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Environmental Values and Judicial Review after *Lujan*: Two Critiques of the Separation of Powers Theory of Standing*

*Jonathan Poisner**

INTRODUCTION

Standing law, in the blunt terms of Justice Scalia, asks "[w]hat's it to you?" Standing doctrine inquires whether the party attempting to assert a claim in court is the appropriate one to litigate the issue in question. "Those who do not possess . . . standing may not litigate as suitors in the courts of the United States." During the 1960's and early 1970's, a series of cases "liberalizing" standing doctrine opened the courthouse doors to many litigants who otherwise would have been denied standing. After *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, standing was called a mere "nettlesome technicality" for those seeking judicial review of federal agency actions.

In the years since *SCRAP*, environmental groups have enjoyed relatively lenient standing scrutiny, as compared with other litigants. How-
ever, case law in the years since *SCRAP* has disappointed the expectation of environmentalists that standing would no longer be an issue. A series of Supreme Court cases decided over the last fifteen years, culminating with *Lujan v. National Wildlife Federation*, 7 has renewed doubts about the continuing ability of environmental groups to withstand standing law scrutiny.

This reinvigoration of standing law demands critical attention. In part, such attention should focus upon the Court's application of the doctrine in order for environmental litigants to better formulate litigation strategies. However, an exclusive focus on the application of the doctrine may prevent the examination of the manner in which the underlying theory of standing can unconsciously shape one's approach to environmental issues.

Recent developments in standing law doctrine depend on the claim that the separation of powers demands a strict approach to standing. Under this theory of standing, the "cases or controversies" clause of article III of the United States Constitution specifically precludes the courts from adjudicating certain types of claims. This limitation is designed to keep the federal courts within their proper role in a democratic society. According to the separation of powers theory of standing, disputes that only implicate the public interest are inappropriate for judicial resolution since the judiciary's function is to protect minority and individual interests from the tyranny of the majority.

This Comment examines the separation of powers theory of standing and critiques the theory's implicit assumption that democracy serves only to protect and aggregate private interests. This assumption fails to adequately account for government action in areas such as environmental law which are best understood as advancing public values, not private interests. In Part I, I briefly sketch the modern history of the law of standing. While the trends of liberalization and constriction have not occupied absolutely distinct time periods, there has clearly been a re-

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is established if an organization demonstrates that: 1) "its members would otherwise have standing to sue in their own right," 2) "the interests it seeks to protect are germane to the organization's purpose;" and, 3) individualized participation is not necessary for the claim asserted or the relief requested. Hunt *v.* Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).


9. *See infra* notes 403-21 and accompanying text.

10. *See infra* notes 64-78 and accompanying text.


13. *See infra* notes 151-57 and accompanying text.

14. For example, United States *v.* Students Challenging Regulatory Agency Procedures,
cent shift toward rebuilding standing as a barrier to litigation in administrative law.\(^{15}\)

In Part II, I explain the separation of powers theory that has prompted the recent constriction in the law of standing. I rely principally on the writings of Justice Scalia because he has been the Supreme Court’s most outspoken proponent of stricter standing requirements.\(^{16}\) I argue that Scalia’s view of the judicial role rests upon a belief that democratic government is justified by its ability to aggregate the private preferences of its citizens.\(^{17}\)

In Part III, I critique the separation of powers theory of standing\(^{18}\) from two perspectives. First, in an \textit{internal critique}, I accept the premise of private preference aggregation. I argue that key features of modern standing law are dysfunctional in attaining the goals of private preference aggregation.\(^{19}\) Environmental law is paradigmatic of this dysfunctionality. Second, in an \textit{external critique}, I explore an alternative, “republican” paradigm of democracy which emphasizes the existence of public values which are distinct from the mere summation of private preferences.\(^{20}\) The republican paradigm necessarily rejects the assumption implicit in the separation of powers theory of standing that democracy serves merely to aggregate private interests. I argue that the separation of powers theory inhibits the development and enforcement of the public values which lie at the heart of the republican paradigm. Since many

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\(^{15}\) See generally infra notes 173-79 and accompanying text.

\(^{16}\) Throughout this Comment, I refer to the synthesis of case law and Justice Scalia’s writings as the “separation of powers theory of standing.” I do not mean to deny the possible development of a different separation of powers theory of standing. See, e.g., Logan, \textit{supra} note 15.

\(^{17}\) See generally infra notes 187-313 and accompanying text.

\(^{18}\) See generally infra notes 314-421 and accompanying text.
modern environmental laws are best understood as expressions of public values, rather than as compromises among private interests, I conclude that a standing law based exclusively on the theory that government serves only private interests threatens to disorder one's thinking about environmental law.\(^{21}\)

I

HISTORICAL OVERVIEW OF STANDING LAW

A. The Liberalization of Standing Law

Others have fully documented the liberalization of standing law.\(^{22}\) Nevertheless, a brief history will clarify the importance of recent changes in standing doctrine.

1. The Unraveling of the Private Law Model

Prior to this century, courts did not address standing as a distinct issue in determining whether to hear certain claims.\(^{23}\) Indeed, the term "standing" as applying to the article III "cases or controversies" requirement appears to have first been used in a concurring opinion by Justice Frankfurter in 1939.\(^{24}\) Under the common law, the availability of judicial review depended upon the existence of a cause of action;\(^{25}\) courts initially adopted this framework for review of administrative agency actions.\(^{26}\) If the administrative decision did not infringe upon a common law right, judicial review was unavailable.\(^{27}\) Commentators refer to this as the "private law" model.\(^{28}\)

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\(^{21}\) See generally infra notes 403-21 and accompanying text. Throughout this Comment, I attempt to avoid sinking too far into the doctrinal quicksand that surrounds standing law in the administrative law context; I will leave that to others more adept. Likewise, this Comment is not a close analysis of the conclusion in Lujan v. National Wildlife Federation that the Federation's proffered proof of injury-in-fact was insufficient. The point of this Comment is that requiring such proof is both unnecessary and counterproductive.


\(^{23}\) Chayes, Public Law Litigation, supra note 6, at 9; Sunstein, Privatization, supra note 22, at 1434.


\(^{25}\) Chayes, Public Law Litigation, supra note 6, at 8-9.

\(^{26}\) Id.

\(^{27}\) Sunstein, Privatization, supra note 22, at 1434.

\(^{28}\) Id. at 1436. See generally Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976) [hereinafter Chayes, Role of the Judge] (contrasting the private law and public law models). Sunstein explains the private law model as applied to administrative law:

When citizens entered into civil society from the state of nature, they did so with
This model unraveled in the twentieth century as Congress extended the reach of regulatory agencies over individuals by enacting statutes which created a broad spectrum of intangible and diffuse benefits to the public at large. In response to these new forms of statutory and agency action, the Supreme Court recognized individual standing based solely on violations of a statute and surrogate standing for individuals to assert the public interest. According to Professor Sunstein, these doctrines created a "close association between the existence of an implied cause of action [from a given statute] and the existence of standing." In 1946, this interpretation apparently was codified in section 10 of the Administrative Procedures Act (APA): "[a]ny person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 

Sunstein, Privatization, supra note 22, at 1435.

29. Chayes, Public Law Litigation, supra note 6, at 9.
30. See, e.g., The Chicago Junction Case, 264 U.S. 258, 266-69 (1924) (standing based on Transportation Act and Judicial Code); see also Sunstein, Privatization, supra note 22, at 1438-39.
32. Sunstein, Privatization, supra note 22, at 1440. This view of standing is consistent with the "legal wrong" test articulated in Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118 (1939):

The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right — one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.

Id. at 137-38 (footnotes omitted). Courts interpreted this "legal wrong" test stingily, and were often reluctant to find a legal interest in given statutes. See Scalia, Separation of Powers, supra note 1, at 887 n.28 (citing as examples Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (Secretary of Labor's definition of "locality" neither invaded nor threatened legal rights of iron and steel producers) and Alabama Power Co. v. Ickes, 302 U.S. 464, 479-80 (1938) (federal loans and grants to municipalities for the purpose of constructing electrical distribution systems do not invade or threaten legal rights of electric power company)).

33. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 702 (1988)); see Fletcher, supra note 15, at 255 n.151 (noting that the APA was not intended to change existing standing law, but rather to codify it); Scalia, Separation of Powers, supra note 1, at 887-88. Section 702 serves as the default standard for judicial review when a violation of law is alleged under a statute which neither provides for nor forbids judicial review. 5 U.S.C. § 701(a) (1988). Courts are empowered to overturn agency actions that are "arbitrary, capri-
In the 1960's, courts used the APA provision as a guide in interpreting standing to challenge newly adopted statutes providing for broad public benefits, such as antidiscrimination and environmental statutes. A common-law interest "became a sufficient but not a necessary condition for legal protection." To be sure, standing remained difficult to establish, as a court's determination of whether a regulatory statute contained an implied cause of action could be complicated and time-consuming. Nevertheless, the general trend was toward finding implicit causes of action in statutes.

2. The Injury-in-Fact Test and its Application to Noneconomic Injuries

The Supreme Court could have continued to ease standing requirements by interpreting regulatory statutes to contain private causes of action. For example, the Court could have read the APA phrase "adversely affected or aggrieved within the meaning of the relevant statute" to provide for standing whenever any interest advanced by the relevant statute was allegedly impaired. The Court, however, took a different tack. In Association of Data Processing Service Organizations v. Camp, the Court held that standing to challenge an administrative agency action existed where a litigant alleged "injury in fact." By re-
quiring injury-in-fact, the Court converted the question of standing from a determination of positive law into a factual inquiry.\textsuperscript{40}

Camp was considered a breakthrough by proponents of liberalized standing requirements.\textsuperscript{41} It promised a preliminary determination of standing rather than a prolonged determination based on the merits of the claim.\textsuperscript{42} For many litigants who had clear economic damages, the new test dramatically eased the process of bringing a claim.

However, Camp left many unanswered questions. The Court made virtually no effort to define the injury-in-fact required for standing. Clearly, increased economic competition qualified as injury since this was the injury recognized by the Court in the case.\textsuperscript{43} In addition, the Court stated in dicta that noneconomic injuries could be sufficient.\textsuperscript{44} Nevertheless, it remained unclear whether or not the Court would require a threshold level of injury.\textsuperscript{45}

The Court clarified the injury-in-fact test in Sierra Club v. Morton.\textsuperscript{46} In that case, the Sierra Club challenged a United States Forest Service plan to turn California's pristine Mineral King Valley into a ski resort run by Walt Disney Enterprises.\textsuperscript{47} The complaint alleged that the development would violate a variety of environmental statutes.\textsuperscript{48} The Sierra Club refused to allege that specific Club members would be harmed.\textsuperscript{49} Rather, the Sierra Club alleged that its demonstrated interest in conservation justified standing for the organization as a representative of the public interest that would be harmed if the development were to go forward.\textsuperscript{50}

A divided Court\textsuperscript{51} rejected this broad, public-interest theory of standing. The majority limited the availability of standing to environ-

\textsuperscript{40} See Sunstein, Privatization, supra note 22, at 1445.
\textsuperscript{41} See Chayes, Public Law Litigation, supra note 6, at 14-15; Davis, supra note 36, at 452-53.
\textsuperscript{42} See Chayes, Public Law Litigation, supra note 6, at 14-15; Sunstein, Privatization, supra note 22, at 1445; see also Davis, supra note 36, at 462 (describing standing as a "practical" question requiring "quick and clear answers").
\textsuperscript{43} 397 U.S. at 152. The injury in Barlow v. Collins was also economic. 397 U.S. at 162-63.
\textsuperscript{44} 397 U.S. at 154.
\textsuperscript{46} 405 U.S. 727 (1972).
\textsuperscript{47} Id. at 728-30.
\textsuperscript{48} Id. at 730 n.2.
\textsuperscript{49} Id. at 735 n.8 (noting the Sierra Club's express request in its brief not to rely on its members' use of the forest in the determination of standing).
\textsuperscript{50} Id.
\textsuperscript{51} The case was decided by a four to three vote; Justices Powell and Rehnquist did not participate. The majority opinion was written by Justice Stewart, and joined by Chief Justice
mental groups in two ways. First, the majority held that the injury sufficient to confer standing must be personalized; that is, the litigant must have been injured as an individual. The Court indicated that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." Second, the Court held that individuals must use environmental resources to qualify for individualized injury. The Court reasoned that "[t]he alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park." Thus, the Sierra Club's failure to allege "use" by its members was fatal. Since its members did not use the environmental resource, the Club had a "mere 'interest in . . . [the] problem'" which was but its "own value preferences," not the type of injury sufficient to invoke judicial review.

While technically a loss for proponents of liberalized standing, many viewed Sierra Club as a validation of the liberalization of standing in Camp. Dicta in Sierra Club strongly endorsed the view that noneconomic injuries — and specifically environmental injuries — were sufficient so long as the injuries occurred to individual plaintiffs. In-Burger and Justices White and Marshall. Id. at 728. Justices Brennan, Douglas, and Blackmun each filed dissenting opinions. Id. at 741, 755.
52. Id. at 734-35.
53. Id. Under this reasoning, mere membership in an interest group whose ideological purpose has been frustrated cannot be the basis of a claim of injury because such abstract injuries are not the type which can be understood as discretely harming specific individuals.
54. Id. at 735. Mineral King Valley is part of Sequoia National Forest and is adjacent to Sequoia National Park. Id. at 728.
55. Id. at 739-40. Commentators have ridiculed this distinction between Sierra Club members who had visited ("used") the Valley and those who had not. Professor Vining has written:

When the redwoods are cut, what is the difference in the loss suffered by a paraplegic who has been feasting on the beauty of the forest through movies and recordings . . . and the loss suffered by one who sees and hears without such devices? . . . [W]hat is the difference between one who has walked in the valley and intends to return, and one who has yet to walk there but intends to do so? . . . But taking those who walk [through the Valley] as the relevant group of members, what is the nature of the loss they suffer that the Court had in mind? The movement of particular trees past the eye?

J. VINING, supra note 22, at 159; see also Sax, Standing to Sue: A Critical Review of the Mineral King Decision, 13 NAT. RESOURCES J. 76, 81-82 (1973) (arguing that the search for a present user is inconsistent with fact that the purpose of one of the statutes at issue in the Mineral King litigation was to benefit "future generations").
56. R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 634 (2d ed. 1978) (Sierra Club "can more plausibly be regarded as a victory" for environmental groups than a "defeat"); Mashaw, supra note 5, at 1141 (presenting but not advocating this viewpoint); cf. W. RODGERS, supra note 5, § 1.6, at 24-25 (noting that the result in Sierra Club allowed interest groups to "proceed as before" in litigation once they named individual plaintiffs).
57. 405 U.S. at 734 ("Change in the aesthetics and ecology of the area . . . may amount to an 'injury in fact' sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society. . . .")
STANDING

deed, the Sierra Club promptly amended its complaint to allege use of the area by its members, and the Mineral King litigation continued. 58

The Court’s decision the next year in United States v. Students Challenging Regulatory Agency Procedures 59 reinforced the view that Sierra Club was a victory for environmental groups seeking standing to challenge agency action. The plaintiffs, a group of law students, challenged an Interstate Commerce Commission (ICC) order approving a surcharge on freight shipments on the grounds that the ICC failed to prepare an environmental impact statement as required under the National Environmental Policy Act (NEPA). 60 Plaintiffs’ alleged injury-in-fact relied on a three-step claim: the ICC order failed to encourage recycling; lack of recycling increased the amount of trash deposited in the camping, hiking, and fishing areas which the students used; and increased amounts of trash harmed the students’ aesthetic interests. 61

The Court upheld the plaintiffs’ standing to bring the claim. The plaintiffs could allege the aesthetic injury to their use of parks, even though any person in the nation could claim the same injury. 62 In a sweeping statement, the Court said “[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.” 63

The decision in Camp converted the question of standing into a factual inquiry into the existence of injury. Sierra Club and SCRAP then liberalized standing doctrine through their clear recognition that noneconomic injuries were sufficient to confer standing. Where agency actions affected common resources used by environmental litigants, the requirements of standing were easily met. Nevertheless, the requirements of personalized injury and use of natural resources constituted a development later used to constrict the availability of standing.

B. The Constriction of Standing Law

1. The Theory: Separation of Powers

Until recently, courts considered the doctrines of separation of powers and standing to be discrete areas of the law. In 1968, Chief Justice Warren wrote for the Court that standing law “does not by its own force raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Govern-

61. 412 U.S. at 678.
62. Id. at 687.
63. Id. at 688.
Separation of powers could guide a determination of whether a dispute was justiciable by the courts. Yet, standing law, according to scholars of the Warren Court, merely determined whether "a party ha[d] a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." Thus, standing required the litigant to demonstrate the "concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends."

Chief Justice Burger and Justice Powell, in three cases in the mid-1970's, abandoned the Warren Court's framework by asserting that separation of powers concerns should guide standing jurisprudence. In Schlesinger v. Reservists Committee to Stop the War, the Court denied standing to citizens who alleged that certain appointments of Congressmen to the Armed Forces Reserve violated the Incompatibility Clause of the Constitution. In United States v. Richardson, the Court denied standing to citizens who alleged that the secrecy of the Central Intelligence Agency's budget violated the Statements and Accounts Clause of the Constitution. In both cases, the injury-in-fact test was linked to the separation of powers. In Schlesinger, Burger noted that concrete injury

64. Flast v. Cohen, 392 U.S. 83, 100 (1968) (upholding standing of taxpayer to challenge spending in violation of the First Amendment's Establishment Clause). The Court continued: "such [separation of powers] problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated." Id. at 100-01.

65. L. Tribe, American Constitutional Law § 3-14, at 107 (2d ed. 1988) (quoting Sierra Club v. Morton, 405 U.S. 727, 731 (1972)) (emphasis added by Tribe). In Flast, Chief Justice Warren wrote that "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." 392 U.S. at 99-100.

66. L. Tribe, supra note 65, § 3-14, at 108-09 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962) (upholding standing of voters to challenge Tennessee legislative apportionment scheme which violated their right to vote)).

Under this theory, standing law had an instrumental justification — it insured competent decisions by the courts in an adversarial system. Yet, this purpose is not served by more modern formulations of standing law. As commentators have noted, the doctrinal requirements that the Court has created in the last 15 years bear virtually no relationship to the instrumental goals thought to be at work in the Warren Court. See, e.g., Chayes, Public Law Litigation, supra note 6, at 24-25 ("[a] warm body — meeting the Court's injury-in-fact requirement" does not necessarily ensure protection of "vigorous adversary presentation"); Scalia, Separation of Powers, supra note 1, at 891 (modern standing law does not ensure adverseness); Sunstein, Privatization, supra note 22, at 1448 (modern standing doctrine bears no relationship to whether the dispute is sufficiently concrete for judicial resolution or whether the litigant is likely to be a strong advocate); see also Winter, supra note 24, at 1489 (not only does standing law not ensure vigorous advocacy, but in some cases it "does just the opposite").


68. 418 U.S. at 208; U.S. Const. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House of Congress during his Continuance in Office.").

69. 418 U.S. at 177; U.S. Const. art. I, § 9, cl. 7 (Congress must provide a regular statement and account of receipts and expenditures of public money).
was essential for standing because only Congress was competent to deal with abstract questions and because recognition of abstract injuries would lead to "government by injunction." In Richardson, Burger argued that if no individual suffers injury, the dispute is by definition properly "committed to the surveillance of Congress, and ultimately to the political process," not to the judiciary. Similarly, Powell argued that the injury-in-fact test was essential to restrict judicial power to its proper role in a democratic form of government. Thus, Powell concluded in Warth v. Seldin that, under the principle of separation of powers, "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party."

By the 1980's, standing doctrine rested solidly on the separation of powers theory. In Valley Forge Christian College v. Americans United for Separation of Church and State, the Court denied standing to litigants who challenged a Federal land giveaway to a bible college as violative of the Establishment Clause. According to the Court, the injury-in-fact requirement ensured that courts do not rule upon "abstract questions of wide public significance which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches." Then, in Allen v. Wright, the Court united standing with the separation of powers by noting that the implementation of standing doctrine could be understood by a "single basic idea — the idea of separation of powers."

