Standing as a Limitation on Judicial Review of Agency Action

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The increasing influence of agency regulation in modern society makes effective execution of many laws dependent on proper functioning of the administrative state. Standing doctrine delineates the boundary between the powers of the executive and the judiciary, both of which have important functions in ensuring proper management of the administrative state. In Barnum Timber Co. v. U.S. Environmental Protection Agency, the Ninth Circuit probed this boundary, ultimately finding that the plaintiff had standing to sue EPA for the federal agency’s allegedly arbitrary approval of a state agency’s impaired waters list that it submitted to the EPA under the Clean Water Act. In this Note, I argue that the degree of judicial influence over agency action permitted by the Ninth Circuit’s decision allows the judiciary to unduly interfere with the executive’s ability to control the administrative state, which violates separation of powers. Limiting grants of standing for plaintiffs to sue federal agencies regulating state agencies while granting plaintiffs a private right of action to enforce their rights against the state agency directly causing the plaintiffs’ injury would be less of an intrusion on the separation of powers and would promote more effective enforcement of the law.

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INTRODUCTION

The struggle between the executive and the judiciary for control of the administrative state stretches back to the earliest years of the United States.\(^1\) The increasing role of the administrative state in American society underscores the importance of proper governance of the administrative state. Defining the appropriate role for each of these branches is essential in assuring proper and accountable governance of the administrative state.\(^2\)

The modern administrative state is controlled by the executive.\(^3\) The executive’s claim to control comes from the Take Care Clause of the Constitution, which charges the executive with the duty to “take care that the laws be faithfully executed.”\(^4\) The Court has described the duty to take care that the laws are enforced as “the Chief Executive’s most important constitutional duty.”\(^5\) Because administrative agencies exist to implement the law, managing the administrative state has come to be perceived as part of executing the law.

The judiciary is tasked with defending the rights of individuals.\(^6\) Where executive action harms individuals, vindicating the rights of individuals can involve exercising the power of judicial review to judge the propriety of agency actions.\(^7\) Where the courts find that the agency has acted improperly, the courts often order the agency to take an action or desist from an action in order to remedy the harm. Professors Stewart and Sunstein term compelling agency action or inaction a “private right of initiation.”\(^8\)

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2. The legislature also has an important role in controlling the administrative state. See Kagan, supra note 1, at 2255–60 (noting congressional controls over the administrative state). However, the role of the legislature in this conflict is beyond the scope of this Note.
3. Id. at 2246.
6. See Marbury, 5 U.S. (1 Cranch) at 170 (“The province of the court is, solely, to decide on the rights of individuals.”).
7. This judicial review can come in the form of reviewing the substance of an agency’s decision or the process through which the agency made the decision. See Kagan, supra note 1, at 2269–72.
8. See Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 HARV. L. REV. 1193, 1204–06 (1982). Stewart and Sunstein distinguish between a “strong” right of initiation that requires the defendant agency to take action, and a “weak” right that only requires the agency to justify its decision not to take action. Id. at 205. Barnum sought a strong right of initiation.
The doctrine of standing delineates the boundaries between executive and judicial control over the administrative state by defining the types of cases that courts can hear. Where agency actions cause other actions by third parties, it is often unclear which actions the agency should be liable for, and which are the result of the third party’s discretion. Defining the boundaries of agency liability also defines the boundaries of executive authority, as the boundary defines the point at which the judiciary will step in and take control of the administrative state. Judicial oversight has its benefits, but granting the courts too much discretion to interfere in the management of the administrative state can violate the separation of powers.

While courts have traditionally been cautious of intervening in agency enforcement decisions, the Ninth Circuit’s 2011 decision in *Barnum Timber Co. v. U.S. Environmental Protection Agency* (*Barnum*) marks a departure from that trend. In holding that a landowner had standing to challenge the Environmental Protection Agency’s (EPA) approval of the California State Water Resources Control Board’s (SWRCB) allegedly arbitrary listing of a creek on Barnum’s property as impaired under the Clean Water Act (CWA), the court dramatically expanded its authority to question the executive’s enforcement decisions. While judicial oversight of agency action is appropriate in certain circumstances, the extent of judicial interference that *Barnum* permits can undermine the executive’s ability to enforce the law and prevent the executive from being held accountable for its enforcement decisions.

Part I of this Note provides an overview of standing doctrine and the ways in which it maintains the separation of powers. Part II summarizes *Barnum*, highlighting its divergences from the traditionally strict requirements for showing causation. Part III demonstrates the effects that judicial overreaching can have on the executive’s ability to manage the administrative state and the electorate’s ability to hold the executive accountable for its decisions. Part IV proposes limiting judicial intervention in the executive’s management of the administrative state to abuses of executive discretion, whether active or passive. Part V argues that an expansion of private rights of action to allow plaintiffs to sue the regulated entities that cause them harm, rather than federal agencies, can fill the void caused by restricting private rights of initiation and minimize intrusion on the executive’s prerogative to manage the administrative state.

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9. See, e.g., Tozzi v. Dep’t of Health & Human Servs., 271 F.3d 301, 307–09 (D.C. Cir. 2001) (noting that the agency’s listing of a chemical as a carcinogen affected the purchasing decisions of local municipalities which affected the profits of the plaintiffs).


12. Barnum Timber Co. v. EPA (*Barnum III*), 633 F.3d 894 (9th Cir. 2011).
I. STANDING AND THE SEPARATION OF POWERS

Standing is a constitutional doctrine, rooted in Article III’s limitation of the courts’ purview to “cases” and “controversies,”13 that inquires “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”14 One of the functions of standing is to maintain the separation of powers.15 While the power of judicial review enables the judiciary to check gratuitous exercises of power by the legislature and executive, standing ensures that the judiciary’s use of this power does not intrude on the prerogatives of the other branches.16 Thus, limiting the power of the judiciary also ensures that, to the extent possible, decisions are made by the accountable political branches rather than the unaccountable judiciary.

In order to bring a claim in federal court, plaintiffs must demonstrate all three elements of standing: injury-in-fact, causation, and redressability.17 An injury-in-fact is an injury that is concrete, particularized, and actual or imminent.18 Proving causation requires plaintiffs to show that the injury is “fairly traceable”19 to the challenged action such that the challenged action has a “determinative or coercive effect” in causing the injury.20 Redressability refers to the likelihood that a favorable decision will remedy the injury. Plaintiffs must show that the remedy prayed for is “likely” to redress the injury.21 Each of these elements serves to delineate the “proper—and properly limited—role of the courts in a democratic society.”22

Requiring plaintiffs to prove standing maintains the separation of powers by ensuring that the judiciary acts only as an arbiter of “specifically identifiable

