Standing as Channeling in the Administrative Age

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STANDING AS CHANNELING IN THE ADMINISTRATIVE AGE

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Abstract: For several decades, courts have approached citizen suits with judicially created rules for standing. These rules are vague and unworkable, often serving merely as a screening mechanism for docket management. The use of standing rules to screen cases, in turn, yields inconsistent decisions and tribunal splits along partisan lines, suggesting that courts are using these rules in citizen suits as a proxy for the merits. Many have suggested that Congress could, or should, provide guidelines for standing. This Article takes the suggestion a step further and argues that Congress has implicitly delegated the matter to the administrative agencies with primary enforcement authority over the subject matter. Courts regularly allow agencies to fill gaps in their respective statutes, so Congress’s silence on a point often constitutes discretionary leeway for the agency. Agencies already have explicit statutory authority to preempt citizen suits or define violations for which parties may sue; the existing statutory framework therefore suggests that agencies could promulgate rules for standing in citizen suits. Moreover, agencies have an advantage over courts in terms of expertise about which suits best represent the public interest. Further, for suits against the agencies themselves, agencies could default to the “special solicitude for states” rule. Finally, this Article explains how standing can function as a beneficial channeling tool rather than an ad hoc screening device, by allowing agencies to align citizen suits more closely with the larger public interest.

INTRODUCTION

Congress authorizes citizen suits for the enforcement of certain federal laws, but the authorizing statutes do not delineate any criteria

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for parties to have standing to bring such suits.¹ Courts have derived standing rules (ambiguous enough to be standards rather than actual rules) from the U.S. Constitution and jurisprudential concerns.² Yet the judicial approach has proved unwieldy and yields inconsistent, unpredictable results even from the same court.³ This Article proposes a public solution, using recent environmental litigation as a hypothetical model as to how our thesis could achieve positive, and practical, solutions.

The need for Congress to give the courts guidance about standing for citizen suits has received mention in U.S. Supreme Court opinions and focused attention in academic articles.⁴ Numerous commentators

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¹ See, e.g., 42 U.S.C. § 7604(a) (2006) (“[A]ny person may commence a civil action on his own behalf . . . .”).

² For instance, the U.S. Supreme Court has frequently noted that the standing doctrine preserves the separation of powers, a central component of our constitutional scheme. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (“The core component of standing is an essential and unchanging part . . . of Article III.”); Allen v. Wright, 468 U.S. 737, 752 (1984) (“[T]he law of Article III standing is built on a single basic idea—the idea of separation of powers.”); see also Lujan, 504 U.S. at 601–02 (Blackmun, J., dissenting) (arguing that the standing doctrine mediates the separation of power between the coordinate branches of government); Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 894 (1983) (couching support for the doctrine in a separation-of-powers argument). Similarly, other prudential concerns may affect whether a court may properly adjudicate a dispute. See, e.g., Baker v. Carr, 369 U.S. 186, 204–06, 217, 237 (1962) (holding that the plaintiffs had standing, but that their claims presented a nonjusticiable political question). Some commentators, however, doubt whether the Court’s justiciability doctrines, including the standing doctrine, are motivated by fidelity to constitutional principles. See generally Robert J. Pushaw, Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 Cornell L. Rev. 393 (1996) (arguing that the Supreme Court must reformulate its justiciability doctrines to better account for Federalist principles).

³ See, e.g., Robert J. Pushaw, Jr., Limiting Article III Standing to “Accidental” Plaintiffs: Lessons from Environmental and Animal Law Cases, 45 Ga. L. Rev. 1, 52 (2010) (“[S]tanding rules are indefinite and elastic, and the justices have applied them capriciously. . . . Not surprisingly, the Court has reached inconsistent (even contradictory) results in cases that presented materially indistinguishable facts . . . .”).

⁴ See Summers v. Earth Island Inst., 555 U.S. 488, 501 (2009) (Kennedy, J., concurring) (noting Congress’s ability to create by statute Article III injuries); Massachusetts v. EPA, 549 U.S. 497, 516–17 (2007) (citing Lujan, 504 U.S. at 580) (encouraging Congress to define standing statutorily); FEC v. Akins, 524 U.S. 11, 19–20 (1998) (discussing how Congress can define injury); Lujan, 504 U.S. at 580 (Kennedy, J., concurring) (noting that Congress has the power to define standing and causation); Warth v. Seldin, 422 U.S. 490, 501 (1975) (noting that Congress can grant a right of action to persons who would otherwise be barred by prudential standing rules); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) (“Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.”); see also infra note 5 (collecting scholarly commentary). In his Lujan concurrence, Justice Anthony Kennedy also stated:
have argued that Congress can, and perhaps should, address the issue. We take the next step and argue that Congress already has—albeit impliedly—authorized administrative agencies to give such guidance via promulgated regulations. Such agencies are in the best position, from the standpoint of our government’s institutional design, to do so. And these agencies have primary enforcement authority, by statute, for the subject matter of the citizen suits.

Suits brought from outside the agency, under the relevant statute, take two forms: citizen enforcement actions against private-sector violators, and suits against the agency to compel more enforcement or reg-

In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

... [We would exceed constitutional limitations if] we were to entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.

504 U.S. at 580–81 (citation omitted).

5 See Kimberly N. Brown, What’s Left Standing? FECA Citizen Suits and the Battle for Judicial Review, 55 U. Kan. L. Rev. 677, 688, 690–94 (2007) (arguing that the Akins decision left Congress with significant power to define standing); Sean Connelly, Congressional Authority to Expand the Class of Persons with Standing to Seek Judicial Review of Agency Rulemaking, 39 Admin. L. Rev. 139, 161–63 (1987) (arguing that Congress has the power to expand standing); James Dumont, Beyond Standing: Proposals for Congressional Response to Supreme Court “Standing” Decisions, 13 Vt. L. Rev. 675, 678, 684–89 (1989) (arguing that Congress may use its power to establish Article I courts to bypass the constitutional minimums Article III standing attempts to protect); William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 223–24 (1988) (arguing that if a duty is statutory, Congress should have unlimited power to define who can enforce the duty); Cass R. Sunstein, Informational Regulation and Informational Standing: Akins and Beyond, 147 U. Pa. L. Rev. 613, 616–17 (1999) (arguing that the Akins decision expands congressional authority to define standing); Cass R. Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 Mich. L. Rev. 163, 178 (1993) [hereinafter Sunstein, What’s Standing?] (stating that there is no evidence that Article III was intended to limit the ability of Congress to define standing). But see, e.g., John G. Roberts, Jr., Article III Limits on Statutory Standing, 42 Duke L.J. 1219, 1226 (1993) (arguing that an act of Congress is unconstitutional if it directs a federal court to hear a case that does not meet the requirements of Article III standing).

6 We are unaware of any academic literature advocating for this proposal; however, others have contemplated related proposals from a narrower or tangential perspective. See Brian D. Galle, Can Federal Agencies Authorize Private Suits Under Section 1983?, 69 Brook. L. Rev. 163, 165 (2003) (proposing that § 1983 authorizes federal agencies to make their regulations enforceable by citizens); Amanda M. Rose, Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5, 108 Colum. L. Rev. 1301, 1349–58 (2008) (proposing that Congress grant the Securities and Exchange Commission the power to screen Rule 10b-5 class actions by deciding who may file such claims as well as whom they may file them against).


ulation.\textsuperscript{9} There are legal distinctions between these two types of actions, besides the obvious difference of the defendants in each instance. In the latter type, challenging agency inaction, the claims technically proceed under the Administrative Procedure Act (APA),\textsuperscript{10} but the substance of the claims depend on the same substantive statute as the first type of citizen suits. Even though the two types of actions are distinct, they relate to each other enough to discuss them together.

This dichotomy, however, leads to our bifurcated thesis. First, we make the rather bold suggestion that agencies can, and should, delineate some parameters regarding the injury-in-fact and causation elements of standing for citizen suits against third-party polluters. The second thesis is a more tentative suggestion: agencies should officially adopt the Supreme Court’s “special solicitude for states”\textsuperscript{11} in the second type of case, suits challenging agency inaction. This second rule would not bar citizen suits against agencies, but would simply give a preference—in terms of standing to sue—to state attorneys general, and would use the state-brought suit as a benchmark to assess the legitimacy of other plaintiffs in public interest lawsuits against agencies.

As mentioned above, the Supreme Court has invited Congress to give guidance about standing for citizen suits, as citizen suits are one of the most significant contexts in which standing is an issue.\textsuperscript{12} In addition, there is an emerging scholarly consensus that Congress can, and should, accept this invitation.\textsuperscript{13} If we accept this premise, then it follows that Congress can delegate such authority to the appropriate government agencies to propose and adopt the guidelines for those cases over which the agency already has primary enforcement authority.

The most obvious argument supporting this suggestion is the agency’s specialization and expertise.\textsuperscript{14} Judicial doctrines of deference to agency interpretation of statutes, which rest upon a presumption of agency expertise and resources, suggest that courts would also accede to an agency’s rules about standing. The deference afforded under the

\textsuperscript{9} See, e.g., Massachusetts, 549 U.S. at 505.
\textsuperscript{11} See Massachusetts, 549 U.S. at 520.
\textsuperscript{12} See supra note 4 and accompanying text (providing examples of citizen suits in which standing presented a question).
\textsuperscript{13} See, e.g., supra note 5 (summarizing the scholarly views). But see Heather Elliott, Congress’s Inability to Solve Standing Problems, 91 B.U. L. Rev. 159, 161–65 (2011) (arguing that Congress has little power to resolve standing problems).
Supreme Court’s 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* and its 1944 decision in *Skidmore v. Swift & Co.* accurately presume that agencies have staff with relevant expertise and training, that agencies’ specialized functions provide them with opportunities to analyze the issues deeply, and that they have a repeat-player’s vantage point on the litigation surrounding their governing statutes. An agency’s mandate from Congress encourages it to conduct extensive research as it formulates its position; agencies also collect vast amounts of useful data via the reporting requirements imposed on the regulated industries. Applying this logic to the standing requirements for citizen suits, the agencies have superior information and expertise to discern the fine line between citizen suits that benefit the public and those that are unnecessary, vexatious, or abusive. The APA’s prescribed standards for judicial review (“arbitrary and capricious” is the default rule) further bolster the regime of judicial deference to agency decisions, at least where those decisions are well researched and subject to deliberation.

Congress delegates authority not only by what it says, but also by what it does not say. Other commentators have demonstrated that statutory ambiguity and gaps are the actual mechanism by which the laws delegate discretion to administrators. Statutory precision, by con-

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16 See, e.g., 42 U.S.C. § 7403 (2006) (requiring the EPA to establish a national research and development program); *Chevron*, 467 U.S. at 865 (“[T]he Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.”).
17 See, e.g., 42 U.S.C. § 7414 (authorizing the Administrator to require recordkeeping, periodic compliance certifications, and the submission of reports).
19 See, e.g., *Chevron*, 467 U.S. at 844 (“Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).
20 See, e.g., William N. Eskridge, Jr. & Judith N. Levi, *Regulatory Variables and Statutory Interpretation*, 73 Wash. U. L.Q. 1103, 1107–08 (1995). Professors William Eskridge and Judith Levi argue that governmental discretion or decision making is often delegated through what they call “regulatory variables,” linguistic devices in the statute that leave the delegated interpreter a range of meanings and applications. See id. They eventually shift to the term “regulatory variability” out of fear that readers will imagine a list of magic words that delegate discretion. Id. at 1107. It is well established that the legislature intends to delegate some of its authority to agencies. The focus here is on the mechanism for delegation, which is essentially a linguistic one. Id. at 1108–09. Some portions of enabling statutes may be specific and directive, other provisions may contain ambiguity, requiring the authorized official or administrator to exercise discretion to fill in the gaps or flesh out the practical meaning. This linguistic feature of vagueness or ambiguity inherently delegates
contrast, functions as a constraint, issuing instructions that an administrator must carry out mechanically. The idea that ambiguity confers discretion is also the essence of the *Chevron* doctrine—where the statute is ambiguous, courts must defer to agency interpretations and gap-filling as long as it is merely “reasonable,” which is a very low threshold. In fact, the Supreme Court’s most recent *Chevron*-based decision treats statutory ambiguity as a *mandate* for the agency to craft the official interpretation or to fill in the gaps on its own, without superimposing judicial precedents onto the unclear portion of the law.