70. 418 U.S. at 221 n.10.
71. Id. at 222.
72. 418 U.S. at 179.
73. Id. at 188 (Powell, J., concurring).
74. Warth v. Seldin, 422 U.S. 490, 499 (1975) (denying standing to a variety of litigants challenging exclusionary zoning ordinances) (emphasis added).
75. 454 U.S. 464 (1982).
76. Id. at 470; see U.S. CONST. amend. I, cl. 1 (Congress shall make no law "respecting an establishment of Religion").
77. 454 U.S. at 475 (quotations omitted). The Court distinguished Flast, discussed at supra notes 64-65, by arguing that Flast involved the federal government's spending powers, while the situation before the Court in Valley Forge involved a giveaway of land under the Property Clause. 454 U.S. at 480 (citing U.S. CONST. art. IV, § 3, cl. 2 (Congress vested with "power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States")). The Court also argued that Flast involved congressional action while the situation in Valley Forge involved executive action. Id. at 479.
78. 468 U.S. 737, 752 (1984) (emphasis added). Allen is discussed more fully at infra notes 240-47 and accompanying text. See also Sheldon, supra note 8, at 10,563 (noting that separation of powers concerns were the "most critical" factor in the restriction of standing in Lujan v. National Wildlife Federation). The Court still presents other purposes of standing law, such as the need to ensure adverseness. See, e.g., Allen, 468 U.S. at 750. However, these other purposes are now clearly secondary to the Court's ideological justification for limiting standing. See, e.g., id. at 752.
2. The Causation Requirements

Concomitant with its adoption of the separation of powers theory, the Court established two causation requirements for standing. These requirements increased the difficulty of obtaining standing. After its introduction as a single requirement in 1973, the test was refined to require litigants to demonstrate both that the alleged injury is fairly *traceable* to the challenged government action,\(^79\) and that it is likely to be *redressed* by the remedy requested.\(^80\) Superficially, these requirements seem unobjectionable. The requirement that the injury be traced to the governmental action ensures that a litigant demonstrate a logical relationship with the alleged legal violation.\(^81\) The requirement that the requested remedy redress the injury ensures that courts are not merely rendering advisory opinions.\(^82\)

The Supreme Court cases imposing the causation requirements illustrate the formidable barrier the test presents to the attainment of stand-

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79. See infra notes 89-91 and accompanying text.
80. See infra notes 92-94 and accompanying text.
81. Requiring some connection between the litigant and the agency action seems appropriate. In the modern regulatory state, merely requiring injury-in-fact to establish standing would soon degenerate into universal standing. Virtually any major regulatory decision arguably affects the entire economy, and hence each individual, whether as a consumer or worker. Considerations of judicial manageability alone suggest there must be some nexus between the plaintiff and the action challenged.

In *Camp*, when the injury-in-fact test was developed, the Court dealt with this concern by also requiring that the alleged harm be within the "zone of interest" of the statute or constitutional guarantee in question. Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 156 (1970). It was unclear at the time whether this test was intended to be a constitutional or prudential rule, but the Court has now made clear that it is prudential. In *Clarke v. Securities Industry Association*, the Court explained that the zone of interest test is largely a question of congressional intent. 479 U.S. 388, 394 (1987). *Clarke* involved a challenge by a trade association representing securities brokers, underwriters, and investment bankers. The group argued that the Comptroller of Currency's approval of two banks offering of discount brokerage services to the public violated the National Bank Act. The Court in *Clarke* held that the APA presumptively grants judicial review of agency action by aggrieved parties "absent some clear and convincing evidence of legislative intention to preclude review." *Id.* at 395 n.9 (quoting Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986)). The test is "not meant to be especially demanding" and should only preclude review if "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 399.

It remains unclear why some parallel to the zone of interest test was not relied on to deal with the causation issue in contexts other than the APA. Instead, the Court developed its separate causation tests.

82. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976) ("Absent such a showing [of redressability], exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation."). In other words, if the Court cannot alleviate the harm alleged, its involvement in the dispute is merely advisory, a role the Court has long rejected. See generally P. BATOR, P. MISHKIN, D. SHAPIRO & D. MELTZER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 67-72 (3d ed. 1988) [hereinafter HART & WECHSLER].
The causation test first appeared in *Linda R.S. v. Richard D.* In *Linda R.S.*, the Court held that the mother of an illegitimate child had no standing to enjoin a state attorney general's policy of nonenforcement of child-support laws against the fathers of illegitimate children. The mother argued that favoring legitimate over illegitimate children violated the Equal Protection Clause. According to the Court, however, the failure to prosecute did not cause the injury because it was speculative whether the father would pay child support if the attorney general prosecuted.

Because *Linda R.S.* had the potential to intrude into the discretion of prosecuting attorneys, it was unclear to what extent the case would serve as precedent on the issue of causation. The causation test unambiguously became a constitutional requirement, however, in *Warth v. Seldin* and *Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO)*. In *Warth*, a variety of groups sought to enjoin an allegedly exclusionary zoning ordinance. The Court denied standing on grounds that it was speculative whether the failure to obtain housing was traceable to the ordinance rather than to economic factors. In *EKWRO*, the Court denied standing to groups challenging an Internal Revenue Service (IRS) rule allowing hospitals to retain charitable status regardless of their treatment of indigent patients. The groups alleged that the IRS rule was contrary to the Internal Revenue Code. According to the Court, it was speculative whether a change in the tax policy would result in the hospitals' treatment of the indigents involved in the suit. As such the causal relationship was too attenuated to justify standing and the remedy would not redress the injury.

The Court reaffirmed the causation test in *Allen v. Wright* and linked the test to the separation of powers. In *Allen*, several parents' groups alleged that an IRS policy benefitting racially discriminatory

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84. Id. at 616.
85. Id. at 618.
86. See EKWRO, 426 U.S. at 37 ("[P]etitioners analogize the discretion vested in the IRS . . . to the discretion of a public prosecutor as to when and whom to prosecute. They thus invoke the settled doctrine that the exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution.") (citing Linda R.S., 410 U.S. at 619).
87. 422 U.S. 490 (1975).
89. Warth, 422 U.S. at 504.
90. EKWRO, 426 U.S. at 33.
91. Id. at 42-43. The legislative history of the relevant portion of the Internal Revenue Code clearly indicates Congress' belief that the tax incentives would increase the amount of indigent services. Winter, supra note 24, at 1473 n.570.
schools illegally interfered with desegregation efforts. The Court denied standing on grounds that it was uncertain whether the change to a more favorable tax status for racially discriminatory schools actually decreased the availability of racially integrated schooling for the children of these particular plaintiffs.

The Court's reasoning was explicitly premised upon the separation of powers theory of standing. The Court explained that the causation standard prevents the courts from taking on the role of "continuing monitors of the wisdom and soundness of Executive action." Aside from theory, the Court's test inevitably implicates separation of powers concerns. Determining causation involves imprecise and manipulable judgments. Thus, causation-based decisions about standing are likely to reflect the individual judge's views about the appropriate roles of the legislative, judicial, and executive branches.

3. Proof of Injury-in-Fact

a. Theory and Application

In the most recent stage in the renaissance of standing as a bar to potential litigants, the Supreme Court has endorsed a rule requiring plaintiffs to prove injury-in-fact in order to survive a summary judgment challenge to standing. The separation of powers theory underlies the requirement of proof, as it does other standing requirements. If federal courts lack constitutional authority under article III to rule in the absence of injury-in-fact, it follows that they must require proof of this injury or risk acting without authority. In contrast, under the Warren Court's "adverseness" theory of standing, plausible or sincere allegations of injury would suffice.

93. Id. at 739-40.
94. Id. at 757-59. For another example of a Supreme Court denial of standing on causation grounds, see Diamond v. Charles, 476 U.S. 54, 66-69 (1986) (denying pediatrician standing to intervene in support of state abortion statute because it was too speculative whether a decrease in abortions would increase the number of babies served by the pediatrician).
95. See supra note 78 and accompanying text; see also Haitian Refugee Center v. Gracey, 809 F.2d 794, 801-07 (D.C. Cir. 1987) (Bork, J.) (stating that separation of powers is the primary influence on Court's use of the causation tests); Sunstein, Privatization, supra note 22, at 1459-61 (arguing separation of powers norms drive the Court's causation analysis).
96. Allen, 468 U.S. at 769 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).
97. See infra notes 212-56 and accompanying text.
100. See supra note 74 and accompanying text.
The D.C. Circuit was the first circuit to require proof as a matter of course. In *Wilderness Society v. Griles*, the D.C. Circuit denied standing to an environmental group seeking to challenge a Bureau of Land Management (BLM) land giveaway in Alaska. It was uncontroversial that the amount of Federal land in Alaska would decrease as a result of the allegedly illegal agency policy. However, the Wilderness Society could not prove that its members used any land that would be affected by the decision. On this basis, the Court denied standing.

The panel in *Griles* distinguished the holding of *SCRAP* and other standing cases that had not required such proof by arguing that those cases had reached the Supreme Court as motions to dismiss, not as motions for summary judgment. According to the Court, a motion for summary judgment allows “supplementation of the record, and accordingly a greater showing is demanded of the plaintiff.”

Other federal courts in the 1980's similarly denied standing to a variety of plaintiffs who failed to prove injury. In 1990, a Supreme Court plurality endorsed the requirement of proof of injury-in-fact by arguing that the facts supporting article III jurisdiction must “affirmatively appear in the record.” *Lujan v. National Wildlife Federation* confirmed

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(Brennan, J., dissenting) (standing merely requires “good-faith allegation” of injury-in-fact); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24:21, at 291 (1983) (Under proper adversity purpose, “proof of injury is not required for standing; an allegation of it is all that is required, and then the court must use its judgment, not necessarily based on evidence, in deciding whether the allegation of injury is sufficiently plausible.”).


103. 824 F.2d 4 (D.C. Cir. 1987).

104. *Id.* at 13.

105. *Id.* For additional D.C. Circuit cases in which that court has denied standing on the basis of inadequate proof of injury, see Northwest Airlines, Inc. v. Federal Aviation Admin., 795 F.2d 195 (D.C. Cir. 1986); Safir v. Dole, 718 F.2d 475 (D.C. Cir. 1983) (opinion by Scalia, J.); Alaska Excursion Cruises, Inc. v. United States, 603 F. Supp. 541 (D.D.C. 1984).

106. 824 F.2d. at 16.

107. *Id.* The court in *Griles* relied heavily upon a footnote in *SCRAP*, 412 U.S. 669, 689 n.15 (1973), which hinted that standing might become harder to establish as a case progresses.

108. For non-D.C. Circuit cases denying standing based on insufficient proof of injury, see Proffitt v. Lower Bucks County Joint Mun. Auth., 29 Env't Rep. Cas. (BNA) 1696 (3d Cir. May 11, 1989) (opinion designated “not for publication”); Sierra Club v. SCM Corp., 747 F.2d 99 (2d Cir. 1984); Mountain States Legal Found. v. Costle, 630 F.2d 754, 765 (10th Cir. 1980); Maine Ass'n of Indep. Neighborhoods v. Commissioner, Maine Dep't of Human Serv., 697 F. Supp. 557 (D. Me. 1988), vacated and remanded on other grounds, 876 F.2d. 1051 (1st Cir. 1989).


109. FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596, 608 (1990) (quoting Mansfield Co. & L.H.R. Co. v. Swan, 111 U.S. 379, 382 (1884)). The fact that the Court cited a case decided in 1884 for this proposition illustrates the paucity of recent precedent for the requirement. The plurality in *FW/PBS* addressed the standing issue despite the fact that the parties neither
the inevitability of the proof requirement as part of the separation of powers theory of standing.

b. Lujan v. National Wildlife Federation

In July 1985, the National Wildlife Federation filed a complaint alleging that the Bureau of Land Management’s land reclassification program violated the Federal Land Policy and Management Act (FLPMA), NEPA, and the APA. The suit challenged Reagan administration efforts to open approximately 170 million acres of federal land in seventeen states to mining activities. On December 4, 1985, the district court granted the Federation’s motion for a preliminary injunction, indicating its belief that the Federation was likely to win on the merits.

Two years later, the D.C. Circuit upheld the preliminary injunction, as well as the Federation’s standing. On remand, both parties moved for summary judgment in the district court, with the BLM once again challenging the Federation’s standing. The district court held that the Federation lacked standing. The court relied on Griles’ holding that standing at the summary judgment stage requires a more specific showing of injury-in-fact than is necessary upon a motion to dismiss. The court therefore entered summary judgment and lifted the preliminary injunction.

On June 20, 1989, the court of appeals reversed the district court’s decision and upheld the Federation’s standing for the second time. The court argued that the original court of appeals panel had upheld standing on a motion for a preliminary injunction, not a motion to dis-

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114. Id. at 277. The court enjoined the BLM from taking any action inconsistent with pre-1981 classifications and withdrawals of land. The court did not need to address the issue of the Federation’s standing because it simultaneously accepted Congressman John Siebeling’s standing to intervene. Id.
115. National Wildlife Fed’n v. Burford (Burford I), 835 F.2d 305 (D.C. Cir. 1987). All three justices agreed that the Federation had standing, although Judge Williams dissented on the granting of the preliminary injunction. Id. at 327.
117. Id. at 329; see Wilderness Soc’y v. Griles, 824 F.2d 4, 16-17 (D.C. Cir. 1987). The district court concluded that the Federation’s affidavits in support of standing were inadequate for this higher showing. 699 F. Supp. at 332.
The court reasoned that the burden of establishing standing for a preliminary injunction was at least as high as for summary judgment. Thus, *Griles*, which rested on the distinction between a motion to dismiss and summary judgment, was inapplicable. Nevertheless, the court declined to reinstate the preliminary injunction, stating that "the case should now proceed with dispatch." 

The Supreme Court reversed. After six years, the case was dismissed for lack of standing. Two rationales supported the Court's holding. First, the Court held that the plaintiff's evidence that its members used the affected land was insufficient to survive a motion for summary judgment. The Court required the litigant to come forth with "specific facts" demonstrating use of the precise land that would be affected by each challenged land withdrawal. For example, an affidavit alleging use of land in the "vicinity" of mining was insufficient proof of injury. Recognizing that this holding probably conflicted with the broad grant of standing in *SCRAP*, the Court explicitly limited *SCRAP* to challenges to standing arising as motions to dismiss.

Second, the Court held that the BLM's land withdrawal program was not an "agency action" within the meaning of the APA's judicial review provision. Rather, the "program" consisted of many individual "actions." Accordingly, the program as a whole was not reviewable. The Court considered it irrelevant that violations of the law were allegedly "rampant within this program." Thus, a showing of

120. *Id.* at 427. As such, it was the "law of the case." *Id.* at 432-33. While the *Burford I* majority only explicitly discussed the question of standing upon a motion to dismiss, Judge Williams' separate opinion had noted that evidence of injury-in-fact existed in sufficient specificity to support a motion for a preliminary injunction. *Burford I*, 835 F.2d. at 328-30 (Williams, J., concurring in part).

121. *Burford II*, 878 F.2d at 432-33.

122. *See supra* notes 103-07 and accompanying text.

123. *Burford II*, 878 F.2d at 434.

124. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990) (5-4 decision). Judge Edwards' use of the "law of the case" as a justification for standing in *Burford II* was not binding on the Supreme Court since the Supreme Court is not bound by D.C. Circuit precedent. *Id.* at 3185 n.1.

125. *Id.* at 3187-89 (lack of sufficient proof under Fed. R. Civ. P. 56). Four Justices dissented from this holding, finding that the plaintiffs had provided sufficient evidence to survive a summary judgment motion. *See id.* at 3194-96 (Blackmun, J., dissenting).

126. *Id.* at 3187.

127. *Id.* at 3187-88.

128. *Id.* at 3189.

129. *Id.* at 3189 (interpreting 5 U.S.C. § 702). The Court invoked "ripeness" jurisprudence in reaching this conclusion. *See id.* at 3190. The Court noted that it would not find an agency action final for the purposes of judicial review until it was of "more manageable proportions . . . [with] its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id.*

130. *Id.* at 3189-90.

131. *Id.* at 3189-91.

132. *Id.* at 3190.
injury with respect to one piece of land opened to mining activity would not provide standing to challenge the other 1200 or so land withdrawals.\textsuperscript{133} To stop the new activity, the plaintiffs would have to prove injury for each tract of land at issue.

The Court's holdings in \textit{Lujan} do not substantively alter standing law doctrine. Indeed, the holding on the meaning of "agency action" in the context of programmatic review is not determined by constitutional restrictions on standing, but rather by mere interpretation of the APA.\textsuperscript{134} Nevertheless, \textit{Lujan} is significant for any evaluation of standing doctrine. First, the increased burden of proof requirement at the summary judgment stage affects the degree to which the injury-in-fact requirement will likely bar litigants from challenging agency action.\textsuperscript{135} Second, the holding denying review of agency activity at the programmatic level reveals the Court's aversion (and perhaps open hostility) to general judicial supervision of the legality of agency behavior. \textit{Lujan} thus delineates the judicial philosophy that will guide the Court into the twenty-first century.

\textbf{C. Standing in a Nutshell}

At this point, a synopsis of standing law may prove useful. Standing law presently requires a litigant who wishes to survive summary judgment to fulfill three core constitutional requirements that the Court has located in article III.\textsuperscript{136} First, a plaintiff must prove that he personally has suffered some actual or threatened injury.\textsuperscript{137} The injury must be "distinct and palpable."\textsuperscript{138} In the environmental context, the injury test

\begin{footnotes}{133} \textit{Id.} at 3189-91.\end{footnotes}

\begin{footnotes}{134} In addition, the "holding" on the definition of agency action is arguably dicta, since it was one of two alternative reasons the Court used to dismiss an argument that the district court had abused its discretion in denying the Federation the opportunity to supplement the record. \textit{See id.} at 3189, 3191-92. \end{footnotes}

\begin{footnotes}{135} \textit{See generally infra} notes 257-68 and accompanying text.\end{footnotes}

\begin{footnotes}{136} The key distinction between a motion for summary judgment and a motion to dismiss is that survival of a motion to dismiss does not require proof of injury in fact. \textit{See supra} notes 125-28. It remains unclear whether the causation tests will similarly become flexible based on the procedural posture of the case.\end{footnotes}

\begin{footnotes}{137} \textit{See generally supra} notes 38-63 and accompanying text.\end{footnotes}

\begin{footnotes}{138} Valley Forge Christian College \textit{v.} Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982). Judge Posner has recently explained this requirement: [The injury] must at least resemble the type of injury that would support a lawsuit under traditional principles of common law or equity; it must therefore affect one's possessions or bodily integrity or freedom of action, however expansively defined \ldots and not just one's opinions, aspirations, or ideology. \textit{People Organized for Welfare \& Employment Rights} \textit{v.} Thompson, 727 F.2d 167, 171 (7th Cir. 1984); \textit{see also} \textit{Wright \& Miller, supra} note 22, \$ 3531.1, at 371 (cases liberalizing standing all involved "actual effect on tangible activities"); \textit{L. Tribe, supra} note 65, \$ 3-16, at 114 (describing injury-in-fact law prior to \textit{Lujan} as one in which a litigant must demonstrate "an individuated harm impacting specifically upon him and [that is] of a tangible and concrete nature").\end{footnotes}
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will often require proof that the litigant used the resource at issue.139

Second, a plaintiff must demonstrate that the injury can be traced to the challenged action.140

Third, a plaintiff must show that a favorable decision will redress the injury.141

Beyond these article III requirements, statutory and prudential concerns also limit standing. Under the APA, plaintiffs alleging illegality that is common to many agency actions must prove injury with respect to each and every action in order to have standing to challenge them as a group.142 In addition, plaintiffs must claim an injury within the "zone of interest" of the statute allegedly violated.143 By definition, Congress could choose to alter these statutory limitations. Prudential concerns that may also limit standing include144 rules concerning the assertion of a third party's rights145 and the litigation of generalized grievances.146 Congress may confer standing by statute where it would otherwise be denied on prudential grounds, but it may not expand jurisdiction beyond the article III limitations.147

II
THE SEPARATION OF POWERS THEORY OF STANDING

No single document or commentator comprehensively explains the application of separation of powers theory to standing law. Nevertheless, such a separation of powers theory of standing can be pieced together from academic writings and court opinions that have invoked the principle to justify recent developments in standing law. The theory as I present it relies heavily on Justice Scalia's academic writings.148 It remains unclear to what extent the four justices who joined Scalia in Lujan agree with the more extreme formulations of his theory.149

139. See supra notes 54-55, 104-05, 125-27 and accompanying text.
140. See supra notes 87-91 and accompanying text.
141. See supra notes 92-94 and accompanying text.
142. See supra notes 129-33 and accompanying text.
144. For a brief overview of the prudential requirements, see Fletcher, supra note 15, at 251-53.
147. Warth, 422 U.S. at 501 ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208-10 (1972) (Congress may grant standing as broadly as article III permits).