16. The Federalist No. 48 (James Madison).
17. Litigants do not have standing unless all three of the requirements are met, and courts have hesitated to dismiss claims where plaintiffs had suffered cognizable harms, but failed to show causation or redressability. See, e.g., Allen v. Wright, 468 U.S. 737, 756–60 (1984) (acknowledging that plaintiffs had suffered a cognizable harm from a reduced opportunity to seek a desegregated education, but denying standing on causation grounds). The elements of standing “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case,” so “each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. with the manner and degree of evidence required at the successive stages of the litigation.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).
18. Lujan, 504 U.S. at 560. The Court contrasted this to injuries that are hypothetical or conjectural. Id.
19. Id. Commentators and judges alike have noted that the vagueness of this requirement has resulted in its inconsistent application, often by judges seeking to dispose of disfavored claims on procedural grounds. See, e.g., Gene Nichol, Causation as Standing Requirement: The Unprincipled Use of Judicial Restraint, 69 KY. L.J. 185, 206–13 (1980); Patricia Wald, The D.C. Circuit: Here and Now, 55 GEO. WASH. L. REV. 718, 723 (1987).
21. Lujan, 504 U.S. at 561. This is contrasted to a situation where the prayed-for relief will only have “speculative” effects on the injury. Id.
violation[s] of the law” 23 and does not encroach on the more legislative function of policymaking. Applying this principle, the Court held in *Simon v. Eastern Kentucky Welfare Rights Organization* that indigents failed to show causation when they challenged an Internal Revenue Service (IRS) rule broadening the definition of a “nonprofit hospital operated exclusively for charitable purposes.” 24 The Court found that the plaintiffs had not shown that a favorable verdict would result in greater access to services, since the hospitals might simply decide to forgo the favorable tax treatment rather than expand their indigent services. 25 The Court reasoned that permitting this claim would open the door for litigants to use the judiciary to challenge “the particular programs agencies establish to carry out their legal obligations” and would effectively allow the courts to act as “continuing monitors of the wisdom and soundness of Executive action,” which is a more appropriate role for the Congress or the electorate. 26

Another function of standing limitations is to prevent courts from being “called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions.” 27 The causation and injury-in-fact requirements strike the balance between the executive as executor of the law and the judiciary as defender of individual rights by defining what harms are sufficient to merit judicial curtailment of the executive’s prerogative to manage the administrative state. Requiring potential plaintiffs to demonstrate an injury-in-fact that is more distinctive than that affecting the general populace serves this purpose by limiting the availability of judicial review to those individuals with more than a general concern about an issue. In doing so, standing also balances the role of the judiciary as an enforcer of individual rights against the prerogative of the executive to manage the administrative state by only allowing the courts to interfere with the executive’s prerogative where an individual right is violated. 28

In situations involving regulation of a third party, causation is “substantially more difficult to establish,” since courts are wary of holding defendant agencies liable for “the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.” 29 For

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25. *Id.* at 42–46.
27. *Warth*, 422 U.S. at 500.
28. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169–71 (1803) (noting that the “province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion,” and that questions of how the executive conducts its duties are “in their nature political,” but executive action that violates individual rights are not beyond the reach of the judiciary).
example, in *Allen v. Wright*, the Court found that parents of black children attending public schools did not have standing to sue the IRS for failure to deny tax-exempt status to segregated private schools as required by IRS regulations.\(^3\) While recognizing that the diminished ability to receive an education in a racially integrated school is a cognizable injury, the Court held that the plaintiffs’ chain of causation was too attenuated.\(^4\) It was “entirely speculative” as to whether withdrawal of the tax exemption from any particular private school would lead it to admit black students, or whether enough parents of private schoolchildren would, as a result of the policy changes, transfer their children to public school in sufficient quantity to significantly impact the racial composition of public schools.\(^5\) While there the Court appears to be somewhat ambivalent in its causation decisions,\(^6\) these limitations on the availability of judicial review prevent the judiciary from taking an overly active role in policymaking and channel advocacy efforts into the political process.\(^7\)

II. LOOSENING THE BOUNDS: *BARNUM TIMBER v. EPA*

In finding that a party had standing to hold a regulatory agency liable for the actions of an entity regulated by the agency, the Ninth Circuit examined the question of how closely tied an injury must be to executive action in order to render that executive action an abuse of discretion worthy of judicial correction. In a departure from the traditional standing jurisprudence, the *Barnum* court’s findings of causation and redressability loosened the restrictions placed on judicial review of agency action to such a degree as to resemble a grant of third-party standing.\(^8\) As broadening the scope of judicial review expands the circumstances in which the judiciary may compel an agency to act, the *Barnum* court implicitly endorsed a broader role for the judiciary in the management of the administrative state.

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31. *Id.* at 760.
32. *Id.*
33. *See also* Warth v. Seldin, 422 U.S. 490, 502–16 (1975) (denying standing to various organizations and individuals challenging exclusionary zoning ordinances because they could not show that striking the ordinances would lead to plaintiffs obtaining housing). *But see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280–81 n.14 (1978) (holding that a white student had standing to challenge an affirmative action policy without proving that he would have been admitted but for the policy, which interfered with his opportunity to compete for the slots reserved for minorities).
35. Third-party standing refers to the ability of a party not directly involved in a controversy to file a suit on behalf of an involved party. *See* William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 243–47 (1988). EPA’s decision to approve SWRCB’s listing of Redwood Creek directly involved SWRCB, which proposed the regulation, and any party harmed by the approval. *Barnum III*, 633 F.3d 894, 896 (9th Cir. 2011). This Note argues that EPA’s approval did not cause Barnum’s harm, and thus Barnum was a third party seeking standing to file on behalf of SWRCB.
A. Summary

Barnum Timber owned property and conducted timber harvesting in California’s Redwood Creek watershed. Barnum involved a challenge to EPA’s approval of SWRCB’s decision to list Redwood Creek as impaired by nonpoint source pollution, a decision that Barnum alleged had caused the devaluation of its property. While the CWA does not provide a direct mechanism for limiting nonpoint source pollution, the Act requires states to set water quality standards for all waters within their boundaries, known as Total Maximum Daily Loads (TMDLs). States must then identify and submit to EPA a list of impaired waterways that will not be able to meet their TMDLs. EPA may approve or disapprove the list in whole or in part. States must continue to engage in a planning process to achieve compliance with federal water quality standards for those listed waterways.

In 2002, SWRCB placed Redwood Creek on the state’s list of waterways impaired for temperature, and renewed its listing of Redwood Creek in 2006. EPA approved both listings. However, at the time of Barnum’s suit, SWRCB had not promulgated an implementation plan for Redwood Creek. Barnum had unsuccessfully challenged both listings of Redwood Creek through SWRCB’s public comment process and in a state court suit against SWRCB, alleging that the listings were arbitrary. The state court dismissed the suit, holding that Barnum could not obtain the relief sought without joinder of EPA.