The citizen-suit statutes are silent about standing. Congress, however, situated each of these provisions within a longer act that confers primary enforcement authority on an agency. The enactments conf
tain general standards—“intelligible principles” in the jargon of delegation analysis—and entrust the agency with authority to work out the details, set standards, create a monitoring and enforcement regime, and so forth.26 Included in this delegated authority to fill in the details, we argue, is the unanswered question of who has standing to bring the related citizen suits. Legislative silence on nearly every other matter, the Court has held, impliedly puts the issues under the agency’s discretion and purview.27 There is no reason to think that standing should be a singular exception to this paradigm.

Moreover, Congress expressly authorizes agencies to cabin all potential citizen suits through preemption and displacement.28 Whenever an agency commences litigation against a violator—such as an industrial polluter—that suit automatically preempts any duplicative citizen suits against the same defendant.29 Thus, an agency can effectively block a citizen suit that it deems contrary to public policy. Similarly, through even inchoate regulations, agencies can displace related public interest suits brought under common law doctrines, as seen recently in the Supreme Court’s 2011 decision in American Electric Power Co. v. Connecticut.30 Furthermore, agency regulations and standards can define the actual violations for which citizens could sue.31


26 Indeed, a regulatory statute, such as the Clean Air Act, will typically include congressional findings and a congressional declaration that establish the federal government’s authority to regulate and outline the general purposes of the regulatory scheme. See, e.g., 42 U.S.C. § 7401(a)–(b). Additionally, the statute will often authorize the implementing agency to conduct research, create programs, develop systems for monitoring compliance, and take enforcement action. See, e.g., id. §§ 7403(a)–(c), 7413.

27 See, e.g., Chevron, 467 U.S. at 844.


29 See 42 U.S.C. § 7604(b)(1)(B) (“No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil action . . . .”).

30 See Am. Elec. Power Co., 131 S. Ct. at 2537 (“[T]he Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions . . . .”).

31 See 42 U.S.C. § 7411(b)(1)(A) (requiring the EPA to publish a list of stationary sources that “cause[] or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health”); see also id. § 7411(e) (“After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.”).
In other words, the legislative silence on standing effectively delegates the question to the relevant agency to answer, just as it does with any other question under the statute. The structural aspects of the statute that functionally allow the agency to preempt, displace, and channel potential citizen suits imply that defining standing would also be appropriate for the same agency. Congress has, we argue, already left this matter to the agencies, even if the agencies have not acknowledged this up to now.

Even apart from the agencies’ expertise, longstanding judicial deference, and the implicit delegation within the statutes themselves, an additional factor argues in favor of agencies shouldering the burden of defining standing. This point is essentially political: agencies are subject to the notice-and-comment procedures of the APA. These procedures introduce a democratic aspect into the rulemaking we propose here. Thus, rather than have courts define standing by judicial fiat—which inevitably invites complaints about judicial activism—an agency rule about standing for citizen suits would involve a substantial period of public comment, plus the agency’s duty to respond to significant points raised during the comment period. Activist groups that regularly bring citizen suits would have an opportunity to weigh in on the standing rules for future public interest lawsuits. Similarly, proposed agency regulations must undergo Office of Management and Budget (OMB) review, and this scrutiny provides another layer of political buffering through the President, who usually supervises OMB closely.

32 See 5 U.S.C. § 553(a)–(b) (2006) (defining the scope of the APA’s notice-and-comment requirements); see also id. §§ 556, 557 (providing procedures for hearings and appeals that ensure due process).


There is a growing need for agencies to step into this role. Recent decisions by the Supreme Court suggest an increasingly liberal—or at least confusing—approach to standing. In American Electric, the Court split evenly on the question of standing. Had Justice Sonia Sotomayor not recused herself from the decision, it would apparently have gone 5–4 in favor of recognizing standing; this would have opened the door for innumerable future suits involving similar parties. Additionally, as citizen suits continue to proliferate under the U.S. Code and under common law tort theories (as a way of circumnavigating the Code), the courts’ need for guidance on standing increases correspondingly. Courts will need agencies to play gatekeeper in order for federal judicial dockets to remain manageable.

At the same time, there is a concern that courts could go in the other direction and functionally eliminate citizen suits by taking a

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36 See Pushaw, supra note 3, at 49–54 (chronicling the Court’s unsteady application of its own rules on standing).
38 See infra notes 148–154 and accompanying text.
39 See, e.g., Summers, 555 U.S. at 490; Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593 (2007); Daimler-Chrysler Corp. v. Cuno, 547 U.S. 332, 338 (2006); Natural Res. Def. Council v. EPA, 658 F.3d 200, 201 (2d Cir. 2011); Nat’l Elec. Mfrs. Ass’n v. U.S. Dep’t of Energy, 654 F.3d 496, 497 (4th Cir. 2011); Lake Carriers Ass’n v. EPA, 652 F.3d 1, 3 (D.C. Cir. 2011) (per curiam); Sierra Club v. U.S. Army Corps of Eng’rs, 645 F.3d 978, 982 (8th Cir. 2011); Pac. Merch. Shipping Ass’n v. Goldstene, 639 F.3d 1154, 1158 (9th Cir. 2011); Barnum Timber Co. v. EPA, 633 F.3d 894, 895 (9th Cir. 2011); Cal. Wilderness Coal. v. U.S. Dep’t of Energy, 631 F.3d 1072, 1079 (9th Cir. 2011); Nat’l Petrochemicals & Refiners Ass’n v. EPA, 630 F.3d 145, 147 (D.C. Cir. 2010); S. Coast Air Quality Mgmt. Dist. v. FERC, 621 F.3d 1085, 1089–90 (9th Cir. 2010); White v. United States, 601 F.3d 545, 547 (6th Cir. 2010); Catawba Cnty. v. EPA, 571 F.3d 20, 25 (D.C. Cir. 2009) (per curiam); Ctr. for Biological Diversity v. U.S. Dep’t of the Interior, 563 F.3d 466, 471–72 (D.C. Cir. 2009); Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18, 25 (1st Cir. 2007); Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin., 489 F.3d 1279, 1284 (D.C. Cir. 2007) (per curiam); Sierra Club v. Johnson, 436 F.3d 1269, 1272 (11th Cir. 2006).
40 See, e.g., Am. Elec. Power Co., 131 S. Ct. at 2534 (involving a public nuisance action against energy companies for their alleged contributions to climate change); Comer v. Murphy Oil USA, 585 F.3d 855, 855 (5th Cir. 2009) (same), vacated en banc, 607 F.3d 1049 (5th Cir. 2010) (lacking quorum); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868–69 (N.D. Cal. 2009) (same).
“blunt-instrument” approach to standing.\textsuperscript{41} In contrast, the specialized federal agencies are more likely to offer nuanced guidelines.\textsuperscript{42} Citizen suits are a subset of a larger movement of public interest litigation, which includes cases like the landmark tobacco lawsuit brought by state attorneys general, and class action lawsuits brought by plaintiffs’ attorneys.\textsuperscript{43} Urbanization and globalization have made citizens’ lives and interests intersect (and collide) much more than in previous eras. Accordingly, the public interest is a far more valid legal concern today than it was in the agrarian common law period, when many of our procedural protocols evolved.\textsuperscript{44}

It seems appropriate at this point to turn to a few examples to illustrate what we envision the agencies doing. The traditional Article III standing doctrine has three prongs: injury-in-fact, causation, and redressability.\textsuperscript{45} The last prong, redressability, falls squarely within the judiciary’s institutional competence, and thus should probably remain with the courts, as they have superior information about what remedies they can impose.\textsuperscript{46} Injury-in-fact, by contrast, is something about which an agency has more information and expertise. For example, suppose that for citizen suits over air pollution, the Environmental Protection Agency (EPA) defined a minimum threshold of environmental harm that merits an enforcement action, such as the affected geographic area (say, more than twenty acres) or metric tons of emissions (the Clean Air Act regulations already contain similar benchmarks).\textsuperscript{47} Standing re-


\textsuperscript{42} See Peter L. Strauss, Administrative Justice in the United States 135 (2d ed. 2002) (describing the expertise of agency staff).

\textsuperscript{43} Cf. infra notes 109–121 and accompanying text.

\textsuperscript{44} Cf. Massachusetts, 549 U.S. at 504–05 (describing the rise in carbon dioxide emissions and its related climatological effects).

\textsuperscript{45} See, e.g., Lujan, 504 U.S at 560–61. The doctrine itself falls within a much larger concept of justiciability, through which the Supreme Court interprets the words “Cases” and “Controversies” to implicate certain limitations on judicial power. See U.S. Const. art. III, § 2; see also Erwin Chemerinsky, Constitutional Law 62 (4th ed. 2011) (describing the constitutional requirements for standing).

\textsuperscript{46} See Lujan, 504 U.S. at 580–81 (Kennedy, J., concurring) (suggesting that if Congress were to adopt standing guidelines, it should do so only for injury and causation).

\textsuperscript{47} Cf. 42 U.S.C. § 7412(a)(1) (2006) (defining “major” hazardous air pollutants as any source that emits or could emit ten tons per year of any hazardous pollutant or twenty-five tons per year of any combination of hazardous pollutants); id. § 7472 (defining a Class I area to include national wilderness areas larger than five thousand acres and national parks larger than six thousand acres); id. § 7479(1) (defining “major” sources under the
quirements that reference such benchmarks would bring symmetry to this area of law. This Article uses such examples—twenty acres or twenty tons—purely for illustration; the EPA’s actual standard might be far different. 48

Similarly, regarding the causation prong, the Supreme Court has swung widely between extremes—from United States v. Students Challenging Regulatory Agency Procedures (SCRAP) 49 in 1973 to Lujan v. Defenders of Wildlife 50 in 1992 and back to Massachusetts v. EPA 51 in 2007. Yet the EPA has decades of experience defining chains of causation for liability under CERCLA, 52 RCRA, 53 TSCA, 54 and FIFRA 55—tracing lines of ownership and responsibility for both the affected land and the contaminants themselves (manufacturers, sellers, users, and disposers). 56 For

48 The EPA is the congressionally designated “expert” in regulating the pollutants in our atmosphere. See, e.g., Am. Elec. Power Co., 131 S. Ct. at 2539 (“The expert agency is surely better equipped to do the job than . . . . [f]ederal judges [who] lack the scientific, economic, and technological resources an agency can utilize . . . .”). Therefore, we propose that the EPA is in the best position to determine the most viable and practical scope of enforceable injuries. Cf. Milwaukee, 451 U.S. at 323 (“The agency imposed the conditions it considered best suited to further the goals of the Act . . . .”).

49 412 U.S. 669, 685 (1973) (8–0 decision) (holding that five law students had standing to challenge a nationwide railroad freight increase).

50 504 U.S. at 571–78 (7–2 decision) (holding that the defendants lacked standing to challenge an agency rule defining the territorial scope of the Endangered Species Act because their claimed injury was not concrete and particularized).

51 549 U.S. at 526 (5–4 decision) (granting Massachusetts standing to challenge EPA inaction under the Clean Air Act because of Massachusetts’ special interest in protecting its citizens).


56 See 42 U.S.C. § 6903(5) (defining “hazardous wastes” so that the EPA may regulate generation, transportation, or disposal that may “cause, or significantly contribute to an increase in mortality or an increase in a serious irreversible, or incapacitating reversible illness”); United States v. Alcan Aluminum Corp., 964 F.2d 252, 257, 264–65 (3d Cir. 1992) (holding that under Section 107 of CERCLA, a plaintiff must show a causal connection between a release or threatened release and the incurrence of response costs (citing 42 U.S.C. § 9607)).
certain environmental citizen suits, the EPA could promulgate very well-informed, nuanced rules about the appropriate lines for courts to draw on the causation element of standing.