In addition, a litigant may possess standing as to one form of relief, but not as to another. See, e.g., Lyons v. Los Angeles, 461 U.S. 95 (1983) (litigant has standing to seek damages for unconstitutional use of choke hold, but lacks standing to enjoin further police use of choke holds).

148. See supra note 16.
149. Chief Justice Rehnquist and Justices O'Connor, White, and Kennedy joined Justice Scalia's opinion in Lujan. It is also worth noting that the Court in Lujan emphasized that
Despite this qualification, understanding the theory is important for three reasons. First, even the more moderate versions of the theory should alarm environmentalists, as increasing burdens of proof will require public interest organizations to invest large amounts of money to finance previously routine administrative challenges. Second, the more extreme versions of the theory indicate the possible future outlines of standing doctrine should Justice Scalia's views gain the support of a majority of the Court. These views could completely preclude review of significant areas of governmental decisionmaking related to the management of environmental resources.\textsuperscript{150} Finally, absent competing explanations of the separation of powers as it relates to standing, lower court judges searching for guidance in this confusing area of the law will likely be inclined towards Justice Scalia's views.

In broad terms, standing law under the separation of powers theory serves to minimize the role of the judiciary in a democratic society. Somewhat more specifically, standing law limits the judiciary's ability to inflict harm both upon society and upon itself as a result of its undemocratic manner of decisionmaking.

\textbf{A. Harm to Society}

Proponents of the separation of powers theory stress the potential harm to society should judges fail to restrict access to the federal court system. This claim rests first upon an axiomatic view about the appropriate role of courts in society, and second upon instrumental arguments about court competence.

\textbf{I. Axiomatic Argument}

The axiomatic argument begins with the assumption that American courts exist to protect individual rights.\textsuperscript{151} This mission is justified by focusing on the antimajoritarian nature of judicial review in a democratic polity. Courts are said to be antimajoritarian because they are explicitly expected to make decisions without reference to political pressure. Because courts are antimajoritarian, separation of powers theorists contend that their legitimacy must stem from an antimajoritarian function: the protection of individuals and minorities against the tyranny of the major-

\textsuperscript{150} See Perino, supra note 6, at 135.

\textsuperscript{151} Scalia, Separation of Powers, supra note 1, at 894; see also id. at 883 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion."); United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).
According to Justice Scalia, standing law limits courts to this traditional role of protecting minorities. Standing requires concrete injury because unless a plaintiff can show "he is harmed more than the rest of us" there is no reason to believe a majority is harming a minority, and thus no justification for judicial review. However, concrete injury alone is not sufficient. Rather, Justice Scalia indicates that there are some injuries that are so widely shared that even a congressional grant of standing would "not suffice to mark out a subgroup of the body politic requiring judicial protection."

The Supreme Court has expressed a similar argument in several opinions. In the context of standing law, Justices O'Connor and Rehnquist have both invoked the notion that judicial power is a "last resort" in a democratic society. In this view, society normally carries out its affairs democratically, with the antimajoritarian judiciary only having legitimate power to support antidemocratic interests, and then only as a last resort after the political process has failed. Standing serves to ensure that courts act within this proper role. Justice O'Connor, for example, argues that requiring a showing of causation in order to confer standing prevents the judiciary from assuming the illegitimate role of watchdog

153. Id. at 894. As such, concrete injury separates the plaintiff from all others who could claim the benefit of the social contract. The relationship between material or concrete injury and the injury-in-fact test has been explained by Professor Stewart:

The ultimate ground of the "injury in fact" test, reminiscent of the common law's focus on the protection of material interests, may be in the contractarian theory of government. Put simply the theory is this: the justification for government lies in individuals' willingness to assent to a scheme of mutual cooperation that increases individuals' opportunity to satisfy their preferences. Social action, when limited to the provision and allocation of material advantages, requires no general agreement on personal preferences or values. So long as only material interests are accorded protection by law, rules can be formulated which will enable each individual to pursue his own ends through a system of reciprocity that increases wealth, leisure, and the like, thus enlarging material opportunities for all. If ideological interests are accorded legal protections, however, two basic difficulties emerge. First, ideological interests ... often have an all or nothing feature. ... If several conflicting ideological interests are accorded recognition, or even one ideological interest that conflicts with material interests, it may be impossible to achieve stable compromise. Second, vindication of a litigant's ideological preferences may require others to acknowledge principles which they reject. But such enforced orthodoxy is contrary to contractarian premises; an agreement to share the fruits of cooperative endeavor is not an undertaking to embrace another's ideology.

against executive branch illegality. She argues that failure to enforce the causation requirement would

\[\ldots\] pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal court adjudication. "Carried to its logical end, [respondents'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the power of the purse; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful government action." \(^{157}\)

Thus, standing law in this view properly limits the federal judiciary's ability to influence executive branch behavior and restricts the courts to the protection of minority interests.

2. The Instrumental Argument

Proponents of the separation of powers theory also argue that too much court involvement in policy disputes harms society in more concrete ways. One traditional version of this argument asserts that courts cannot effectively adjudicate polycentric disputes. \(^{158}\) As such, courts must refrain from deciding cases with large ramifications for parties not before the court. \(^{159}\) Injury and causation tests thus properly exclude from the courts those cases with effects not discretely tied to the litigants before the court. \(^{160}\)

In addition, some contend that repeated clashes between the branches harm the "vitality" of the representative branches. \(^{161}\) According to this argument, close scrutiny by the judiciary undermines the function of the majoritarian political process. The political process must be allowed both to define public rights through legislation and enforce them with executive discretion. \(^{162}\) In this view, court interference with the normal give-and-take bargaining of the political process upsets its natural effectiveness.

\(^{157}\) Allen, 468 U.S. at 759-60 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1971)); see Haitian Refugee Center v. Gracey, 809 F.2d 794, 805 (D.C. Cir. 1987) (Bork, J.) (causation test "implies separation of powers because it is necessary to prevent the virtually limitless spread of judicial authority").


\(^{159}\) See Coyle, supra note 158, at 1069.

\(^{160}\) Valley Forge, 454 U.S. at 473 (arguing that standing "reflects due regard for the autonomy of those persons likely to be most discretely affected by a judicial order").

\(^{161}\) Id. at 474 (quoting United States v. Richardson, 418 U.S. 166, 188 (1974)).

\(^{162}\) See Scalia, Separation of Powers, supra note 1, at 897 (noting that power of executive to "lose or misdirect laws . . . [may be] one of the prime engines of social change").
Justice Scalia adds two other instrumental arguments. First, Justice Scalia contends that the judiciary tends to make policy decisions that reflect its class bias. For example, he believes that the more lenient standing granted in environmental cases reveals this bias. Second, Scalia believes that lenient standing undermines the political process by converting political decisions into legal decisions. In particular, according to Scalia, the failure to strictly enforce the requirement of particularized injury-in-fact in the 1970's allowed too-prompt access to the courts, making the courts a key component of public debate about political issues. Accordingly, liberal standing "overjudicial[ized] . . . the process of self-governance."

B. Harm to the Courts

The separation of powers theory of standing also emphasizes the potential for future harm to the judiciary itself if courts fail to exercise self-restraint. In part, the argument rests on a "slippery slope" claim that more lenient standing will become universal standing. For example, Justice O'Connor argued in Allen that if "the abstract stigmatic injury [to blacks in general from racial discrimination] were cognizable, standing would extend nationwide to all members of the particular racial groups. . . . A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine." Presumably, such virtually universal standing would undermine the ability of the courts to function effectively.

The argument that standing law prevents harm to the courts also stems from concerns about loss of legitimacy. Allegedly, the judiciary risks a loss in public faith when it acts beyond its traditional role. Thus, in Richardson, Justice Powell noted:

It is this role [protection of individual rights], not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coex-

163. Id. at 896.
164. See supra note 6.
165. Scalia, Separation of Powers, supra note 1, at 897.
166. Id. at 893.
167. Id. at 881.
168. Allen v. Wright, 468 U.S. 737, 755-56 (1984). From this, Justice O'Connor concluded that only racial discrimination suffered personally by the litigant should be cognizable, as opposed to abstract stigmatic injury by all those of the litigant's race. Id. at 757 n.22.

Justice Brennan responded:

[The complaint, fairly read, limits the claim of stigmatic injury from illegal government action to black children attending public schools in districts that are currently desegregating yet contain discriminatory private schools benefiting from illegal tax exemptions. . . . Thus, the Court's "parade of horribles" concerning black plaintiffs from Hawaii challenging tax exemptions granted to schools in Maine . . . is completely irrelevant for purposes of Art. III standing in this action.

Id. at 770-71 n.3 (Brennan, J., dissenting).
istence of the countermajoritarian implications of judicial review and the
democratic principles upon which our Federal Government in the final
analysis rests.169

Similarly, Justice Rehnquist notes that court legitimacy would be jeop-
ardized if the "courts [were] merely publicly funded forums for the venti-
lation of public grievances. . . ."170 In his words, article III of the
Constitution "forecloses the conversion of courts of the United States
into judicial versions of college debating forums."171

C. Premise of Private Preference Aggregation

A critical examination of the separation of powers theory of stand-
ing must begin by locating the theory's central premise. At one level, the
theory clearly rests on the axiom about courts' appropriate role.172 But
this axiom begs the question. Why should only nonmajoritarian interests
receive judicial protection? Put another way, what does majoritarian
politics accomplish that would be frustrated by judicial interference?

Apparently, a belief that majoritarian politics accurately aggregates
the private preferences of society's members underlies the separation of
powers theory of standing.173 This belief, in turn, rests on a deeply lib-
eral notion that the social contract was instituted for the protection of
private interests.174 Under this approach, democracy serves private in-
terests by providing a forum in which those private interests are aggre-

tice Rehnquist later quoted Powell in Valley Forge:

[Re]peated and essentially head-on confrontations between the life-tenured branch
and the representative branches of government will not, in the long run, be beneficial
to either. The public confidence essential to the former and the vitality critical to the
latter may well erode if we do not exercise self-restraint in the utilization of our
power to negative the actions of the other branches.

Valley Forge Christian College v. Americans United for Separation of Church and State, 454
U.S. 464, 474 (1982) (quoting Richardson, 418 U.S. at 188 (Powell, J., concurring)).

170. Valley Forge, 454 U.S. at 473.

171. Id.

172. See supra notes 151-57 and accompanying text.

173. Cf. Pierce, supra note 15, at 1277 (while many doctrinal inconsistencies exist in
Supreme Court standing opinions, the common purpose of separation of powers theory is to
"reduce the opportunities for politically unaccountable federal judges to substitute their policy
preferences for those of politically accountable institutions"). For a discussion of other possi-
bile justifications and how they fail to explain present standing law doctrine, see infra notes
180-86 and accompanying text.

174. The belief that the social contract was designed to protect private interests can be
directly traced to Locke. See B. Barber, Strong Democracy: Participatory Politics
For a New Age 4 (1984) (noting that under Lockean liberalism government was justified
only for "the mutual preservation of [individuals'] . . . lives, liberties, and estates"); see also
Stewart, supra note 154, at 1739 (justification for government under the contractarian theory
"lies in individuals' willingness to assent to a scheme of mutual cooperation that increases
individuals' opportunity to satisfy their preferences"); Winter, supra note 24, at 1454 (demo-
strating ideological connection between standing and liberalism).
gated through competition in the political marketplace. Because competing groups usually advance such private preferences in modern society, this theory is often referred to as "pluralism."

In this context, standing law prevents court interference with majoritarian preference aggregation. Standing duplicates the ability of the political process to account for the intensity of private preferences. Weak and diffuse preferences which are likely to lose in the normal aggregation of preferences that characterizes the political process are treated as insufficient for standing. Scalia explains:

The doctrine of standing . . . was almost tailor-made to protect political discretion. It is rudimentary political science that slight harm, expense, or inconvenience imposed upon a large, diffuse body of the population will generally not arouse effective political opposition. But diffuseness, expansiveness, lack of particularity was what the doctrine of standing was all about. In other words it excluded from the courts precisely those interests that were likely to lose in a rulemaking proceeding with substantial political content — the potential hikers and campers who would be harmed by construction of a new ski resort, to take a real life example.

In sum, the political process is a battle among interest groups reflecting their private preferences. The outcome of both congressional and administrative agency outcomes legitimately reflects the bargaining power of these "selfish interests." As such, the judiciary should avoid

175. See Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1543 (1988) [hereinafter Sunstein, Republican Revival] (goal of democracy under interest group approach is "to ensure that the various inputs are reflected accurately in legislation; the system is therefore one of aggregating citizen preferences"); M. Tushnet, Red, White, and Blue: A Critical Interpretation of the Constitution 70 (1988) (liberal tradition insists that public policy be made from the aggregation of individual preferences); D. Beauchamp, The Health of the Republic 75 (1988) (arguing that the private preference view of politics conceives of democracy as but a "mechanism, a structure, a field of rules in which private interests compete for scarce resources: that is, politics is a market"); see also Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 32-33 (1986) [hereinafter Sunstein, Interest Groups].

176. Sunstein, Republican Revival, supra note 175, at 1542. This use of the term "pluralism" is distinct from the use of the word to refer to a conception of politics and society in which "different groups pursu[e] divergent conceptions of the good life." Id. at 1542 n.9. For the second concept, I borrow Professor Sullivan's term "normative pluralism." See Sullivan, Rainbow Republicanism, 97 YALE L.J. 1713, 1714 (1988).

177. Scalia, Rulemaking, supra note 16, at vi (emphasis in original).

178. Scalia, Two Wrongs, supra note 16, at 40; see Chevron v. Natural Resources Defense Council, 467 U.S. 837, 865-66 (1984) (administrative process properly political); Scalia, Responsibilities of Regulatory Agencies Under Environmental Laws, 24 HOUS. L. REV. 97, 107 (1987) (judiciary must stay out of agency decisionmaking because it will interfere with the "political" decisions of agencies); see also Epstein, Modern Republicanism, 97 YALE L.J. 1633, 1650 (1988) ("individual self-interest is the engine both of economic and social advancement").

This view is consistent with Justice Rehnquist's majority opinion in United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (upholding against an equal protection claim a congressional revision of an existing railroad pension scheme). The Court's reasoning in that case effectively means that any statute that was merely a compromise among competing private interests will always be considered rational.
political disputes because their involvement interferes with the accurate aggregation of preferences.\textsuperscript{179}

Some might choose to defend the law of standing in political terms without reference to the capability of the political process to accurately aggregate preferences. These theorists would agree that standing serves to prevent judicial interference with the political process. However, they would argue that the political process deserves protection not because of its aggregative function, but rather because it was the political process society \textit{chose} in adopting the Constitution.\textsuperscript{180} Under this reasoning, the accuracy of aggregation is secondary to the historical consent of the governed. Accordingly, the "traditional" law of standing would be upheld to maintain the legitimacy of that consent.\textsuperscript{181}

However, this historical argument does not justify the modern law of standing. First, it fails to consider that the authors of the Constitution could not have foreseen the vast legislative power that the Executive branch now wields through agency rulemaking.\textsuperscript{182} The proponents of

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\textsuperscript{179} See supra note 177 and accompanying text. Some liberal theorists reject the preference aggregation justification for democracy in favor of the view that the democratic process is its own justification. See, \textit{e.g.}, Simon, \textit{The New Republicanism: Generosity of Spirit in Search of Something to Say}, 29 WM. \& MARY L. REV. 83, 89 (1987) (modern liberalism defines the public interest in terms of the process in which it is reached, with preference aggregation a minority position held by certain branches of conservative thought); Horowitz, \textit{Republicanism and Liberalism in American Constitutional Thought}, 29 WM. \& MARY L. REV. 57, 69 (1987) ("[T]he liberal ideal holds that the public interest is either simply procedural, or the sum of private interests."). Thus, Scalia might argue that the common good of democracy stems not from the accurate aggregation of preferences, but solely from the legitimacy of majoritarianism. Democracy is justified regardless of its outcome, and in some instances, despite its outcome. Accordingly, standing must be strictly enforced to ensure that administrative outcomes reach the same result as the legislative process. See Scalia, \textit{Two Wrongs}, supra note 16, at 40 (goal of administrative rulemaking is to reach the result the legislature would have reached). This argument cannot be distinguished from the preference aggregation argument for the purpose of evaluating the law of standing. With the preference aggregation justification, the availability of judicial review threatens to interfere with the aggregation of preferences because unlike majoritarian processes, the judiciary does not account for intensity of preferences. Similarly, with the process justification, the availability of judicial review threatens to interfere with the result that would have been reached by majoritarian processes. The internal critique, see infra notes 187-313 and accompanying text, serves as a critique of standing law under \textit{both} justifications for democracy since it demonstrates how modern standing law doctrine causes the administrative process to reach outcomes that differ from the likely outcome of even-handed legislative bargaining.

\textsuperscript{180} Cf. Posner, \textit{The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities}, 1974 SUP. CT. REV. 1, 29 (although many statutes lack a rational relationship to the public interest, they should survive judicial scrutiny because they are "the product of the constitutionally created political process of our society").

\textsuperscript{181} See, \textit{e.g.}, Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3191 (1990) (describing court role being maintained as "traditional").

\textsuperscript{182} See C. SUNSTEIN, \textit{AFTER THE RIGHTS REVOLUTION} 216-17 (1990) (questioning application of traditional understanding to the contemporary reality of the federal bureaucracy); Chayes, \textit{Public Law Litigation}, supra note 6, at 60 (improper to focus solely on historical role of courts since society now confronts bureaucratic decisionmakers wielding vast legislative power).
historical consent as a basis of separation of powers must explain this anomaly. Second, the historical claim ignores a growing body of evidence that the federal courts heard "public actions" both before and after the American Revolution.\(^{183}\) For example, in 1876 the Supreme Court held that "[t]here is . . . a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty, not due to the government as such."\(^{184}\) The Court allowed the suit to proceed even though the litigants "had no interest other than such as belonged to others" and wished to enforce "a duty to the public generally."\(^{185}\) Thus, modern standing restrictions make little sense if historical consent and tradition explain how standing law protects the democratic process.\(^{186}\)

The preference aggregation justification best explains the function of standing law doctrine. Given the goal of preference aggregation, one may evaluate the degree to which standing law succeeds in preventing judicial interference with democratic processes.

III

TWO CRITIQUES OF THE SEPARATION OF POWERS THEORY OF STANDING

The preference aggregation premise discussed above raises two divergent lines of refutation to the separation of powers theory of standing. In the first section below, I accept the premise and argue that modern


Winter argues that at least three causes of action were available at common law in the early history of the U.S. that would not survive modern standing analysis. Winter, supra note 24, at 1398-1409. These causes of action included relator suits (any person could bring suit for injunction in name of attorney general without attorney general as party), mandamus actions (injunction where court can act before an injury actually occurs to anyone), and informer's statutes (any member of community may sue to vindicate regulatory policy choice and receive one third of the penalty). Id.


185. Id. at 354. Another case had a similar holding:

Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government. The right to recover the penalty of forfeiture granted by statutes is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer. Marvin v. Trout, 199 U.S. 212, 225 (1905).

186. Of course, a final factual rebuke is to point out that the injury-in-fact and causation tests are both less than 22 years old. Thus, one cannot posit these tests as valid solely because they uphold the consented-to legitimacy of the democratic process.

Theoretical difficulties also arise when the entirety of standing law theory is premised upon a theory of consent. As Professor Tribe has argued, claims from consent invariably fail to explain "whose consent counts and what the consent encompasses," or even why consent matters. L. Tribe, supra note 65, at 66.
standing law, rather than preventing court interference with accurate aggregation, actually obstructs accurate aggregation. I refer to this as the "internal critique." In the second section, I question the premise. I advance an alternative justification for democracy stressing the "public" or "republican" character of certain areas of law. Under this explanation of democracy, the public values embodied in law deserve the same judicial protection given to private interests. I refer to this as the "external critique."

