightforward doctrinal analysis, although an alternative result founded in legal theory and precedent was available. In so doing, the court missed an opportunity to identify a public rights exception in the determination of adequate representation under preclusion doctrine based on the significant difference between conventional cases that focus on individual interests and citizen suits that consider effects on public interests. Citizen suits, such as Headwaters' challenge to the Forest Service's decision-making process under the National Environmental Policy Act, National Forest Management Act, and the Administrative Procedures Act, usually involve disputes over public rights or public goods that affect communities as a whole. Had the court chosen, instead, to outline the parameters for the proper application of preclusion by virtual representation in a citizen suit, it could have advanced the judicial goals of efficiency and finality, while

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* Laura Evans is a candidate for the Juris Doctor degree in 2007 from the University of California, Berkeley, Boalt Hall School of Law.
balancing and protecting the interests of the courts, the parties, and the public. Instead, the Ninth Circuit expressly declined the opportunity to expand virtual representation theory to include a presumption of adequate representation where public rather than private rights are at stake. This Note argues that by choosing a cautious approach, the court missed an opportunity to acknowledge the unique aspects of statutory citizen suits in environmental litigation, and to open the door for change in this area of civil procedure. This Note proposes an expansion in preclusion doctrine, to extend the application of virtual representation in cases involving public rights or goods, potentially balanced by a corresponding reduction in the harm requirement for standing in such cases.

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INTRODUCTION

In *Headwaters Inc. v. United States Forest Service*, the Ninth Circuit rejected a lower court finding of claim preclusion due to virtual

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representation of the plaintiffs in a prior case, thus allowing a citizen suit challenging the Forest Service's ("Service") decision about logging in national forests in Oregon and California to advance. In so doing, the court missed an opportunity to identify a public rights exception in the determination of adequate representation under preclusion doctrine. A public rights exception would be based on the significant difference between conventional cases, which focus on harms to individuals, and citizen suits considering effects on public interests. Had the court chosen, instead, to outline the parameters for the application of preclusion by virtual representation in a citizen suit, it could have advanced the judicial goals of efficiency and finality, while balancing and protecting the interests of the court, the parties, and the public. Instead, the Ninth Circuit interpreted Supreme Court precedent broadly, to further the implicit policy of allowing all people to have their "day in court," and limiting the exercise of preclusion by virtual representation. The court clothed its policy-based decision in a deceptively straightforward doctrinal analysis, despite the availability of an alternative result based on existing legal theory and precedent.

Virtual representation can be defined as a "party's maintenance of an action on behalf of others with a similar interest." If a court deems virtual representation to have occurred, a potential party to the current case will be precluded from litigating claims previously litigated by a different party in a former suit. Virtual representation typically has three elements: adequate representation of a party to a current suit by a party of a former suit, an identity of claims between suits, and a final judgment on the merits in the prior suit. Traditional application of virtual representation doctrine in citizen suits, however, ignores the fact that these suits are representative by nature. Citizen suits, like those brought under environmental statutes such as the National Environmental Policy Act (NEPA), usually involve disputes over public rights or public goods that benefit communities as a whole. The individual interests of the named plaintiffs are not the focus of the case. While virtual representation is rarely applied in cases involving individual harms, to respect access by individuals to the courts, a more liberal application is appropriate when both the original and later cases concern the protection of identical public interests.

2. BLACK'S LAW DICTIONARY 1079 (8th ed. 2005).
3. See, e.g., Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003). Black's Law Dictionary describes virtual representation doctrine as "[t]he principle that a judgment may bind a person who is not a party to the litigation if one of the parties is so closely aligned with the nonparty's interest that the nonparty has been adequately represented by the party in court." BLACK'S LAW DICTIONARY, supra note 2, at 1306.
In *Headwaters Inc. v. United States Forest Service*, the plaintiffs challenged the Service's decision-making process with regard to logging in certain national forests in Oregon under the National Forest Management Act (NFMA), NEPA, and the Administrative Procedure Act (APA) in an effort to protect the forests for public use and enjoyment. The Ninth Circuit reversed the Chief Judge of the District of Oregon's *sua sponte* decision that virtual representation precluded the suit. In so doing, the Ninth Circuit interpreted precedent too broadly, expressly rejecting an opportunity to expand virtual representation theory by crafting an exception within adequate representation doctrine where public rather than private rights are at stake.

The procedure used to address disputes over the public goods at issue in many environmental statutory citizen suits is crucial because it plays a central role in determining whether the benefits of public goods are secured for entire communities in a way that is efficient and appropriate to their nature. Creating a usable, dependable mechanism for the application of virtual representation would ensure efficiency and finality for the court, the defendants, and the community. These results are particularly important when the defendant is a government agency, as is often the case in environmental statutory citizen suits, because limited taxpayer resources are at stake.

This Note argues that by erring on the side of caution, the appellate court missed a rare opportunity to acknowledge the unique aspects of statutory citizen suits in environmental litigation, and to open the door for reform of this area of civil procedure. Statutory citizen suits in environmental litigation involve public interests that may be presumed to be adequately represented by vigorous litigation by any citizen because the interest to be protected does not differ from citizen to citizen. This Note proposes a new procedure for assessing virtual representation in statutory citizen suits concerning environmental litigation. When such a suit is brought, the court would identify the suit as dealing with a public right, require publication of notice of the suit to allow the opportunity for intervention, and take measures to ensure that its decision fully

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5. 399 F.3d at 1050.
8. *Id. Sua sponte* decisions are decisions made by a judge without the request of a party. BLACK'S LAW DICTIONARY, supra note 2, at 1155.
10. See *infra* note 129 and Part III.D for an explanation of what are public rights—for instance, rights that deal with goods that approximate non-rivalrous consumption goods, i.e., goods that are not depleted when consumed.
11. Such as via newspaper notice. In essence, many of the notice procedures used in class action suits could be incorporated.
accounts for the interests of the whole community. After final judgment on the merits, any citizen suit subsequently brought on identical claims would be precluded.

Part I of this Note provides an overview of traditional virtual representation theory, scholars’ views on the subject, and a brief discussion of related civil procedure doctrines as they affect environmental cases. Part II then discusses the *Headwaters* case in more detail. Part III continues by analyzing the Ninth Circuit’s decision in light of the public rights at issue in the statutory suit in the *Headwaters* case, the theoretical underpinnings of virtual representation, and significant Supreme Court precedent. This analysis is the foundation for proposed changes in preclusion doctrine. The Note considers possible counterarguments to these proposed revisions in judicial interpretation, and calls for a new standard for civil procedure in environmental cases involving statutory citizen suits and public rights.

I. BACKGROUND LAW

A. *National Environmental Policy Act*

The National Environmental Policy Act (NEPA) requires federal government agencies to institute measures to ensure that the agencies consider environmental impacts prior to taking any “major” or “significant” action, in accordance with the procedural requirements set forth in the Act. The specific requirements for implementing the NEPA statute are laid out in the Code of Federal Regulations at section 1500.3, which states that NEPA compliance requires consideration of both the “spirit and letter of the law.” The regulations further specify that judicial review of agency action may take place only after either a final environmental impact statement or environmental analysis is filed, a finding of no significant impact is made, or the agency has taken an action that will lead to an “irreparable injury.”