Regarding suits against the agency itself, to which our secondary thesis is directed, we recognize that there is a potential conflict of interest for agencies to delimit who has the right to sue them. Our tentativeness on this prong of our proposal arises out of this problem. Nevertheless, the risk of agency self-interest is minimal given that our proposed rule originated with the Supreme Court, in Massachusetts, rather than with an agency.57 This is the “special solicitude for states” rule.58 Promoting the public interest is the primary virtue of such cases. And suits to compel an agency to regulate are inherently policy driven, so it is appropriate to favor plaintiffs who are more likely to represent broad public interests, such as state attorneys general.59

This Article proceeds as follows. Part I provides, rather briefly, the necessary background on the origin and development of the doctrine of standing, as well as the development and role of citizen suits.60 On the former point, we highlight the relative newness of the concept and the still underdeveloped nature of the Supreme Court’s jurisprudence on standing. Moreover, the emergence of the doctrine of standing coincides historically with the advent of citizen suits, which present the thorniest scenarios for courts in this arena.61 To some extent, the problem of standing and the nature of citizen suits are inseparable, and Part I attempts to situate standing within the context of public interest litigation, and citizen suits within the framework of the standing requirements. Both standing and citizen suits are features of the larger modern phenomenon of public interest litigation.62 The statutory component of the standing doctrine (i.e., citizen-suit provisions), and the relative infancy of the jurisprudence on the point, can give a background rationalization for our argument that administrative agencies should provide input to develop the doctrine of standing in the future.

After this background, Part II provides a foreground for the discussion: a recent case that is particularly illustrative for the arguments

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57 See Massachusetts, 549 U.S. at 519–20.
58 See id.
59 Cf. id. (granting deference to state attorneys general because they act in the interest of their constituents).
60 See infra notes 66–121 and accompanying text.
61 See infra notes 66–83 and accompanying text.
62 See e.g., Massachusetts, 549 U.S. at 504–06 (discussing standing in the context of environmental protection litigation).
that follow.\textsuperscript{63} The Supreme Court’s decision, in 2011, in \textit{American Electric} included a striking discussion of standing, which reveals both a trend on the Court regarding this issue, as well as an urgent need for extrajudicial input in this area.

Part III is the heart of the Article, presenting the main arguments for our primary thesis—that some of the definitions for standing to bring citizen suits can, and should, come from the administrative agencies entrusted with primary enforcement of the same laws or regulations.\textsuperscript{64} The arguments are partly descriptive and statutory—describing Congress’s implicit delegation of authority to the agencies to promulgate rules on this point—and partly normative, arguing that the agencies have the most expertise and best information to craft such rules. Besides arguing that agencies are a particularly appropriate source of guidance on this point, we also provide reasons for the urgency of extrajudicial input on issues of standing—the current trend toward judicial acquiescence, the proliferation of citizen-suit statutes, and the increasing market share of public interest litigation in our legal system overall. This Part will also attempt to anticipate and answer substantial objections to our thesis.

Part IV explores our secondary thesis—that states, through their attorneys general, should have preferential standing rules in public interest litigation against federal agencies, at least compared to private citizens or special interest groups.\textsuperscript{65} The main thrust of the argument is that these state officials better represent the public interest, in a holistic sense, than do private-party litigants. The Supreme Court, however, has also provided a few pragmatic and legal-formalist arguments for giving states special solicitude to have standing to bring claims against federal agencies. At the outset, we offer the disclaimer that we believe this secondary thesis is severable from the first. Thus, a reader could reject this part of the argument and still embrace the primary thesis, regarding citizen suits. Even so, the two prongs of our argument relate closely enough that they merit being discussed together.

This Article’s bifurcated thesis is premised on the proposal that standing should no longer serve primarily as a screening device, used to mitigate the quantity of plaintiffs navigating through the judicial system. Rather, standing should be viewed as a channeling mechanism, whereby all harmed individuals are channeled through procedural

\textsuperscript{63} See \textit{infra} notes 122–154 and accompanying text.

\textsuperscript{64} See \textit{infra} notes 155–299 and accompanying text.

\textsuperscript{65} See \textit{infra} notes 300–353 and accompanying text.
mechanisms that reveal the most egregiously injured plaintiffs, that is, those plaintiffs with the best (or worst, from the individual perspective) harms. Viewing standing as a doctrine that promotes channeling actually accomplishes the purposes the screening view purports to accomplish, but as this Article will explain, also achieves increasingly consistent results as to a critical threshold question such as standing. Consistent results thereby translate into better enforcement and greater understanding of our rights under federal statutes in the administrative age.

I. STANDING AND THE PUBLIC INTEREST

Historically, the emergence of standing requirements and the rise of public interest litigation were interrelated, and both are more recent developments than many lawyers and academics realize. Compared to procedural protocols inherited from the common law era, the jurisprudence of standing is arguably still in its infancy—it remains underdeveloped and undertheorized compared to other issues related to the definition of parties (such as privity, interpleader, indemnification, and accessory liability) and the other rules surrounding the commencement of litigation (statutes of limitations, pleading requirements, jurisdiction and venue, ripeness, and so forth). Citizen suit statutes, and codification more generally, created new issues—including important preliminary issues like standing—that confronted courts in the twentieth century. The following sections sketch the recent appearance of standing requirements and the simultaneous advent of public interest litigation. This brief background should help explain both the appropriateness and the present urgency for extrajudicial input to develop the boundaries of standing.

66 See Pushaw, supra note 3, at 32 (“The liberalization of standing sparked a huge rise in public interest litigation . . . .”).


69 See infra notes 70–121 and accompanying text.
A. The Origins of Modern Standing

Scholars have debated for decades about the origins of standing. A consensus has emerged that the modern standing doctrine began somewhere around the time of the Supreme Court’s 1923 decision in *Frothingham v. Mellon* and its 1924 decision in *Chicago Junction*. The question of why the doctrine arose, however, dwarfs the question of when. Understanding this contentiousness may help rationalize why its current application places a glass ceiling on public interest litigants.

The majority view now rests in the “insulation thesis,” which proposes that progressive Supreme Court justices manipulated the doctrine to “insulate” (i.e., protect) New Deal agencies from judicial review. Insulating agencies allowed them to implement New Deal goals freely, with essentially no limitations. Professor Daniel Ho and Erica

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70 See Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 Stan. L. Rev. 591, 594 (2010) (“Indeed, even the most basic question of the origins of the standing doctrine eludes scholars.”); Pushaw, supra note 2, at 396 (“[C]ommentators have failed to provide a rigorous theory of justiciability built upon the founders’ ideas.”).


74 See, e.g., Ho & Ross, supra note 70, at 594–95. Professor Daniel Ho and Erica Ross note the unique effect that this insulating prerogative may have accidentally caused: rather than keeping public interest litigation out of the courts, it essentially entrenched “the liberal New Deal administrative state.” See id. at 595.

75 See id. at 597–98 (explaining that liberal justices believed administrative agencies could best address the economic turmoil of the 1920s and 1930s). Until recently, though generally accepted among scholars, the thesis was merely speculation based on historical records and case law of the early 1900s. See id. at 595. Professor Ho and Ross “provide[] the first systematic empirical confirmation for the insulation thesis.” Id. at 647.
Ross conclude that standing existed without contest among conservative and liberal judges prior to the period of insulation, but that empirical evidence suggests that New Deal insulation played a significant role in crafting the modern doctrine.\textsuperscript{76} The minority view is that standing originated—and continues to arise out of—a need for judicial docket management, purely as a matter of efficiency.\textsuperscript{77} Some adherents of the insulation thesis, however, believe that docket management is present but is a secondary factor in standing’s development.\textsuperscript{78}

The difference between the insulation thesis and the docket-management theory is subtle, but fundamental. The docket-management theory (a synonym for “judicial efficiency”) implicitly views standing as a screening mechanism, focusing on the \textit{number} of plaintiffs before the court, through which certain plaintiffs are screened by the gatekeepers of justice (i.e., the courts).\textsuperscript{79} On the other hand, the insulation thesis implicitly views standing as a channeling function, in that it focuses on the \textit{nature} of the plaintiffs seeking relief before the court.\textsuperscript{80} The insulation view seeks to funnel all potential plaintiffs through certain procedural mechanisms that in turn create consistency in standing rulings and certainty in the minds of the plaintiffs. This “channels” the citizen-plaintiffs, and those that come out the other side represent the most egregiously harmed plaintiffs. That is essentially what standing seeks to accomplish—producing plaintiffs whose harms are personal to

\textsuperscript{76} Id. at 648. Professor Ho and Ross’s article presents some interesting conclusions from these early pre-insulation empirical findings:

[T]he early animators of the standing doctrine themselves assumed their decisions would have \textit{some} precedential effect on the lower courts and future Justices. While the doctrine certainly appears to be used strategically around the time of the New Deal to insulate agencies . . . . [o]ur data show that the doctrine . . . does not speak to any strong notion that standing is all politics.

\textit{Id.} (emphasis added). But the analysis does not preclude a stronger docket-management thesis because the evidence suggests that the doctrine did exist before the New Deal. \textit{See id.}

\textsuperscript{77} \textit{See}, e.g., Pushaw, \textit{supra} note 3, at 10 n.42. As Professor Pushaw notes:

I have long maintained that this need for docket control has been a major impetus behind the development of standing doctrine. The Court, however, has been reluctant to mention this concern explicitly, likely fearing that doing so would be condemned as an illegitimate policy decision that contradicts its long-standing position that Congress has absolute control over federal jurisdiction.

\textit{Id.} (citation omitted).

\textsuperscript{78} \textit{See}, e.g., Ho & Ross, \textit{supra} note 70, at 648.

\textsuperscript{79} \textit{See} Pushaw, \textit{supra} note 3, at 10 n.42.

\textsuperscript{80} \textit{See} Ho & Ross, \textit{supra} note 70, at 594–96.
them.\footnote{See \textit{Lujan}, 504 U.S. at 581 (Kennedy, J., concurring) ("[T]he party bringing suit must show that the action injures him in a concrete and personal way.").} But with such confusing and conflicted judicial decisions, the practical realities of standing in the administrative age simply do not intersect with the theoretical purposes the doctrine claims to support.\footnote{Compare \textit{Massachusetts}, 549 U.S. at 516–26 (holding that Massachusetts had a personal stake in the outcome of a genuine controversy, and therefore had standing to sue), with \textit{id.} at 535 (Roberts, C.J., dissenting) (arguing that the standing doctrine ensures judicial restraint and thereby promotes the separation of powers).} Screening mechanisms are inherently susceptible to political bias, stereotyping, and inappropriate grouping, and this approach to standing has made the doctrine more controversial than it otherwise would be.

The key difference between the two theories and the concomitant problems they theoretically displace rests in the nature of the problems they solve. If the problem standing seeks to address is that too many plaintiffs permeate the judicial system, then standing remedies that through a screening function (the judicial efficiency theory). If, however, the problem is the nature of the plaintiffs, then standing remedies that through a channeling mechanism (the insulation theory). Viewing standing as a channeling mechanism, as opposed to a screening device, is the underlying premise of our thesis.

The idea that administrative agencies should define standing also comports with the channeling view. Historically, standing channeled implementation and enforcement of progressive legislation to agencies with the appropriate expertise and organizational mission. Similarly, agencies can draw upon that knowledge and specialized expertise to channel private citizen suits through the most appropriate plaintiffs—those who best represent the public interest. Unfortunately, modern courts have increasingly used standing as a screening mechanism to limit the number of suits, rather than as a mechanism to channel public interest suits to the best plaintiffs.\footnote{See \textit{Pushaw}, supra note 3, at 10 n.42.} From a policy perspective, such channeling requires the type of expertise found in agencies rather than courts, which of course was the justification for the insulation thesis in the first place.

B. The Modern Doctrine

Arguably, in \textit{Lujan} the Supreme Court set out an unattainable test for plaintiffs litigating under citizen suit provisions.\footnote{See, e.g., Sunstein, \textit{What’s Standing?}, supra note 5, at 165–67.} Climate change
forced the Court to address the standing analysis in a new context.\(^{85}\) Several state attorneys general, local governments, and private litigants sought to compel the EPA to declare, through rulemaking proceedings, that carbon dioxide emissions from new motor vehicles were an “air pollutant” under Section 202 of the Clean Air Act,\(^{86}\) and in turn craft regulations that would place limitations on those emissions.\(^{87}\) The EPA had refused to act\(^{88}\) and the U.S. Court of Appeals for the D.C. Circuit denied review on appeal; however, the Supreme Court granted the petition for a writ of certiorari.\(^{89}\)

The plaintiffs’ standing was the first contested issue in *Massachusetts*\(^{90}\). The Court distinguished states from normal litigants for the purposes of standing by giving special deference to Massachusetts.\(^{91}\) The risk of actual and imminent harm because of global warming was intensified by the threat of “rising seas . . . swallow[ing] Massachusetts’[s] coastal land.”\(^{92}\) The State’s particularized injury derived from its capacity as a landowner.\(^{93}\) As the sea level continues rising, the documented severity of injury to the state increases.\(^{94}\) Although the injury technically arises in the future, had the EPA continued its strategy of regulatory delay, a concrete and imminent injury would result.\(^{95}\) Further, the State demonstrated a causal connection from the coastline injuries to the claimed source of those injuries (carbon dioxide emissions) be-

\(^{85}\) Cf. *Massachusetts*, 549 U.S. at 518–23 (holding that the plaintiffs had standing to sue over a future injury).