A. Internal Critique: The Dysfunctionality of Standing Doctrine

This section critiques the doctrine of standing in relation to its goal of safeguarding majoritarian preference aggregation. First, I analyze the ways in which the injury-in-fact and causation tests reduce the availability of judicial review of administrative agency action. Second, I analyze the impact of decreased judicial review on the preference aggregating function of bureaucracies and Congress. Finally, I rebut the counter-argument that a relaxed standing doctrine threatens the judiciary's role as protector of individual rights.

1. Decrease in Judicial Review

Standing law diminishes judicial review in three related ways. First, the requirement of particularized injury-in-fact threatens the reviewability of agency actions which implement statutes with diffuse benefits, especially at the programmatic stage. Second, the manipulability and unpredictability of the causation determination undermine efforts to review agency actions in complex regulatory schemes by rendering the outcome uncertain from case to case. Third, the increased cost of litigation engendered by standing doctrine will likely discourage public interest organizations from bringing lawsuits challenging agency action.

a. Prohibitive Injury-in-Fact Model

The requirement of particularized injury-in-fact threatens to distort many modern regulatory statutes. Individual citizens may have difficulty challenging agency failure to implement statutes with diffuse benefits because they must first establish how denial of the benefit to the public has palpably injured them as individuals. 187

Recent litigation in the D.C. Circuit illustrates this threat, as well as the uneven application of standing doctrine. For example, in Wilderness Society v. Griles, the litigation concerned a BLM decision that excluded the land underneath unnavigable submerged waters in calculating the

187. See F. Grad, Environmental Law 895 (3d ed. 1984) (noting that the problem of diffuse benefits was historically a problem for environmental groups attempting to gain standing since "the character of the aggrievement may be diffuse").
size of land grants that were being made to native Alaskans. Since the total acreage of all the land grants was fixed, the decision would necessarily result in an increase in the total amount of land granted to native Alaskans, and therefore a decrease in the amount of federal land in Alaska. As such, it clearly diminished the broad public benefit that stems from federal stewardship of land. Yet, the court of appeals denied the Wilderness Society standing because it could not identify the particular land used by its members that would no longer be under federal stewardship. The Wilderness Society was not allowed to predicate standing upon an injury to its members' opportunity to use federal lands in Alaska.

In contrast, the D.C. Circuit did not require this type of particularization in Center for Auto Safety v. National Highway Transportation Safety Administration. The Center challenged a Reagan administration decision to reduce the minimum fuel-efficiency standards for light trucks. It claimed standing on the grounds that the decision would injure the Center's members' opportunity to purchase fuel-efficient trucks. Standing became a central issue on appeal. The court delved into a highly complex set of auto industry incentives established by statute to determine how the mileage reduction would affect the availability of fuel-efficient light trucks several years in the future. A majority found injury-in-fact.

Justice, then Judge, Scalia dissented. Scalia argued that a court could not find injury-in-fact without an identification of the particular type of trucks that would be unavailable to plaintiffs. Scalia warned that

[i]f the injuries hypothesized by the interest groups suing in the present cases are sufficient, it is difficult to imagine a contemplated public benefit under any law which cannot — simply by believing in it ardently enough — be made the basis for judicial intrusion into the business of the political branches.

188. 824 F.2d 4 (D.C. Cir. 1987). See supra notes 103-07 for a review of Griles.
190. Griles, 824 F.2d at 13, 15.
191. 793 F.2d 1322 (D.C. Cir. 1986).
192. The court assumed that Congress intended to provide standing "coterminous with the full reach of standing permitted by article III," thus leaving article III standing as the only limiting factor. Id. at 1324. The Center had previously litigated many such decisions without any concern over standing. Id. at 1330 n.45.
193. Id. at 1334.
194. Id. at 1343-44 (Scalia, J., dissenting).
195. Id. at 1342 (Scalia, J., dissenting). Scalia stressed the speculative nature of future fuel efficiency and determined it was "an ingenious academic exercise in the conceivable," in which petitioners merely "imagine[d] circumstances in which [they] could be affected by the agency's action." Id. at 1343 (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688-89 (1973)).
In Scalia's view, particularization is necessary to exclude public actions from the courts.196

The Supreme Court has never specifically determined the degree of particularity at which the injury must be described. However, the Court seems to have implicitly answered the question in *Lujan*, where it required highly particularized and direct injury. In *Lujan*, the only injury to National Wildlife Federation members that the Court recognized was interference with their use of particular land that would be subjected to new uses.197

The Court need not have characterized the injury so specifically. It could have legitimately described the injury in at least three other ways. First, the Court could have recognized as injury the Federation's members' decreased opportunity to use federal lands as a result of the BLM reclassifications.198 Second, given that the same number of Federation members now must share a smaller amount of public land, competition for use of lands will increase, with a concomitant decrease in its aesthetic value as wilderness.199 Third, the Court could have recognized as an injury the BLM's procedural violation of not preparing a land management plan or an environmental impact statement.200

In certain environmental law contexts, the particularization requirement appears especially inappropriate in relation to the goals of standing

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196. Scalia concluded his dissent by noting that "the question whether there is adequate reason for late issuance of light-truck fuel economy standards is of interest only to the society at large, and should by resolved through the political mechanisms by which that society acts. There is no basis for believing that these plaintiffs have suffered the personal hurt that alone justifies judicial interference with execution of the laws." *Id.* at 1345.


198. See, e.g., *Center for Auto Safety*, 793 F.2d at 1322 (injury-in-fact from decreased opportunity to purchase high mileage trucks).


200. This procedural failure to plan was central to the litigants' claim in *Lujan*. See *Lujan*, 110 S. Ct. at 3184 (plaintiff alleged failure to develop land-use plans, to submit recommendations to the President, to consider multiple uses, to prepare an environmental impact statement, and to provide public notice of decisions). *Lujan* did reject a finding of standing based upon the informational injury to the Federation's purpose (dissemination of information to its members), but it never addressed the procedural injury to individual members. See 110 S. Ct. at 3193-94 (holding that the affidavit about the Federation's informational injury was "conclusory and completely devoid of specific facts").

It had seemed well established that failure to prepare an environmental impact statement that was required by NEPA was by itself injury in fact, provided the plaintiff demonstrated any geographical nexus to the site. See, e.g., *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 119-21 (8th Cir. 1990); *Friends of the Earth v. United States Navy*, 841 F.2d 927, 931 (9th Cir. 1988); *National Wildlife Fed'n v. Hodel*, 839 F.2d 694, 712 (D.C. Cir. 1988); *Forelaws on Board v. Johnson*, 743 F.2d 677, 680 (9th Cir. 1984); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983); *South East Lake View Neighbors v. Department of Housing & Urban Dev.*, 685 F.2d 1027, 1038-39 (7th Cir. 1982); *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975).
law. For example, in land-use planning disputes, such as Lujan, the statutory requirement that an agency engage in environmental planning is designed to identify at an early stage potential injury to the environment and users of the natural resources affected. Requiring plaintiffs to prove particularized injury just so that they can force an agency to prepare an environmental impact statement seems incoherent.\footnote{See Fletcher, supra note 15, at 259-60.} Likewise, in many complex regulatory schemes, "[s]ometimes the government itself does not know precisely the locations or the identities of the people to whom its policies will apply."\footnote{Wald, supra note 98, at 720. The difficulty in identifying the specific impacts of a regulatory scheme is especially acute where the statute requires challenges to be made within 60 days of the issuance of the regulation. Id.}

The requirement of particularization, when combined with Lujan's narrow definition of an agency "action,"\footnote{See supra notes 129-33 and accompanying text.} will especially limit environmental organization challenges to agency action at the programmatic level. First, the scope of the program may render it difficult to isolate the individualized effects of the policy with precision.\footnote{Lawrence, supra note 102, at 10,293. Particularization to challenge programmatic changes is also difficult in contexts other than environmental law. See, e.g., Maine Ass'n of Indep. Neighborhoods v. Commissioner, Maine Dep't of Human Serv., 697 F. Supp. 557, 561 (D. Me. 1988) (denying standing to challenge allegedly unlawful changes in state regulations concerning AFDC program since plaintiffs could not identify any specific individuals who were denied benefits as the result of the changes), vacated and remanded on other grounds, 876 F.2d 1051 (1st Cir. 1989).} For example, in Griles particularization was impossible because the locus of the harm depended on future decisions by Native Alaskans.\footnote{Recognizing the difficulty of this showing, the court of appeals remanded to the district court to give the Wilderness Society additional time for discovery. Wilderness Soc'y v. Griles, 824 F.2d 4, 20 (D.C. Cir 1987) (failure to allow discovery to substantiate injury constituted an abuse of discretion); see also Wald, supra note 98, at 720 (sometimes the government does not yet know who will be affected by its policies within the time in which organizations must challenge regulations).} More importantly, review will be extremely burdensome to pursue where the program under scrutiny never embodies the challenged policy in a formal rule or single agency decision. For example, the BLM program challenged in Lujan involved over 1240 individual land decisions, making it time-consuming and costly to prove injury for each individual plot of land affected.\footnote{Lawrence, supra note 102, at 10,293. As Scalia admitted in his majority opinion in Lujan, The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Lujan v. National Wildlife Fed'n, 109 S. Ct. 3177, 3191 (1990). This cost will also impact the Courts. See Brief of Amici Curiae in Support of Respondents Urging Affirmance at 22, Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990) (No. 89-640) [hereinafter Brief of State of California] (Brief submitted by the State of California with Florida, North Carolina, Ohio, Vermont, and Wyoming) (failure to allow for program-}
The preclusion of programmatic review has other potential drawbacks. First, as a program moves from concept or general policy to actual implementation, it develops a natural inertia with the investment of time and money. As a result, the courts are naturally less willing to intervene and enforce the law at the implementation stage. Second, in the particular case of NEPA and other environmental planning cases, effective litigation requires programmatic review. Programmatic review is imperative since it is often impossible to properly evaluate the environmental impact of a particular decision without reference to other related decisions that may be made in the course of a larger program.

Indeed, several states as amici curiae urged the Supreme Court in *Lujan* not to apply standing law so as to allow the BLM to avoid creating a programmatic environmental impact statement. The states argued that "[the rule proposed by [the] BLM [in its brief (and adopted by the Court in *Lujan*)] would be a disaster for the states, gutting NEPA as well as FLPMA protections on precisely those federal programs with the potential for the widest possible economic and environmental consequences." The states warned that if the Court accepted the BLM's position on programmatic review, then "any national program, no matter how ambitious, could be characterized as a series of individual decisions, in order to frustrate judicial review of an agency's actions."
b. Manipulable and Unpredictable Causation Requirements

The Court's unpredictable causation tests also threaten to diminish judicial review of agency actions. First, the finding of causation hinges on a manipulable determination of the injury-in-fact at issue. Second, causation is a "metaphysically undisciplined" concept, and as such always carries with it a level of uncertainty. This uncertainty increases the risks inherent in bringing a lawsuit, thereby discouraging potential plaintiffs. Since causation asks whether the agency action caused the plaintiff's injury, the outcome often depends on how the injury is defined. Several Supreme Court opinions demonstrate the manipulability of the definition of injury and its resultant effect on the causation determination.

_Linda R.S. v. Richard D._ typifies how the definition of the injury-in-fact can be manipulated to influence the outcome of the causation tests. In _Linda R.S._, the mother of an illegitimate child seeking child support sued the district attorney on the grounds that his policy not to prosecute fathers of illegitimate children for failure to pay child support violated the Equal Protection Clause. The Court characterized the injury as failure to obtain child support. It then concluded that even "if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will ... result in payments of support can, at best, be termed only speculative."

Aside from the "odd" nature of this statement, the salient issue for standing is the generality at which the Court described the injury. The Court viewed injury-in-fact as the lack of child support. However, the Court could have characterized the mother's injury as a violation of the Equal Protection Clause due to the discriminatory character of the district attorney's policy. The policy of not prosecuting fathers of illegiti-
mates clearly caused such an injury, and an order revoking the policy would remedy the discriminatory treatment.

The Court also manipulated causation in *Simon v. Eastern Kentucky Welfare Rights Organization.* In *EKWRO,* indigent plaintiffs challenged an IRS ruling that allowed hospitals to receive favorable tax treatment as a charitable corporation, even if the hospital refused to treat indigent patients in some circumstances. The Court denied standing because the plaintiffs could not demonstrate that the hospitals would treat *them* if the Court forced the IRS to revert to the prior scheme. According to the Court, hospitals might decide to forgo the tax benefits and continue to not provide indigent medical care. Yet, the Court could have characterized the injury as the particular inability of these plaintiffs to obtain medical care. If so, causation is direct; reestablishing the old IRS policy would once again provide the indigents with the precise opportunity to receive medical services that Congress intended.

In other cases where the injury could be described as lost opportunity the Court has treated redressability in this manner. In *Regents of the University of California v. Bakke,* for example, the plaintiff could not demonstrate that he would have been admitted to medical school in the absence of the school's affirmative action program. If injury was denial of admission, Bakke could not have met the causation standard required by *EKWRO.* However, the Court defined the injury as interference with the opportunity to compete that is guaranteed by the Equal Protection Clause. Suddenly causation was clear and the Court could find standing. Similarly, in *Arkansas Writers v. Ragland,* the Court

222. *Id.* at 28-32 (outlining the disputed tax incentive scheme).
223. *Id.* at 43 ("It is . . . speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services.").
224. *Id.*
225. *Id.* at 32-33, 40-41.
227. See Chayes, *Public Law Litigation,* supra note 6, at 19; Sunstein, *Privatization,* supra note 22, at 1465. The manipulation of injury and causation in both *Linda R.S.* and *EKWRO* may be explainable by factors outside of the standing law debate. *Linda R.S.* is arguably a special case due to long-standing judicial reluctance to interfere with prosecutorial discretion; Judge Bork described *Linda R.S.* in this way. See Haitian Refugee Center v. Gracey, 809 F.2d 794, 804 (D.C. Cir. 1987) (opinion of Bork, J.). Likewise, *EKWRO* is potentially "special" in that courts have frowned on one citizen litigating to increase the tax liability of another. See Sunstein, *Privatization,* supra note 22, at 1454 & n.105.
229. *Id.* at 279.
230. *Id.* at 280 n.14.
231. See Sunstein, *Privatization,* supra note 22, at 1465; see also *Hart and Wechslер,*
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struck down a taxation scheme that favored certain magazines over the plaintiff's publication based on content.\textsuperscript{233} If the injury-in-fact had been the taxes paid, however, redressability would have become problematic. The state could comply with an adverse Court decision by ending the other magazines' exemption, thus not providing plaintiffs with financial compensation. Recognizing that this reasoning might render many First Amendment claims unreviewable, the Court rejected the standing challenge. Because the First Amendment focuses on maintaining the opportunity to compete fairly in the marketplace of ideas, the Court did not require a financial remedy — equalized opportunity was sufficient.

Unfortunately, the Supreme Court has offered little guidance to courts trying to characterize injuries in relation to the causation determination.\textsuperscript{234} As discussed above, separation of powers principles may inform courts' judgments,\textsuperscript{235} but the precise dictates of these principles remain unclear.\textsuperscript{236} Consulting the substantive law in dispute might provide guidance, but this would link the standing determination to the merits of the case, in contradiction to the central premise of \textit{Camp} that standing analysis is separate from analysis of the merits.\textsuperscript{237}

In any case, regardless of the manipulability of the injury characterization, the metaphysical nature of a causation inquiry often engenders extensive uncertainty.\textsuperscript{238} Professor Chayes has written that,

\begin{quote}
[a]ny first-year law student, at least after he has read the \textit{Palsgraf} case, could predict what would happen when the metaphysically undisciplined concept of causation is introduced. . . . [O]ur mythical first-year law
\end{quote}

\textit{supra} note 82, at 132-33 (on the need to ignore redressability in equal protection cases).

\textsuperscript{232} 481 U.S. 221 (1987).

\textsuperscript{233} \textit{Id.} at 223. The Arkansas tax scheme exempted from certain taxes magazines focusing on special interest topics. \textit{Id.}

\textsuperscript{234} \textit{But see} Allen v. Wright, 468 U.S. 737, 752-53 (1984) (Justice O'Connor noting that despite the fact that standing "incorporates concepts concededly not susceptible of precise definition . . . standing questions can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases"); \textit{supra} note 197 and accompanying text (discussing \textit{Lujan}'s implicit guidance on particularization).

\textsuperscript{235} \textit{See supra} notes 64-78 and accompanying text; \textit{see also} Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987) (Bork, J.) (suggesting that although the causation test is inherently difficult to apply, separation of powers principles can provide sufficient guidance to judges).

\textsuperscript{236} \textit{See Allen}, 468 U.S. at 766 (Brennan, J., dissenting) (arguing that the majority's "mere incantation" of the separation of powers provides no principled justification for its decision); \textit{see also} \textit{WRIGHT \& MILLER, supra} note 22, § 3531.5, at 121 supp. n.15.5 (separation of powers is so amorphous that its application to causation analysis "simply doubles the uncertainty without any corresponding benefit"); Wald, \textit{supra} note 98, at 723 (arguing that individual judges' own views of separation of powers likely to resolve inherently unpredictable causation analysis).

\textsuperscript{237} \textit{See Sunstein, Privatization, supra} note 22, at 1466; \textit{see also} Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 153 (1970) (standing and the merits of claim are distinct inquiries).

\textsuperscript{238} \textit{See WRIGHT \& MILLER, supra} note 22, § 3531.5, at 439 ("[T]he general concept of causation is subject to uncertainty and manipulation.").
student knows that there are no direct or indirect injuries. There are only causal chains of different lengths. Allen v. Wright seems to bear out Chayes’ claim. In that case, the majority and dissenting opinions reached diametrically opposing causation conclusions on the same facts. Five Justices found the remedy to be doubtful because it required speculation as to the effect on third parties of a tax status change. Causation was described as “attenuated at best,” “highly indirect,” and “far too weak.” Yet, on the same facts Justice Brennan found that “[c]ommon sense alone would recognize that the limitation of tax-exempt status for racially discriminatory private schools would serve to lessen the impact that those institutions have in defeating efforts to desegregate the public schools.” Justice Stevens likewise found that “[c]onsiderations of tax policy, economics, and pure logic all confirm the conclusion that respondents’ injury in fact is fairly traceable to the Government’s allegedly wrongful conduct.”

The problem of causation’s manipulability, combined with its metaphysical unpredictability, will always be acute where the plaintiff challenges government action that harms the plaintiff through a third party. Causation in these cases depends on the response of the third

239. Chayes, Public Law Litigation, supra note 6, at 19. The Court has recognized that the problem is the length of the causal chain. In Allen, Justice O'Connor suggested that there was no standing since the "line of causation between the illegal conduct and injury . . . [was] too attenuated." 468 U.S. at 752.


241. See id. at 759, 774. Parents of children attending schools undergoing desegregation challenged the Internal Revenue Service's failure to deny charitable tax exemption status to private segregated schools. The challenge was both statutory and constitutional. Id. at 745 n.12.

242. Id. at 758-59.

243. Id. at 757.

244. Id.

245. Id. at 759.

246. Id. at 774 (Brennan, J., dissenting).

247. Id. at 789 (Stevens, J., dissenting). Splits like Allen, when they are along traditional conservative/liberal lines, are particularly troublesome in that they make more plausible the notion that the Justices are manipulating standing in order to reach particular results on the merits.

248. See, e.g., Von Aulock v. Smith, 720 F.2d 176, 181 (D.C. Cir. 1983) (when agencies are challenged and the injury occurs through a third party, the inquiry "involves the delicate task of guessing the likely action in hypothetical situations of parties not before the court").