Since its enactment in 1969, NEPA has had a dramatic impact both on how the federal government considers environmental impacts and on how government decisions are litigated. NEPA was the first of a number of significant environmental laws passed in the 1960s and ’70s, and was among the first to authorize the now familiar environmental citizen lawsuit. The statute was intended to ensure that information regarding environmental impacts was available to persons making decisions with

14. Id.
environmental impact, including everyday Americans, legislators, government administrators, and judges faced with environmental claims. NEPA continues to affect federal government action at every level.\textsuperscript{16}

Although NEPA created one of the causes of action under which the \textit{Headwaters} plaintiffs brought suit, the substantive environmental aspects of the case became subsumed in the analysis of civil procedure issues. NEPA remains important to this examination of the \textit{Headwaters} case because it creates the rights at issue in NEPA-based citizen suits. In addition, the rights that NEPA protects affect the interests of communities as a whole rather than of individual citizens, and so are public rather than private in nature. Thus, NEPA's citizen suit provisions are representative of the type of statutory citizen suit for which this Note suggests a revision to civil procedure.

\textbf{B. Virtual Representation}

1. \textit{Res Judicata, Privity, and Virtual Representation}

Res judicata is a civil procedure doctrine that bars re-litigation of a claim by the parties to a prior suit. Privity describes the "connection or relationship between two parties" that have a "legally recognized interest in the same subject matter."\textsuperscript{17} The theory of privity allows for the expanded application of res judicata when there is a very close relationship between the parties to a prior suit and the different parties to a new suit based on the same claims. A court may preclude re-litigation if such a relationship exists. For example, the \textit{Restatement (Second) of Judgments} lists several of these privity relationships, including trustees and beneficiaries, class actions, an official and the people the official represents, and one party and another vested with authority to litigate on the first party's behalf.\textsuperscript{18} Other relationships where courts have found privity include co-owners of property, a partnership and its members, and a corporation and its officers.\textsuperscript{19}

The concept of privity can extend beyond these traditional fiduciary, contractual, and legal relationships, and has come to encompass a further, broader type of relationship called virtual representation, in which a party to a suit is determined to have served as an adequate representative for the interests of a separate party making the same claims in a later

\begin{itemize}
\item \textbf{16.} \textit{Id.}
\item \textbf{17.} \textit{BLACK'S LAW DICTIONARY}, \textit{supra} note 2, at 976.
\item \textbf{18.} \textit{RESTATEMENT (SECOND) OF JUDGMENTS} § 41 (1982).
\item \textbf{19.} \textit{Id.} §§ 54, 59-60.
\end{itemize}
This differed from regular privity, where parties had to be bound to each other contractually or through specific legal duties. Instead, virtual representation could arise between parties entirely unrelated except for the common interest. This concept arose from probate proceedings, where it became essential to hold unborn remaindermen (persons with an independent future interest) to a current decree.21

One underlying policy for virtual representation, and for all forms of preclusion, is efficiency in the courts.22 Preclusion is an equitable doctrine that seeks to prevent defendants from facing repeated and expensive litigation.23 Virtual representation also promotes consistency in the law by avoiding the potential for conflicting court decisions on a single claim, and is consonant with the objectives of adherence to common law precedent. However, there is no "clear or coherent theory" of virtual representation for courts to apply uniformly,24 and judicial guidance on the issue has been vague.25 The situations and manner in which virtual representation was applied in the past largely were left to the discretion of the state courts.26

Federal circuit courts have differed in their approach to virtual representation. The Fifth Circuit succinctly described virtual representation as "an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues."27 Similarly, the Sixth Circuit recognizes virtual representation when a party to prior litigation "adequately represent[s]" a party to subsequent litigation.28 If there is no express agreement to be bound, virtual representation exists only when the representation is very evident.29 The Eighth Circuit held that an "identity of interests" between the prior and current parties is also necessary for virtual representation.30 Additional factors for determining

20. See CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4457 (2006) (discussing the emergence of a virtual representation doctrine within privity and how virtual representation has been interpreted in various courts).
21. Id.
22. See Tyus v. Schoemehl, 93 F.3d 449, 453 (8th Cir. 1996) (considering whether the parties were precluded from re-litigating certain voting district boundaries). But cf. Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 193 F.3d 415, 432 (6th Cir. 1999) (en banc) (Moore, J., concurring in the judgment) (challenging the assumption that efficiency always results from an application of virtual representation).
23. See Tyus, 93 F.3d at 454.
24. WRIGHT & MILLER, supra note 20, § 4457.
25. See Richards v. Jefferson County, 517 U.S. 793, 796 (1996); see also infra note 33 and accompanying text.
26. See Richards, 517 U.S. at 796.
29. Id.
if virtual representation has occurred include: whether the current party took part in the first case; any sign that the current party agreed to the outcome of the first case; whether the current party engaged in tactics to try and escape the results of the first case; and whether the party was "adequately represented." In the Ninth Circuit, a lawyer who represents a losing client and later becomes a plaintiff with the same claim is not collaterally estopped by his involvement in the earlier case. The Headwaters case further demonstrates the Ninth Circuit's reluctance to find virtual representation.

2. Supreme Court Precedent

The leading United States Supreme Court case on virtual representation, relied upon by the Ninth Circuit in Headwaters, is Richards v. Jefferson County. Richards involved a suit by "a class of all nonfederal employees subject to the county's tax," challenging a county occupational tax on the grounds that it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The defendant county successfully moved for summary judgment in state court on the grounds of res judicata because plaintiffs in another case, other county taxpayers and the city of Birmingham, had already litigated the issue. The matter went to the Supreme Court of Alabama, which affirmed on a virtual representation theory. The United States Supreme Court overturned the Alabama decision, holding that the plaintiffs' due process rights had been violated. The Court explained that it would only interfere with a state court's rules regarding the repeated litigation of an issue if a fundamental right of the litigants was threatened. In this case, the fundamental right was the federal constitutional right to challenge the levying of taxes as a violation of due process.

The Court expressed concern that the plaintiff taxpayers had not received adequate notice of representation in the initial Birmingham case. Unlike Headwaters, Richards involved a class action. The Court

31. Id.
34. Id. at 795.
35. Id.
36. Id. at 796.
37. Id. at 797.
38. See id.
39. Id. at 799 (explaining that "[w]e begin by noting that the parties to the [prior] case failed to provide petitioners with any notice that a suit was pending which would conclusively resolve their legal rights").
was troubled by the lack of notice because notice would allow a potential party to determine whether to be involved in the matter, furthering a due process right to be heard that the Court wished to protect in this class action case. The Court especially noted that to find virtual representation in a case involving a class action, "a prior proceeding" would have to be "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." The focus on notice in Richards appears to relate to the class action status rather than to virtual representation.

Most significantly to this Note, the defendants in Richards argued that the case was about a public issue in which "the people may properly be regarded as the real party in interest." In response, the Court articulated a key passage differentiating public and private rights. The Court distinguished between the limits on taxpayer standing in suits for misuse of public funds and access to courts for the purpose of presenting a federal constitutional challenge regarding those taxes:

Our answer requires us to distinguish between two types of actions brought by taxpayers. In one category are cases in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds... or about other public action that has only an indirect impact on his interests.... As to this category of cases, we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all.