Following the dismissal, Barnum sued EPA in federal court. Barnum sought a declaratory judgment that EPA’s approval of SWRCB’s listing was arbitrary and capricious under the Administrative Procedure Act and contrary to the CWA. Barnum also requested injunctive relief vacating the impairment

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36. Barnum III, 633 F.3d at 896. This Note assumes that SWRCB’s regulation was in fact arbitrary, and that EPA had the ability to prevent SWRCB from enforcing it. Whether EPA is actually able to prevent SWRCB from implementing a nonpoint regulation that EPA deems arbitrary is beyond the scope of this Note.
37. 33 U.S.C. § 1313(c)(2) (2006). If a state fails to set TMDLs, EPA will set TMDLs for the state. Id. § 1313(d)(2).
38. Id. §§ 1313(d)(1)–(2).
39. Id.; 40 C.F.R. § 130.7(d)(2).
40. 33 U.S.C. §§ 1313(e)(1)–(3); see also CAL. CODE REGS. tit. 14, § 898 (2012) (requiring evaluation of mitigation measures for bodies of water listed as impaired under the CWA).
41. Barnum III, 633 F.3d at 896. States must resubmit their impaired waterways lists for review on a regular basis. SWRCB initially listed Redwood Creek as impaired for sediment in 1992 and set a TMDL for Redwood Creek in 1998. Brief for Appellee at 8–9, Barnum III, 633 F.3d 894 (9th Cir. Apr. 2, 2009) (No. 08–17715).
42. Brief for Appellee at 9, Barnum III, 633 F.3d 894 (9th Cir. Apr. 2, 2009) (No. 08–17715).
designation and preventing EPA from enforcing it.\textsuperscript{46} The district court granted EPA’s motion to dismiss on the grounds that the plaintiff lacked standing.\textsuperscript{47} The Ninth Circuit reversed on appeal, finding that each element of standing was present.\textsuperscript{48}

To survive a motion to dismiss, Barnum’s burden was to state enough facts to make the case plausible on its face.\textsuperscript{49} The Ninth Circuit found Barnum had identified an injury-in-fact based on the reduction of the economic value of Barnum’s property.\textsuperscript{50} Based on the declarations of two forestry experts, the court found that the reduction in economic value was sufficiently specific, concrete, and particularized to satisfy the injury-in-fact analysis.\textsuperscript{51} EPA had conceded injury-in-fact in the trial court.\textsuperscript{52}

\textit{Barnum’s} import lies in the court’s analysis of causation and redressability. The court found that EPA’s approval triggered the application of a California law\textsuperscript{53} that would require regulation of Redwood Creek.\textsuperscript{54} The court held that the triggering would feed “the public’s and the market’s perception that Barnum’s timber operations were restricted by the listing,” thereby decreasing the property’s value.\textsuperscript{55} Barnum supported this claim with the declarations of the two forestry experts, who stated that the impaired waters listings were available to the public, that the listings would give the public the impression that the property would be subject to onerous regulation, and that this impression would result in the public devaluing the property.\textsuperscript{56} The court did not provide any support for its conclusion that Barnum had shown causation, simply holding that the “commonsense assessments” made by the forestry experts were “more than sufficient to support the causal connection element of Article III standing” at the pleading stage.\textsuperscript{57}

\textsuperscript{46} \textit{Id.}; see also 5 U.S.C. § 706(2)(A) (2006).
\textsuperscript{47} Barnum Timber Co. v. EPA (\textit{Barnum II}), No. C 08-01988 WHA, 2008 WL 5115088 (N.D. Cal. Dec. 4, 2008).
\textsuperscript{48} \textit{Barnum III}, 633 F.3d 894, 902 (9th Cir. 2011).
\textsuperscript{50} \textit{Barnum III}, 633 F.3d at 897–98.
\textsuperscript{51} \textit{Id.} The majority compared the injury-in-fact analysis to a regulatory taking, which recognizes the reduction of value due to a government regulation as a sufficient injury-in-fact at the pleading stage. \textit{Id.} at 898 (discussing \textit{Lucas v. S.C. Coastal Council}, 505 U.S. 1003 (1992)). The dissent argued that the injury was not “concrete and particularized” but was “speculative and uncertain” in that it was dependent on “a long chain of future events,” including Redwood Creek remaining on the list of impaired waters, California developing a TMDL that affects timber operations, and California applying that plan in a manner that affects Barnum. \textit{Id.} at 905.
\textsuperscript{52} \textit{Id.} at 897.
\textsuperscript{54} \textit{Barnum III}, 633 F.3d at 898.
\textsuperscript{55} \textit{Id.} at 898–99. Barnum also claimed causation based on economic injury from the extra expenditure required to comply with the regulations. \textit{Id.} at 898. Having found for Barnum on the reduction in perceived value theory, the court declined to review the extra expenditure theory of causation.
\textsuperscript{56} \textit{Id.} at 898–99.
\textsuperscript{57} \textit{Id.} at 899–900. See also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (noting that to survive a motion to dismiss, the plaintiff must produce specific facts such that the claim is plausible on its face).
Causation in *Barnum* is directly linked to redressability. The court concluded that, since the listing caused the injury, delisting would remedy the injury.\(^5\) The injury was redressable, as finding that EPA’s approval of the listing was arbitrary and capricious would allow the court to order the delisting of Redwood Creek.\(^5\) The court supported this conclusion by noting that Barnum’s claim of diminished value referred specifically to the effects on its property rather than a general effect on the market.\(^6\) The diminution did not “depend on the unpredictable actions of third parties” because the expert declarations offered a “commonsense assessment of the market for real property—in general regulatory restrictions on one property that affect the uses to which a second property can be put will lower the second property’s value.”\(^6\) The court further held that Barnum did not have to “allege that EPA is the sole source of the devaluation of its property,” and that Barnum “need not eliminate any other contributing causes to establish its standing.”\(^6\)

**B. Analysis**

The Ninth Circuit’s decision in *Barnum* deviates from the Supreme Court’s standing jurisprudence on causation and redressability. The standard for showing that one event is “fairly traceable” to another or “likely” to be redressed by a particular judicial remedy is high, and the expert assessments on which the *Barnum* court relied in finding causation made inferences that were just as attenuated and speculative as inferences the Supreme Court refused to make in prior standing cases. By accepting attenuated connections between the challenged action and the resulting harm, the *Barnum* court articulated a standard for causation and redressability that approaches a grant of third-party standing.

While Barnum claimed that the reduction in its property’s value was “fairly traceable” to EPA’s approval of SWRCB’s listing because the listing created the impression of imminent regulation,\(^6\) there were several other

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5. *Barnum III*, 633 F.3d at 899.
6. Id. at 899.
60. Id. at 900.
61. Id. The court distinguished this case from *San Diego County Gun Rights Committee v. Reno*, in which the plaintiffs claimed that federal gun control laws infringed on their Second Amendment rights by increasing the price of guns. *Id.* at 899–900. The *Reno* court found that the plaintiffs’ claim lacked causal connection and redressability because the guns were also regulated by state law and the plaintiffs did not show that the state law would not have the same effect in the absence of the federal law. *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996). The majority in *Barnum* distinguished *San Diego* on the grounds that the *San Diego* plaintiffs alleged a general effect on the market for guns, whereas Barnum alleged a specific effect on its property, and the third-party actions in *Barnum* were more predictable. *Barnum III*, 633 F.3d 894 at 900–01.
62. *Barnum III*, 633 F.3d at 901. As causation and redressability are interconnected in this case, the court’s analysis conflates them somewhat. The dissent found lack of redressability in that EPA’s decision was not the proximate cause of the regulations imposed, and argued that the state regulations and not the EPA’s decision would be the cause of any resulting harm. *Id.* at 905–08 (Gwin, J., dissenting).
63. *Id.* at 898.
parties involved in the chain of causation. The listing triggered regulation, but state of California made the decision to link the regulation to EPA’s approval of the listing. In addition, SWRCB is responsible for proposing properties for regulation and for designing and implementing regulations. Thus SWRCB’s actions are more predictive of the likelihood of reduction in value than EPA’s approval of the listing. EPA had approved the listing of Redwood Creek as impaired multiple times in the nineteen years prior to the suit and SWRCB had yet to promulgate regulations for the property. There was no telling when or if SWRCB would choose to promulgate regulations for Redwood Creek and whether EPA’s most recent approval would contribute to SWRCB’s decision to regulate. Holding EPA liable for injury caused by California’s or SWRCB’s decisions to regulate would be holding EPA liable for “the independent action of some third party not before the court.”