Most challenges in the environmental context involve third-party actions. Usually, the government itself does not commit the environmental injury, but rather fails to prevent a third party from causing the injury. Where the citizen directly sues a polluter, such as under the Clean Water Act, demonstration of causation is more straightforward. See Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 71-73 (3d Cir. 1990), cert. denied, 111 S. Ct. 1018 (1991). Plaintiffs must show in Clean Water Act cases that the "defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant, and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." Id. at 72.
party to the government action. Yet, most regulatory regimes — including many environmental programs — are inherently probabilistic and systemic.\textsuperscript{249} Any particular regulated party may not modify her behavior due to regulation, but a large enough percentage of the class of such parties will change their behavior to warrant the benefits of the regulation.\textsuperscript{250} As Professor Sunstein concludes, "the connection between the risk and any actual injury to any person cannot readily be established before or after the fact."\textsuperscript{251} Therefore, the "consequences of greater enforcement for any particular member of the class of beneficiaries are often unavoidably speculative."\textsuperscript{252}

The uncertainties of the Court's causation tests are magnified in the environmental context, where causation problems abound. Causation is difficult to establish in environmental disputes for a number of reasons. Environmental disputes often turn on the frontiers of science. Ecological relationships, in particular, are extraordinarily complex and often ill-understood.\textsuperscript{253} Moreover, many environmental injuries stem from a combination of numerous types of sources each of which contribute to the overall injury, making it difficult to link injury to an individual source or even to a particular type of source.\textsuperscript{254} These uncertainties, added to the standard difficulties present in the causation test in the regulatory context, could dramatically increase the difficulty of litigation in environmental law. Asking plaintiffs to demonstrate causation under a standard of "substantial likelihood"\textsuperscript{255} will render standing decisions unpredict-

\textsuperscript{249}. See Sunstein, \textit{Privatization}, supra note 22, at 1458 (citing environmental, automotive, occupational, and antidiscrimination statutes as examples of "probabilistic and systemic" schemes); Wald, supra note 98, at 722 (complex nature of most government regulation makes it impossible to offer precise proof as to how one actor will react to another); see also C. Sunstein, \textit{supra} note 182, at 215.

\textsuperscript{250}. For example, the failure to follow a safety procedure in the transportation of hazardous wastes may not cause harm in any particular case, but rather creates an increase in overall risk to the public. Despite the risk, however, it may be impossible for a plaintiff to directly link the agency's failure to enforce the rule to any particular environmental injury.

\textsuperscript{251}. Sunstein, \textit{Privatization}, supra note 22, at 1458.

\textsuperscript{252}. \textit{Id}.

\textsuperscript{253}. See Sagoff, \textit{Do We Need a Land Use Ethic?}, 3 ENVT. ETHICS 293, 303 (1981) (in the ecological context, "linear chains of causality are not often found; events are the results of any number of interacting causes").

\textsuperscript{254}. See R. Stewart & J. Krier, \textit{supra} note 56, at 259-62 (describing causation problems relating to multiple sources); Stewart, \textit{Regulation in a Liberal State: The Role of Non-Commodity Values}, 92 YALE L.J. 1537, 1557-58 n.75 (1983) ("[T]he legal system must cope with thousands of different activities and tens of thousands of different chemicals that pose different, difficult to identify, risks to health and the environment. . . . [H]arms [of pollution] are collective and often consist of individually small, but, in the aggregate, potentially significant risks of ecological or health harm at some uncertain point in the future.").

\textsuperscript{255}. See, \textit{e.g.}, Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 74-78 (1978) (granting standing to environmental groups challenging constitutionality of Price-Anderson Act's limitation on liability based on "substantial likelihood" that the limitation caused nuclear power plants to be built); Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990) (noting that to defeat a summary
able in environmental contexts; asking for proof of causation with particularity, as the Supreme Court seemed to do in *Allen*, could be asking for the impossible.\(^\text{256}\)

c. Increased Cost of Litigation

Besides the degree to which the injury-in-fact and causation tests might preclude review in certain situations, recent changes in standing law will increase the cost of public interest litigation challenging agency action. First, the injury-in-fact test may require extensive discovery and documentation by public interest litigators.\(^\text{257}\) In a land use dispute, for example, documenting the users of all of the land subject to the dispute may prove both costly and time-consuming.\(^\text{258}\) In addition, rigid requirements of proof in cases involving environmental health risks to humans may necessitate the expenditure of considerable sums to substantiate epidemiological claims of risk to health as injury-in-fact.\(^\text{259}\) Second, the inherent uncertainty surrounding causation questions\(^\text{260}\) will likely increase the number of appeals and thus the average cost of environmental litigation. Finally, the limitation on programmatic review\(^\text{261}\) will force environmental groups to challenge each specific "action," leading to a "proliferation of lawsuits" that could threaten the "financial resources of environmental groups."\(^\text{262}\) Higher costs will deter some "poorer" public interest organizations from entering litigation against administrative agencies, and may also lessen the amount of litigation brought by more established organizations.\(^\text{263}\)

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\(^\text{256}\) The Supreme Court has yet to resolve the appropriate level of deference to be given to congressional determinations of causation. *See* Lawrence, *supra* note 102, at 10,293. The D.C. Circuit in *Center for Auto Safety v. Thomas* split evenly *en banc* on standing, with five judges explicitly calling for deference to congressional determinations of causation. 847 F.2d 843, 844 (D.C. Cir. 1988) (opinion of Wald, C.J.).

\(^\text{257}\) *See* Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 936-37 (1985) ("If plaintiffs have to produce affidavits from affected members, make those members available for depositions, and brief and argue standing on a motion to dismiss, the costs of getting to the merits of a case rise significantly."); Lawrence, *supra* note 102, at 10,293; *see also* Mashaw, *supra* note 5, at 1169 (noting that if litigants are forced to prove injury in fact at summary judgment, the benefits to environmental groups of Camp's liberalization of standing may prove "ephemeral").

\(^\text{258}\) *See* Lawrence, *supra* note 102, at 10,293.


\(^\text{260}\) *See* supra notes 212-56 and accompanying text.

\(^\text{261}\) *See* supra notes 203-06 and accompanying text.

\(^\text{262}\) Sheldon, *supra* note 8, at 10,565.

\(^\text{263}\) *See* D. Henning & W. Mangun, *Managing the Environmental Crisis* 35
Finally, because standing is a prerequisite for article III jurisdiction under the separation of powers theory, stricter requirements will increase litigation costs. Because of its jurisdictional status, courts may rule upon standing sua sponte and industry intervenors may raise the issue. Thus, the costs to the agency and the plaintiffs could increase even where the agencies themselves do not wish to challenge the plaintiff’s standing. Moreover, because standing may be challenged for the first time on appeal, plaintiffs must always demonstrate injury and causation at the initial court proceeding. Waiting until the agency, the court, or an industry intervenor brings up standing on appeal risks having the court of appeals rule that the plaintiff may not supplement the record.

2. The Danger of Decreased Judicial Review

Thus far, I have argued that strict injury and causation requirements threaten judicial review of important environmental regulations by potentially removing probabilistic harms and diffuse injuries from the domain of the courts. I have also argued that even where decisions remain technically reviewable, the costs associated with proving standing may

(1989) (environmental groups anticipating litigation face a constant shortage of funds, especially in contrast to industry and government); Jordan, Citizen Litigation under the Clean Water Act: The Second Circuit Renews its Leadership Role in Environmental Law, 52 Brooklyn L. Rev. 829, 839 n.65 (1986) (arguing, based on experience as a citizen organization litigator, that any expected increase in litigation costs or in delay of recovering attorney fees, where applicable, will have a dampening effect on citizen litigation); Russell & Gregory, Awards of Attorney’s Fees in Environmental Litigation: Citizen Suits and the “Appropriate” Standard, 18 GA. L. Rev. 307, 326-27 (1984) (the complex and technical nature of environmental litigation makes it expensive for environmental groups who often lack financial resources).


265. See Jordan, supra note 263, at 830 (citing standing challenges by industry intervenors as an example of industry tactics designed to increase the time and expense of litigation to environmental plaintiffs).

266. The agency might prefer to litigate on the merits for a variety of reasons. For example, it might be confident of victory on the merits and therefore might desire a quick court resolution to eliminate any uncertainty as to the action’s legality. It might also believe that even if the particular plaintiffs are of doubtful standing, other plaintiffs with standing will be found, and the agency would prefer to resolve the issue promptly, regardless of which way the issue is resolved by the lawsuit. Finally, the agency might prefer an environmental group as a plaintiff so that its own position seems moderate in comparison to an industry group simultaneously challenging the agency action.


268. See, e.g., Proffitt v. Lower Bucks County Joint Mun. Auth., 29 Env’t Rep. Cas. (BNA) 1696 (3d Cir. May 11, 1989) (opinion designated “not for publication”) (where proof of standing does not affirmatively appear on the record after trial, a circuit court can order the case dismissed rather than remanding for additional proof, even if the standing issue was never raised in the lower court).

This problem was also partly at work in Lujan, where both the D.C. Circuit and the Supreme Court examined the district court’s refusal to accept four supplemental affidavits from the Federation on the question of injury in fact. Lujan v. National Wildlife Fed’n, 110 S. Ct. 3177, 3189, 3191-93 (1990).
prove prohibitive. It remains to be explained why this decrease in court review of agencies is objectionable. Indeed, it is precisely this decrease in judicial review that proponents of the separation of powers theory of standing applaud. Within the premise of preference aggregation, a decrease in review may be desirable because it prevents courts from replacing the agencies' political, preference-aggregating decision with their own nonpolitical judgment. I argue the opposite: court review of agencies increases the general ability of bureaucracies to aggregate majoritarian preferences accurately because review makes agencies more politically accountable. While seemingly counterintuitive, the judiciary’s undemocratic internal process does not preclude its interaction with bureaucracies in a manner that is more majoritarian than bureaucracies acting alone.

a. Uncontrolled Bureaucracy

The theory of second best in the economics of regulation explains how judicial review can foster an increase in democratic decisionmaking by agencies. Under this theory, “a regulatory scheme that is intrinsically inefficient when viewed in isolation may actually contribute to the overall efficiency of an economy because of the way it interacts with apparent inefficiencies elsewhere in the system.”269 By analogy, the interaction of two antimajoritarian processes (the courts and executive bureaucracies) may be more majoritarian than either acting alone.270

Judicial review of agency decisions may compensate for some antidemocratic tendencies of the bureaucratic structure. Courts can lessen the danger of agency capture by industry, equalize the bargaining power between regulated industries and environmental plaintiffs, and heighten public scrutiny of agency actions. The increased accountability of agencies will encourage them to more accurately reflect democratic preferences in their actions.

i. Capture

Court review of agency action is often justified as a means to prevent capture of agencies by the industries they seek to regulate.271 Capture theory argues that the close cooperation between regulators and the regulated leads agency officials to internalize the viewpoints of industry.272

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270. Cf. id. (analogizing to the economic theory of the second best in arguing that the nonmajoritarian process of judicial review of fundamental rights may enhance the democratic process).
271. See, e.g., Pierce, supra note 15, at 1280-81; Sunstein, Interest Groups, supra note 175, at 74.
272. M. Shapiro, Who Guards the Guardians? Judicial Control of Administration 65 (1988). An important early work on agency capture concerned the capture of the
Because the creation of administrative agencies "breached safeguards of electoral accountability and separated powers," popular election of the President is considered insufficient to counteract this tendency.273

Some recent work discounts the effect of agency capture in the environmental context. First, modern public interest groups may frustrate the development of the cozy and secretive relationship that leads to capture.274 Second, the broad, cross-industry mandate of agencies such as the Environmental Protection Agency (EPA) is likely to prevent its officials from internalizing the norms of any particular industry.275

These recent works challenging the likelihood of capture are not entirely persuasive. Although an agency such as EPA might as a whole regulate several industries, specific EPA officials and staff may work primarily with one particular industry. Moreover, even if EPA is secure from capture, other agencies whose actions impact the environment may be more susceptible. The Forest Service and the Bureau of Land Management, for example, have been heavily influenced by the industries with which they regularly interact.276 If capture theory is even partially correct, it raises serious questions as to the ability of administrative agencies to accurately account for individual preferences. A decrease in the use of the judiciary as an external check on agency behavior would increase the potential for capture.

ii. Uneven Bargaining Power

If environmental plaintiffs are precluded from seeking judicial review of agency action, the output of those agencies will be skewed towards the interests of regulated industries.277 Agencies will systematically distort the will of Congress in order to avoid the costs of lawsuits, which only the regulated industry could threaten to bring.278

As Professor Pierce notes,


273. Sunstein, Interest Groups, supra note 175, at 60.

274. Sabatier, Social Movements and Regulatory Agencies: Toward a More Adequate — And Less Pessimistic — Theory of "Clientele Capture," 6 POL'Y SCI. 301 (1975) (arguing that emergence of "public interest" groups may prevent agency capture).


277. The objects of regulation — those required to do something — always have standing. See C. Sunstein, supra note 182, at 211.

278. See Sunstein, Privatization, supra note 22, at 1433, 1463 ("The principal problem with the [private-law] model . . . was that . . . [t]he interests of regulated industries could be protected through the courts, whereas the interests of regulatory beneficiaries were to be vindicated through politics or not at all. . . . [Unequal court access] impos[es] a perverse set of
Standing to obtain judicial review of agency action is a critical determinant of a party's ability to participate effectively in the agency's decision-making process. Agencies' administrators recognize that they must respond to arguments made by parties that can challenge policy decisions in court, but they can ignore with relative impunity arguments made by parties that lack this power.  

Indeed, in some situations, the lawsuit may be an essential component of the bargaining process between agencies and interested parties. Thus, a serious distortion of agency outcomes may develop if the law of standing bars regulatory beneficiaries, but not industry, from exerting pressure upon agencies.

iii. Public Awareness and Accountability

Finally, judicial review of agency decisions tends to foster publicity, which can further the goal of majoritarian preference aggregation. At the simplest level, publicity enhances the likelihood that agency actions will accord with majoritarian preferences by alerting the public to important issues that might otherwise be ignored. Public interest litigators often select lawsuits based in part on the desire to stimulate public debate and exert pressure on the agencies or industry. The publicity surrounding successful lawsuits also may increase membership in public interest organizations and thus improve their lobbying clout. Since many benefits of regulations may be defined as classic public goods, public in-
terest organizations are essential if the public at large is to be adequately represented.283

b. Congress is Unable to Police the Bureaucracy

Thus far, I have argued that the injury-in-fact and causation tests are manipulable, uncertain, and costly. These requirements are likely to preclude or discourage judicial review of many agency actions. Given the need to oversee the bureaucracy, I have argued that the decrease in judicial review may impede the expression of majoritarian preferences by agencies.

However, proponents of the separation of powers theory of standing may reply that Congress — the most clearly majoritarian branch — has sufficient power to check the antidemocratic tendencies of executive agencies.284 Under this line of reasoning, court intervention is at best superfluous, and may also be counterproductive in two ways. First, courts may make poor policy decisions.285 Second, the availability of court review may allow Congress to avoid making important regulatory decisions.286 Accordingly, courts should rely on Congress to make decisions regarding broad issues of public policy and to act as the watchdog of agencies.

One problem with relying on Congress is the time-consuming nature of the political process.287 Many controversial agency decisions made potentially unreviewable by modern standing law involve vital public interests which cannot suffer extensive delay. For example, after the BLM reclassifies the public land at issue in Lujan, leasing will begin. Congress may only regulate mining on those lands to prevent unnecessary or undue environmental degradation; it may not revoke such a lease without effecting a taking.288 Leaving the watchdog role to Congress threatens in

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283. Public interest organizations allow individual preferences to be articulated in the legislative process without the free-rider problems that otherwise plague the expression of such preferences. See generally Feldman, Divided We Fall: Associational Standing and Collective Interest, 87 Mich. L. Rev. 733 (1988).


286. For an argument that Congress routinely uses "symbolic" goals as a means of leaving difficult legal, ethical, and political questions to agencies and the courts, see Dwyer, supra note 275, at 245-46. See also Stewart, supra note 154, at 1695.


288. See Sheldon, supra note 8, at 10,564; see also Mansfield, On the Cusp of Property Rights: Lessons from Public Land Law, 18 Ecology L.Q. 43 (1991) (discussing the extent of control the BLM may exercise over mining claims). The same dynamic was at work in Valley Forge, discussed at supra notes 75-77 and accompanying text. Once the property had been
some cases to establish a system in which blatantly illegal agency decisions can never be redressed.\textsuperscript{289}

Moreover, the notion that Congress can effectively oversee the vast array of decisions which federal agencies make underestimates the scope of executive agency decisionmaking.\textsuperscript{290} Congress may effectively oversee controversial political decisions, but it is unlikely to scrutinize most regulatory behavior.\textsuperscript{291} Moreover, reliance on congressional pressure seems particularly inappropriate in cases like \textit{Lujan} where the "gravamen of the complaint . . . is [the] BLM's demonstrated willingness to ignore congressional directives."\textsuperscript{292}

c. \textit{Objections to Increased Judicial Review}

Calls for increased judicial review of agency decisions are subject to two obvious objections. Empirically, one might observe that court review of agency actions in the environmental arena has been counterproductive.\textsuperscript{293} Additionally, anticipation of a lawsuit may lead agencies to delay taking important action in order to ensure that the action will survive a potential lawsuit.\textsuperscript{294}

By themselves, these arguments fail to present a compelling case for a restrictive standing law, as they present the costs of judicial scrutiny, but ignore the benefits. The benefits of access to judicial review do not stem so much from individual instances of review as from its deterrent

given to the bible college, it could not be taken back by Congress without payment.

\textsuperscript{289} For example, if the plaintiffs' allegations in \textit{Lujan} were correct, the BLM has systematically ignored applicable laws. \textit{See} Brief of Amici Curiae the Wilderness Society, et al, in Support of Respondents, \textit{Lujan} v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990) (No. 89-640) [hereinafter Wilderness Society Brief] (available on LEXIS).

\textsuperscript{290} \textit{See} Chayes, \textit{Public Law Litigation}, supra note 6, at 60 (arguing that courts are essential partners with legislature in making bureaucracies behave); Stewart & Sunstein, \textit{Public Programs and Private Rights}, 95 \textit{HARV. L. REV.} 1193, 1226-27 (1982) (suggesting reasons why Congress is unlikely to oversee agencies effectively); Sunstein, \textit{Interest Groups}, supra note 175, at 75.


Even if congressional committee staffs do spend a great deal of time attempting oversight behind the scenes, this control is likely to reflect \textit{their} biases (the congressional staff's) rather than the popular will. The pro-Congress argument presumes that congressional committees are immune from "capture," a possibility that cannot be categorically dismissed. \textit{See} M. Shapiro, supra note 272, at 10 (arguing that calls for greater pluralism in access to policymakers were historically prompted by worries over capture of administrative agencies or congressional committees).

\textsuperscript{292} \textit{Wilderness Society Brief}, supra note 289.

\textsuperscript{293} \textit{See}, e.g., S. Melnick, supra note 285, at 72.

\textsuperscript{294} \textit{See} Dwyer, supra note 280, at 820.
effect on the regulatory system as a whole.\textsuperscript{295} As Judge Leventhal has explained,

[I]t misses the point of judicial review . . . to focus on the impact which a court's decision had in any particular case. The proper object of scrutiny is the extent to which the activity of the courts has encouraged agencies to modify their decisionmaking process in an effort to avoid judicial restraints, and perhaps even more to the point, the extent to which these process changes have affected agency output.\textsuperscript{296}

3. \textit{Review Role Does Not Harm Court's Role in Protection of Individual Rights}

Even if one accepts that courts are useful in controlling executive agencies, the argument remains that liberal standing law harms the judiciary by decreasing its effectiveness in upholding other areas of the law, such as those involving individual rights.\textsuperscript{297} Under this view, the judiciary's effectiveness may suffer due to the practical implications of universal standing or due to a loss of legitimacy in the eyes of the public.

Both Justice O'Connor and Chief Justice Rehnquist argue that failure to uphold standing doctrine would lead to universal review of agency decisions.\textsuperscript{298} Yet, the fear of universal standing is not a sufficient justification for the barriers imposed by modern standing law. For one, the expense of lawsuits makes the threat of an overwhelming flood of litigation implausible.\textsuperscript{299} In states that permit “any person” to challenge administrative action, the litigation has come in “trickles, not floods.”\textsuperscript{300}

\textsuperscript{295} See Sunstein, \textit{Interest Groups}, supra note 175, at 75 n.199.

\textsuperscript{296} Leventhal, \textit{Environmental Decisionmaking and the Role of the Courts}, 122 U. PA. L. REV. 509, 526 (1974). Of course, it is not possible to prove that the benefits of this review outweigh the costs, any more than it is possible to prove that the costs outweigh the benefits. See O'Leary, supra note 280, at 569 (1989 study of the impact of federal courts on EPA concluding that “[t]he actions of courts have been neither entirely positive nor totally negative”). The question therefore becomes where to place the burden of proof. I would argue that this burden should properly rest upon those who wish to remove a check on government (e.g., eliminate judicial review) rather than on those who wish to maintain it.