Because the guarantee of due process is not a mere form, however, there obviously exists another category of taxpayer cases in which the State may not deprive individual litigants of their own day in court. By virtue of presenting a federal constitutional challenge to a State's attempt to levy personal funds, petitioners clearly bring an action of this latter type.

The Court appears to indicate that, in the case of public actions with indirect impact on personal interests, it would allow states broad discretion in determining what judicial proceedings to apply, and even whether to grant standing in the first place. In the Headwaters case, the Ninth Circuit did not follow the Supreme Court's lead and delve into this distinction between public and private actions.

40. Id. (citations omitted).
41. Id. at 801 (citations omitted).
42. See id. ("Even assuming that our opinion in Hansberry may be read to leave open the possibility that in some class suits adequate representation might cure a lack of notice... ").
43. Id. at 803.
44. Id.
45. Id.
3. Academic Perspective

Outside of the court system, some debate has arisen with regard to the theory behind virtual representation. One academic in particular, Robert Bone, expounds a theory explaining prior judicial use of the doctrine and positing that virtual representation should be expanded to apply in more cases.\(^\text{46}\) Another author, Jack L. Johnson, counters that due process is too fundamental a right to jeopardize by finding virtual representation under the present understanding of the doctrine, much less an expanded version.\(^\text{47}\) A comparison of these viewpoints illuminates the implications of the Ninth Circuit's *Headwaters* decision.

Robert Bone's analysis is also useful for how it differentiates between various other theories justifying virtual representation. Bone argues that it is most appropriate to apply virtual representation to preclude a suit when a party to the litigation had no inherent participation right in the prior litigation on the same claims, rather than because the prior party adequately represented the new party.\(^\text{48}\) Bone suggests that in most court cases where virtual representation was found, the plaintiff was precluded due to this lack of individual right to bring suit, rather than for reasons of adequate prior representation.\(^\text{49}\) Bone suggests that it is error to start with the assumption that each person has a "right to strategic freedom in litigation."\(^\text{50}\) Not all aspects of a democracy provide people in their individual capacity the right to be directly involved in decision-making.\(^\text{51}\) Rather, the starting point for virtual representation analysis should be a determination of whether a person has a right to litigate or participate in litigation in the first place, and if so, the strength of the person's claim and what kind of participation that claim deserves.\(^\text{52}\)

In contrast to this liberal construction of virtual representation doctrine, some academics propound that virtual representation should be avoided based on a process-oriented participation theory whereby involvement by the parties in the litigation is one of the purposes of the litigation. Pursuing litigation may give the person dignity, create "civic virtue," or provide "symbolic affirmation of individual equality."\(^\text{53}\) Other scholars put forward an outcome-oriented participation theory in which


\(^{48}\) See Bone, supra note 46, at 288.

\(^{49}\) Id. at 206.

\(^{50}\) Id. at 288.

\(^{51}\) Id. at 281.

\(^{52}\) Id. at 288.

\(^{53}\) Id. at 202.
additional litigation of an issue is valued because it enhances the ultimate resolution of the dispute or because it creates sound public norms. Bone contends that the true basis of virtual representation is a “no-participation theory,” where parties are not allowed to litigate because they have little or no right to do so, rather than a focus on the adequacy of any actual representation. Even so, Bone acknowledges that there is a certain intuition to process-oriented theory in certain circumstances. This is because under that theory a party is virtually represented only when the party had neither the right to “individual treatment,” because of some highly personal interest, nor the “power to control the litigative transaction or subject matter outside of the lawsuit.” So, while Bone argues that democracy doesn’t always allow individuals to have a direct personal say in what happens to them, he recognizes the power of the norm that says individuals should be involved in what affects them.

Two other aspects of Bone’s analysis are relevant to the virtual representation discussion. First, he discusses fiduciary relationships, which have often been the basis for finding virtual representation. Three aspects characterize fiduciary relationships: a fiduciary represents the beneficiary’s interests rather than his or her own interests, a fiduciary controls the beneficiary’s interests both in and out of court, and the claims and remedies found in fiduciary litigation do not look at the beneficiary as an individual. Bone asserts that the fiduciary concept supports a broader application of virtual representation preclusion in other situations where the same characteristics are found, such as public law cases. Second, Bone discusses public law examples in his analysis of the theories of virtual representation. Specifically, he refers to taxpayer suits, like those cited in the Richards case, and other cases in which citizens were bound to the results of suits that dealt with government action because the plaintiff represented an entire class of citizens. Both the Richards case and Bone’s theory of virtual representation refer to the

54. Id. at 201.
55. Id. at 203, 205. Bone gives a full discussion of the other theories as well. See id. at 237–79.
56. Id. at 285.
57. Id. at 279.
58. Id. at 281.
59. This introduction to the role of fiduciary relationships in virtual representation analysis is further developed in the analysis of the public versus private interests distinction in Part III.B, infra.
60. See Bone, supra note 46, at 226–27.
61. Id. at 228 (“The fiduciary model plays a central role in virtual representation . . . the more closely a court is able to analogize new factual situations to this paradigm, the less trouble the court is likely to have with precluding a nonparty . . . . Public law cases . . . illustrate this point.”).
62. Id. at 210–11.
idea that the plaintiff is filling a role rather than acting as an individual. In Richards, the Court emphasized that the concept of the “status” of the party as a taxpayer was central to the ability to proceed with the lawsuit.

Bone has garnered both direct and indirect support for his ideas in the courts. In his concurrence in Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Judge Moore of the Sixth Circuit cited Bone, noting the importance of distinguishing between individual and group or public rights. In Tyus v. Schoemehl, the Eighth Circuit also emphasized the distinction between “public law” and “private law” issues, finding virtual representation to be best applied to public law. Citing Richards, the court reasoned that public actions that affect people indirectly involve innumerable plaintiffs, with the potential that a claim could be litigated indefinitely—circumstances raising significant “concerns about judicial economy and cost to defendants.” The court further recognized the likelihood that in public law cases, where “by definition everyone benefits,” some parties would await the outcome of an early case, knowing they would benefit from a positive outcome, while they could never be harmed by an adverse decision since they would not be bound to it. Virtual representation is meant to limit this type of tactical maneuvering.

However, Jack L. Johnson counters that due process is too fundamental a right to jeopardize through virtual representation. He follows traditional doctrine and emphasizes that the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution protects people from being deprived of property without a fair hearing. Since a lawsuit is a type of property, the right to sue cannot be taken from an individual unless the process is fundamentally fair. Johnson argues that due process is meant to protect a person’s property from courts overzealous about efficiency. He concludes that “mere cost cannot overcome the individual property rights protected by the Fourteenth Amendment.” Johnson is concerned that virtual representation could lead to “mandatory intervention,” so that all affected parties have the

63. See Richards v. Jefferson County, 517 U.S. 793, 803 (1996) (using “status” to discussing what enabled a taxpayer to bring suit); Bone, supra note 46, at 210–11 (discussing the “status” of a taxpayer rather than the individual’s identity).
64. See Richards, 517 U.S. at 803.
65. 193 F.3d 415, 432–33 (6th Cir. 1999) (en banc).
66. 93 F.3d 449, 456 (8th Cir. 1996).
67. Id.
68. Id.
69. Johnson, supra note 47.
70. Id. at 1305.
71. See id. at 1326–27.
72. Id. at 1326 (referring to the holding in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)).
opportunity to assert their interests in court, which he views as putting a heavy burden of joinder on non-parties.\textsuperscript{73}

To support his emphasis on the need for fair hearing, Johnson points to the well-known \textit{Fuentes v. Shevin} case, in which the Supreme Court held that two state statutes violated constitutional due process requirements because they deprived individuals of property without a hearing on the \textit{ex parte} motion of one party.\textsuperscript{74} The Court wished to ensure that due process would "protect [the owner's] use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party."\textsuperscript{75} However, the \textit{Fuentes} Court was concerned with concrete, individually owned, personal property, in contrast to the type of property involved in environmental cases, where the "property" at issue is held for the common good of a community and is not owned by the plaintiff at all.\textsuperscript{76} Johnson's argument focuses on the need to protect individual interests in property without specifically addressing the balance of due process versus fairness and efficiency concerns for public goods such as environmental resources.