EPA’s only recourse to coerce California or SWRCB to comply with its order to implement a particular regulation would be to cut funding to California or SWRCB. Even if the funding termination were a nondiscretionary result of noncompliance (which it is not), concluding that EPA’s approval of a state agency’s decision to regulate a waterway would cause regulation is no less speculative than to conclude that changing the tax incentives available to nonprofit hospitals would decrease access to medical services for indigents or that removing tax-exempt status from segregated schools was likely to cause integration. Thus, EPA’s actions cannot be said to have caused the harm to Barnum under the standard enunciated by the Supreme Court’s standing jurisprudence.

Furthermore, regulation does not necessarily lead to market devaluation, as the market is also an independent actor. The market could react positively due to the beneficial effects of regulation, such as improved water quality or stocks of salmon. Changes in market value could also be attributed to elements such as timber prices or development in the vicinity.

Barnum’s theory of redressability is also premised on predictions that are more “speculative” than “likely.” In order to demonstrate that EPA’s denial of approval would restore Redwood Creek’s value, Barnum should have been required to show that EPA’s disapproval of SWRCB’s listing would have

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64. See Pronsolino v. Nastri, 291 F.3d 1123, 1140 (9th Cir. 2002) (noting that “[s]tates, however, have the ultimate discretion to decide both ‘if and how’ they will undertake to control nonpoint sources of pollution” (emphases in original)); CAL. CODE REGS. tit. 14, § 898 (2012).
65. Id.
68. See Pronsolino, 291 F.3d at 1140 (noting that “states must implement TMDLs the extent that they seek to avoid losing federal grant money there is no pertinent statutory provision otherwise requiring implementation of § 303 plans or providing for their enforcement”).
72. See Lujan, 504 U.S. at 561.
resulted in the delisting of Redwood Creek, and that delisting would remove the threat of regulation by preventing SWRCB from regulating. In reality, EPA’s denial of approval would not have removed the specter of regulation that allegedly decreased the value of Barnum’s property, as California could still regulate Redwood Creek under state law regardless of EPA’s approval.73

The court’s conclusion that Barnum “need not eliminate any other contributing causes to establish its standing”74 approaches a grant of third-party standing to challenge unlawful actions by regulatory agencies. As the effects of agency actions such as altering environmental regulations or tax incentives can have long chains of attenuated consequences, loosening the requirements for causation and redressability to the degree required by Barnum would substantially increase the judiciary’s control over administrative agencies by expanding the range of circumstances in which the judiciary can compel federal administrative agencies to act. This increase in the judiciary’s power over agencies necessarily reduces the executive’s discretion in managing the administrative state.

III. JUDICIAL MANAGEMENT OF THE ADMINISTRATIVE STATE AND THE SEPARATION OF POWERS

While limited judicial intervention has beneficial effects,75 excessive judicial intervention such as that permitted by Barnum can interfere with the separation of powers. Excessive judicial intervention can encroach on the prerogative of the executive to manage the administrative state, and usurp the monitoring functions best left to Congress and the electorate.

A. Impairment of Executive Enforcement of the Law

The Take Care Clause of the Constitution grants the executive the prerogative to manage the administrative state.76 Courts have traditionally given great deference to the executive’s prosecutorial discretion in enforcing the law.77 This deference is rooted in the historic discretion given to the

73. The CWA explicitly preserves the rights of states to adopt more stringent water pollution requirements. 33 U.S.C. § 1370 (2012).
74. See Barnum III, 633 F.3d 894, 901 (9th Cir. 2011).
75. Private rights of action can counteract the effects of agency capture. See Zinn, supra note 10, at 110–11; Stewart & Sunstein, supra note 8, at 1278–84. Private rights of initiation can also improve the administrative decision-making process. See, e.g., Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1046 (D.C. Cir. 1979) (noting that the plaintiffs “brought to the Commission’s attention a perspective, different from that of most of its registrant corporations, that it might not otherwise have fully appreciated,” which served to “ensure that the agency [gave] due consideration to citizen participation, and in this sense might actually enhance the agency’s effectiveness in furthering the public interest”).
76. U.S. CONST., art. II, § 3.
Acknowledging the importance of defining enforcement agendas, courts defer as well to administrative enforcement decisions. The Supreme Court has held that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion” and that the courts should not interfere absent explicit congressional instruction.

Defining an agenda and setting priorities for the expenditure of enforcement resources is a central element of the executive’s prerogative in enforcing the law. In an ideal world, the executive would be able to initiate an enforcement action in response to every violation of the regulatory rights it is statutorily obligated to enforce. One of the realities of governance, though, is that enforcement resources are finite and agencies never have sufficient resources to identify and prosecute every violation of every regulation under their purview. Thus, an essential component of the executive’s prerogative as head of the administrative state is the ability to determine how to allocate agency resources and how to prioritize the statutes to rigorously enforce, the violations to emphasize, and the areas of the country to police most carefully.

Private rights of initiation may compromise the executive’s ability to set priorities by diverting limited enforcement resources from the executive’s preferred agenda to the mandated enforcement action. In Adams v. Richardson, the D.C. Circuit placed the Department of Health, Education and Welfare’s Office of Civil Rights (OCR) under court order in response to claims that OCR was not sufficiently enforcing complaints of segregation in schools receiving federal funding. However, complying with the court’s order compromised the ability of OCR to enforce other types of complaints, including allegations of

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78. See Sunstein, supra note 77, at 665.
79. See Heckler v. Chaney, 470 U.S. 821, 831 (1985). Courts have also noted that agency enforcement decisions are “peculiarly within [the agency’s] expertise.” Id. Heckler did not turn on standing, but on the related question of when an agency has discretion over whether to take action. The Administrative Procedure Act grants courts jurisdiction to review agency action only where the decision has not been “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2) (2006). Questions of jurisdiction are distinct from whether a plaintiff has standing, but the inquiries are related in this circumstance as they both look to agency discretion.
80. Heckler, 470 U.S. at 831, 834.
82. See Heckler, 470 U.S. at 831–32 (“[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another . . . whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”); Eric Biber, The Importance of Resource Allocation in Administrative Law, 60 Admin. L. Rev. 1, 16–21 (2008) (noting the ways that resource allocation can shape agency decision making).
gender and disability discrimination. In response, advocates for groups representing those whose complaints were not investigated sought to intervene to obtain enforcement orders of their own, further increasing the constraints on OCR. In another case against OCR, the court ordered OCR to request additional funding to accomplish its judicially mandated goals. Seeking to compel the executive to reallocate funding from one agency to another can constrain the executive’s discretion in managing not only the agency under judicial order, but other agencies as well. In addition to the costs of litigation, increasing an agency’s liability for its actions also increases the cost of administering agencies. Increasing the costs of agency action further limits the resources available to the executive to carry out its regulatory agenda.