\textsuperscript{297} See, e.g., United States v. Richardson, 418 U.S. 191, 191-92 (Powell, J., concurring) (if courts do not exercise self-restraint, Congress may retaliate in a manner that undermines the courts' ability to protect rights). Of course, this argument should be taken with a grain of salt. As Professor Tribe has noted, the Court has set about invigorating standing law with a “fervor” that “surpass[es] its enthusiasm for protecting individual rights guaranteed by specific constitutional provisions.” L. Tribe, supra note 65, § 3-7, at 68.

\textsuperscript{298} See supra note 168 and accompanying text (O'Connor's concern that a Hawaiian could sue as a result of a violation in Maine); supra note 171 and accompanying text (Rehnquist arguing against courts becoming mere "debating forums"). But cf. Sax, supra note 55, at 84-85 (arguing that any individual citizen \textit{does} have a litigable interest in the preservation of natural resources such as the Alaskan wilderness).

\textsuperscript{299} See Sunstein, \textit{Privatization}, supra note 22, at 1448 n.74 (noting that "numerous costs, monetary and nonmonetary, of initiating litigation" will prevent a large increase in lawsuits as a result of more liberal standing); Sax, supra note 55, at 85-86; see also supra note 263 (environmental citizen suits strain interest group resources).

\textsuperscript{300} 4 K. Davis, supra note 101, § 24:6, at 227 (citing New York and Massachusetts as
Moreover, the specter of universal standing does not explain why the injury-in-fact and causation tests are the proper means of preventing this flood. One could draw lines that would better prevent the scenarios which Justice O'Connor and Chief Justice Rehnquist envision.\textsuperscript{301}

Proponents of strict standing requirements also argue that the courts will lose their legitimacy if they disregard strict standing rules because they will become overly involved in political disputes.\textsuperscript{302} However, if this is the goal of standing rules, the law at present is vastly over- and under-inclusive. Many intense political disputes in which the court risks loss of public confidence will involve clear injury-in-fact.\textsuperscript{303} Yet, most of the cases in which the Supreme Court has denied standing have concerned diffuse public benefits. The public is unlikely to be aroused over such issues regardless of how the Court rules.\textsuperscript{304} Thus, the Court's use of standing as a surrogate to avoid political issues that threaten its legitimacy is an artificial justification. This is particularly true given the existence of other judicial mechanisms, such as judicial deference on the merits and reluctance to grant preliminary injunctions, which can有效地 limit the risk of an overreaching judiciary.\textsuperscript{305}

Furthermore, the risk of damage to the courts does not exist equally with regard to constitutional and statutory challenges. In reviewing agency compliance with a statute, courts do not directly confront one branch, but rather act as arbiters between Congress and the executive branch, a role that seems unlikely to cause widespread disillusionment.\textsuperscript{306} In fact, for courts to sit idly by while the other two branches expend resources to fund political wrangling seems far more likely to damage public confidence than if the courts were to intervene.\textsuperscript{307} As such,
preventing the judiciary from confronting the other branches only argues for prudential standing rules that apply to constitutional challenges where a direct clash with another branch truly occurs. The argument does not justify application of the rules to statutory challenges.

Finally, worries about a loss of public faith in the judiciary rest on a questionable empirical assumption that the public will perceive judicial review of broad regulatory statutes as inappropriate. Professor Vining notes that the private rights model of adjudication was premised upon a notion of the judiciary's role that is now outdated. Vining contends that when the Supreme Court decided Camp, society was clearly too interrelated with large institutions for the private adjudicative model to make sense. "In the real world that courts now face it cannot possibly be said that the decisions of consequence are primarily those of human individuals exercising personal rights in pursuit of private ends." Vining concluded that because society changed at the same time as the Court expanded standing, the public would not view the judges' new role as illegitimate. In fact, the new role struck a responsive chord with the public. Congress' inclusion of citizen suit provisions in the environmental statutes of the 1970's reflects public sentiment that the judiciary plays a central role in monitoring government bureaucracy.

it appropriate for judiciary to resolve constitutional impasse between Congress and the executive branch since political solution would be repetitious, time-consuming, and involve possible retaliatory efforts on unrelated issues), vacated as moot sub nom. Burke v. Barnes, 479 U.S. 361 (1987).

308. J. VINING, supra note 22, at 48.

309. Id. at 49; see also 4 K. DAVIS, supra note 101, § 24:20, at 288 ("[O]ur dependence on the judiciary [to ensure government legality] is deeply entrenched and is likely to continue.").

310. J. VINING, supra note 22, at 49.

311. Id. at 51. "We and the judge see things in the same new way. A conceptual change does not really occur in any of us — at least in the law, and perhaps elsewhere as well — until it has occurred in all of us." Id.; see also Chayes, Public Law Litigation, supra note 6, at 8 (pervasive changes in contemporary legal consciousness will make it difficult for the Supreme Court to sustain its resistance to public rights litigation).

312. J. VINING, supra note 22, at 52.


In addition, others argue that if anything threatens the courts' legitimacy, it is the use of jurisdictional rules as a means of protecting the courts' resources. Congress, not the courts, has traditionally been considered the overseer of court resources. Levit, The Caseload Conundrum, Constitutional Restraint, and the Manipulation of Jurisdiction, 64 NOTRE DAME L. REV. 321, 361 (1989) ("If the problem is one of architecture, institutional reforms should be the province of the legislature. Federal courts which import caseload analysis into their jurisdictional theories to effect structural changes are engaging in the systematic displacement of the legislative prerogative."); see also Sunstein, Privatization, supra note 22, at 1448 n.74 (standing is an "arbitrary way" of limiting the federal caseload).
4. Summary of Internal Critique

The injury-in-fact and causation tests are likely to decrease judicial review of agency action. This, in turn, threatens to skew the output of administrative agencies away from an accurate aggregation of individual preferences. Therefore, rather than protecting the majoritarian process, as the proponents of the separation of powers theory of standing contend, standing doctrine warps those processes.

B. External Critique: Pluralism Rejected

In this section, I reject the premise of preference aggregation which underlies the separation of powers theory of standing. I argue that some legislation enacts "public values" which are distinct from the mere summation of private preferences. Drawing on "republican" theorists, I argue that many environmental issues can only be understood in terms of public values. I conclude that a standing doctrine focused exclusively on private injury will distort the ways in which judges, legislators, administrators, and the public think about environmental law.

1. Republican Vision

a. Republican Theory

While republican theory is by no means uniform, key common denominators exist.\textsuperscript{314} The republican theory of democracy starts by distinguishing private from public preferences.

Public preferences involve not desires or wants but opinions or views. They state what a person believes is best or right for the community or group as a whole. These opinions or beliefs may be true or false, and we may meaningfully ask that person for the reasons that he or she holds them.\textsuperscript{315}

For classical republican theorists, "sound government required citizens to subordinate their private interest to the general good."\textsuperscript{316} Modern re-

\textsuperscript{314} See Sunstein, Republican Revival, supra note 175, at 1564-65. Several commentators have noted a recent resurgence of "republican" scholarship. See, e.g., Sunstein, Interest Groups, supra note 175, at 30 n.7; see also M. Tushnet, supra note 175, at 160-163; Winter, supra note 24, at 1507; Sherry, Republican Citizenship in a Democratic Society (Book Review), 66 Tex. L. Rev. 1229, 1243 (1988).


\textsuperscript{316} Sunstein, Interest Groups, supra note 175, at 31. Sunstein notes that "[t]he republican conception carries with it a particular view of human nature; it assumes that through discussion people can, in their capacities as citizens, escape private interests and engage in the pursuit of the public good." Id.; see also D. Beauchamp, supra note 175, at 15.

Professor Arrow's justification for democracy is similar: [T]he case for democracy rests on the argument that free discussion and expression of opinion are the most suitable techniques of arriving at the moral imperative implicitly common to all. Voting, from this point of view, is not a device whereby each individual expresses his personal interests, but rather where each individual gives his
Republican theorists do not advocate a complete abandonment of private interests. Rather, they contend that "political actors, citizens, and representatives are not supposed to ask only what is in their private interest, but also what will best serve the community." Modern and classical republicanism rejects the pluralist vision which glorifies politics as the struggle among self-interested groups for scarce resources.

Republican theorists explain politics as a process of deliberation through which citizens choose common goals and values. "The idea behind deliberation is that the process of negotiation and discussion can be educational. In the context of deliberation, in other words, positions are not construed as exogenous variables but are endogenous to the decision-making process." Accordingly, deliberation requires political actors to continually reevaluate their preferences in light of ongoing public debate. Under this conception, legislation resulting from deliberation opinion of the general will.


The republican/pluralism debate has plagued theorists for the last 250 years. For a general discussion of this philosophical schism, see M. Tushnet, supra note 175, at 4-17. The republican ideal is linked to the Antifederalists. See Sunstein, Interest Groups, supra note 175, at 35-36. Thus, the ideal may seem anachronistic given the decentralized, agrarian economy on which key Antifederalists based their theory. Cf. id. at 37-38. However, Federalists' ideas also contained aspects of republican thought. Madison, for example, believed that representation allowed decisions to be made above the fray of ordinary self-interested politics. Sunstein, Republican Revival, supra note 175, at 1559 (Madison's Federalist No. 10 "emphasized the capacity of a large republic to obtain public-spirited representatives"). Republican thought is not inherently antiliberal. Id. at 1541; see also D. Beauchamp, supra note 175, at 3 n.3. Sunstein calls his political theory "liberal republicanism." Sunstein, Republican Revival, supra note 175, at 1541. He isolates four characteristics of liberal republicanism: (1) deliberation in politics; (2) equality of political actors; (3) universalism, with the belief that some normative disputes have substantively right answers; and (4) citizenship with broad participation rights. Id.

319. Sunstein, Republican Revival, supra note 175, at 1548-51. This deliberative ideal is meant as "aspirational and critical" not "descriptive" of most modern politics. Id. at 1549. The deliberative ideal demands political equality to ensure that the outcome of the deliberative process truly reflects the values of the entire community. See generally id. at 1552-53; Horowitz, supra note 179, at 72. Some would add that a flourishing republican society also requires a rough equality of material condition. See Sunstein, Republican Revival, supra note 175, at 1552-53 (many republican writers emphasize the connection between republican systems and economic equality).

320. M. Sagoff, supra note 315, at 40-41. Professor Sunstein has explained that to say this is not to suggest that deliberation calls for some standard entirely external to private beliefs and values (as if such a thing could be imagined). The republican position is instead that existing desires should be revisable in light of collective discussion and debate, bringing to bear alternative perspectives and additional information.

Sunstein, Republican Revival, supra note 175, at 1549.

321. Sunstein, Republican Revival, supra note 175, at 1549.
is not an aggregation of private preferences, but rather reflects public values distinct from any private interest.\textsuperscript{322} Freedom, under this view, is communal and social, not just the negative liberty from external coercion by others.\textsuperscript{323}

Clearly, such a theory has implications for administrative law. If "public values" underlie a particular statute, the administrator must implement those values.\textsuperscript{324} Likewise, in litigation over the statute's enforcement, the question of whether a violation occurred should focus on the public values the statute was intended to protect. Modern republican theory does not hold that all statutes must be understood in republican terms, or that all should be.\textsuperscript{325} Rather, as applied to standing, the theory strongly suggests that actions on behalf of public values should be allowed where the goals of the statute involved are best explained in republican terms.

\textit{b. Objections to Republican Theory and Counterarguments}

While a complete discussion of the potential drawbacks of republican theory is beyond the scope of this Comment, I will attempt to meet and counter several readily apparent objections. First, one might argue that the republican vision relies in error on legislative deliberation. Some

\textsuperscript{322} See A. MAAS, CONGRESS AND THE COMMON GOOD 3-5 (1983); Sax, supra note 189, at 550-52 (arguing that collective action is legitimate even if it is coercive and sacrifices a level of autonomy since certain collective values exist that can only be expressed through the political community). Sagoff defines "public values" as goals or intentions that people ascribe to the group or community of which they are members; such values are theirs because they believe and argue they should be theirs; people pursue these values not as individuals but as members of the group. They then share with other members of their community intersubjective intentions or, to speak roughly, common goals and aspirations, and it is by virtue of these that a group or community is a group or community.

M. SAGOFF, supra note 315, at 100.

\textsuperscript{323} Michelman, \textit{Politics and Values or What's Really Wrong with Rationality Review?}, 13 CREIGHTON L. REV. 487, 509 (1979). In Professor Michelman's words, "Values . . . are public as well as private in origin, originating in political engagement and dialogue as well as in private experience. . . . Politics is a process . . . for making the self-defining choices that constitute our moral freedom. As social beings in a social world, we have such choices to make regarding . . . the moral ambiance of the social world we can only inhabit together. Such choices by their nature have to be made jointly, that is to say politically. Public values, then, are a necessary accompaniment of the moral freedom of the individual."

\textit{Id.}

\textsuperscript{324} S. KELMAN, supra note 317, at 111 (agency bureaucrats act legitimately as "ongoing institutional representatives for values that Congress has chosen to grant legitimacy by enshrining in statutes").

\textsuperscript{325} See M. SAGOFF, supra note 315, at 2-7 (distinguishing between social regulation understandable in republican terms and economic regulation understandable in strictly private terms); \textit{see also} D. BEAUCHAMP, supra note 175, at 28-29 (arguing that republican thought does not seek to eliminate the paradox between the individual and citizen, but rather seeks to manage it); Sax, supra note 189, at 554 (arguing that neither collective nor individual values should be of exclusive importance).
commentators believe that in reality interest group politics dominate congressional decisionmaking.\textsuperscript{326}

However, other scholars demonstrate that interest group theory cannot entirely explain legislative politics.\textsuperscript{327} More importantly, the argument that republicanism relies too heavily on deliberation in Congress threatens to confuse the descriptive with the normative. Arguing that an interest group theory more accurately describes modern politics by no means mandates a conclusion that republican ideals cannot serve as a normative benchmark against which legislation may be evaluated.\textsuperscript{328}

Second, it might be argued that the search for the public values obscures the primacy of individuals.\textsuperscript{329} In a democracy, it could be argued,

\begin{itemize}
  \item 326. Epstein, supra note 178, at 1637 ("It does not take an elaborate empirical study to note the powerful influence that individual self-interest exerts over politics."). Indeed, a variety of "public choice" theorists have attempted to explain all legislative activity in terms of private interests. According to this school, individuals, whether voters or legislators, are motivated by private interests rather than the public interest. See generally Lee, Politics, Ideology, and the Power of Public Choice, 74 VA. L. REV. 191 (1988); M. LANDY, M. ROBERTS & S. THOMAS, THE ENVIRONMENTAL PROTECTION AGENCY — ASKING THE WRONG QUESTIONS 19 n.20 (1990) ("the central thrust of public choice theory is [that] . . . people are essentially the same when they act publicly as when they act privately; self-interest is dominant throughout human affairs") (quoting Gwartney & Wagner, Public Choice and the Conduct of Representative Government, in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 26 (J. Gwartney & R. Wagner eds. 1988)).
  \item 327. See Fitts, Look Before You Leap: Some Cautionary Notes on Civic Republicanism, 97 YALE L.J. 1651 (1988) (collecting studies showing that much congressional behavior cannot be explained by private interests) (citing D. ROBYN, BRAKING THE SPECIAL INTERESTS 1-11 (1987); S. KELMAN, MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT 231-47 (1987); A. MAASS, CONGRESS AND THE COMMON GOOD 3-31 (1983)); see also Kelman, On Democracy Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement, 74 VA. L. REV. 199 (1988) (demonstrating the serious methodological flaws with public choice studies that purport to demonstrate that regulatory legislation is solely the product of well-organized constituencies advancing their narrow economic interests). Moreover, one theorist sympathetic to the public choice school notes that public choice theory is not able to explain environmental law in terms of private interests. Eskridge, Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 VA. L. REV. 275, 320 (1988) (public choice theorists' claim that legislation solely represents private interest group bargaining has difficulty explaining environmental statutes which "were opposed by the classic array of omnipotent interest groups. . . . [I]deological and historical factors seem essential to an understanding of what happened."). Another commentator has noted that while trucking regulation was long dominated by special interests, the deregulation of the industry in 1980 is only explainable by reference to the public interest. D. ROBYN, supra, at 1-11.
  \item 328. Sunstein, Republican Revival, supra note 175, at 1549 ("Modern republicans do not claim that existing systems actually embody republican deliberation. . . . It is a basis for evaluating political practices."); see also Horowitz, supra note 179, at 64 (republicanism as "ideal type" rather than description).
  \item 329. This claim is put most strongly by Professor Nozick:

[T]here is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of the others, uses him and benefits others. Nothing more.

\end{itemize}
the republican cure (recognition of public values at the expense of individuals) might become more harmful than the disease (uncontrolled bureaucracy). Commentators often portray republicanism as being potentially totalitarian.\textsuperscript{330} This argument, however, confuses the primacy of private preferences with the primacy of individuals. The public values approach to regulation still assumes that individuals are the root of social policy. However, the approach treats individuals’ preferences as citizens as equal to their preferences as private individuals. It “treat[s] people with respect and concern insofar as it regards them as thinking beings capable of discussing issues on their merits. This is different from regarding people as bundles of preferences capable primarily of revealing their wants.”\textsuperscript{331} Under the republican view, society may still advance as a public value the promotion of private interests. As Professor Sunstein notes, “the promotion of (particular) private interests is often a legitimate function of regulation.”\textsuperscript{332} Republican theory merely requires that the administrator “[d]eliberate about those interests, rather than respond[] mechanically to constituent pressures.”\textsuperscript{333} Finally, the republican emphasis on the public good does not eviscerate individual rights; rather, republicans consider rights to be either preconditions for or outcomes of the deliberative process.\textsuperscript{334}

\textsuperscript{330} See, e.g., Bell & Bansal, \textit{The Republican Revival and Racial Politics}, 97 \textit{Yale L.J.} 1609, 1611 (1988) ("[T]he shared values in which the antifederalists laid faith included a historically constant and (for whites) a unifying belief in the inferior and subordinated position of black Americans."); Sherry, supra note 314, at 1243-44 (noting the “obvious danger” of the republican vision’s “tendency to shade into totalitarianism”); Sunstein, \textit{Republican Revival}, supra note 175, at 1540 ("[T]he republican belief in the subordination of private interests to the public good carries a risk of tyranny and even mysticism."); Farber, \textit{From Plastic Trees to Arrow’s Theorem}, 1986 U. Ill. L. Rev. 337, 351 (unless values are unanimously held, it would be totalitarian to impose them on others through the state).

Contrast this view, however, with Hannah Arendt’s interpretation of Jefferson. She argues that Jefferson conceived of tyranny as a situation where the ruler monopolized for himself the rights of action, banished the citizens from the public realm into the privacy of their households, and demanded of them that they mind their own, private business. Tyranny, in other words, deprived of public happiness, though not necessarily of private well-being, while the republic granted to every citizen the right to become “a participator in the governmental affairs,” the right to be seen in action.

H. ARENDT, \textit{ON REVOLUTION} 127 (1965), quoted in M. SAGOFF, supra note 315, at 117.

\textsuperscript{331} M. SAGOFF, supra note 315, at 44.


\textsuperscript{333} \textit{Id.} (emphasis added); see Sunstein, \textit{Republican Revival}, supra note 175, at 1574-75 (principle of universalism does not deny existence of different perspectives and does not “assert that political participants must put their private complaints to one side when they come to politics. . . . [But it does] require public-regarding justifications offered after multiple points of view have been consulted and (to the extent possible) genuinely understood.”).

\textsuperscript{334} See Sunstein, \textit{Republican Revival}, supra note 175, at 1551. Obvious preconditions would be a broad liberty of expression and conscience, the right to vote, and equality. \textit{Id.} Indeed, it was the republican Antifederalists who were most strongly in favor of the Bill of Rights. \textit{See id.} at 1551 & n.57. For a republican critique of the result in \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986), see Michelman, supra note 318 (republican thought would invalidate Georgia’s statute criminalizing homosexual sodomy).
Third, some might argue that the republican vision is elitist, an accusation that is particularly worrisome given the historical charge that environmental regulation is elitist. According to this argument, the political process expresses not "public" values so much as the values of the powerful. Republican thought is vulnerable to this charge since historically republicanism was often combined with "strategies of exclusion" that left women and blacks out of the political equation.