\(^{86}\) See id. at 532.

\(^{87}\) See id. at 510–12.

\(^{88}\) See Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,925–31 (Sept. 8, 2003) (explaining that the EPA questioned whether the Clean Air Act authorized the agency to issue regulations addressing global climate change and that political pressures from both sides of the issue led the agency to conclude that regulation “was not appropriate at this time”).


\(^{90}\) See 549 U.S. at 520–30. The Court took a narrow approach to reviewing the D.C. Circuit’s standing decision, holding that only one of the plaintiffs must establish standing for the Court to review the case. See id. at 518 (citing Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 52 & n.2 (2006)).

\(^{91}\) See id. at 519 (“That Massachusetts does in fact own a great deal of the territory alleged to be affected” only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.”).

\(^{92}\) See id. at 522 (noting the importance of the fact that Massachusetts owned a substantial portion of coastal lands).

\(^{93}\) Id.

\(^{94}\) See id. at 522–23.

\(^{95}\) See id. at 525.
cause the emissions at least contributed to the harms alleged. The Court’s remedial powers could provide the State relief as well, because although regulating motor vehicle emissions would not completely reverse the effects of global warming, the Court can compel the EPA to “slow or reduce” it if necessary.

As to the merits of the case, the Court concluded that the EPA must either regulate greenhouse gas emissions from new motor vehicles or decide the emissions are not pollutants. The Court interpreted Section 202 of the Clean Air Act to provide the EPA with statutory authority to regulate carbon dioxide emissions and ruled that the EPA’s arguments held no weight against the statutory text. After the conclusion of Massachusetts, the EPA released an endangerment finding and initiated a mandate to regulate carbon dioxide emissions potentially contributing to global warming.

The decision’s most logical outcome grants standing to state attorneys general litigating against federal agencies. Over time, the role of a state attorney general has shifted from a counsel for the executive branch to the “people’s lawyer.” The powers granted to state attorneys general reach much farther than simple citizen protection: the

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96 549 U.S. at 523. The Court explained that regardless of how large or small, automobile emissions at least “contribute” to the injury, and thus the EPA should regulate those contributions. See id. at 523–24.

97 Id. at 525 (citing Larson, 456 U.S. at 244 & n.15) (satisfying redressability).

98 Id. at 532. The Court held that if the EPA believes that carbon dioxide gases cause no harm to the atmosphere, then the “EPA must say so.” Id. at 534.

99 Id. at 532–33 (refusing to allow the EPA to attempt to avoid its statutory obligation to regulate dangerous emissions).

100 See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009).


103 Id. at 39. That the state attorney general now represents the people is further evidenced by the fact that forty-three states currently elect their attorney general. See About NAAG, Nat’l Ass’n of Att’ys Gen., http://www.naag.org/about_naag.php (last visited Aug. 24, 2012).
state attorney general position affords the citizens of a particular state a method of influencing national policy.\textsuperscript{104} Additionally, because the Court rejected the EPA’s refusal to regulate, the decision points to the implicit contrast with previous decisions where the Court customarily granted judicial deference to agency decisions.\textsuperscript{105} The question remained, however, whether standing as described in Massachusetts included private organizations, such as special interest groups.\textsuperscript{106} The conclusion follows that for standing, interest groups have inferior positioning to state attorneys general.\textsuperscript{107} That would end this discussion, had the Second Circuit not issued a puzzling discussion on standing two years later.\textsuperscript{108}

C. Standing’s Role in Public Interest Litigation

The modern trend of standing decisions indicates a liberalization of the standing doctrine.\textsuperscript{109} This facilitates increasingly aggressive public interest litigation through citizen suit provisions.\textsuperscript{110} We take a moderate stance on the relative value of public interest litigation.\textsuperscript{111} Nevertheless, in light of cases such as American Electric that illustrate the Court’s presumable willingness to uphold standing for a private plaintiff,\textsuperscript{112} public interest litigation will soon present a practical, unmanageable problem to which we propose a minimalist, but feasible, solution that could channel several positive externalities.

\textsuperscript{104} See Stevenson, supra note 102, at 40 (noting that electing an attorney general “allows voters an alternative method of influencing national policy”). Indeed, such an empowering new role for a state attorney general could have a democratizing effect. See id. at 40–41. Although this could create inefficiency, it could also promote checks and balances. See id. at 41.

\textsuperscript{105} See id. at 74 (“This distinction further tips the scales towards the states, who not only have assurances of standing, but also have an invitation to compel federal agencies to regulate new areas where they have been previously silent.”).

\textsuperscript{106} See, e.g., id. at 50 (“Activist groups . . . may find that they have a diminished role for litigation against federal agencies in light of the special solicitude rule.”).

\textsuperscript{107} Id.


\textsuperscript{109} We propose, as others have agreed, that the doctrine will continue down this path. See infra notes 122–154 and accompanying text.

\textsuperscript{110} See Pushaw, supra note 3, at 32 (noting this rise in public interest litigation).

\textsuperscript{111} Cf. Daniel P. Kessler, Introduction to Regulation Versus Litigation: Perspectives from Economics and Law 3 (Daniel P. Kessler ed., 2011) (“[T]he use of litigation as a means to force companies to accept regulation outside of the normal political process raised several new questions about litigation’s dynamic costs and benefits.”).

\textsuperscript{112} See infra notes 148–154 and accompanying text.
Citizen suits are a subset of a larger movement of public interest litigation.\textsuperscript{113} The common law developed during a time when society was more rural and decentralized, and individual property rights were the foundation of our legal system. In a milieu focused on personal property rights and disputes between individual parties, it makes sense to have lawsuit entry requirements that ensure the plaintiff’s personal stake or property interest in the claim.\textsuperscript{114} Public interests have greater importance in modern politics due to urbanization, globalization, and infrastructured society.\textsuperscript{115} Apart from institutional competency problems (i.e., avoiding courts issuing declaratory judgments or settling political questions), historical standing requirements helped guarantee that plaintiffs would have the incentive to prosecute a claim properly, and that parties did not bring claims with first-order impacts on other individuals’ personal property rights.\textsuperscript{116}

\textsuperscript{113} See infra notes 155--299 and accompanying text.
\textsuperscript{114} See, e.g., Lujan, 504 U.S. at 581 (Kennedy, J., concurring) (“[T]he party bringing suit must show that the action injures him in a concrete and personal way.”).
\textsuperscript{116} See Lujan, 504 U.S. at 581 (Kennedy, J., concurring) (“This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” (internal quotation marks omitted)).
The modern era brought changes to this legal landscape. Urbanization has made citizens’ legal interests overlap, and sometimes collide, much more than in previous eras;\textsuperscript{117} globalization and technical advances have similarly increased individuals’ connectivity.\textsuperscript{118} As a result, collective legal rights—the public interest—can create a demand for legal redress that would have been largely unknown in the common law era.\textsuperscript{119} The public interest is arguably a more valid legal concern today than it was a century ago, when many of our procedural protocols, including standing requirements, first evolved.\textsuperscript{120} Public interest litigation, whether in the form of citizen suits, class actions, or attorney general claims, now constitutes an important share of court dockets in the United States, and the rules for standing have become antiquated and unworkable.\textsuperscript{121} There is an urgent need for updated eligibility rules for plaintiffs bringing citizen suits, and the relevant administrative agencies are in the best position to bring the necessary subtlety to this area.

II. STANDING IN AMERICAN ELECTRIC

The 2011 U.S. Supreme Court case, \textit{American Electric Power Co. v. Connecticut}, involved a group of defendants\textsuperscript{122} that the plaintiffs\textsuperscript{123} claimed were “the five largest emitters of carbon dioxide in the United

\textsuperscript{117} See Lobel, \textit{supra} note 115, at 942.
\textsuperscript{120} See Deborah L. Rhode, \textit{Public Interest Law: The Movement at Midlife}, 60 Stan. L. Rev. 2027, 2028 (2008) (discussing how the capacities of public interest law have increased as the problems it seeks to address have multiplied).
\textsuperscript{122} The defendants that petitioned the U.S. Supreme Court included four private companies (American Electric Power Company, Inc.; Southern Company; Xcel Energy Inc.; and Cinergy Corporation), and the Tennessee Valley Authority (a government-owned corporation that operates several fossil fuel-fired power plants in various states). See Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2534 & n.5 (2011).
\textsuperscript{123} The plaintiffs included eight states (California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin), the City of New York, and a group of three nonprofit trusts (Open Space Institute, Inc.; Open Space Conservancy, Inc.; and the Audubon Society of New Hampshire). See id. at 2533–34 & nn.3–4.
The plaintiffs’ assertions, however, differed from those considered by the Court in 2007 in *Massachusetts v. EPA*; the plaintiffs in *American Electric* asserted that the defendants’ carbon dioxide emissions violated federal common law public nuisance protections.\(^{125}\) On appeal, the Supreme Court considered whether the plaintiffs could maintain federal common law nuisance claims against carbon dioxide emitters, ultimately deciding the nuisance claim 8–0 in favor of American Electric because a future EPA regulation displaces any federal common law right to seek a remedy for carbon dioxide emissions.\(^{126}\) Unlike the issues of displacement and preemption, on which the justices generally agreed, an issue of contention among the justices involved the question of whether New York City, the States, and the private plaintiffs had standing.\(^{127}\) The deciding eight justices split on the issue of standing in an ambiguous four-sentence paragraph.\(^{128}\)

Thus, although the Supreme Court overturned the Second Circuit’s decision as to nuisance in *American Electric*, the Court’s split left the Second Circuit’s decision on standing intact.\(^{129}\) The Second Circuit

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\(^{124}\) See *id.* at 2534 (“[the defendants’] collective annual emissions of 650 million tons constitute 25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities, and 2.5 percent of all anthropogenic emissions worldwide.” (citation omitted)).


\(^{126}\) *Am. Elec. Power Co.*, 131 S. Ct. at 2537. Justice Sonia Sotomayor did not take part in the Supreme Court’s consideration of the case because she had heard the matter while on the Second Circuit. See *id.* at 2540.

\(^{127}\) See *id.* at 2535.

\(^{128}\) See *id.* The four-sentence paragraph gave no indication of the Court’s future intentions on standing, nor did it indicate which justices voted for or against standing; the latter is particularly unusual. See *id.* Justice Ruth Bader Ginsburg may have given a clue as to how the split emerged through her use of “adhered,” noting that four justices “adhered to the dissenting views in *Massachusetts v. EPA*.” See Martinned, Comment to *Supreme Court Unanimous That Clean Air Act Displaces Climate Suits*, [Volokh Conspiracy](http://volokh.com/2011/06/20/supreme-court-unanimous-that-clean-air-act-displaces-climate-suits/) (June 20, 2011, 2:04 PM), http://volokh.com/2011/06/20/supreme-court-unanimous-that-clean-air-act-displaces-climate-suits/. Also, Justice Samuel Alito peculiarly wrote a single-sentence concurrence joined by Justice Clarence Thomas. See *Am. Elec. Power Co.*, 131 S. Ct. at 2540–41 (Alito, J., concurring); see also Jonathan H. Adler, *Supreme Court Unanimous That Clean Air Act Displaces Climate Suits*, [Volokh Conspiracy](http://volokh.com/2011/06/20/supreme-court-unanimous-that-clean-air-act-displaces-climate-suits/) (June 20, 2011, 10:45 AM), http://volokh.com/2011/06/20/supreme-court-unanimous-that-clean-air-act-displaces-climate-suits/ (noting Justice Antonin Scalia and Chief Justice John Roberts’s potential strategy to limit the *Massachusetts* standing decision by not joining Justice Alito’s concurrence).