Judicial interference in agency administration can also restrict the executive’s ability to decide how to enforce the law. Statutes often give agencies several means by which they can pursue compliance. Under Title VI of the Civil Rights Act, for example, an enforcing agency faced with a noncompliant grant recipient has the discretion to enforce a complaint by seeking voluntary compliance, terminating funding through an administrative proceeding, or referring the matter to the Department of Justice for litigation. Different methods for pursuing compliance have different strengths and weaknesses and are appropriate for different situations. In the school desegregation cases, for example, voluntary compliance was more time-consuming but was the least expensive, created the least amount of political pushback, allowed OCR to negotiate a tailored settlement, and preserved the relationship with the regulated entity. Fund termination, on the other hand, created the strongest incentive to comply but generated the most political pushback, and withdrawing funds could have harmed intended beneficiaries by further degrading the quality of their educational opportunities should the jurisdiction refuse to accede to OCR’s demands. Litigation would have been the most expensive option, but could have generated precedent and led to

85. See id.
88. See, e.g., 40 C.F.R. § 7.130(a) (2012) (detailing the options available to EPA to obtain compliance from a noncompliant grant recipient). In this regard, EPA’s Title VI regulations are representative of most other executive agencies’ enforcement options.
91. Jones, supra note 90, at 159–64.
judicially mandated relief.92 Judicial limitation of the amount of time permitted to OCR to obtain voluntary compliance before terminating funding93 or initiating litigation would have constrained the executive’s enforcement discretion and could have impacted the executive’s ability to bring a successful enforcement action.

In addition to constraining the executive’s authority over resource allocation, judicial involvement in managing the administrative state can reduce overall agency efficiency. The threat of litigation can incentivize agencies to institute complex formal procedures that will insulate their decisions against judicial challenges, deter agencies from taking action, and undermine agencies’ bargaining positions with regulated entities that know that they can subsequently challenge unfavorable decisions in court.94 The judiciary is ill suited to make the types of decisions necessary to manage the administrative state.95 Officers appointed to lead agencies are typically experts in their fields, while judges are generalists with no particular expertise in public administration or the areas in which agencies regulate.96 As a result, judges are likely to be less competent in balancing the myriad factors that go into enforcement decisions.97 Even if judges had comparable expertise to agency administrators, courtrooms are a much more constrained forum for determining how to allocate agency resources; judges lack the time to hear all of the evidence, and the adversary system is poorly designed to handle polycentric questions regarding resource allocation.98 As a result, judges dictating agency action via private rights of initiation are more likely to make poor managerial and policy choices than expert agency administrators.

B. Erosion of the Democratic Accountability of the Executive

The breadth of deference traditionally given to the executive to make enforcement decisions underscores the need to ensure that the executive is held politically accountable for these decisions. While private rights of initiation can

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92. Id. at 164.
94. See Wilson, supra note 87, at 282–84.
95. Warth v. Seldin, 422 U.S. 490, 500 (1975) (noting that loosening standing requirements may result in the courts being “called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions”).
96. See Stewart & Sunstein, supra note 8, at 1208–12.
97. See id.
98. See, e.g., Daniel T. Deacon, Note, Deregulation Through Nonenforcement, 85 N.Y.U. L. REV. 795, 821–22 (2010); Kevin Coyle, Standing of Third Parties to Challenge Administrative Agency Actions, 76 CALIF. L. REV. 1061, 1069 (1988); West, supra note 10, at 43 (asserting that agenda-setting is an “‘executive function’ best left to administrators” because of the “subtle balancing considerations” agencies face when allocating resources); see generally Donald Horowitz, Courts and Social Policy (1976) (courts ill-equipped to deal with the complexities of social policy). But see Malcolm Feeley, Implementing Court Orders in the United States: Judges as Executives, in JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES (Marc Hertogh & Simon Halliday eds., 2004) (noting how courts have used special masters and other mechanisms to build their institutional capacity to deal with complex issues like prison reform).
provide the public with a limited check on unpopular regulatory agendas, the electoral process is ultimately the most appropriate mechanism for holding the executive politically accountable for its actions, including its decisions about its management of the administrative state. Overreliance on judicial accountability can reduce the effectiveness of other more effective means of accountability by obscuring the effects of the executive’s decisions.

A central component of the executive’s authority, the management of the administrative state is also an important political tool. As far back as *Marbury v. Madison*, the Court has acknowledged that questions of how the executive conducts its duties are “in their nature political.” Candidates for the presidency typically include an administrative agenda in their campaign promises, in addition to legislation that they intend to champion. The President can also use administrative action to make policy decisions outside of Congressional channels—a power that is also used for political ends. The ability to focus administrative enforcement on particular issues or regions is a key component of this authority.

Judicial review is an inherently limited check on unpopular use of executive authority. While private rights of initiation can compel the executive

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99. Allen v. Wright, 468 U.S. 737, 760 (1984) (noting that finding a plaintiff has standing would effectively allow the courts to act as “continuing monitors of the wisdom and soundness of Executive action” and that “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 governmental action” (citation omitted)).

100. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169–71 (1803). This conclusion established the general rule that the political question doctrine exempts decisions concerning the executive’s conduct of its duties from judicial review. However, the Court also noted that the fact that the decision in question allegedly violated Marbury’s individual rights outweighed the concerns about political questions, making it proper for the Court to hear the case. *Id.*


to take actions it would not otherwise prioritize \textsuperscript{104} or to provide redress for individual plaintiffs, private rights of initiation are by nature reactive and piecemeal. Plaintiffs must wait for a wrong to occur before being able to begin the long process of filing suit to correct the problem. The only way to obtain proactive or large-scale relief is to place agencies under court order. However, this results in the administration of agencies by an unaccountable judge.

In contrast, executive control promotes accountability in that the President is a visible figurehead that the public can identify and evaluate, and is elected by and accountable to a national constituency. \textsuperscript{105} Congressional oversight can also supplement electoral accountability. In addition to reshaping the duties delegated to agencies, \textsuperscript{106} Congress holds the power of the purse over agencies, and on various occasions uses this power to compel agencies to change their policies by refusing to fund objectionable initiatives. \textsuperscript{107} Congress can also initiate audits of agencies via the Government Accountability Office and initiate investigations into agency conduct. \textsuperscript{108}

While the effects of individual decisions are nearly impossible to measure, increased judicial involvement in the management of the administrative state could, on the aggregate, reach a level where it weakens the ability of Congress and the public to hold the executive accountable for its regulatory agenda by obscuring the agenda’s nature and its effects. The more actions the judiciary requires the executive to take in pursuing a judicially compelled regulatory agenda, the fewer resources the executive retains to pursue its own regulatory agenda. Unless the public carefully tracks which decisions are made by the executive and which are made by the judiciary, the executive could be perceived as solely responsible for actions of the administrative state taken during that particular executive’s term, regardless of whether the executive

\textsuperscript{104} See, e.g., Massachusetts v. EPA, 549 U.S. 497, 526 (2007) (compelling EPA to regulate greenhouse gasses); Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (compelling OCR to enforce Title VI complaints more aggressively).

\textsuperscript{105} Kagan, supra note 1, at 2331–39; see also Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (noting that “in our political system, the primary check against prosecutorial abuse is a political one”).


\textsuperscript{108} West, supra note 10, at 131. The Government Accountability Office was formerly known as the General Accounting Office.
wanted to pursue them. Thus, when it comes time for the public to evaluate the performance of the executive at the polls, this lack of transparency could result in the executive being blamed for poor judicial administration of an agency or, conversely, credited for the results of effective judicial administration.