Johnson does not make the distinction between public and private interests that is important in both the Supreme Court's analysis in \textit{Richards} and in Robert Bone's analysis. As Section II explains, the Ninth Circuit did not recognize this distinction either when it chose not to recognize a public rights exception in deciding the \textit{Headwaters} case.

\textit{C. Other Relevant Civil Procedure Doctrine}

At least two other elements of civil procedure doctrine, in addition to virtual representation, present unique benefits and challenges for environmental statutory citizen suits. The first is the traditional class action, which has been utilized frequently in environmental cases and can be very helpful in environmental litigation based on common law rights.\textsuperscript{77} Like virtual representation, class action suits have the potential to bind non-parties to court decisions. Unlike virtual representation, however, a

\begin{itemize}
  \item \textsuperscript{73} See id. at 1314.
  \item \textsuperscript{74} 407 U.S. 67 (1972).
  \item \textsuperscript{75} Id. at 81.
  \item \textsuperscript{76} See id. at 70 (explaining that the plaintiffs' personal property, such as a gas stove and stereo, were taken because money was owed and not paid on the property).
\end{itemize}
class action is binding only if potential parties receive notice and have the 
opportunity to opt-out of the proceedings.\textsuperscript{78} Indeed, the fundamental 
right of due process underlies both virtual representation and class action 
document.\textsuperscript{79}

Johnson’s analysis of class actions is helpful for determining in what 
situations virtual representation should apply. Johnson summarizes 
certain factors that determine if class action is appropriate in a given 
situation: the number of people affected by the lawsuit; the difficulty for 
all potential plaintiffs to become parties to a single lawsuit; and the fact 
that the relief appropriate for each individual may be very small.\textsuperscript{80} 
Johnson points out that class actions work especially well in situations 
where “collectively the harm may be severe, yet individually the harm 
may be insufficient to justify an independent, individual suit.”\textsuperscript{81} This is 
certainly the situation in the typical environmental statutory citizen suit. 
Some of the features of the class action, such as the identity of interests 
and the importance of notice to all potentially affected parties, will 
inform the proposed change to the virtual representation doctrine 
discussed below.

The second procedural doctrine particularly relevant to virtual 
representation is standing.\textsuperscript{82} Traditional standing doctrine requires the 
plaintiff to demonstrate an individual and specific 
injury.\textsuperscript{83} This 
requirement has proven to be quite a hurdle in many environmental 
cases.\textsuperscript{84} A number of academics, including Christopher Elmendorf and 
David Cassuto, have argued that a more liberal standard for establishing 
estanding would be appropriate for environmental law.\textsuperscript{85} Cassuto asserts

\textsuperscript{78} See, e.g., Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 193 F.3d 415, 425-
426 (6th Cir. 1999) (en banc).
\textsuperscript{79} Id.
\textsuperscript{80} Johnson, supra note 47, at 1328–30.
\textsuperscript{81} Id. at 1330–31.
\textsuperscript{82} A full discussion of standing doctrine and its implications is beyond the scope of this 
Note. Standing will be explored only as it relates to virtual representation. See infra note 132 and 
accompanying text for further analysis of standing and virtual representation.
\textsuperscript{84} Some of the landmark cases involving standing and environmental suits are Sierra 
Club, 405 U.S. at 734 (denying environmental plaintiffs standing for harms involving change in 
“aesthetics and ecology,” due to lack of individualized injury); Lujan v. Nat’l Wildlife Fed’n, 504 
U.S. 555, 561–62 (1992) (holding that plaintiff environmental organizations lacked standing to 
challenge a regulatory action due to a failure to show individual, non-speculative injury); and 
the type of harm required in an environmental lawsuit and permitting standing based on citizen 
concerns regarding likely ongoing discharges and the deterrent effect of statutory penalties in 
reducing future harm).
\textsuperscript{85} See, e.g., Christopher S. Elmendorf, State Courts, Citizen Suits, and the Enforcement 
Elmendorf argues that:

Laws usually aim to improve the condition of a class of people. To violate the law is to 
hurt a member of this class, creating the central predicate of Article III standing:
that standing in environmental statutory citizen suits should be based on the
harm the statute means to address, and not individual harm, because the
harm to the individual is of "little relevance." In contrast, some
judges have argued that an easing of standing requirements in
environmental litigation is inappropriate because litigation should only
occur between parties with a true stake in the matter. The relationship
between an expansion in the recognition of virtual representation to
preclude litigation in environmental statutory citizen suits and standing in
these suits is analyzed in Part III.E.

II. THE HEADWATERS CASE

A. Case Background

In the late 1990s, the U.S. Forest Service (Service) planned to allow
logging in, and the sale of timber from, four national forests in Oregon
and California: Mt. Hood, Rogue River, Siskiyou, and the Willamette.
In May 1999, a group of environmental organizations and citizens,

‘injury in fact.’ Yet, immediate connections between environmental damage and
human welfare are not inevitable. Within the ambit of environmental law are remote
and rarely visited lands; uncommon and inconspicuous species; and the depths of the
seas . . . . A doctrine of standing bottomed on causation and redressability could
impede citizen-suit enforcement, much as the complexities of proving causation
ensnarl common-law environmental claims. All ‘ideological’ plaintiffs would benefit
from liberal state court standing to enforce federal law, but environmentalists have the
most to gain.

Id. David N. Cassuto similarly asserts that “[e]nvironmental law differs in fundamental respects
from laws based on traditional property interests. So too must the rhetoric in which such laws are
framed. Current standing doctrine has no place in environmental jurisprudence, where injury to
the plaintiff has little relevance.” The Law of Words: Standing, Environment, and Other

[t]he common denominator among the multiple perspectives is membership in the
social system . . . . Rather than relying on an unworkable notion of standing to
determine the viability of a cause of action, courts should consider whether the injury
complained of is of the type the statute seeks to prevent and whether it threatens the
health and longevity of the social system.

86. See Cassuto, supra note 85, at 127; see also David M. Driesen, Standing for Nothing:
The Paradox of Demanding Concrete Context for Formalist Adjudication, 89 CORNELL L. REV.
808, 876 (2004) (criticizing the inconsistent application of standing doctrine and noting that
"some observers claim that the Court has been especially demanding in environmental cases,
even though individual injury has little to do with the merits of many environmental claims
reaching the Supreme Court").