\(^{129}\) See *Am. Elec. Power Co.*, 131 S. Ct. at 2535. Correspondingly, although the Supreme Court’s decision holds great importance to this Article, the substantive standing analysis comes from the Second Circuit’s opinion. See *id.*; *Connecticut v. Am. Elec. Power Co.*, 582
clearly meant to take the analysis a step beyond *Massachusetts*. In *Massachusetts*, the Supreme Court avoided the standing analysis for the private conservation groups.\(^{130}\) In *American Electric*, however, the Second Circuit tackled the question head on, holding that the trusts sufficiently alleged facts that proved standing.\(^{131}\)

### A. Standing for the Private Plaintiffs

The Second Circuit’s *American Electric* decision focused on the future injury to the ecological value of the properties\(^{132}\) owned by the trusts.\(^{133}\) Petitioners claimed that these diminishing harms undermined their ability to promote legitimate goals with the properties: to preserve land for use and enjoyment, and for scientific and educational purposes.\(^{134}\) The defendants argued that these injuries constituted future injuries, and not the kind of injuries that could fairly be characterized as imminent.\(^{135}\)

In *American Electric*, the Second Circuit turned to the definition of “imminent” applied by the Supreme Court in its 1992 decision in *Lujan v. Defenders of Wildlife*.\(^{136}\) In *Lujan*, the Court interpreted the term as not imposing a strict temporal requirement that a future injury occur within a particular period after a complaint is filed.\(^{137}\) The Second Circuit echoed these sentiments, holding that the plaintiffs’ arguments indicated that the certainty of the future injury—as opposed to a mere hypothetical international travel that will happen soon as in *Lujan*—confers standing.\(^{138}\) The emissions that contributed to the harms would

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\(^{130}\) *See Massachusetts*, 549 U.S. at 518 (stressing the special position of Massachusetts).

\(^{131}\) *See Am. Elec. Power Co.*, 582 F.3d at 349.

\(^{132}\) The properties included lands owned by the trusts or lands held in conservation easements. *See id.* at 342.

\(^{133}\) *Id.* Similar to *Massachusetts*, the trusts argued that the rising sea levels caused by global warming, to which the defendants’ emissions contributed, harmed properties along the coasts and tidal rivers. *See id.*

\(^{134}\) *Id.*

\(^{135}\) *See id.* at 342–43.

\(^{136}\) *See id.* at 343 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 & n.2 (1992)); *cf. Lujan*, 504 U.S. at 579 (Kennedy, J., concurring) (stating that the claimed “injury must be real and immediate” (internal quotation marks omitted)).

\(^{137}\) 504 U.S. at 564 & n.2.

\(^{138}\) *Am. Elec. Power Co.*, 582 F.3d at 343 (citing Clinton v. City of New York, 542 U.S. 417, 459 (1998)); *see Baur v. Veneman*, 352 F.3d 625, 641 (2d Cir. 2003) (holding that the plaintiff had standing at the motion to dismiss stage even though the medical harm was merely “anticipated”).
continue, and only worsen as time went on, until the injuries manifested into a complete diminution in property value.\textsuperscript{139}

The causation—the nexus between the alleged harms and the alleged acts of the defendants—was that the defendants allegedly amounted to the “five largest emitters of carbon dioxide in the United States.”\textsuperscript{140} Expanding on this, the plaintiff-States argued that the defendants’ emissions “directly and proximately contribute to their injuries and threatened injuries.”\textsuperscript{141} The defendants relied on an argument attributing pollution harm to its source; however, the Court had rejected that argument two years prior in \textit{Massachusetts}.\textsuperscript{142} Instead, the Second Circuit explained that simply proving that the defendants contributed to the pollution sufficed to show that the defendants’ acts contributed to the plaintiffs’ alleged injuries, and as such, the defendant may not escape liability by requiring a special burden of proof to establish standing.\textsuperscript{143} A plaintiff does not have to sue every defendant potentially causing their injuries; the pollution of a single defendant can justify causation of at least some part of a plaintiff’s injuries.\textsuperscript{144}

The plaintiffs argued that a court could redress the harms caused by the defendants’ substantial emissions of carbon dioxide into the atmosphere by capping the defendants’ emissions to a specific percentage each year for at least a decade.\textsuperscript{145} The defendants countered that the plaintiffs could not prove that capping the defendants’ emissions by an unidentified percentage would redress the harms the plaintiffs sought to delay.\textsuperscript{146} The \textit{American Electric} court held, however, that causation was established because “[p]laintiffs have sued [d]efendants who, they allege, are \textit{directly} causing them injury.”\textsuperscript{147}

\textsuperscript{139} See \textit{Am. Elec. Power Co.}, 582 F.3d at 344.
\textsuperscript{140} See id. at 345 (citation omitted).
\textsuperscript{141} \textit{Id.} Contributing to an ongoing problem such as global warming can suffice as an injury for standing. See \textit{Massachusetts}, 549 U.S. at 521.
\textsuperscript{142} See \textit{Am. Elec. Power Co.}, 582 F.3d at 345–46 (rejecting the elevated traceability burden advocated by the defendants and applying the common law causation standard for indivisible harm).
\textsuperscript{143} See id. at 345–46.
\textsuperscript{145} \textit{Am. Elec. Power Co.}, 582 F.3d at 347–48.
\textsuperscript{147} See \textit{Am. Elec. Power Co.}, 582 F.3d at 348 (emphasis added).
B. The Plurality Problem: Where Do the Nine Justices Stand?

Justice Sonia Sotomayor recused herself from the Supreme Court’s consideration of American Electric, as she had taken part in the Second Circuit’s review of the case. The remaining eight justices split evenly on the standing issue. Arguably, the continued “liberalization” of standing hinges on what Justice Sotomayor would decide, as her vote will break the tie on standing.

In her short time on the Supreme Court, Justice Sotomayor has voted twice with the liberal block of the Court on the issue of standing. In 2011 in Arizona Christian School Tuition Organization v. Winn, she voted along with Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan in favor of standing. And in 2010 in Salazar v. Buono, Justice Sotomayor joined a dissenting opinion, along with Justices Ginsburg and John Paul Stevens, rejecting Justice Antonin Scalia’s arguments against standing. In sum, if Justice Sotomayor had voted, it appears that a five-justice majority would have favored standing in American Electric. When similar cases arise in the future, and all the justices can vote, this majority will likely prevail, despite the opposition from Chief Justice John Roberts and Justices Scalia, Clarence Thomas, and Samuel Alito.

III. Agency-Created Standing Requirements for Citizen Suits

The definitions for standing to bring citizen suits can, and should, come from the administrative agencies entrusted with primary enforcement of the same laws or regulations. The arguments in favor of this position are partly descriptive and statutory—describing Congress’s

149 Id. at 2535.
150 See id. at 2535, 2540.
152 131 S. Ct. at 1450 (Kagan & Sotomayor, JJs., dissenting) (arguing in favor of standing in a taxpayer suit alleging that Arizona’s tuition tax credit violated the Establishment Clause).
153 130 S. Ct. at 1830 n.2 (Ginsburg, Stevens, & Sotomayor, JJs., dissenting) (agreeing with the plurality that the plaintiff had standing to allege that the public display of a Latin cross in a national park violated the Establishment Clause). Justice Stephen Breyer also dissented in Salazar. See id. at 1843 (Breyer, J., dissenting) (“For the same reason, we must here assume that the plaintiff originally had standing to bring the lawsuit.”).
implicit delegation of authority to the agencies to promulgate rules on this point—and partly normative, arguing that the agencies have the most expertise and best information to craft such rules. Besides arguing that agencies are a particularly appropriate source of guidance on this point, we also provide reasons for the urgency of extrajudicial input on issues of standing—the current trend toward judicial acquiescence, the proliferation of citizen-suit statutes, and the increasing market share of public interest litigation in our legal system overall. This Part will also attempt to anticipate and answer substantial objections to our thesis.

A. Congress’s Authority to Define Standing and to Delegate Its Authority

The text of Article III, and the nontextual separation-of-powers doctrine, furnished part of the basis for the U.S. Supreme Court’s early jurisprudence on standing—the doctrine kept courts from creeping too close to legislative functions by, for instance, issuing declaratory judgments or answering political questions. The original idea was not to limit Congress, but rather to limit the courts from stepping in where Congress had declined to act. Eventually, of course, some commentators interpreted the doctrine as a pushback from the courts against Congress, cabining Congress from conscripting “the courts in its battles with the executive branch.”

Yet most academic commentary up to now has focused on Congress’s ability to expand standing, when the statutes in question already had the broadest possible language permitting parties to sue,

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155 See infra notes 158–237 and accompanying text.
156 See infra notes 238–246 and accompanying text.
157 See infra notes 247–299 and accompanying text.
158 U.S. Const. art. III.
159 See John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1971–73 (2011) (discussing how no one overarching theory of separation of powers can explain all constitutional provisions and thus concluding that each provision should be interpreted at a retail level).
160 See, e.g., Scalia, supra note 2, at 894.
161 See id. at 882–83.
163 See, e.g., supra note 5 (summarizing scholarly perspectives).
(i.e., “any person”).\textsuperscript{164} Congress left the standing question completely open in these statutes; this left courts to navigate without direction and created confusion in the academic literature—how can we argue about the farthest limits of congressional expansion in the area, when Congress begins statutes with the most inclusive terminology available? Our argument takes the discussion in a countervailing direction: whether Congress could add language limiting who can sue, or excluding certain parties as plaintiffs if their connection to the claim seems too attenuated. This idea is certainly less controversial than speculations about whether Congress’s power to authorize suits is infinite. Congressional restrictions on standing present no separation-of-powers concerns or other constitutional issues, assuming that the restrictions do not present a genuine due process violation or infringe on Seventh Amendment rights.\textsuperscript{165}

Congress has simply remained silent in federal citizen suit provisions, and on standing in general.\textsuperscript{166} Rather than viewing the “any person” language of citizen-suit provisions as maximally expansive, it seems more reasonable to read the language as perfectly minimal in terms of guidance about the legally appropriate plaintiffs for a given citizen suit.\textsuperscript{167} Congress simply left the question unanswered—a gap in the law.

Congress could have answered the question; it would have been within its powers to do so.\textsuperscript{168} For starters, Congress could have left out the citizen-suit provision completely, leaving no opportunity to sue. Under the public rights doctrine, citizen suits best resemble public rights rather than private rights;\textsuperscript{169} and what Congress giveth, Congress

\textsuperscript{164} See, e.g., 42 U.S.C. § 7604(a) (2006); see also 33 U.S.C § 1365(a) (2006) (“[A]ny citizen may commence a civil action on his own behalf . . . .”).

\textsuperscript{165} See U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”); id. amend. VII (“In Suits at common law . . . the right of trial by jury shall be preserved . . . .”); id. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”). Some legislative assignments of common law claims to bankruptcy courts through pendent or ancillary jurisdiction have, according to the Court, violated the Seventh Amendment to the U.S. Constitution. See, e.g., Stern v. Marshall, 131 S. Ct. 2594, 2615 (2011) (“The ‘experts’ in the federal system at resolving common law counterclaims such as [the defendant’s] are the Article III courts . . . .”).

\textsuperscript{166} See, e.g., 42 U.S.C. § 7604(a).

\textsuperscript{167} See id.

\textsuperscript{168} See, e.g., Lujan, 504 U.S. at 580 (Kennedy, J., concurring) (stating that Congress has the power to define injury and causation).

\textsuperscript{169} See, e.g., F. Andrew Hessick, Standing, Injury in Fact, and Private Rights, 93 CORNELL L. REV. 275, 276–77 (2008) (“[A] desire to limit private individuals’ ability to invoke the judiciary to vindicate public rights has motivated the Court to limit the types of factual injuries
can taketh away. Further, each of the statutes themselves limits the citizen suits to the scope of the relevant act (such as the Clean Air Act).\(^{170}\) Congress can impose a wide variety of other limitations on the right to sue under these enactments: statutes of limitations, notice requirements or similar time constraints,\(^ {171}\) limitations on forum or venue (such as giving original jurisdiction to the D.C. Circuit),\(^ {172}\) or requiring agency acquiescence to the suit (such as the Equal Employment Opportunity Commission’s “right to sue” letters).\(^ {173}\) Congress forbids the suits when the agency has already commenced enforcement.\(^ {174}\) Even if Congress has not yet exercised its power to define the eligibility for potential plaintiffs, it seems undeniable that Congress could further delimit the injury-in-fact and chain of causation that would suffice for standing. It is unsurprising, therefore, that the Supreme Court has suggested, and many commentators concur, that Congress can define some limitations on standing for citizen suits, at least within reason.\(^ {175}\)

Given this seemingly easy premise, it follows that Congress can delegate authority to the appropriate government agencies to propose and adopt the guidelines for those cases over which the agency already has primary enforcement authority. Congress has already delegated to the applicable agencies the power to promulgate regulations,\(^ {176}\) to spend funds on research and monitoring compliance,\(^ {177}\) and to bring enforcement actions.\(^ {178}\)

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\(^{170}\) *E.g.*, 42 U.S.C. § 7604(a)(1)–(3) (limiting the provision’s applicability to the Clean Air Act).