IV. JUDICIAL CONTROL AND THE LIMITS OF EXECUTIVE DISCRETION

Executive discretion in managing the administrative state is not without its limits, and judicial involvement is sometimes appropriate to correct the excesses of the executive. In circumstances where a regulated entity’s harmful act is a direct result of an agency’s action or inaction, it is appropriate to hold the agency liable for harm caused by the actions of the regulated entity, as the interests of the individuals harmed outweigh the concerns about preserving executive discretion.\textsuperscript{109} While \textit{Barnum} allows for attenuated chains of causation, the standard for proving standing should be high in keeping with the executive’s broad discretion in managing the administrative state.

In contrast to the Ninth Circuit’s loose approach to causation in \textit{Barnum}, the D.C. Circuit addresses the balance between individual rights and executive discretion by recognizing causation in cases involving injuries caused by regulated entities only where the plaintiff can present “substantial evidence” of a causal relationship between the government policy and the regulated entity’s conduct, where the government policy explicitly authorizes action that would otherwise be illegal, or where the agency has consciously abdicated a statutory duty.\textsuperscript{110}

A. Causal Relationship

Requiring the plaintiff to show that the defendant has in fact caused the harmful actions of the third party reduces the likelihood that the defendant will be held liable for independent actions of the third party. In order reduce this likelihood, the D.C. Circuit grants standing only where plaintiffs to present “substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress.”\textsuperscript{111} In \textit{Tozzi v. U.S. Department of Health & Human Services}, the D.C. Circuit found that Health and Human Services (HHS) could be liable for harms caused by the actions of third parties taken in reaction to HHS’s allegedly arbitrary decision to list a chemical as a known carcinogen.\textsuperscript{112} The plaintiff alleged that several municipalities and health care organizations decided to phase out the plaintiff’s products relying on the HHS listing, causing the plaintiff financial harm.\textsuperscript{113} The D.C. Circuit found that Congress “intended

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\item \textsuperscript{110} See Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 366 F.3d 930, 941–42 (D.C. Cir. 2004).
\item \textsuperscript{111} Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 366 F.3d 930, 941–42 (D.C. Cir. 2004).
\item \textsuperscript{112} Tozzi v. Dep’t of Health & Human Serv., 271 F.3d 301, 307–09 (D.C. Cir. 2001).
\item \textsuperscript{113} Id. at 308.
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the [HHS listing] to serve as a resource for state, federal and local regulatory authorities,” and several municipalities had cited the HHS list in their decisions to phase out the chemical.\textsuperscript{114} While noting that a tort standard of causation did not apply, the court held that it was “not at all ‘speculative’ to expect that the dioxin upgrade will cause some non-trivial number of state and local agencies to regulate dioxin.”\textsuperscript{115}

In contrast, the court in \textit{Freedom Republicans, Inc. v. Federal Election Commission}, found that the Federal Election Commission (FEC) did not cause the Republican Party (GOP) to continue using an allegedly discriminatory system of awarding delegates at its nominating convention by deciding not to withdraw funds from the GOP when a complaint was filed challenging the practice.\textsuperscript{116} The court explained that it could not “confidently predict” that withdrawing FEC funding would result in the GOP’s abandonment of the bonus delegate system.\textsuperscript{117} In fact, the court found that the bonus delegate system predated the FEC’s funding of the Republican Party and that the system was caused by the results of the 1912 Republican nominating convention.\textsuperscript{118}

Under the D.C. Circuit’s test, Barnum’s declarations would not be “substantial evidence of a causal relationship between the government policy and the third-party conduct.”\textsuperscript{119} Barnum’s declarations attributed the devaluation of Barnum’s property solely to EPA’s approval,\textsuperscript{120} which ignored several important links in the chain of causation. The most salient missing factors were the effects of SWRCB’s original listing of Redwood Creek as impaired, California’s decision to link approval with regulation, and SWRCB’s decisions about how to regulate. It is unlikely that one could “confidently predict”\textsuperscript{121} that EPA’s listing caused the devaluation to a degree that would leave “little doubt as to causation.”\textsuperscript{122}

Barnum would also be unlikely to prevail on redressability. EPA’s approval of SWRCB’s arbitrary regulation was no more closely linked to the public’s devaluation of Barnum’s property than the FEC’s decision to continue funding the GOP was linked to the GOP’s decision to continue its allegedly discriminatory practices.\textsuperscript{123} Because California retains the independent

\begin{itemize}
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id. at 309.
\item \textsuperscript{116} Freedom Republicans, Inc. v. Fed. Election Comm’n, 13 F.3d 412, 419 (D.C. Cir. 1994). The GOP used a system that awarded bonus delegates to states with a history of voting Republican. A disproportionate number of these delegates went to states with disproportionately white populations. Thus the plaintiffs claimed that the practice discriminated against African-Americans. Id. The complaint was filed under Title VI of the Civil Rights Act. Id.
\item \textsuperscript{117} Id. at 418–19. At the 1912 Republican convention, delegates from Southern states that had traditionally voted Democrat nominated William Taft over Theodore Roosevelt. Roosevelt subsequently ran as an independent, leading to a victory for Democrat Woodrow Wilson. Id.
\item \textsuperscript{118} Nat’l Wrestling Coaches Ass’n v. Dep’t. of Educ., 366 F.3d 930, 941–42 (D.C. Cir. 2004).
\item \textsuperscript{119} Barnum III, 633 F.3d 894, 898–99 (9th Cir. 2011).
\item \textsuperscript{120} Freedom Republicans, 13 F.3d at 419.
\item \textsuperscript{121} Nat’l Wrestling, 366 F.3d at 941–42.
\item \textsuperscript{122} See Freedom Republicans, 13 F.3d at 419.
\end{itemize}
authority to regulate Redwood Creek absent EPA approval, revoking EPA’s approval would do nothing to redress the harm.

B. Authorization

An agency’s action can also be the cause of a third party’s action where the government action explicitly authorizes third-party conduct that would otherwise be illegal. In Animal Legal Defense Fund, Inc. v. Glickman, for example, the D.C. Circuit held that the United States Department of Agriculture (USDA) was liable for “aesthetic harm” suffered by a zoo patron caused by a zoo following USDA’s regulation that allowed for primates to be housed in individual cages with minimal cage enrichment devices. The justification for this liability was that the third party would not have acted absent the agency’s authorization, and thus the agency should be liable for the ensuing harm.

In contrast, the D.C. Circuit in National Wrestling Coaches Association v. Department of Education rejected the plaintiffs’ claim that a Department of Education (ED) regulation implementing Title IX of the Educational Amendments Act, which requires universities to provide equal funding of men’s and women’s sports, had caused several universities to make gender-conscious decisions in cutting their men’s wrestling programs. Noting that the plaintiffs challenged only the regulation and not Title IX itself, and that Title IX authorized gender-conscious decisions, the court found that the university would still have been able to make the gender-conscious decisions absent the regulation. Thus the regulation did not cause the gender conscious decisions.

Barnum would also likely struggle to show causation under the authorization of illegal action test. EPA’s approval of SWRCB’s listing is similar to the ED’s Title IX regulation in National Wrestling, in that it endorsed an action authorized by another source. The CWA explicitly preserves the


126. Glickman, 154 F.3d at 430–44. Aesthetic harm is a term used in injury-in-fact cases referring to harm caused by seeing something that disturbs the viewer. The plaintiff argued that the regulation was an arbitrary interpretation of a law requiring that primates be housed in a manner adequate to promote the psychological well being of primates. Id.