87. See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 202
(2000) (Scalia, J., dissenting) (“The new standing law that the Court makes—like all expansions
of standing beyond the traditional constitutional limits—has grave implications for democratic
environmental organizations lacked standing to challenge a regulatory action due to a failure to
show individual, non-speculative injury).

88. See infra note 136 and accompanying text.
89. Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1050 (9th Cir. 2005).
including the Klamath-Siskiyou Wildlands Center (the Center), sued the Service in the District of Oregon. The plaintiffs asked for declaratory and injunctive relief in order to force the Service to undertake development of an environmental impact statement (EIS) as required by NEPA and to follow other procedures mandated by the National Forest Management Act (NFMA) and the Administrative Procedure Act (APA). However, in December 1999, after the district judge issued a scheduling order, but before the judge or the defendants took any other action, the plaintiffs stipulated to a dismissal with prejudice based on a settlement. The case was not a class action, nor is there evidence that the judge considered the implications of the stipulation on non-parties.

In February 2001, the Center, with the help of a different attorney, brought a new suit under NEPA and NFMA, addressing what were known as the Beaver-Newt and Silver Fork timber sales, the same sales at issue in the prior litigation. The Service moved to dismiss on the grounds of res judicata, which the Center unsuccessfully argued did not apply because the attorney in the previous case had not been authorized to settle the case. However, in July 2001, the Chief Judge of the District granted the Service's motion to dismiss on the grounds of res judicata.

Three days later, Headwaters Inc. filed a suit, again in the District of Oregon, with very similar allegations, presented by the same attorney from the Center's second suit and dealing with the same timber sales. This suit differed from the previous two suits by alleging that its claims affected "the plaintiffs' interest in and use of the forest," and further, "relate[d] its claims to particular endangered species." The Chief Judge was assigned to this case, too. This time he dismissed the case sua sponte, on the grounds of virtual representation.

The plaintiffs appealed, and the Ninth Circuit reviewed de novo. The appellate court, in an opinion by Judge Berzon, found that the claims brought by Headwaters and co-plaintiff Forest Conservation Council (Council) were identical for purposes of privity to those brought by the prior plaintiffs. The court also found that there had been a final judgment on the merits in the original 1999 case, because "a stipulated

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91. Headwaters, 399 F.3d at 1050.
92. See id.
93. Id.
94. Id. at 1051.
95. Id.
96. Id.
97. Id.
98. Id.
99. Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1050 (9th Cir. 2005).
100. Id. at 1052.
dismission of an action with prejudice in a federal district court generally constitutes a final judgment on the merits and precludes a party from reasserting the same claims in a subsequent action in the same court.” 101 However, the appellate court reversed on the grounds that the Chief Judge erred in finding virtual representation. 102 The Chief Judge had not determined whether Headwaters and the Council were “adequately represented” by the original 1999 plaintiffs, and further erred by not allowing Headwaters and the Council the chance to prove that they had not been adequately represented. 103 The Ninth Circuit did not find “adequacy of representation,” because the pleadings did not provide the information necessary to determine adequacy in “nontraditional” forms of privity. In addition, the Chief Judge had not allowed the parties to argue the representation issue. 104 Since the judge who granted the stipulated dismissal did not certify or treat this case as a class action, there were no “safeguards” in place to protect the interests of all potential parties to the judgment. 105 Finally, and perhaps most significantly, the appellate court expressly chose not to recognize a “public right” exception to the due process requirement of adequate representation. 106

Circuit Judge Goodwin added a brief concurrence to the opinion, reminding the district judge that the Ninth Circuit’s ruling did not prohibit a finding of virtual representation once further factual development of the record was conducted, if that development showed that the plaintiffs were “gaming” the system to draw out litigation. 107 He also mentioned that the remedies of attorneys’ fees and costs could be imposed on the plaintiffs if that were the case. 108

B. Case Analysis

In finding that it was not appropriate for the Chief Judge to dismiss the Headwaters case sua sponte on the grounds of virtual representation, the Ninth Circuit noted the lack of any precedent for upholding a lower court’s dismissal when the parties had not been able to make any arguments or explanations in their favor. 109 The appellate court noted

101. Id.
102. Id. at 1050.
103. Id.
104. Id. at 1054–55.
105. Id. at 1056.
106. Id. at 1054.
107. Id. at 1057 (Goodwin, J., concurring). However, preclusion in that case would be better justified on the basis of “forfeiture for improper acts” rather than adequacy of prior representation. See Bone, supra note 46, at 222. Thus, this argument is not addressed in the analysis.
108. Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1057 (9th Cir. 2005).
109. Id. at 1054–55.
that judicial efficiency and economy were not at issue in this case, as resources had not been used in determining the merits of the underlying issues. This was not a case of summary judgment since only the initial complaint had been filed.

Given the lack of any record regarding the adequacy of representation of interested non-parties in the instant case or the two preceding cases, much less a hearing on the merits, it would be easy to conclude that the Ninth Circuit appropriately remanded—and that to do otherwise would be judicial activism. However, by rejecting the virtual representation holding, the Ninth Circuit established precedent that would apply to more than just the facts of the Headwaters case. As the analysis below will demonstrate, the court missed the opportunity to expand virtual representation doctrine in environmental law cases, within the Richards precedent, based on the identity of claims between the prior and current citizen suit complaints.

III. ANALYSIS OF VIRTUAL REPRESENTATION AND THE INTERESTS DISTINCTION

While the notion of allowing each potential litigant a “day in court” is very strong in American legal tradition, there are other instances besides virtual representation where not every issue can be litigated afresh. For example, stare decisis prevents courts from readdressing an issue already decided by a higher court or by the court itself, except in extraordinary circumstances. Additionally, class actions allow one or more plaintiffs to represent an entire class of litigants. The existence of these doctrines allows room for the expansion of another doctrine limiting the amount of access to courts.

A. Precedent

In Headwaters, the Ninth Circuit lost a rare opportunity to craft an expansion of virtual representation theory in public rights cases, such as environmental statutory citizen suits, to recognize that when the interests of the public as a whole have been adequately represented, inquiry into the representation of the specific interests of individual non-parties is not necessary. This finding would comport with the Supreme Court’s analysis in Richards v. Jefferson County, which remains the Court’s sole precedent on adequate representation. However, while the Headwaters

110. Id. at 1055, 1056–57.
112. Headwaters, 399 F.3d at 1052.
opinion cited Richards for the proposition that due process required adequate representation, and described the facts and holding involved in Richards, the opinion did not discuss the distinction between the two categories of suits articulated in Richards—suits by plaintiffs as individuals and suits filed in the public interest.\(^{115}\) In Richards, the Supreme Court distinguished between cases where taxpayers were suing for themselves in their individual roles as those who suffered a financial harm, and taxpayers who were suing on behalf of the public at large in their roles as citizens representing the public good as a whole.\(^{116}\) In contrast, the Ninth Circuit chose not to find a public rights exception to the due process requirement without even exploring the distinctions between public and private law actions.\(^{117}\)

**B. The Role of the Plaintiff as Representative**

While there is room in common law precedent to expand the application of virtual representation preclusion in certain circumstances, this Note seeks to determine if those circumstances are theoretically appropriate in environmental statutory citizen suits. In other words, is the argument that virtual representation should preclude cases in which the plaintiff's interest derives from his role as a member or representative of a larger group, rather than from an individual interest, valid in the context of public laws and more specifically in environmental statutory citizen suits?