\(^{171}\) *See, e.g.*, id. § 7604(b)(1)(A) (requiring that a plaintiff provide notice to the EPA, the State, and to any alleged violator of the Clean Air Act sixty days prior to commencement of any suit).

\(^{172}\) *See, e.g.*, id. § 7413(d)(4); id. § 7524(c)(5).

\(^{173}\) *See id.* § 2000e-5(f)(1).

\(^{174}\) *See id.* § 7604(b)(1)(B).

\(^{175}\) *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring); *supra* note 5 and accompanying text (summarizing scholarly commentary recommending that Congress act on Justice Anthony Kennedy’s suggestions in *Lujan*).

\(^{176}\) For example, Congress has required the EPA to publish regulations in a number of areas. *See, e.g.*, 42 U.S.C. § 7408(a)(1) (to define pollutants); *id.* § 7408(f)(1) (to regulate the transportation of pollutants); *id.* § 7409(a)(1) (to define air-quality standards); *id.* § 7411(b)(1)(A) (to list stationary sources).

\(^{177}\) *See, e.g.*, id. § 7403(a)–(b) (research); *id.* § 7403(c) (monitoring).

\(^{178}\) *See, e.g.*, id. § 7413 (federal enforcement).
B. Implied Delegation

Not only could Congress delegate to agencies the task of defining standing for citizen suits, but arguably it already has. The statutory silence on this issue presumably leaves a gap for the agency itself to fill, especially within the context of a larger enactment conferring broad discretionary powers on an agency.

Congress typically delegates authority with broad, general authorizations, giving an agency power to promulgate regulations, to conduct research or require reporting (information gathering), to monitor compliance, to bring enforcement actions, and to conduct adjudicative tribunals or hearings.\(^{179}\) Specific or express provisions are the exception, not the rule. There are a few areas, such as subpoena powers, where courts have historically required “express authorization” in the agency’s organic statute,\(^{180}\) but normally the opposite is true—agencies function within broad authorizations and have nearly unfettered discretion within those general guidelines.\(^{181}\) In other words, Congress more often delegates authority by what it does not say than by what it specifies.\(^{182}\)

The doctrine of judicial deference to agency interpretations of law, which was established in the Supreme Court’s 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, rests on the idea that


\(^{180}\) See, e.g., United States v. Sec. State Bank & Trust, 473 F.2d 638, 641 (5th Cir. 1973); *see also* Interstate Commerce Comm’n v. Brimson, 154 U.S. 447, 485 (1894), overruled by Bloom v. Illinois, 391 U.S. 194 (1968) (“[T]he power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises.” (citation omitted))).


statutory ambiguity authorizes implementing agencies to exercise discretion. If a statute is ambiguous, courts must defer to the agency’s interpretation and gap-filling as long as it is merely “reasonable.” Chevron deference is a cornerstone of administrative law. In 2009, in Negusie v. Holder, the Supreme Court abruptly turned Chevron from a permissive rule into a compulsory rule, and reversed an agency (the Board of Immigration Appeals) for having deferred to the Court’s own precedents instead of formulating its own resolution to an ambiguity in the law pertaining to refugees. The Court’s groundbreaking approach—requiring, rather than merely allowing, agencies to interpret their governing statutes—has startling implications for Chevron analysis and for administrative law in general.

The Court’s decision in Negusie continued a trend originating with its 2005 decision in National Cable & Telecommunications Ass’n v. Brand X Internet Services, which explicitly declared a preference for agencies, rather than courts, to fill statutory gaps. But the Court took the much bolder step of transforming this preference into a mandate. For the sake of clarity and convenience, we refer to this new approach as “injunctive Chevron” to distinguish it from classic Chevron jurisprudence. Justice John Paul Stevens, the author of Chevron, dissented in Negusie and charged the majority with turning

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184 See id.
187 See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980–85 (2005) (explaining that expert agencies are better equipped than generalist courts to make the delicate policy choices necessary to resolve statutory ambiguities in regulatory statutes).
188 Compare Mayo Found., 131 S. Ct. at 712–14 (explaining that Chevron typically provides the appropriate standard of review for agency gap-filling “where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, [and] where the resulting rule falls within the statutory grant of authority”) (alteration in original) (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173 (2007)), with Negusie, 555 U.S. at 516–17, 523 (holding that, in the first instance, the Board of Immigration Appeals ought to resolve an ambiguity in the Immigration and Nationality Act).
Chevron on its head.\textsuperscript{189} In 2011, the Court continued in this direction by making Chevron a doctrine of preemption as well, holding in American Electric Power Co. v. Connecticut that courts cannot initiate interpretation of a statute where a particular administrative agency has promised to do so instead.\textsuperscript{190}

The citizen-suit statutes are simply silent about standing. Congress placed each of these statutes, however, within a longer act conferring primary enforcement authority on an agency.\textsuperscript{191} The larger acts that surround the citizen-suit statutes contain general standards—“intelligible principles” in the jargon of delegation analysis\textsuperscript{192}—that guide the agencies in their endeavors.\textsuperscript{193} The statutes give an agency authority to set standards, develop a monitoring and enforcement plan, and so forth.\textsuperscript{194} It seems logical to infer that this delegated authority to fill in the details includes the question of who has standing to bring the related citizen suits. Legislative silence on nearly every other matter puts the issues under the agency’s discretion and purview.\textsuperscript{195} Standing is yet another point that fits into this larger paradigm.

Not only does the legislative silence within the citizen-suit provisions serve as an invitation for the relevant agency to fill the gap, but the overall structure of the acts also suggests that Congress intended (or would have intended, had it considered the question) for the agency to fill this gap. For example, the larger statutory framework expressly authorizes agencies to limit all potential citizen suits through preemption and displacement.\textsuperscript{196} Any agency litigation against a violator automati-

\textsuperscript{189} See Negusie, 555 U.S. at 534 (Stevens, J., concurring in part and dissenting in part) (arguing that the Court misapplied Chevron deference to a question of pure statutory interpretation that courts ought to decide).

\textsuperscript{190} See 131 S. Ct. 2527, 2538–39 (2011) (holding that the plaintiffs’ federal common law nuisance claims were preempted by (1) the Environmental Protection Agency’s (EPA) pending rulemaking and (2) the Clean Air Act’s express provisions for private enforcement).

\textsuperscript{191} See id. at 2538–39 (describing the Clean Air Act’s citizen-suit provision); supra note 25 (collecting citizen-suit provisions in various regulatory statutes).

\textsuperscript{192} See Mistretta, 488 U.S. at 372 (noting that Congress is permitted to “delegate[s] power under broad general directives,” but that it must articulate an intelligible principle to guide agency action).

\textsuperscript{193} See Bryan Clark & Amanda C. Leiter, Judicial Hide and Seek: What Agencies Can (and Can’t) Do to Limit Judicial Review, 52 B.C. L. Rev. 1687, 1700 (2011) (noting that the “intelligible principle requirement does little to constrain Congress’s ability to transfer sweeping quasi-legislative authority to agencies”); supra notes 24–27 and accompanying text.

\textsuperscript{194} See supra notes 25–26 and accompanying text.

\textsuperscript{195} See, e.g., Chevron, 467 U.S. at 844.

\textsuperscript{196} See, e.g., 42 U.S.C. § 7604(b)(1) (B) (2006); California v. Dep’t of the Navy, 624 F.2d 885, 887 (9th Cir. 1980) (per curiam) (holding that the states have broad powers to implement the provisions of the Clean Air Act, but that the Act preempts state regulations).
cally preempts any citizen suits against the same defendant. Thus, agencies have express statutory authority to forestall (by a preemptive move) any citizen suit that they deem contrary to the policy of the current administration. Similarly, agencies can “displace” related public interest suits brought under common law doctrines. This applies even when the agency is still in the process of researching and drafting the nascent regulations. Agencies can also channel citizen suits by defining, via regulation, the actual violations for which citizens may sue, and through their extensive systems of permits, variances, and specific exemptions for the regulated industry. Arguably, judicially delineated standing requirements such as injury and causation that are within the agency’s expertise contradict the statutory schema that Congress created.

198 See id.
200 See, e.g., id.
201 For example, the Clean Air Act authorizes a number of suits. See 42 U.S.C § 7413(b) (permitting the EPA to pursue administrative remedies when the state fails to comply with or enforce a state implementation plan (SIP)); id. § 7420 (allowing the EPA to issue regulations and collect noncompliance penalties against stationary sources not in compliance with the Clean Air Act); id. § 7477 (providing the EPA with the power to prevent modifications to a major emitting facility that do not comply with the regulations); id. § 7509(a) (allowing the EPA to sanction states not in compliance with their own SIPs); id. § 7511(d) (allowing EPA enforcement of fees imposed on major stationary sources in “ozone nonattainment areas”). These enforcement provisions, however, depend on the EPA’s defined terms published (and updated from time to time) in the relevant regulations. See id. § 7408(a)(1) (requiring the EPA to compile a list of air pollutants “which may reasonably be anticipated to endanger public health or welfare”); id. § 7409(b)(1) (requiring the EPA to define National Ambient Air Quality Standards (NAAQS) to allow “an adequate margin of safety . . . requisite to protect the public health”); id. § 7411(b) (requiring the EPA to publish regulations defining “new” stationary sources subject to the Prevention of Significant Deterioration (PSD) Program); id. § 7412(b)(2) (requiring the EPA to keep an updated list of hazardous air pollutants); id. § 7412(d) (requiring the EPA to promulgate regulations establishing emissions standards for each category of major area sources of hazardous air pollutants); id. § 7502 (requiring the EPA to designate nonattainment areas for NAAQS).
202 The EPA’s regulations provide a prime example of such a permitting system. See, e.g., 42 U.S.C. § 7411(c) (delineating new source performance standards (NSPS) permits); id. § 7411(j) (delineating NSPS waivers); id. § 7474(b)(1)(B) (delineating the PSD program permitting process); id. § 7475(d)(2)(D) (providing exemptions to PSD permitting requirements); id. § 7503 (delineating nonattainment area permits); id. § 7503(c)(1) (allowing offsets to permit requirements); id. § 7661c (delineating permitting requirements for hazardous air pollutants).
203 We argue that recent Supreme Court decisions have increasingly viewed the rule of Chevron deference as a mandate, rather than a discretionary option, meaning that agencies must fill gaps in ambiguous statutory language. See, e.g., Mayo Found., 131 S. Ct. at 713–14. Following this logic, in conjunction with the clearly ambiguous language of most citizen-
C. Agency Expertise, Information, and Specialization Relevant to Standing

Judicial doctrines of deference to agency interpretation of statutes, which rest upon a presumption of agency expertise and resources,\(^\text{204}\) suggest that courts would also accede to an agency’s rules about standing. The premise underlying judicial deference as articulated in both the Supreme Court’s 1944 decision in *Skidmore v. Swift & Co.* as well as its decision in *Chevron* is that agencies have staff with relevant expertise and training, and that their specialized functions provide agencies with opportunities to analyze the issues deeply.\(^\text{205}\) Agencies conduct extensive research to formulate policy positions and collect large quantities of useful data via the reporting requirements imposed on the regulated industries.\(^\text{206}\)

As the Supreme Court itself recently opined, “The expert agency is surely better equipped to do the job than . . . . [f]ederal judges [who] lack the scientific, economic, and technological resources an agency can utilize . . . .”\(^\text{207}\) Regarding standing for citizen suits, agencies have superior information (compared to private plaintiffs) about how to rank or prioritize various violators (potential defendants). Thus, the agencies can assess the relative urgency of suing substantial violators on one end of the continuum, as opposed to de minimis violators against whom citizen suits would arguably be frivolous.\(^\text{208}\)

suit provisions, the administrative agency must articulate some standards by which private persons may sue private industry members allegedly violating the statutory scheme, private industry members operating without the necessary permits, or the administrative agency itself. *See, e.g.*, 42 U.S.C § 7604(a) (“[A]ny person may commence a civil action . . . .”). Our bifurcated proposal is the most logical solution to both the statutory ambiguity as well as the standing “crisis” as explained in this Article.