127. Id. at 440 (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 45 n.25 (1976)).

128. Nat’l Wrestling, 366 F.3d at 941. The plaintiffs claimed that these actions violated the Equal Protection Clause. Id. at 936.

129. Id.

130. Id. The court also rejected the argument that there was substantial evidence of direct causation in that other factors were cited by the universities for the cancellation of the wrestling programs, such as lack of league sponsorship, budgetary concerns, and the need to balance athletics with the universities’ other priorities, Id. at 941–43.

131. See id.
rights of states to set higher standards for their local waters. Thus, EPA’s approval did not legitimize illegal SWRCB action.

C. Intentional Systemic Nonenforcement

The extreme case of intentional systemic inaction, in which an agency consciously adopts an explicit policy not to enforce a duty that Congress entrusts to the agency, underscores the harm to individuals and to the separation of powers that can result when the executive abuses its discretion in managing the administrative state. Agency inaction can directly cause harm by allowing bad action by regulated entities. However, systemic intentional nonenforcement has consequences beyond the harm caused to individual regulatory beneficiaries by unpunished violations of their rights. Systemic nonenforcement of a regulation can remove incentive to comply and can even encourage noncompliance.

Intentional systemic nonenforcement can also violate the separation of powers when it is used to encroach on the province of the legislature. A rule only has validity so far as it is enforced, so by intentionally abdicating its statutory duty to enforce the law, or by enforcing the law selectively, the executive effectively rewrites statute. Thus, intentional systemic nonenforcement is an abuse of the executive’s enforcement discretion because it intrudes on the prerogative of the legislature to make the law. Judicial intervention in such a situation is not a violation of the separation of powers, however, as the judiciary is acting to correct another violation of the separation of powers.

Courts should only make findings of intentional systemic nonenforcement in extreme circumstances. One of the only instances in which a court found intentional systemic nonenforcement is in Adams v. Richardson, where the

132. The CWA generally preserves state authority to adopt more stringent water pollution requirements. 33 U.S.C. §§ 1313(c)(3)(a), 1370 (2006) (requiring the Administrator to approve any continuing planning process submitted to him which include “effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section” (emphasis added)).

133. While 33 U.S.C. § 1370 would not prohibit a state agency’s listing that was arbitrarily overprotective, EPA’s approval of that listing still would not authorize the listing because the regulated entity would retain the ability to challenge the underlying state regulation. CAL. WATER CODE § 13330.

134. See, e.g., Women’s Equity Action League v. Cavazos, 879 F.2d 880, 885–86 (D.C. Cir. 1989) (holding that nonenforcement of Title VI complaints by HEW caused harm to the complainants).

135. See Deacon, supra note 98, at 807–16 (describing various modes of nonenforcement as used by the Bush Administration).


D.C. Circuit found that the Department of Health, Education and Welfare’s OCR, which was responsible for investigating complaints of discrimination against schools, had taken enforcement actions against fewer than ten percent of the schools it had found to be segregated.\textsuperscript{138} The court found that OCR had “consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty” to enforce complaints against segregated schools.\textsuperscript{139} The court ordered OCR to enforce complaints more aggressively, and then kept OCR under judicial order for the next seventeen years to ensure that OCR properly carried out its statutorily mandated duties.\textsuperscript{140} The level of OCR’s conscious disregard for the law is far greater than the situation in \textit{Barnum}, which involved only a single decision by EPA.\textsuperscript{141}

In contrast to the \textit{Barnum} court’s permissive causation standard, the D.C. Circuit’s test more effectively limits findings of causation to cases in which the regulated entity is not truly independent but instead acts in concert with, or under the authority of, the federal agency. When a federal agency exercises substantial control over the actions that a regulated entity takes and directly causes or authorizes an action by the regulated entity that inflicts an injury-in-fact on another party, judicial intervention is appropriate because the executive has abused its discretion in causing the harm. In situations where the agency’s action is one of many factors in the regulated entity’s decision, the judiciary should defer to the executive’s discretion. This approach strikes a more appropriate balance between the executive’s mandate to enforce the law, the legislature’s mandate to make the law, and the judiciary’s mandate to defend individual rights.

V. PRIVATE RIGHTS OF ACTION AS A SUPPLEMENT TO THE EXECUTIVE’S ENFORCEMENT CAPACITY

Striking the balance between the executive’s prerogative to manage the administrative state and the judiciary’s prerogative to protect individual rights strongly in favor of the executive leaves many judicially cognizable injuries without a remedy in cases where an agency action contributes to, but does not cause, a third party’s harmful action.\textsuperscript{142} The Court has long held, though, that “[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”\textsuperscript{143} Granting injured parties

\begin{itemize}
  \item \textsuperscript{138} \textit{Adams I}, 351 F. Supp. 636, 638 (D.D.C. 1972).
  \item \textsuperscript{139} \textit{Adams II}, 480 F.2d at 1162. The \textit{Adams II} court was not concerned with standing, but with the related question of whether OCR was acting within its prosecutorial discretion. \textit{Id.} at 1161–63. \textit{Adams II} was approvingly cited by the Supreme Court in \textit{Heckler}. \textit{Heckler} v. \textit{Chaney}, 470 U.S. 821, 833 n.4 (1985); see also \textit{Roman} v. \textit{Korson}, 918 F. Supp. 1108, 1113 (W.D. Mich. 1995) (finding abdication where USDA had only once brought an enforcement action in eight years for failure to follow notice and comment procedures prior to increasing rents and to roll back and refund illegally charged rent).
  \item \textsuperscript{140} See \textit{Bunch} & \textit{Mindle}, supra note 84, at 86.
  \item \textsuperscript{141} See \textit{Barnum} \textit{III}, 633 F.3d 894, 896 (9th Cir. 2011).
  \item \textsuperscript{142} \textit{Allen} v. \textit{Wright}, 468 U.S. 737, 783 (1984) (noting that the plaintiff had suffered a judicially cognizable injury).
  \item \textsuperscript{143} \textit{Marbury} v. \textit{Madison}, 5 U.S. (1 Cranch) 137, 147 (1803).
\end{itemize}
a private right of action to sue the third party that caused the harm would fill
this void with less intrusion on the separation of powers than expanding
standing to pursue private rights of initiation against regulatory agencies.144 A
private right of action would allow Barnum to file suit against SWRCB for
violating the CWA. While members of the Court have questioned whether
congressionally granted standing for private rights of action violates the Take
Care Clause,145 private rights of action provide a means with which to
supplement the executive’s capacity to enforce the law and vindicate the rights
of regulatory beneficiaries without constraining the executive’s discretion or
obscuring its decisions from popular accountability.

A. Enforcement Discretion

Critiques of the use of private rights of action to enforce federal regulation
rely on the unitary executive theory.146 Contrary to these critiques, private
rights of action are consistent with, and can enhance, the executive’s duty to
enforce the law. Particularly where potential plaintiffs have suffered an injury,
the interest in ensuring that the injured party has a remedy outweighs any
marginal infringements on the executive’s ability to enforce the law.