The role played by the plaintiff in litigation, to either seek protection of solely personal interests or to act as a representative of the interests of the public, plays a major part in assessing the fairness and appropriateness of applying preclusion. As introduced in the discussion of academic perspectives on virtual representation in Part I, virtual representation is particularly suitable in situations in which the plaintiff is acting as a representative of another, such as the example of fiduciary relationships in which the fiduciary represents, controls, and claims benefits for the principal.\(^{118}\) In general, public law cases approximate fiduciary cases\(^{119}\) because representatives for the public interest to be

\(^{115}\) Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1053 (9th Cir. 2005).

\(^{116}\) See Richards, 517 U.S. at 803 (distinguishing taxpayers who were complaining "about an alleged misuse of public funds" and taxpayers who were fighting a tax levy against them on constitutional grounds).

\(^{117}\) See Headwaters, 399 F.3d at 1054.

\(^{118}\) See Bone, supra note 46, at 228, and supra text accompanying note 59.

\(^{119}\) A fiduciary must exercise the duties of good faith, trust, confidence, and candor to the person represented by the fiduciary. See, e.g., BLACK'S LAW DICTIONARY, supra note 2, at 506 (defining the duties of a fiduciary).
protected seek a remedy that will be applied to everyone interested in the matter, not just themselves.\textsuperscript{120}

However, public law cases differ from fiduciary cases in several ways. In fiduciary cases the litigant is under an obligation to promote the interests of the beneficiary, whereas there is not necessarily such an obligation for those suing under public laws.\textsuperscript{121} The public litigant is not, by law, required to identify or address threats to the welfare of other members of the public relating to the case at hand. The public litigant also does not normally have a “special relationship to the subject matter outside the litigation” as the fiduciary does by exercising control over the beneficiary’s interests.\textsuperscript{122} In other words, normally it is not the beneficiary that manages the beneficial interests beyond the courtroom, but rather the fiduciary.\textsuperscript{123} The public law plaintiff does not control the public’s interests in the environmental resource sought to be protected either during or following litigation. Furthermore, the stakes in public law cases are especially high, particularly in those involving individual, constitutional rights.\textsuperscript{124} Fiduciary cases do not necessarily include such large-scale implications or the correspondingly heightened importance and scrutiny of actions and outcomes.

These differences are not especially problematic in ensuring adequate representation in the context of environmental statutory citizen suits. While the environmental plaintiff is under no legal obligation to the public in general, such plaintiff is usually seeking to maximize public benefit by instigating enforcement of public laws to enhance access to, or protect, public goods.\textsuperscript{125} The environmental plaintiff is often a group that has a special interest in the subject matter outside of the litigation, because the group is generally established for the purpose of promoting environmental causes and is often composed of concerned citizens. Regardless of this special interest, however, these groups seek to identify environmental harms to any member of the public, and as plaintiffs litigate to protect the interests of all members of the affected public universally, regardless of membership in the plaintiff’s organization. Like fiduciaries, environmental citizen suit plaintiffs are often predominantly

\begin{itemize}
\item \textsuperscript{120} See Bone, supra note 46, at 229.
\item \textsuperscript{121} See id. at 230.
\item \textsuperscript{122} See id.
\item \textsuperscript{123} See id. at 226.
\item \textsuperscript{124} See id. at 230.
\item \textsuperscript{125} Of course, there is no guarantee that an environmental plaintiff is seeking the appropriate use of public goods. Environmental plaintiffs could be trying to exploit public goods, as well. For example, a mining company could as easily challenge a governmental decision in a citizen suit as an environmental protection group. Then the analogy would apply more generally to potential environmental group interveners. The court, in considering virtual representation, would have to consider the adequacy of the representation in asserting public interests. See Proposal \textit{infra} Part IV.A, and note 140 and accompanying text.
\end{itemize}
acting as representatives, rather than focusing on protection of their own interests, and seek the benefit of the entire class represented.\textsuperscript{126}

Environmental cases also resemble fiduciary relationship cases in other ways. Environmental plaintiffs generally do not focus on individual benefit, particularly not any personal financial benefit. In fact, there is an element of selflessness in many environmental statutory citizen suits, as there are no financial rewards in this litigation, and many environmental plaintiffs and their counsel are under-funded and over-worked. The fiduciary similarly does not act out of personal financial motivations. In addition, like the public-protecting environmental citizen suit plaintiff, the fiduciary seeks benefit for the entire class of beneficiaries, in accordance with executory duties, regardless of the number or individual demands of the beneficiaries. The legal rights and remedies in a fiduciary suit similarly do not acknowledge the individuality of the beneficiaries. All members of a class of beneficiaries have the same rights, and the fiduciary has the same obligations to each member of the class, such as to the legatees of an estate or the shareholders of a corporation. By its nature, the environmental citizen suit also involves the same rights and obligations held by the general public intended to benefit from the suit as by the plaintiff seeking enforcement, penalty, or compliance through the litigation. In general, the plaintiff does not achieve personal gain in excess of the benefit to the public as a whole.

Environmental statutory citizen suits differ the most from other public law cases in that they are not about the assertion of constitutional, individual rights, but concern the benefit to the public as a whole. Because the environmental statutory citizen suit plaintiff is acting as a public citizen, a role that any individual could fill, there is an interchangeability of plaintiffs that makes a broadening of virtual representation in these cases appropriate. In sum, the representative nature of the plaintiff's complaint provides a theoretical justification for analogizing from fiduciary cases to environmental statutory citizen suits.

\section*{C. Virtual Representation and Preclusion Theory}

Traditional justifications for preclusion, such as "judicial economy, repose, and decisional consistency," apply especially in cases seeking enforcement of public laws.\textsuperscript{127} Indeed, it is because environmental statutory citizen suits so often involve public rights and public goods that the argument for an expansion of the virtual representation doctrine is so appropriate in this area. If every citizen were to litigate a public law case,
judicial economy would become judicial largess. Without preclusion due to a finding of virtual representation in a prior suit, it would be possible for citizen after citizen to bring identical lawsuits. Also, one citizen could bring suit, wait to see what happens, and then sue if the result of the first case was not the outcome that the citizen desired. Additionally, if the public interest at issue under the public law were constantly litigated, whomever ultimately had to accomplish changes to the interest would find it hard to proceed with any action, for fear that another lawsuit would be brought or that another case was pending at the time. It is the very nature of the citizen suit that the same public interest is at issue for each citizen, whether or not that citizen is a named party to the current suit.

The need for judicial efficiency and stability applies especially when the defendant is the government, as is often the case in litigation under environmental statutes, because of the government's reliance on limited taxpayer resources. In addition, because a public law will apply to all citizens, decisional consistency is essential to the government's litigation strategy, planning, and management. In fact, there is a positive side to finding that a party has been virtually represented by a prior plaintiff because of the public nature of a suit. Normally parties intervene when they are concerned with a particular case, because if they do not, they cannot participate in an appeal although they are affected by the court's decision. However, a non-party that a court finds to have been virtually represented may be able to appeal the result of a suit.\(^8\) This would allow an environmental group that had chosen not to intervene in a lawsuit, or to bring a case itself, to appeal the case if a court finds the group to be in privity with a party to a prior suit. Clearer rules for finding virtual representation in public suits will enable both parties and interested non-parties to plan legal strategy around probable judicial decisions. Thus, advances in preclusion doctrine are of special importance in the field of environmental law, and of public law as a whole.