\(^{204}\) *E.g.*, *Chevron*, 467 U.S. at 844.

\(^{205}\) *See id.*; *Skidmore v. Swift & Co.*, 323 U.S. 134, 137–40 (1944); *see also* United States v. Mead, 533 U.S. 218, 227–29 (2001) (“The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency’s position.” (footnotes omitted)).

\(^{206}\) *See supra* note 26 and accompanying text.

\(^{207}\) *Am. Elec. Power Co.*, 131 S. Ct. at 2539; *cf.* City of Milwaukee v. Illinois, 451 U.S. 304, 323 (1981) (“The agency imposed the conditions it considered best suited to further the goals of the Act, and provided detailed progress reports so that it could continually monitor the situation.”).

\(^{208}\) *Cf.* *Milwaukee*, 451 U.S. at 323–24 (stating that the EPA imposed the conditions it considered best suited to achieve the statutory goals and concluding that the comprehensive regulatory scheme preempted the plaintiff’s federal common law claim).
The requirements for standing primarily focus on the nature of the plaintiff’s injury. In the context of pollution-related citizen suits, therefore, the nature of the plaintiff’s injury overlaps substantially with the scope, scale, and seriousness of the environmental harm. Thus, the agency must consider how a particular violation fits into the larger context of environmental preservation and the total aggregate of violations. Suppose, for example, that for citizen suits over air pollution, the Environmental Protection Agency (EPA) proscribed a minimum threshold of environmental harm that merits an enforcement action, such as the affected geographic area (e.g., more than twenty acres) or metric tons of emissions (e.g., more than 100,000 tons of emissions). Similar benchmarks already permeate the Clean Air Act regulations. The agency, of course, would select the appropriate levels, put its determination through the usual notice-and-comment procedures (soliciting public comment and addressing the more serious submissions), and develop a detailed administrative record to show how it reached its decision. The Administrative Procedure Act’s (APA) standards for judicial review of agency actions (the default rule is “arbitrary and capricious”) force agencies to develop thorough records of their decision making and to demonstrate thoughtful consideration of alternatives. This standard of review both suggests that agencies normally serve as more consistent and articulate decisionmakers than courts, at least within the agencies’ domains of expertise, and ensures that agency rules on standing derive from extensive deliberation and consideration of multiple alternatives.

Well-informed, well-theorized guidelines for the requisite injury in fact would serve a dual purpose—they would channel citizen suits toward the most urgent, crucial cases, and they would help safeguard

210 See id. at 86–87.
211 See supra note 47 (providing examples of such definitions).
214 See, e.g., Penzoil Co. v. Fed. Power Comm’n, 534 F.2d 627, 632 (5th Cir. 1976) (holding that the agency had to consider, during rulemaking, possible alternatives that would promote the same outcome and protect countervailing interests).
215 See Massachusetts v. EPA, 549 U.S. 497, 560 (2007) (Scalia, J., dissenting) (“This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.”).
against potential abuses of the citizen-suit provisions.\textsuperscript{216} Potential abuses of the provisions could take the form of frivolous claims, or suits in which the plaintiff has some ulterior motive that does not align sufficiently with the public interest.\textsuperscript{217} Allowing agencies to define the requisite injury-in-fact could thus provide a channeling effect to favor plaintiffs with a greater personal stake in the claim (who are therefore more likely to pursue it diligently and follow through to the end), and could better align the citizen-suit plaintiffs with the larger public interest.\textsuperscript{218} As Congress clearly contemplated citizen suits to supplement the agency’s own enforcement efforts,\textsuperscript{219} the agencies themselves would have the best information or knowledge of where those gaps are, or what supplemental litigation would be most helpful from a public policy standpoint.

Similarly, regarding the causation element, we have noted that the EPA has decades of experience defining chains of causation for liability under CERCLA, RCRA, TSCA, and FIFRA—tracing lines of ownership and responsibility for both the affected land and the contaminants themselves (manufacturers, sellers, users, and disposers).\textsuperscript{220} Suppose, therefore, that the EPA drew a cutoff line for the requisite causation in citizen suits—a plausible, specified point between nearly all-inclusive “but-for” causation and an overly strict approach.\textsuperscript{221} In almost any type


\textsuperscript{217} See Adler, supra note 33, at 58–59 (“[T]he priorities of environmental litigation outfits and individual citizen-suit plaintiffs will not always align with the public’s interest in greater environmental protection. Citizen-suit provisions create incentives for environmentalist plaintiffs to pursue their self-interest. . . . [T]here is good reason to believe that at least some environmental litigation is motivated by economic concerns.”).


\textsuperscript{220} See supra notes 52–56 and accompanying text (defining these acts).

\textsuperscript{221} For example, similar arguments were brought to light during oral argument in American Electric

JUSTICE [ANTONIN] SCALIA: [Y]ou’re lumping [the emissions contributors] all together. Suppose you lump together all the cows in the country.
of citizen suit, the relevant agencies could give very informed, nuanced rules about the appropriate lines for courts to draw on the causation element of standing. This would be far superior to the existing practice of leaving this task to the courts, as even a single appellate court can swing between extremes on the issue of causation, as the Supreme Court has done. The inconsistency of judicial findings on the causation prong of standing has led to chronic uncertainty in this area and disparate, unequal results for similarly situated parties.

Unlike the injury-in-fact inquiry, the causation prong of standing shifts the focus to the defendant and the etiological connection be-

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MS. UNDERWOOD: Yes. And in terms of determining what—who is a substantial contributor, there are—because I do think that at some point a company’s emissions or a cow’s would be too small to give rise to standing or—to either standing or a nuisance claim, and there are various ways to draw the lines. It’s a familiar task for common law courts to decide how much is substantial, too. But for an example, if the cut-off were producers of 100,000 tons per year, as in the EPA tailoring rule for new sources, just to take an example, then according to EPA’s own technical data there would be at most a few thousand potential defendants.

222 Compare Pollack v. U.S. Dep’t of Justice, 577 F.3d 736, 741–42 (7th Cir. 2009) (“[Plaintiff’s] belief that the bullets affect him is also unlike the air pollution at issue in *Franklin County*, because it is commonly understood that air pollution can travel three miles through the air and different wind conditions could easily blow the pollution onto land at that distance. In contrast, it is not readily apparent that Pollack would be affected by the shooting at issue here.”), with Sierra Club v. Franklin Cnty. Power of Ill., LLC, 546 F.3d 918, 927–28 (7th Cir. 2008) (holding that the plaintiffs sufficiently alleged standing despite the fact that “no one knows the ultimate magnitude” of their injury).

223 See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (“We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court . . . .”).

224 See *supra* note 222 (illustrating different results from the same court).
tween the supposed perpetrator and the result. Agencies have a superior vantage point on this inquiry as well, that is, filtering the pool of potential defendants. Their expertise and specialized approach to etiology or causation would yield better selections of defendants, and their rules could better align the targets of citizen suits with the actors who pose the greatest direct threats to the public interest. Moreover, agencies already entrusted with primary enforcement authority of an act will have a repeat-player’s advantage on strategy for enforcement litigation. Agencies become familiar with how courts respond to different types of claims in the area and strategies for framing issues; they see how defendants (violators) approach this type of litigation, their propensity for settlement, and their compliance with consent decrees. They likely have a nuanced understanding of the balance between pushing certain defendants to trial and taking a more conciliatory approach to settlement negotiations in order to maximize the result in favor of the public interest.

The redressability prong of standing should remain with the courts rather than agencies, as this falls within the judiciary’s expertise, experience, and specialized role. Even though agencies are better able to define the appropriate injury and line of causation required for citizen suit eligibility, courts have firsthand knowledge about what remedies they can most effectively administer.

An additional factor argues in favor of agency-defined standing requirements: the political or democratic dimension. As mentioned above, agencies are subject to the notice-and-comment procedures of the APA; these rules not only enrich the agency decisions with more thorough deliberation, but also introduce a healthy democratic component into administrative rulemaking. Any rules that agencies promul-

225 Compare Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000) (“The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.”), with Lujan, 504 U.S. at 560 (noting that the plaintiff must show a causal connection between the injury and the conduct complained of such that the injury is “fairly traceable” to the challenged action).

226 See supra note 48.


228 See Lujan, 504 U.S. at 580 (Kennedy, J., concurring) (arguing that Congress could define injury and causation, but making no mention of redressability); supra notes 45–46 and accompanying text.

229 See 5 U.S.C. § 553(b)–(c) (2006); supra notes 32–33 and accompanying text.

230 See Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 66 (1969) (describing notice-and-comment procedures as the most “democratic” regulatory procedure because they provide the public with open access); cf. Cajun Elec. Power Coop.,
gate about standing for citizen suits would involve substantial periods of public comment,\textsuperscript{231} and responsive discussion by the agency to the received comments before the final regulation appears in the Federal Register.\textsuperscript{232} Activist groups that regularly bring citizen suits would have an opportunity to weigh in on the standing rules for future public interest lawsuits.\textsuperscript{233} The activists’ participation in setting their own boundaries for future litigation would not only yield useful information, but also would enhance the perceived legitimacy of the rules among those they affect the most. Another source of political accountability for the agencies is the rigorous Office of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) review that proposed regulations must undergo.\textsuperscript{234} OMB and OIRA work under close supervision by the President,\textsuperscript{235} who is more sensitive to national public sentiment than either the courts or the agencies.\textsuperscript{236} These valuable, democratizing sources of input on the standing requirements—public

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\textsuperscript{231} See 5 U.S.C. § 553(c) (requiring that agencies give interested persons an opportunity to participate in the rulemaking process “through submission of written data, views, or arguments with or without opportunity for oral presentation”); Richard J. Pierce, \textit{Rulemaking and the Administrative Procedure Act}, 32 Tulsa L.J. 185, 185–87 (1996).

\textsuperscript{232} See 5 U.S.C. § 553(c); Stephen M. Johnson, \textit{The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet}, 50 Admin. L. Rev. 277, 281–83 & n.22 (1998) (stating that courts have interpreted the APA requirements to mean that agencies must respond to the received public comments).


\textsuperscript{234} See supra notes 34–35 and accompanying text.

\textsuperscript{235} See supra notes 34–35 and accompanying text.

\textsuperscript{236} See Charles Gardner Geyh, \textit{Can the Rule of Law Survive Judicial Politics?}, 97 Cornell L. Rev. 191, 195 (2012) (“The legal establishment maintains that judges who are buffered from political pressure will . . . follow the law—hence the need for an independent judiciary that is insulated from popular and political control.”); Cristina M. Rodriguez, \textit{Constraint Through Delegation: The Case of Executive Control over Immigration Policy}, 59 Duke L.J. 1787, 1808–09 (2010) (discussing how administrative agencies are subjected to less political pressures than the President or Congress in part due to their scientific and regulatory expertise); Rebecca E. Zietlow, \textit{Popular Originalism? The Tea Party Movement and Constitutional Theory}, 64 Fla. L. Rev. 483, 503 (2012) (“Political officials are held accountable to their electorates . . . in a way that federal courts are not. This is not to say that courts are completely isolated from political pressures. Recent empirical work shows courts are responsive to political trends.”).
comment submission and OMB and OIRA review—are missing from our current regime of ad hoc judicial choices.  

D. The Need for Extrajudicial Inputs

The current system for determining standing is broken. Appellate courts continue to issue opinions on standing that are inconsistent, confusing, and seemingly results-driven. Potential plaintiffs and defendants alike confront an inappropriate level of uncertainty and unpredictability about anticipated litigation in this regard. The ad hoc, decentralized nature of judicial determinations for standing are the natural consequence of the courts’ lack of expertise and specialized knowledge about the proper role of citizen suits. Agencies could provide better-informed rules, and the enabling statutes suggest that this power falls within their existing authority. As the U.S. Code increasingly reflects authorization of citizen suits, the courts’ need for guidance on standing increases correspondingly. Courts will need agencies to play gatekeeper in order for federal judicial dockets to remain manageable. Agencies are better able than courts to fulfill Congress’s intentions regarding citizen suits. Courts necessarily must take a “blunt-instrument” approach to standing, whereas specialized federal agencies can offer more nuanced guidelines.

Finally, as mentioned above, the latest spate of Supreme Court decisions on standing suggest an increasingly liberal—or at least confusing—approach. Ultimately, liberalized standing rules facilitate increased citizen-suit activity. Thus, we argue, new parameters from an appropriate extrajudicial source would be particularly timely at this

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238 See Pushaw, supra note 3, at 52; supra notes 222–223 (citing conflicting outcomes in standing cases decided by the same court).