One may respond in two ways to this critique. First, one can admit that republicanism has elitist aspects, but combine a revival of republican theory with concerted efforts to alleviate this flaw. Such efforts are feasible because republican thought logically requires political equality to ensure that the deliberative process reflects the entire community's values.

Second, one can counter that the pluralist understanding of democracy is also elitist. Since the pluralist political system merely promises each individual an opportunity to compete for protection of their private interests, it clearly disadvantages those without resources. Additionally, by stressing that fair competition among private interests is the ideal model of political behavior, the pluralist theory reinforces the belief that maldistribution of resources is desirable as a means of spurring individual conduct. As such, the model undermines any existing public value in favor of greater substantive equality. By denying the existence of public values such as equity, the pluralist model serves as a constant ideological

336. See M. TUSHNET, supra note 175, at 166 ("Citizens need secure economic positions, allowing them to avoid personal domination by individuals on whom they depend, in order that they be able to develop public values in public life without fear of retaliation in their other activities."); Bell & Bansal, supra note 330, at 1612 ("The virtuous citizen, however, can only be free to pursue his human essence through civic participation and through the life of the mind by having the luxury of material independence.").
337. Sunstein, Republican Revival, supra note 175, at 1539.
338. "Elements of traditional republican thought are quite unattractive — especially its . . . acceptance of class hierarchies, manifested by the limited classes of people entitled to wield political influence. A revival of republicanism must attempt to eliminate these elements." Sunstein, Interest Groups, supra note 175, at 30-31 n.8 (citations omitted).
339. See Sunstein, Republican Revival, supra note 175, at 1541, 1550.
340. See K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 395-403 (1985) (arguing that pluralist system systematically disadvantages the poor who lack resources to influence public policy); Sunstein, Republican Revival, supra note 175, at 1544 ("[P]luralism tends to ignore the power of some groups to limit the number and nature of issues set for democratic resolution, or, most generally, the fact that preferences are formed against the backdrop of disparities in power and limitations in both opportunities and information."). But see Fitts, Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process, 136 U. PA. L. REV. 1567, 1639-43 (1988) (arguing that many of the practical reforms urged by modern republicans may decrease, not increase, public-regarding behavior by government towards the poor).
rejection of such values, and thus converts the poor into just another interest group clamoring for a larger share of the pie.

Lastly, one may critique republican thought from the perspective of "normative pluralism."\textsuperscript{341} This view of pluralism, in contrast to interest-group pluralism, celebrates the normative function of intermediate social groups.\textsuperscript{342} This conception "rejects any quest for agreement upon a single common good, and locates social interaction and value formation principally in settings other than citizenship."\textsuperscript{343} The republican's emphasis on the individual's relation to the state threatens this premise of normative pluralism.

While such a criticism is correct to repudiate any attempt to homogenize citizens into a unitary vision of the common good, this criticism is misplaced when aimed at modern civic republicans. Modern republicans may believe that public values are forged in the crucible of public debate, and that citizens must enter into this debate with a desire to seek the common good, but they do not believe that the common good requires suppression of differences. Indeed, modern republicans celebrate diversity, and suggest that intermediate groups can "serve as outlets for some of the principal functions of republican systems."\textsuperscript{344} Moreover, the normative pluralist vision is inadequate as an exclusive guide to social policy. An appeal to intermediate organizations and groups leaves unstated the role of government when government, not intermediate groups, must take the initiative in setting policy — for example, in setting environmental policy.\textsuperscript{345}

2. Environmental Law as the Embodiment of Public Values

Environmental law exemplifies those legislative regimes in which public values occupy a prominent position. Hence, a republican approach to judicial review in the area of environmental law will best effectuate the purposes of the laws.

In \textit{The Economy of the Earth}, Mark Sagoff distinguishes between economic and social regulation.\textsuperscript{346} Economic regulation sets "prices, performance standards, entry requirements, schedules, and so on, in the

\begin{footnotes}
\item[341] Sullivan, \textit{supra} note 176, at 1714.
\item[342] \textit{Id.}
\item[343] \textit{Id.} This view seeks a concept of politics "as the interaction of groups that are more than simple aggregations of individual preferences, but less than components of a single common good." \textit{Id.}
\item[344] Sunstein, \textit{Republican Revival}, \textit{supra} note 175, at 1573.
\item[345] \textit{Id.} at 1574 (citing environmental and broadcasting policy as areas where government regulation of some sort is essential, thus mandating some theory by which to determine whether the action is appropriate). \textit{Cf.} Ehrenreich, \textit{Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law}, 99 \textit{Yale L.J.} 1177, 1220-30 (1990) (the normative pluralist ideal fails to explain how government should act when it cannot be neutral between competing groups).
\item[346] M. SAGOFF, \textit{supra} note 315, at 2-3.
\end{footnotes}
railroad, trucking, securities, telecommunications, and other industries thought to be affected with a public interest." Social regulation, in contrast, addresses more than the problems of a particular industry. It reflects a pursuit of broad ethical objectives across the entire economy: "Social regulation expresses what we believe, what we are, what we stand for as a nation, not simply what we wish to buy as individuals." As Sagoff describes it, social regulation is republican in nature — it creates and implements public values.

Sagoff argues that most environmental problems are “moral, aesthetic, cultural, and political,” not merely situations where private interests conflict. In this sense, the major environmental statutes passed in the 1960's and 1970's were explicitly forms of social regulation. The preservation of species and wilderness, and the maintenance of clean air and water were declared to be national goals. Congress designed many of these statutes to further environmental protection even where costs outweighed the benefits when understood in economic terms. These statutes reflected a societal judgment that environmental protection “is what national dignity and self-respect minimally require.” These laws were “not intended to satisfy personal preferences.”

Other commentators echo Sagoff’s interpretation of environmental law. A public values approach underlies the justifications advanced

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347. Id. at 2.
348. Id.
349. Id. at 16-17.
350. Id. at 6.
351. See id. at 20; cf. Sunstein, Republican Revival, supra note 175, at 1555 (“Measures that attempt to select and pronounce values — embodied in, for example, broadcasting regulation, environmental measures, or antidiscrimination law — attest to the republican belief in universalism.”). But see Epstein, supra note 178, at 1647 (suggesting that private interests formed a clean air/dirty coal coalition and adopted air pollution laws that imposed “wasteful” restrictions on low sulfur western coal).
354. Id. at 1398.
355. M. SAGOFF, supra note 315, at 122.
356. See D. BEAUCHAMP, supra note 175, at 77; Reich, Introduction, in THE POWER OF PUBLIC IDEAS 4 (R. Reich ed. 1988); Paehlke & Torgerson, Environmental Politics and the Administrative State, in MANAGING LEVIATHAN: ENVIRONMENTAL POLITICS AND THE ADMINISTRATIVE STATE 289-90 (R. Paehlke & D. Torgerson eds. 1990); Sax, supra note 189 (arguing that interest in public land is only understandable in terms of collective, public values); see also Dwyer, supra note 275, at 248-49 (some legislators favored absolute statements of public health not because they were convinced it was sound public policy but because it re-
for environmental protection, historical analyses of environmental politics, and the attempts by environmental activists to expand the arena of public participation in environmental decisionmaking.

As I stated above, not every administrative statute, or even every environmental statute, can be understood as an embodiment of public values. Indeed, Sagoff himself carefully distinguishes social regulation from the merely economic. However, acknowledging that some regulation furthers nonpublic goals should not invalidate the use of republican theory as a basis for conferring standing where public values are at stake.

3. Republican Critique of Standing Theory

Several arguments demonstrate that the public values approach provides a more appropriate theoretical basis for standing law than does the separation of powers theory. First, the theory more accurately reflects judicial decisionmaking in agency review cases. Second, the theory preserves the separation of the legislative and executive branches, a distinction imperative in a society emphasizing legislatively enacted values. Third, the theory promotes self-government by providing ordinary citizens with access to the court system. Finally, the republican approach provides greater opportunities for the creation of public law. While not specific to environmental law, these arguments are crucial to understanding the implications of standing law for those wishing to vindicate environmental values in court.

357. See, e.g., Reich, supra note 356, at 4 (laws of the 1960's and 1970's including those concerning the environment were justified on the basis of "public, rather than private, interest. And this perception has given them their unique authority."); S Kelman, supra note 317, at 211; J. Sax, Mountains Without Handrails (1980) (arguing in favor of national park preservation from a republican conception because the parks promote civic virtue by providing opportunities for contemplative recreation); Linder, New Directions for Preservation Law: Creating an Environment Worth Experiencing, 20 Envtl. L. 49 (1990) (preservation properly understood in moral terms, not as fulfillment of individual preferences).


359. Paehlke, Democracy and Environmentalism: Opening a Door to the Administrative State, in Managing Leviathan: Environmental Politics and the Administrative State 40, 42 (R. Paehlke & D. Torgerson eds. 1990); see also id. at 42 ("Every major piece of U.S. environmental legislation in the 1970's allowed for public participation in environmental decisionmaking.").

360. See supra notes 346-49 and accompanying text.

361. Clearly, determining whether a particular statutory scheme reflects a public value can be excruciatingly difficult. Nevertheless, over time the judiciary, as part of an ongoing dialogue with Congress, should be able to oversee a regime centered around public values. Indeed, the resulting dialogue between the judiciary and Congress may itself promote the development of such values.
Public Values Approach is More Consistent with the Actual Practice of Judicial Review

The actual decisionmaking process of the courts when reviewing agency action reveals one flaw in the private injury model of the courts' role. Under the private injury model, judges are not supposed to monitor executive branch lawlessness. However, the theory qualifies this prohibition by allowing oversight of executive branch action if injury-in-fact occurs. The separation of powers theory thus requires private injury as the prerequisite for the exercise of the courts' power, but leaves unclear the courts' role once the power is invoked.

One would expect under a private injury model that private interests would determine the outcome of the case on the merits since the existence of private interests serves as the justification for the exercise of court power. Yet, just the opposite is true. In cases where litigants challenge agency action as violating a statute, the judge will not speak on behalf of the individual who suffered the injury. Rather, the judge must speak on behalf of Congress: the judge will decide whether Congress has spoken on the issue, and if so, will require the agency to comply with congressional intent. It is irrational to require private injury as a condition of access when the judicial function is to enforce the will of the Congress. Certainly the bare words "cases" and "controversies" in article III do not require injury-in-fact. Thus, positing standing on the primacy of the courts as defenders of the individual is a triumph of formalism; only the individually injured are allowed into court, at which time their injuries are promptly ignored.

In contrast, the republican argument better re-

363. This argument owes its intellectual foundation to Professor Fiss. See Fiss, Foreword — The 1978 Term, 93 HARV. L. REV. 1, 9-10 (1979). Fiss uses this type of argument to challenge the notion of legislative supremacy advanced in footnote four of United States v. Carolene Products. 304 U.S. 144, 152 n.4 (1938).
364. See, e.g., Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984); see also J. VINING, supra note 22, at 52 ("[A]fter courts have decided that it is proper for them to act in an administrative context, . . . they have always abandoned their concern for private rights and undertaken to balance public values and public values only.").
365. Invoking the notion of the "last resort" does not save the axiomatic argument. See supra note 156 and accompanying text. Both opinions adopting this tack are entirely conclusory in nature. See, e.g., Allen, 468 U.S. at 752 (O'Connor, J.); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982) (Rehnquist, J.). Moreover, both opinions cite the same 1892 case for authority, but this case in fact noted only that the power to strike down an act as unconstitutional was a last resort. Chicago & Grand Trunk R.R. Co. v. Wellman, 143 U.S. 339, 345 (1892) (rejecting right to challenge the constitutionality of a Michigan law fixing railroad passenger fares). Why the court system is the last resort, and what values should inform court adjudication when it does make decisions is not evident from the last-resort concept. At the very least, the notion of last resort has never been coherently advanced to justify court abstinence from adjudicating a challenge to the executive branch on statutory grounds.
fects the federal courts' attention to the legislative will in substantive judicial review.

Moreover, on its face, republican ideology seems to require that citizens be able to invoke the judicial power to enforce public values. As Professor Winter notes, "[t]he public rights model . . . recognizes that we are the government and that we are entitled to decide our fate. We do so by adopting communal norms and by enforcing them." 366

b. Public Values Approach Avoids Merger of Executive and Legislative Branches

Republican theory also highlights the troubling tendency of the separation of powers theory of standing to subsume the executive and legislative branches into one "political" branch. Thus, the attention of the separation of powers theory to the separation of the judiciary from the other branches appears arbitrary, if not hypocritical.

Justice Scalia insists that judicial rulings on agency enforcement of statutes containing public rights interferes with majoritarian politics. 367 An executive agency's decision to follow or ignore statutory purposes is simply one part of the political resolution of any given social problem. Scalia affirmatively suggests that the executive branch may legitimately "los[e] or misdirect [important legislative purposes] . . . in the vast hallways of the federal bureaucracy." 368

Others bolster Justice Scalia's argument by pointing to the presidential Take Care Clause in the Constitution. 369 This clause arguably delegates to the executive, not the judiciary, the power to ensure obedience to the law. 370 Yet, the Take Care Clause can be viewed as an executive duty rather than a prerogative. 371 One could argue that legislation expresses the political resolution of a social problem, with court supervision upholding the political resolution against executive subversion. 372 Ultimately, then, the argument centers on the appropriate roles of the executive and the legislature, a subject beyond the scope of this Comment. Nevertheless, a brief look suggests that under a republican con-

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366. Winter, supra note 24, at 1508.
367. See supra notes 173-79 and accompanying text.
368. Scalia, Separation of Powers, supra note 1, at 897. This phrase contradicts Judge Skelley Wright who wrote in Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971), that the judiciary's "duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."
369. U.S Const. art. II, § 3, cl. 4 (the President "shall take Care that the Laws be faithfully executed").
371. Id. at 792-95 (Stevens, J., dissenting); C. Sunstein, supra note 182, at 217.
372. See Sunstein, Privatization, supra note 22, at 1472. This does not imply that the executive has no power that can be classified as legislative. The veto power, for example, seems explicitly part of the legislative process.
ception of democracy, "bureaucratic actions do not necessarily bear the stamp of legitimacy as outcomes of a democratic process."³⁷³

Whereas the separation of powers theory of standing fails to distinguish between the legislature and the executive, the republican vision sees a clear demarcation between the two. This demarcation is explained by Richard Andrews:

The principal purposes of legislative action are to weigh and affirm social values and to define and enforce the rights and duties of members of the society, through representative democracy. The purpose of administrative action is to put into effect these affirmations by the legislature, not to rebalance them by the criteria of economic theory.³⁷⁴ Thus, a republican view of standing concerns itself less with separating the judiciary from the executive and legislative branches than with maintaining the distinction between the legislative (deliberative) branch and administrative enforcement.

The common practice of congressional delegation of political decisionmaking to agencies does not detract from this conclusion with regard to standing law. Even if one accepts that judicial review of purely political agency decisionmaking is undesirable, modern standing law is not the solution. If the courts wish to prevent judicial review of purely political decisionmaking, then courts should rely upon a doctrine that focuses on the issues before the court, such as the political question doctrine.³⁷⁵ Moreover, if the decisions under review are "political" in the sense that the decision is committed to agency discretion by law, then plaintiffs will always lose on the merits. Constructing a standing law in order to defeat such challenges is an overly broad solution.³⁷⁶ Finally, some commenta-

³⁷³. Chayes, Public Law Litigation, supra note 6, at 60.
³⁷⁴. Andrews, Cost-Benefit Analysis and Regulatory Reform, in Cost-Benefit Analysis and Environmental Regulations: Politics, Ethics, and Methods 107, 112 (D. Swartzman, R. Liroff & K. Croke eds. 1982), quoted in M. Sagoff, supra note 315, at 29; see also Sunstein, supra note 332, at 524 (administrator’s role is to identify and implement the public values that underlie the statute).
³⁷⁵. See 4 K. Davis, supra note 101, § 24.21, at 293 ("The problem of excessive government by judges is only peripherally affected by determinations of who may litigate; it is directly affected by determinations of what judges may do."); Davis, supra note 36, at 469 (political question doctrine, not standing law, should be used to avoid decisions on political issues); see also 4 K. Davis, supra note 101, § 24:35, at 338-39. Of course, the political question doctrine is not itself uncontroversial. For a critical review see Henkin, Is There a Political Question Doctrine?, 85 Yale L.J. 597 (1976).
³⁷⁶. Sunstein, Privatization, supra note 22, at 1472; Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) (judiciary may only overrule agency interpretations of law where the governing statute does not commit the interpretation to agency discretion). Additionally, if Congress really has delegated power that is inherently political (without legally cognizable standards), then the seldom-used but still valid delegation doctrine casts serious doubt on the constitutionality of the delegation. See, e.g., Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989) (Constitution prohibits congressional delegations of power to agencies where lack of standards make it impossible to "ascertain whether the will of Congress has been obeyed") (quoting Mistretta v. United States, 488 U.S. 361 (1989)). But see Dwyer, supra note 275, at
tors have noted a recent trend in environmental law toward making increasingly specific delegations to agencies, a trend which reemphasizes the distinct functions of the two political branches.377

**c. Public Values Approach Promotes Self-Government Through the Court Process**

A third republican critique of the separation of powers theory of standing highlights the participatory benefits of liberalized standing. Under republican theory, active participation of the citizenry in self-government is a positive good.378

Justice Scalia argues that liberalized standing "overjudicializ[es]... the process of self-governance"379 because individuals turn to the nonpolitical branches for relief instead of to the political. At one level, Scalia's argument makes the plausible assumption that too much reliance on the courts by public interest litigants may inhibit the development of public values.380 However, Scalia fails to explain why citizen participation in court action is not itself valuable as a form of self-government. The value of participation in litigation lies in the differences between courts and other fora of government. Courts serve not only the limited goal of ensuring fairness in pluralistic battles, but also a broader function that transcends political competition. In the judicial process, the citizen "can be heard above the din of pluralistic, self-interested, majoritarian politics, and [can] participate directly in the normative process."381 Moreover, when contrasted with the "secret bargaining of interest group pluralism" that is often used to characterize administrative and legislative politics, courtrooms appear comparatively more open to public scrutiny.382 Most importantly, contrary to the assumption of Scalia's theory,
courts often offer the only opportunity for meaningful citizen participation in the governing process. What Professor Sax wrote twenty years ago seems equally true today:

[The judicial process strongly support[s] the need . . . for citizens to feel that they are not merely passive bystanders in making their government work. The opportunity for anyone to obtain at least a hearing and honest consideration of matters that he feels important must not be underestimated. The availability of a judicial forum means that access to government is a reality for the ordinary citizen — that he can be heard and that, in a setting of equality, he can require bureaucrats and even the biggest industries to respond to his questions and to justify themselves before a disinterested auditor.

Thus, citizen suits to enforce purely public rights enhance rather than undermine self-government.

Finally, despite the nonparticipatory aspects of judicial decisionmaking, judicial review is one key means to force agencies to adopt a more deliberative and participatory model of decisionmaking. The theory of second best, examined in the internal critique, indicates that nonparticipatory judicial review may increase the participatory character of agencies. Without review, in those situations where there is little likelihood of injury-in-fact to a particular person, agencies can rest their decisions on whatever mode of analysis they prefer. Judicial review requires agencies to create a public record that explains their choices and to justify their decisions in the Federal Register in terms of public values, not private interests. In turn, agency employees may increasingly discover public values in statutes as they are forced to articulate their decisions in public terms.

d. Public Values Model Allows Legislature to Create Public Law

Finally, in contradiction to the goals expressed by proponents of the separation of powers theory, the injury-in-fact test expands court power at Congress’ expense. The highly manipulable nature of the injury and

istics also apply to legislative and administrative decisionmaking, the public’s perception of openness is the more important determinant of the psychological benefit of participation.

383. J. SAX, supra note 279, at 57.
384. Id. at 112.
385. But see M. SHAPIRO, supra note 272, at 25 (“Simply attaching the word public to values discovered in litigation is not enough to make them democratic values.”).
386. See supra notes 269-70 and accompanying text.
387. See Wenner, Environmental Policy in the Courts, in ENVIRONMENTAL POLICY IN THE 1990’S, at 189, 194 (N. Vig & M. Kraft eds. 1990) (courts inject a democratic element into bureaucratic decisionmaking by widening effective participation by citizens in the process).
388. See supra note 277-80 and accompanying text.
389. See M. SAGOFF, supra note 315, at 81.
390. See Sunstein, Republican Revival, supra note 175, at 1544-45 (public values approach limits the types of proposals that can be developed and thus makes it “more likely that public-regarding legislation will actually be enacted”).
causation determinations allows the courts wide discretion over which values are legally enforceable.