Courts should expand the standard doctrine of virtual representation to environmental statutory citizen suits where citizens want to litigate for the preservation, increase, or restriction of public rights, or for the securing of public goods. The proposed expansion of preclusion doctrine would not apply to cases involving purely individual rights, benefits, or

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8. This unusual aspect of virtual representation was discussed by Pamella A. Hopper in the context of arguing that an insurance company should be allowed to appeal a case that an insured party lost in spite of the fact that in Texas, the legislature opted to not allow plaintiffs to name insurance companies in suits against their insureds. See Pamella A. Hopper, *Will the Real Party in Interest Please Stand?: Direct Action Statutes v. The Doctrine of Virtual Representation*, 36 S. Tex. L. Rev. 557, 570 (1995) ("The general rule is that a remedy by appeal is available only to parties of record. There are several exceptions to this general rule, including cases in which one is deemed a party under the doctrine of 'virtual representation.'").
losses. As specifically recognized by the Seventh Circuit, the distinction between public and private rights is essential to preclusion analysis.129

D. Definition of Public Goods

Even given a theoretical justification for distinguishing the treatment of suits regarding public interests from those concerning private interests, modification of virtual representation doctrine for environmental statutory citizen suits presents additional considerations. First, a determination must be made of what exactly are public goods or public rights. An exception to the requirement of adequate representation of each plaintiff's interests would apply especially to cases involving those goods that approximate non-rivalrous consumption goods, i.e., goods that are not depleted when consumed. These goods are common by nature, and so are able to be enjoyed by numerous parties, regardless of the personal characteristics of the user. One example of a non-rivalrous consumption good would be national defense—when one citizen benefits from the government's provision of national defense, it is not at the expense of another. The diffuse benefits of such goods make it unlikely that the market will provide an adequate supply, which is why the government provides the good for all citizens. Another example of a non-rivalrous good would be intellectual property. When one person reads a copyrighted book, it does not prevent another person from doing so—the book is not consumed by the first person the way a meal would be.

Environmental goods are often non-rivalrous consumption goods, at least to a degree.130 The interests brought forward by the plaintiffs in Headwaters, including the enjoyment of the continued existence of endangered species and natural habitat, are examples of public goods and non-rivalrous consumption goods.131 In addition to analyzing the nature of the good at issue, courts must also look at the law underlying the plaintiff's claims to determine whether the law was specifically intended to protect public rights and public goods.

E. Virtual Representation and Standing

Traditional standing requires plaintiffs to demonstrate individual harm. This conflicts with the underlying theory of this Note's proposal that plaintiffs in environmental citizen suits are seeking to protect a

129. See, e.g., Tice v. Am. Airlines, 162 F.3d 966, 973 (7th Cir. 1998) (stating that "these rights are individual, not group-based").

130. The tragedy of the commons scenario would eventually apply to some types of environmental goods.

131. Consumption of non-rivalrous goods can be constructively limited by congestion, however. Too many people trying to enjoy a forest could eventually lead to the depletion of enjoyment of others because of crowding.
public interest. Furthermore, an expansion of preclusion by virtual representation would particularly burden environmental plaintiffs due to the existing difficulty in demonstrating individual harm to the plaintiffs in these cases.\textsuperscript{132} If virtual representation is more frequently found in cases involving harm to the public interest, this will result in the preclusion of more of this class of potential plaintiffs from litigation. This burden would fall heavily on environmental plaintiffs unless standing doctrine is liberalized to recognize harm to a whole community, not just the individual. In other words, a public harm rather than harm to a given individual would suffice to establish standing.

Such liberalization in standing doctrine for environmental citizens suit cases is in line with the proposals of David Cassuto and fellow academics.\textsuperscript{133} These proposed changes would grant the plaintiff standing to sue based on the law itself, because “the injury complained of is of the type the statute seeks to prevent,” and because the injury “threatens the health and longevity of the social system.”\textsuperscript{134} Otherwise, a finding that the harm the plaintiffs were suing to address was public in nature, rather than private or individual, could result in the case being thrown out on the grounds of lack of standing.\textsuperscript{135}

The difficulty in applying traditional standing doctrine in environmental citizens suits is that the harm is rarely entirely individual in nature. Courts have recognized harms that are essentially public in nature as a basis for standing.\textsuperscript{136} The courts have, at times, clothed claims that are fundamentally about public rights in individual terms simply to allow suits with merit to proceed—even though the harm is to communities as a whole and not solely to plaintiffs in their individual capacities. If standing were established by Cassuto’s proposed method, virtual representation could be expanded with less concern for excessive burden on environmental plaintiffs, because the justification for bringing the suit would be based on the law protecting public rights, not just for individual claims to these rights.\textsuperscript{137}

One might argue that a change in standing is not necessary to effectuate a change in the application of virtual representation doctrine. The courts will analyze prudential concerns separately from standing issues, and will be able to apply each doctrine appropriately. Standing

\textsuperscript{132} See supra note 82 and surrounding discussion.

\textsuperscript{133} Id.

\textsuperscript{134} Cassuto, supra note 85, at 127–28.

\textsuperscript{135} See id. and surrounding discussion.

\textsuperscript{136} See, e.g., Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (recognizing that “aesthetics and environmental well-being are important ingredients of the quality of life, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process,” but holding that the plaintiffs lacked individualized injury).

\textsuperscript{137} See Cassuto, supra note 85 and surrounding discussion.
doctrine is grounded in constitutional law, and the burden of standing for environmental plaintiffs has been a matter of tremendous judicial and academic scrutiny over the past thirty years. Ultimately, these critics would argue that standing is too controversial to be changed to accommodate expansion in another doctrine.

This Note argues that a broadened standard for virtual representation is justified based on the fact that the harm at issue is to a community, or to the public as a whole, rather than to an individual. Despite the merits of the arguments to the contrary, liberalizing the basis for standing, particularly as promoted by David Cassuto, remains a worthwhile consideration to address and balance the costs of the proposed change to virtual representation for the environmental citizen suit plaintiff.

IV. MODIFICATION TO VIRTUAL REPRESENTATION DOCTRINE

A. Proposal

Because the party bringing suit in an environmental statutory citizen suit is acting in a public role, examination of the identity of interests between the prior and current parties is less relevant than in a traditional civil suit. Therefore, adequate representation of a current party by a prior party to a related case may be presumed in the environmental public interest cases, so long as acceptable procedural protections are in place. Finding virtual representation would require judicial analysis of the complaints in the two proceedings, as the identity of claims can be determined on the papers. Indeed, the Ninth Circuit was able to do just that in the Headwaters case. The key difference when applying virtual representation in the public rights context is that the focus of judicial scrutiny turns to the substantive law itself, and not to the procedural question of adequate representation.