While critics rely on the Take Care Clause to argue that permitting private
rights of action to enforce federal laws intrudes on the executive’s mandate to
ensure that the laws are enforced,147 the Take Care Clause provides the
executive with a duty to enforce the law, not an exclusive license.148 While
private rights of initiation allow the judiciary to compel agency action, thus
constraining the executive’s prosecutorial discretion,149 private rights of action
allow injured parties to file suit directly against regulated entities that commit
harmful, illegal actions. This simply permits a private party to accomplish an
action the executive did not have the resources to accomplish.150

144. Private rights of action are also known as citizen suits and can be created in several ways. The
simplest is by statute. See, e.g., 33 U.S.C. § 1365(a) (2006) (establishing a private right of action to
enforce the CWA). Courts can also find implied private rights of action in some circumstances, though
the Supreme Court strictly constrained implied rights of action in Alexander v. Sandoval, 532 U.S. 275
(2001). See also Stewart & Sunstein, supra note 8, at 1289–1316. Other commentators have proposed
giving agencies discretion to determine when a private right of action exists under a statute within the
agency’s purview. See Matthew C. Stephenson, Public Regulation of Private Enforcement: The Case for

145. While Justice Scalia argued in Lujan that congressionally conferred standing in citizen suits
violates the Take Care Clause, this portion of the opinion did not garner a majority. Compare Lujan v.

146. See, e.g., Harold J. Krent & Ethan G. Shenkman, Of Citizens Suits and Citizen Sunstein, 91

147. See Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting); Stephenson, supra
note 144, at 144; Lujan, 504 U.S. at 576–77.

148. Tara Leigh Grove, Standing as an Article II Nondelegation Doctrine, 11 U. PA. J. CONST. L.
781, 827 (2009).

149. See discussion infra Part III.A.

150. Stephenson, supra note 144, at 107–08.
Supplementing public enforcement with private enforcement is consistent with the executive’s prerogative under the Take Care Clause in that the end result is more comprehensive enforcement. Where the executive is not a party to the suit, there is no concern about the judiciary displacing the executive’s power.151

Other critics express concern over the possibility that private enforcement actions might interfere with future public enforcement actions by disrupting the executive’s ability to pursue compliance through other means152 or by creating bad precedent or precluding later suits.153 These concerns are situational at best, as private rights of action can also increase the overall level of resources available for enforcement154 and often function to encourage legal innovation.155 The advantages and disadvantages of private enforcement, however, do not rise to the level of constitutional concern.156 Even so, the interest in vindicating the rights of individual plaintiffs whose legitimate injuries the executive was unwilling or unable to address through public enforcement should outweigh any concerns about erosion of the executive’s mandate to enforce the law.

Shifting liability from the federal level to the state level could create similar concerns about judicial interference at the state level. However, these concerns do not offend the Take Care Clause. Relatively high causation standards should also limit judicial review to circumstances where the defendant agency actually caused harm to the plaintiff deserving of a remedy.

B. Democratic Accountability

Granting private rights of action to parties injured by regulated entities does not interfere with the electorate’s ability to monitor the executive’s conduct, nor does it incentivize advocates to turn to the judiciary instead of the legislature when seeking reform.

151. Sunstein, supra note 81, at 231 n.300 (noting that “parallel public and private remedies are most familiar to American law; they do not violate the Constitution”).
152. Krent & Shenkman, supra note 146, at 1812–13 (using the example of the Clean Air Act); Stephenson, supra note 144, at 117–19.
154. Stephenson, supra note 144, at 107–08 (noting that granting private rights of action results in more enforcement resources and that regulatory beneficiaries are often better situated to detect violations of the law).
155. Id. at 112–13.
156. Sunstein, supra note 81, at 231 n.300. Limiting private rights of action to parties who can demonstrate an injury-in-fact, rather than granting universal standing, also curbs concerns over citizens suing in furtherance of special interests rather than the public interest or “sweetheart suits,” where a defendant arranges to be sued and settles for lesser damages in order to preclude future suits for greater damages. See e.g., Krent & Shenkman, supra note 146, at 1812–13 (noting that citizen suits under the CWA often seek contributions to private causes in settlement negotiations rather than payments to the federal treasury); David S. Mann, Comment, Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?, 21 ENVTL. L. 175 (1991); Grove, supra note 148, at 816–17.
Private rights of action do not interfere with the electorate’s perception of the executive’s enforcement agenda. Private rights of action only give the judiciary the authority to compel action from regulated entities that have caused harm, which does not divert resources away from the executive’s enforcement agenda. As enforcement actions solely reflect the choices of the executive rather than judicial fiats, private rights of action do not obscure the executive’s enforcement priorities from the electorate. When the time comes for the electorate to express its approval of the way in which the executive has chosen to allocate enforcement resources, the electorate will still have an unadulterated view of the choices the executive made. Thus the electorate remains the ultimate monitor of the executive’s activities.157

While private rights of initiation are criticized for their potential to turn the judiciary into “continuing monitors of the wisdom and soundness of Executive action,”158 granting private rights of action only where the plaintiff can demonstrate an injury-in-fact ameliorates concerns that the electorate will turn to the courts to make policy decisions instead of the legislature.159 Only a limited number of plaintiffs will be able to demonstrate the requisite injury-in-fact, which means that remaining advocates must rely on the legislature to pursue their policy goals.

CONCLUSION

The prerogative to enforce the law is the “most important constitutional duty” of the executive,160 and managing the administrative state is the executive’s primary means of accomplishing that duty. The Barnum court’s decision to make judicial grants of standing to individuals whose injury is the indirect result of a regulatory action could dramatically increase agency liability for tangential consequences of their actions. As each grant of standing is potentially accompanied by a judicially imposed remedy, this broadening of standing would result in increased judicial control of the administrative state. These unjustified intrusions into the executive’s ability to manage the administrative state can impede the executive’s ability to enforce the law and the public’s ability to hold the executive accountable for its efforts.

The role of the private right of initiation should be to check abuses of executive discretion. Judicial intervention may be appropriate where a regulated entity is not an independent actor and the executive’s action is actually causing the harm, or where the executive is intentionally deregulating through nonenforcement, thus intruding on the prerogative of the legislature.

157. See Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (noting that “in our political system, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion can be removed by a President whom the people have trusted enough to elect”).


159. See Scalia, supra note 26, at 894–96.

Even so, courts must narrowly tailor their grants of standing in these situations in order to prevent unnecessary interference with the executive’s prerogative.

However, the executive’s broad discretion in managing the administrative state must be balanced against the interests of plaintiffs in obtaining relief. In run-of-the-mill situations where a regulated entity’s actions harm regulatory beneficiaries, private rights of action are a more appropriate means to allow regulatory beneficiaries to vindicate their rights. SWRCB’s decision to list Redwood Creek as impaired is the classic “independent action of some third party not before the court”\(^\text{161}\) with which Barnum’s true grievance lies. Thus, Barnum should not be able to use the judiciary to intrude on the executive’s prerogative.

Barnum undisputedly suffered an injury-in-fact, and if that injury was caused by regulation that is in violation of the CWA, Barnum is entitled to redress. Instead of granting Barnum standing to sue EPA for SWRCB’s actions, though, it would be more appropriate for Barnum to take action directly against SWRCB. Redirecting Barnum’s claim toward SWRCB would remove the separation of powers concern as the executive would no longer be involved. Additionally, granting a private right of action would also free the executive to pursue its own enforcement agenda in a more transparent way.


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