The Court has suggested several times that Congress may not confer standing where the limitations imposed by article III would deny it. As a result, lower federal courts often demand proof of injury-in-fact even where the statute grants universal standing. Justice Scalia would approve. According to Scalia, as noted above, some injuries are so widely shared that even "a Congressional specification that the statute at issue was meant to preclude precisely that injury would nevertheless not suffice to mark out a subgroup of the body politic requiring judicial protection."

The separation of powers model thus intrudes on congressional power to define values that can be vindicated in court. As such, Professor Fletcher has attacked the Supreme Court's treatment of injury-in-fact as an article III requirement, calling it "incoherent" as a means of limit-
ing court power because it actually enlarges the Court’s power vis-a-vis Congress. He argues that the injury-in-fact determination is an inherently normative inquiry. Fletcher compares two litigants claiming loss of sleep as injury, one due to the barking of a neighbor’s dog and the other because the government has cut back on welfare. The Supreme Court would recognize injury-in-fact, and hence standing to litigate a nuisance for the former, but would undoubtedly dismiss the latter as “ideological,” and therefore inappropriate for judicial redress. Yet, the welfare advocate really does lose sleep — in fact — to the same degree as the nuisance plaintiff. Thus, any distinction between the two litigants on the basis of injury reflects a value judgment about what type of harms should trigger intervention by a court. The danger of the injury-in-fact test is that it shifts the discretionary power to make those value judgments away from Congress and into the hands of the courts: “[f]or the Court to limit the power of Congress to create statutory rights enforceable by certain groups of people . . . is to limit the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against.”

The Court’s actual decisionmaking complicates this criticism. It appears that the Court does not necessarily follow its own black-letter rule. On more than one occasion, as Professor Fletcher has noted, the Court has avoided ruling that congressional grants of standing are beyond article III by “finding” individual rights and thus creating injury-in-fact.

394. See Fletcher, supra note 15, at 231, 233.
395. Id. at 233.
396. Id. at 232-33.
397. See id. at 232.
398. Researchers have documented that citizens do in fact suffer “anguish” when ideological wants are frustrated. M. SAGOFF, supra note 315, at 89 (citing work of Abraham Tarasovsky as outlined in Cuyler, The Quality of Life and the Limits of Cost-Benefit Analysis, in PUBLIC ECONOMICS AND THE QUALITY OF LIFE 141 (L. Wingo & A. Evans eds. 1977)).
399. Fletcher, supra note 15, at 233; Center for Auto Safety v. National Highway Transportation Safety Admin., 793 F.2d 1322, 1337 (D.C. Cir. 1986) (“The courts may appropriately function as the guardians of majority interests, without weakening the separation of powers, when Congress has decided to grant them that role.”) (opinion of Edwards, J.); see Logan, supra note 15, at 61 (“[S]eparation of powers concerns counsel the Court to defer to Congress’ ability to define injuries, no matter how novel, and to bestow standing upon a plaintiff, no matter how many other citizens may suffer the identical injury.”); Winters, supra note 24, at 1481 (noting that court control over access to the judicial process threatens democratic values just as surely as courts’ substantive work; hence justifying a shrinking of access on the grounds that courts are antimajoritarian is incoherent).
400. See Fletcher, supra note 15, at 253 (“The Court has often stated that the power of Congress to grant standing is limited by the Article III requirement that a plaintiff suffer ‘injury in fact.’ But when the Court has decided actual cases involving statutory rights, it has never required any showing of injury beyond that set out in the statute itself.”); see also Pierce, supra note 15, at 1278 (“[C]ontrasting patterns of decisions on statutory and nonstatutory standing cases suggest that the Article III rationale which the Court uses to deny standing in nonstatutory cases . . . does not provide a full picture of the Court’s goals.”). Fletcher cites two cases as indicative of this phenomenon. First, in Havens Realty Corp. v. Coleman, 455
Based on this seeming restraint, other commentators maintain that the injury-in-fact requirement disappears with a congressional grant of universal standing. If, in fact, the commentators are right that the Court will always validate universal grants of standing, then the Court should enunciate its standards for inferring a congressional grant of standing rather than adhering to injury-in-fact language which engenders much lower court confusion and wasted litigation resources. If, on the other hand, the Court considers certain injuries to be not cognizable regardless of congressional intent, an important legislative function has been usurped. The legislature — the classic republican forum for deliberation — is denied the ability to create and have enforced particular public values.

4. Separation of Power Theory Threatens Public Values

The external critique explicated above demonstrates that the private injury model of standing undermines a republican system of government. In this subsection, I argue that it also undermines existing public values, including those in favor of environmental protection.

First, the private injury standing metaphor threatens to disorder legal analysis in a manner that denigrates public values. The question of injury-in-fact necessarily suppresses other issues. In much of environ-

U.S. 363 (1982), two plaintiffs, one black and one white, had separately answered an advertisement for the same apartment in a white neighborhood. The real estate agent lied to the black applicant by saying the unit was no longer available, while showing it to the white applicant. Section 804(d) of the Fair Housing Act of 1968 makes such “steering” based on race illegal. 42 U.S.C. § 3604(d) (1988). The standing issue was that the two plaintiffs were “testers” trying to determine if discrimination existed, rather than real applicants trying to rent the apartment. As such, the testers suffered no traditional injury in fact because they had no intention of renting the apartment. The court upheld standing for the black tester but not for the white. Havens Realty, 455 U.S. at 373-75. The Court found injury in the violation of an enforceable right to truthful information created by section 804(d). Id. at 373. This is clearly a fiction; the beneficiaries of the law were other blacks encountering racial discrimination in the housing market. The tester acted as their representative, and as such, there were no grounds for distinguishing between the white and black plaintiff in their class action.

Second, in United States Parole Commission v. Geraghty, 445 U.S. 388 (1980), the named plaintiff appealed the denial of class certification after his individual claims was no longer at issue. The plaintiff had challenged Parole Commission guidelines which had denied him parole, but by the time of the appeal the plaintiff had been released after serving his full time. Lacking adverse plaintiffs who could show injury in fact, the Court found an individual right to employ the procedural device of Rule 23 class actions under the Federal Rules of Civil Procedure, linking this right to the “private attorney general” concept. Geraghty, 445 U.S. at 403, 404.


402. See Pierce, supra note 15, at 1279 (“The Court’s most recent standing decisions suggest differing views among the Justices. These decisions exacerbate preexisting confusion in the lower courts.”).

403. Winter refers to this as “the ontological effect of the metaphor.” Winter, supra note 24, at 1459.
mental law, an agency's frustration of a public value (e.g., clean air, protection of wildlife) motivates the lawsuit. Yet, courts do not allow litigants to assert this public value unless, by chance, the agency's action materially injures the litigants as individuals rather than as members of the body politic. In such cases, a court's determination that no injury occurred presupposes that no right worth its time has been invaded. Thus, the court's refusal to grant standing in cases that wholly concern public values will inevitably denigrate environmental or other values that the polity sought to support through the law. For example, requiring litigants to prove that they will "view" the destruction of a species or members of an environmental resource in order to gain standing for violations of NEPA severely undermines the value of environmental harmony at the core of the Act.

This disordering effect is magnified by the Court's equation of "use" with "injury" in environmental law. In cases like *Lujan*, environmental groups must plead injury to their members' use of a resource to meet the standing requirements. Yet, many key environmental statutes serve to advance values beyond mere human use. For example, one key purpose of the Federal Land Policy and Management Act at issue in *Lujan* is the protection, not preservation for use, of native flora and wildlife. This philosophy is also represented in the Wilderness Act.

404. A clear example of this disordering effect of the injury requirement can be found in International Primate Protection League v. Institute for Behavioral Research, 799 F.2d 934 (4th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). In this case, an organization was denied standing to sue under the Animal Welfare Act since its members would not witness the alleged acts of cruelty perpetuated inside the laboratories; the groups could only allege abstract interest in humane treatment. Id. at 938. While the Court's alternative holding that the Animal Welfare Act does not provide a private cause of action seems reasonable in light of the statutory scheme, id. at 940, the standing analysis is strained. The value choice against cruelty which Congress was attempting to implement is not any less violated simply because the cruelty occurs away from public view.

405. See *Winter*, supra note 24, at 1469.

406. See *Animal Lovers Voluntary Ass'n (ALVA) v. Weinberger*, 765 F.2d 937 (9th Cir. 1985) (environmental group lacks standing to represent its members because they would not view the environmental destruction). In dicta, the panel noted that ALVA might have had standing to litigate its own organizational interest (as opposed to representing its members) if it had demonstrated "longevity and indicia of commitment to preventing inhumane behavior." Id. at 939. However, this sincere commitment approach to standing is directly contrary to *Sierra Club v. Morton*. 405 U.S. 727, 739 (1972) (Sierra Club's long interest in environmental protection does not confer standing); see *International Primate Protection League v. Administrators of the Tulane Educational Fund*, 895 F.2d 1056 (1990) (under *Sierra Club*, organizational commitment to humane treatment does not confer standing absent direct impact).

407. See supra notes 54-55 and accompanying text.


409. See id. § 1701(a)(8) ("[T]he public lands [should] be managed ... [to] protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate ... will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use."). As this statement of purpose demonstrates, human use is but one (even if the dominant one) of the values advanced in the legislation.
which lists "conservation" as a "use" of land. The Wilderness Act defines wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." It is precisely because many environmental resources are unspoiled by human use that they have public meaning. To deny judicial protection of those areas unless a human use is disrupted is irrational.

Even the requirement that the injury be judicially redressable presents a threat to analysis of environmental problems. Because courts must focus their attention on redressing direct, concrete injuries to humans, their attention is diverted from a remedy for the harm to the public value.

One hopes that standing doctrine does not cause the lawyers and members of environmental organizations to reorient their beliefs to fit the restrictive view of standing. Nevertheless, some reorientation must inevitably result from the investment of enormous time and energy into demonstrating injury to humans. Standing law may also have this

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411. Id. § 1133(b); see also W. RODGERS, supra note 5, § 1.1, at 3.
413. It is not their use, but their symbolic meaning that is valued. As Justice Douglas noted in his Sierra Club dissent, "[t]he river, for example, is the living symbol of all the life it sustains or nourishes — fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life." Sierra Club v. Morton, 405 U.S. 727, 741, 743 (1974) (arguing that the Sierra Club should be allowed to litigate the controversy in the name of the inanimate object being despoiled); see also Sagoff, On Preserving the Natural Environment, 84 YALE L.J. 205 (1974) (arguing for preservation of the environment based on its value as a cultural symbol).
414. See supra notes 92-94 and accompanying text.
415. See Winter, supra note 24, at 1462. Winter refers to this as a "reduction-to-prototype effect." Id.
416. See White, Economics and Law, 54 TENN. L. REV. 161, 170 (1986) ("As lawyers know — to their cost — it is very difficult to say things habitually, even things one doubts, without coming to believe them."); see also id. (to talk in the language of self-interest erodes commitments to communal interests). The production of modes of discourse is at the heart of recent philosophical accounts of power. See, e.g., M. FOUCAULT, TWO LECTURES IN POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 78, 87-108, 119 (C. Gordon ed. 1978).

Lawrence Tribe has described in detail the manner in which speaking about environmental protection in solely human terms reorients beliefs:

[S]uppose a person feels an obligation to protect a wilderness area from strip mining. The initial perception of that obligation is likely to take the form of sympathy for the wildlife and vegetation which would be destroyed or displaced. . . . If the sense of obligation prompts the individual to undertake some concrete effort on behalf of the environment, such as . . . initiating a suit to enjoin the strip mining . . . a subtle transformation is likely to be occasioned by the philosophical premises of the system in which the effort is undertaken. The felt obligation will be translated into the terminology of human self-interest . . . What the environmentalist may not perceive is that, by couching his claim in terms of human self-interest — by articulating environmental goals wholly in terms of human needs and preferences — he may be helping to legitimate a system of discourse which so structures human thoughts and feeling as to erode, over the long run, the very sense of obligation, which provided the initial impetus for his own protective efforts.
disordering effect on the thinking of judges because of the bifurcated analysis it requires them to perform in environmental cases. To determine standing, they must discount the worth of non-use values, concentrating on a detailed analysis of private injury. If they find standing, they must then turn to the substance of the dispute regarding whether the agency action violates a public purpose contained in the statute. It seems conceivable that this process will skew their vision of the social goals of many statutes towards an understanding that seeks only to protect private interests.

Beyond environmental law in particular, the Supreme Court’s rejection of public values also creates a broader disordering effect that has repercussions for all public interest review of agency action. By calling the citizen’s interest in enforcement of the law “merely ideological,” the Court denigrates citizenship and the concept of altruism. Indeed, it denies the very possibility of public values worthy of public enforcement.

In contrast, if one rejects private preference aggregation as the single goal of the political process, it follows that self-government includes enabling any citizen to enforce public rights in courts when Congress so intends. A citizen’s legitimate interest in the law does not end with the law’s passage. From a republican perspective, judicial vindication of public rights is necessary to uphold the dignity of the citizen’s relationship with the state.

The republican’s emphasis on the necessity of public debate raises a further justification for expanded standing. As discussed in the internal critique, lawsuits tend to generate publicity. A strict standing law that requires parties to demonstrate individual material injury may prevent some disputes from becoming public. Yet,

The institutions of democratic government — legislatures, agencies, parties, courts, and the press — depend and thrive on potential for conflicts of this kind to widen beyond their original bounds. This happens when one side — usually the side that otherwise would be defeated — finds a public issue (e.g., a “snail darter”) and moves the conflict into the press, the legislature, and the courts. The decisionmaking process then may become a kind of public good, since it allows everyone who participates in it the feeling of relevance, importance, and community-consciousness flowing from that participation.


417. See S. Kelman, supra note 317, at 218-19 (institutions designed on premise of self-interest tend to create a self-fulfilling prophecy).

418. Of course, the classification of an interest as “merely ideological” as grounds for rejecting standing is entirely circular. If the court implied a public right based on a statute the interest would become “legal.” See Sunstein, Privatization, supra note 22, at 1449 n.79.

419. See supra notes 281-82 and accompanying text.

Thus, the present doctrinal formulation of the separation of powers theory of standing will likely stifle the expression of public values in areas such as environmental law.\textsuperscript{421}

CONCLUSION

As demonstrated in the internal critique, multiple objections to modern standing doctrine exist solely within the framework of pluralist politics that underlies present doctrine. A continued reinvigoration of standing law by the Supreme Court will serve as a barrier to the accurate summation of private preferences. Decreased judicial review will insulate the bureaucracy from the public, meaning that decisions will be more likely to result from private factions controlling the machinery of government.

The internal critique may contribute to solving the flaws it has exposed. In particular, Congress may respond to the need to control the executive branch bureaucracy by including more specific grants of standing. For example, Congress could declare that certain activities constitute prima facie "injury.” Specific grants of standing will be difficult for increasingly conservative courts to ignore, given their emphasis on deference to Congress.\textsuperscript{422}

Yet, in the long run, the fundamental philosophical shift embodied in the external critique may be more significant. Because it would permit judicial enforcement of environmental protection legislation for the natural world’s sake, the external critique offers an escape from modern standing law’s equation of environmental injury with human use.\textsuperscript{423} Likewise, the critique can be used to reinforce the public values underlying many environmental statutes. It also avoids the disordering effect on environmental policies caused by a private injury model of standing. However, as republicanism is not in the mainstream of public discourse,

\textsuperscript{421} Two potential practical advantages supplement these theoretical advantages of the republican vision of standing. First, in lobbying Congress to create universal grants of standing to enforce “public values,” environmental groups may simultaneously accomplish two objectives. Their efforts to convince Congress to adopt universal grants of standing will not only educate Congress as to the existence of social values in general, but also about the environmental values at issue. Second, where successful in obviating the need for environmental groups to prove the elements of standing, the universal grants of standing will free money and time towards substantive pursuits.

\textsuperscript{422} See Chief Justice Burger to Retire from Supreme Court; Reagan Nominates Rehnquist as Successor, Scalia to Fill Vacancy, 17 Env't Rep. (BNA) 217 (June 6, 1986).

\textsuperscript{423} The public values approach is still anthropocentric. Indeed, because the human community creates public values, the theory is explicitly oriented toward humans. However, what distinguishes the approach from a Scalia-like doctrine is that the republican approach is willing to enforce nonanthropocentric values where Congress intends.

For a proposal for a purely nonanthropocentric rule of standing, see Stone, Should Trees Have Standing? — Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972). For a criticism of Stone’s proposal from a perspective I consider supportive of this Comment, see Sagoff, supra note 413, at 219-25.
environmental litigators should not rely exclusively on an appeal to public values and a republican conception of democracy, especially given republicanism's historical baggage. In addition, some environmental statutes, such as those strictly designed to protect human health from toxics, may be more explainable in pluralist terms.

Nonetheless, the republican conception of democracy offers important benefits for the environmental movement. Ecology teaches that the locus of concern and protection in environmental ethics must be the systems and relationships between and among species and their environment. In the famous words of Aldo Leopold, "[a] thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise." This ethic rests on an understanding of the interdependence of the biotic community and the need for decisions to reflect that interdependence.

Humans should heed this lesson of ecology when evaluating their own government. Justice Scalia's individualism fails because it extends judicial protection only to bundles of private, individual preferences. The notion that relationships between humans are intrinsically valuable is lost. In particular, the restrictive present law of standing leaves one's relationship to the community unprotected. Every time the Court denies standing to assert public claims, it undermines the integrity of the community.

424. See, e.g., supra note 330 and accompanying text (discussing the association of republicanism with historical exclusion of some groups).

425. But see D. BEAUCHAMP, supra note 175 (arguing that public health law is best explained in republican terminology).


427. For those who insist on a doctrinal conclusion, I offer the following prescriptions. Justiciability should ask if the parties are adverse, whether the legal question is factually specific enough to inform judgment, and whether there are judicially discoverable standards. Standing, as a separate question, would then ask whether Congress intended a private cause of action. See Sunstein, Privatization, supra note 22, at 1433. A variety of federal equitable powers can then be used to ensure the adequacy of the representation of the public value. See Winter, supra note 24, at 1512; Chayes, Role of the Judge, supra, note 28, at 1311-12; Tushnet, The Sociology of Article III: A Response to Professor Brilmayer, 93 HARV. L. REV. 1698, 1716-17 (1980); Sax, supra note 55, at 86 (arguing class action and party joinder rules can adequately ensure the ability of an organization to litigate on behalf of a public right); Comment, supra note 45, at 317; see also Safriet, Judicial Review of Government Action: Procedural Quandaries and a Plea for Legislative Reform, 15 ENVTL. L. 217, 275 (1985) (in model act, the author would allow review by both a person seeking to assure consideration of a substantial public interest, if the petition alleges facts showing that the specified public interest would otherwise be unprotected, and by an organization, with 25 or more members, representing an identifiable interest of its members and asserting a position authorized by the organization, and if the petition alleges an injury to that identifiable interest).

The injury-in-fact test is a wretched means of ensuring adequate representation. In discussing the impact of a public values approach to administrative law, Stewart and Sunstein conclude that injury-in-fact can be seen as a "very crude mechanism for promoting the integrity of representation." Stewart & Sunstein, supra note 290, at 1281-82 n.369. Others have
been less generous. See, e.g., J. Vining, supra note 22, at 204 n.10 ("An individual or an institution can have just as much 'interest' in forests as in money profit. There is no more reason to believe him sincere in asserting his 'interest' in one case than in the other."); Sax, supra note 55, at 80-81 (criticizing "actual environmental user" test as indicative of representational ability since groups will simply find an injured individual to serve as a front who will have no part in the litigation decisionmaking); Chayes, Public Law Litigation, supra note 6, at 24 (the Court's injury-in-fact requirement does not "speak to the representational problem"); Comment, supra note 45, at 314 (arguing that the injury-in-fact test promotes adequate representation only if actions are brought by plaintiffs in their own self-interest and noting that this is rarely the case in conservation cases).