Environmental cases in which class action is suitable are closely related to cases in which an expansion to virtual representation is appropriate. As mentioned above, class actions are particularly suited to environmental litigation because the potential benefit may be small on a per capita basis, but large to the community as a whole. There are often fewer incentives for each individual affected by an environmental harm to sue individually because the harm may be hard to quantify and may not have a monetary solution. However, environmental statutory citizen suits may be more difficult to fund than environmental class action suits

138. The remedies would have to be determined after consideration of the impact on the community as a whole.
139. Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005).
140. See supra note 81 and accompanying text.
because they do not result in monetary damages paid to plaintiffs. While prevailing plaintiffs in environmental citizen suits may be awarded attorneys' fees, depending on the underlying statutory authority for the suit, the inability to recover damages prevents the accumulation of funds to cover the costs of unsuccessful citizen suits. Thus, citizen suits are generally not the type of cases plaintiffs' lawyers take on contingency. It would promote the purposes behind the citizen suit provisions for the courts to establish procedural doctrine that would encourage the use of this statutory tool, yet protect actual and potential litigants from procedural unfairness.

Based on this reasoning, the most important distinction between the class action and the citizen suit is that the class action provides specific safeguards to ensure adequate notice and representation for potential plaintiffs that the statutory citizen suit does not. The lack of procedural safeguards must be addressed to ensure that all interested parties have a reasonable opportunity to participate in a citizen suit regarding the enforcement of public law before they are considered to have been virtually represented. Much has been learned from experience with class actions that could be useful in an expansion of virtual representation doctrine, given the serious implications of preclusion. Judges are now familiar with the requirements of class actions and could readily extend the appropriate safeguards such as notice to an expanded virtual representation doctrine.

Once the court determines that a case falls under the purview of expanded virtual representation doctrine due to the public rights and/or public goods at issue in the case, it would require publication of notice to ensure that any outside party that might want to intervene would be given the notice and opportunity to make a motion to intervene in the suit. The court would follow normal procedure for considering any motions for intervention or joinder.

The court would then adjudicate the claims while fully cognizant that whatever remedies were granted would affect an entire community of people and that the issue would not be reconsidered in another case at a later time with different parties. Thus, the court might take a more active role in ensuring that a full and fair hearing of the issues is made. This would be especially important in considering settlements. As in class actions, the judge should approve any settlement reached by the parties. The new procedure would be akin to a class action, but without the possibility for parties to opt-out of the case to litigate on their own. This procedure would address some of the concerns the Supreme Court discussed in Richards. After a final judgment on the merits, no party could bring a suit on identical claims subsequently. This procedure would

ensure that defendants, especially governmental defendants, would not have to waste resources re-litigating the same claims over the same factual situation and plaintiffs’ interests.

In sum, the Ninth Circuit could have used *Headwaters* as an opportunity to identify a new procedure for environmental statutory citizen suits, which would allow for a broader notion of privity between prior and current parties to related litigation. The new procedure would require findings of an identity of claims and a final judgment on the merits, just as virtual representation traditionally requires. The main difference would be that adequate representation would be found based on the public nature of the goods and rights at issue in the statute, not the actual representation by a party to the prior suit.

### B. Counterarguments

The arguments made above for broadening the types of cases where privity can be found will meet resistance because of the strong tradition that every American should have his or her “day in court.” However, the proposed procedural change addresses the underlying concerns of adequate representation and due process in several ways. First, the procedure requires an express finding by a judge that the case at hand is one that involves public rights. Once that finding is made, notice is required also to give any interested party the opportunity to move to intervene or join in the case. After all, class actions already permit group litigation and require notice to address due process concerns. The judge also presides with full knowledge that the case will only be heard once and should take an active role in ensuring not only that a full and fair hearing is made, but that any decision takes into account the effect on the whole community whose public right or public good is at issue.

A related critique is that only Congress should make such a fundamental change to the rules of procedure. For example, Johnson argues that if Congress changes the federal rules of procedure, “absentees are . . . on notice that their property interest in their cause of action is at risk of deprivation.” 142 Congressional determination would enable a court to find that adequate representation would support preclusion where the court might not do so otherwise because of constitutional due process issues. 143 One could also argue that the need for congressional determination would be especially strong in the context of environmental cases where the impact is on entire communities, very large constituencies indeed.

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143. *Id.*
There are at least two responses to this line of argument. First, virtual representation has come up too infrequently in the context of environmental cases for Congress to take notice of the issue. Additionally, given the uniqueness of environmental cases discussed above, an expanded version of virtual representation applied in those cases would be less likely to involve fundamental, constitutional rights of individuals than other cases. While it might be important for Congress to change rules affecting individual rights and property, less is at stake when Congress alters the due process requirements for public rights created by statute. Most persuasive, however, is that case precedent in Richards already seems to allow for the possibility of a court making the expansion on its own. Courts have typically exercised a great deal of freedom to expand or contract procedural doctrine.

A further argument against the expansion of virtual representation in environmental cases is that a delay in plaintiffs obtaining relief may be particularly harmful. If a party is precluded by an expanded version of privity and has to fight that judgment on appeal before bringing a new case, critical damage may occur to the environment. Unlike in traditional cases where the harm to plaintiffs is often a one-time event, environmental cases often involve on-going harms where the remedy includes an injunction from further action. In response, one could argue that litigation is already so slow that the added delay would be insignificant. The options of temporary restraining order or preliminary injunction may be available in some cases to stop the harmful activity until the case is ultimately heard and decided. While this does not solve the underlying problem, it recognizes that judicial speed is not a strong point of the American legal system in the first place. The court's ability to weed out frivolous lawsuits may also be a factor that weighs heavily in favor of an expanded notion of virtual representation. As the Headwaters concurrence notes, the district judge appeared to suspect tactical maneuvering in this very case.

Perhaps the most persuasive counterargument, or rather alternate suggestion, would be to have Congress and state legislative bodies include a clause in specific environmental laws providing that an action brought by any one public citizen to enforce that law would be an action representing all citizens. The Richards case makes reference to this

144. The only other cases that were found in a search for environmental cases involving res judicata, much less virtual representation were Bentley v. Honeywell Int'l Inc., 223 F.R.D. 471 (S.D. Ohio 2004) and Norfolk S. Corp. v. Chevron U.S.A. Inc., 279 F. Supp. 2d 1250 (M.D. Fla. 2003).
145. See supra notes 43-45 and accompanying text.
146. Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1057 (9th Cir. 2005) (Goodwin, J., concurring) (referring to parties potentially "gaming the system to prolong unnecessary litigation").
notion by noting, "the Alabama Supreme Court did not hold here that petitioners' suit was of a kind that, under state law, could be brought only on behalf of the public at large."147 Perhaps such clauses will some day be proposed. Until that day comes, however, courts will continue to face the question of whether to apply virtual representation. In the meantime, the distinction between public and individual rights remains a strong justification for an expansion of virtual representation.

CONCLUSION

The ideal solution to the unique challenges of environmental statutory citizen suits would be a recognition of the differences between suits involving private and public goods, leading to the creation of a separate set of procedures for each of these types of cases to promote efficiency and finality. Alternatively, legislators could make clear that public law actions would be dispositive for all potential plaintiffs, and the legislature would enable appropriate standing provisions in the relevant statutes. Given the unlikelihood of such congressional action, a judicial expansion of the traditional doctrine of virtual representation remains a viable option. Under Richards, the Ninth Circuit could legitimately have pursued this option, advancing legal procedure and the goals of the law, but this reform remains for another day.