239 See Pushaw, supra note 3, at 52.

240 See, e.g., 42 U.S.C. § 7604(b) (2006) (providing that citizens cannot bring suit until after they have provided sixty days notice and that private citizen suits are preempted if the Administrator is diligently prosecuting a civil action).

241 See Pushaw, supra note 3, at 10 n.42 (arguing that courts’ docket control needs animate prudential standing limitations).


243 See supra notes 122–154 and accompanying text.

244 See Pushaw, supra note 3, at 32 (“The liberalization of standing sparked a huge rise in public interest litigation . . . .”).
point. The issues surrounding questionable standing cases have grown increasingly complex, and the courts have haphazardly solved them with conflicting and ambiguous rulings.

E. Anticipated Objections

This Section anticipates a few objections to our proposal and attempts to offer at least preliminary responses. Three primary objections seem most pertinent. The first objection is that the judiciary has traditionally served as the gatekeeper for the courts and thus judges should fashion the standing requirements. The argument follows that judges have insider’s experience to identify cases that could cause problems as they proceed through litigation. The second objection is that agency capture presents too large a problem for agencies to define standing requirements, because it would allow the agency to protect the industry through onerous standing requirements. The last objection is that limiting the ambiguity of standing requirements eliminates the more creative citizen-suit standing cases.

1. The Judiciary as the Gatekeeper for the Courthouse

The most obvious objection to the proposal suggested here is a version of the judiciary-as-gatekeeper notion—the idea that the judiciary has been the traditional, or is perhaps the most appropriate, gatekeeper for the courts. Historically, judges fashioned the standing requirements, the argument might go, and they used them to avoid abuses of the court system, to avert awkward constitutional or political turf wars with the other branches, to preserve judicial economy, and to preempt cases whose outcomes would be futile even if

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245 See, e.g., Massachusetts, 549 U.S. at 505 (discussing the harms of greenhouse gases).
246 See supra notes 222–223 and accompanying text.
247 See infra notes 250–268 and accompanying text.
248 See infra notes 269–285 and accompanying text.
249 See infra notes 286–299 and accompanying text.
251 See Lujan, 504 U.S. at 581 (Stevens, J., concurring) (observing that the Court’s standing doctrine “preserves the vitality of the adversarial process”).
252 See Scalia, supra note 2, at 894.
253 See, e.g., Ho & Ross, supra note 70, at 596–97. But see Bradley S. Clanton, Standing and the English Prerogative Writs: The Original Understanding, 63 Brook L. Rev. 1001, 1008 (1997) (arguing that scholars overstate the public’s access to the courts at the time the Constitution was drafted).
the plaintiffs prevailed.\footnote{See, e.g., Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm’n, 680 F.2d 810, 813–14 (D.C. Cir. 1982) (calling the action moot because the agency reissued a challenged rule in compliance with 5 U.S.C. § 553).} An institutional competence version of this argument might posit that judges have insider’s expertise to flag cases that will create unseemly problems as they proceed through litigation, such as failure to prosecute the claims, evidentiary and jurisdictional problems if the proper parties are not involved in the case,\footnote{See Pushaw, supra note 3, at 3 (“[S]tanding enhances the quality of judicial decisions expounding federal law by ensuring that they are made in the context of a concrete dispute between adverse parties with a genuine stake in the outcome . . . .”).} or separation-of-powers issues.\footnote{See id.} The judiciary inherently has the greatest institutional competencies and superior information to screen cases that the courts should not adjudicate.\footnote{See Peter M. Shane, The Separation of Powers and the Rule of Law: The Virtues of “Seeing the Trees,” 30 WM. & MARY L. REV. 375, 384 (1989) (noting that courts rely on a variety of practical and doctrinal mechanisms to screen cases); cf. William W. Buzbee, Standing and the Statutory Universe, 11 DUKE ENVT'L. L. & POL’Y F. 247, 270 (2001) (“The courts’ critical function in standing is to ensure the plaintiff is among the injured, so as to filter the truly afflicted from the abstractly distressed.” (internal quotation marks omitted)); Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 HARV. L. REV. 915, 919 (1988) (“[T]he only federal tribunals that can be assigned to resolve justiciable controversies are ‘article III courts,’ whose judges enjoy the safeguards of life tenure and undiminished salary.”); The Supreme Court, 2003 Term—Leading Cases, 118 HARV. L. REV. 248, 426 (2004) (“Drawing on its abstention and standing jurisprudence, the Court developed a prudential standing rule that had the potential to address both judicial federalism and institutional competency concerns.”). But see Richard J. Pierce, Jr., Issues Raised by Friends of the Earth v. Laidlaw Environmental Services: Access to the Courts for Environmental Plaintiffs, 11 DUKE ENVT'L. L. & POL’Y F. 207, 228–29 (2001) (stating that courts lack the institutional competence to make determinations of injury and causation for standing in the environmental context).} The various versions of this argument share a common premise: that standing is primarily a screening mechanism for the courts, and that those who spend the most time inside the courthouse know best which parties should not enter.

A cynical reply to this objection might suggest that judges use standing requirements to cap—or perhaps reduce—their own caseloads.\footnote{See Pushaw, supra note 3, at 10 n.42 (“Indeed, I have long maintained that this need for docket control has been a major impetus behind the development of the standing doctrine. The Court, however, has been reluctant to mention this concern explicitly, likely fearing that doing so would be condemned as an illegitimate policy decision that contradicts its long-standing position that Congress has absolute control over federal jurisdiction.” (citation omitted)).} This would be an ugly example of bureaucratic self-interest on the part of the judiciary, but it is conceivable that it occurs in a few cas-
es. This response, which approaches a conspiracy theory of laziness, fails to explain the great effort appellate judges have put into rationalizing their determinations on standing. A pretext for clearing the docket would probably be more cursory and dismissive; the opinions on standing, however, are rather Herculean.

A related and more serious reply would be the oft-suggested concern that judges use standing requirements merely as a proxy for the merits, disposing of cases on seemingly sterile procedural grounds as a pretext to punish unsympathetic plaintiffs or reward favored defendants. The consistent breakdown along partisan lines of Supreme Court justices on the issue of standing lends strong support to this idea: judges are abusing the gatekeeper function by finding standing for plaintiffs they favor and finding no standing for plaintiffs whose cause they disfavor, especially in politically controversial public interest litigation. In its worst form, judicial standing requirements could be merely a means of thwarting congressional intent, especially in the domain of social reform legislation. In the wake of the Supreme Court’s 1992 decision in Lujan v. Defenders of Wildlife, in fact, commentators accused the Court of using the very device that was supposed to safeguard the separation of powers to infringe upon the power of the legislative branch, frustrating the purpose of environmental citizen-suit statutes. A short version of this argument is that standing rules are easier to abuse than citizen-suit provisions in the statutes, at least when the rules are fashioned entirely by judges.

An additional response challenges the underlying premise that standing rules are primarily a screening device. It is at least possible to

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259 See Pushaw, supra note 2, at 458 (“In the quarter century before 1937, the Court adapted justiciability concepts to keep dockets manageable in light of the increasing scope of federal law and the appearance of novel forms of action . . . .”).


261 See, e.g., Hessick, supra note 169, at 304–06; see also Transcript of Oral Argument, supra note 221, at 7 (Kennedy, J., questioning) (“[W]e all know that you sometimes have to peek at the merits to see if there’s standing. There’s a little cheating that goes on.”); id. at 11 (Kennedy, J., questioning) (“I’m more receptive to this kind of argument if I know we’re going to the merits as opposed to standing.”).

262 See, e.g., Gene R. Nichol, Jr., Rethinking Standing, 72 Calif. L. Rev. 68, 69–70 (1984) (arguing that the Court has applied the concrete injury requirement to “areas of article III investigation for which the requirement is ill suited”); Richard J. Pierce, Jr., Is Standing Law or Politics?, 77 N.C. L. Rev. 1741, 1742–43 (1999) (arguing that judges grant standing to plaintiffs who align with their ideological agendas).

263 See Pushaw, supra note 3, at 38 (“Thus, Lujan and Spear suggested that the Court would apply its Article III injury-in-fact requirement even when doing so frustrated Congress’s intent.” (citations omitted)).

264 E.g., Sunstein, What’s Standing?, supra note 5, at 217–18.
conceive of standing primarily as a channeling device, and secondarily as a screening device.\textsuperscript{265} That is indeed one way to rephrase the proposal made in this Article. The existence of citizen-suit statutes is prima facie evidence that Congress wanted such suits in the courts.\textsuperscript{266} It is more consistent with this evident congressional intent to treat standing as a way to align those suits as closely as possible with the overarching goals of the relevant act, which is how agencies are likely to approach standing rules when they promulgate them.\textsuperscript{267} The judiciary is more likely to treat standing as a way to eliminate seemingly bogus cases from the array of citizen suits, but it seems more likely that Congress would want such suits channeled than run through a procedural gauntlet.\textsuperscript{268}

2. Agency Capture Limits Citizen Suits Excessively

Although the last objection focused on the incentives and competencies of judges, a second objection to our proposal might be that agencies have a perverse incentive to promulgate overly restrictive standing rules and thereby to limit (or eliminate) citizen suits. One version of this argument might attribute turf-war motivations to the agency—a desire to “own” or control all the public interest litigation in its

\textsuperscript{265} Cf. infra note 326 and accompanying text (describing how the Court’s special solicitude for states rule promotes the screening and channeling of cases).

\textsuperscript{266} See Air Pollution—1970: Hearings on S. 3229, S. 3466, and S. 3546 Before the Subcomm. on Air and Water Pollution of the Comm. of Pub. Works, 91st Cong. 1483 (1970) (statement of Edward F. Mannino) (“The private suit is an absolute necessity for effective enforcement.”); see also S. Rep. No. 91-1196, at 21 (1970) (“If the Secretary and State and local agencies fail in their responsibility, the public would be guaranteed the right to seek vigorous enforcement action under the citizen suit provisions of section 304.”).

\textsuperscript{267} See Chevron, 467 U.S. at 843–44. Indeed, as the Chevron Court noted:

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

\textit{Id.} (citations omitted) (internal quotation marks omitted).

\textsuperscript{268} See S. Rep. No. 91-1196, at 3 (“[T]he committee believes that public participation should not be limited to the development of standards and plans.”).
respective arena. More common and more likely, however, are versions of this objection that assume agencies are prone to capture by the regulated industry itself, which would then seek to shield itself from lawsuits by having its puppet agency promulgate insurmountable standing requirements. Yet an even more sophisticated version of this objection might argue that Congress created citizen suits for the very purpose of bypassing what it perceived as already captured agencies and turning enforcement over to the citizens themselves. Permitting the captured entities to rein in citizen suits, the argument might go, would thus thwart the legislature’s purpose.

This objection mirrors the concern about the judiciary explained above—standing requirements fashioned as a pretext to achieve a political result. One response to this objection, therefore, is that the hazards come out as a wash—if both the judiciary and the agencies have incentives to misuse standing to drive certain results and favor certain parties, then the concerns cancel each other out and we should assign the job to the entity with the greatest expertise in the area.

That said, agency capture is always a serious concern. Nevertheless, the constant complaints from industry about burdensome regulations suggest that such capture is far from complete. In addition, agency capture is more likely to manifest itself in enforcement than in regulations. The primary mechanism through which agency capture occurs

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270 Cf. Gillian E. Metzger, Federalism and Federal Agency Reform, 111 COLUM. L. REV. 1, 27 (2011) (noting forms of agency capture, including industry capture, as the classic form).

271 See supra note 219 and accompanying text.

272 See supra note 219 and accompanying text.

273 See e.g., Adler, supra note 33, at 65–66 (noting the regulatory inefficiencies that hinder business). But cf. Exec. Order No. 13,563 § 6, 3 C.F.R. 215, 217 (2011) (“[A]gencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them . . . .”)

is presidential appointments of agency directors; the rank-and-file civil servant workforce at the agency remains largely intact through election cycles. Although a newly appointed director who wants to adopt an indulgent approach toward the regulated industry can easily abstain from enforcement, repealing or changing regulations is costly in terms of time and resources, as courts require a well-developed administrative record for any changes in the rules. Favors for the industry, therefore, usually will take the form of agency nonenforcement, as it demands no resources and is relatively invisible politically. The upshot is that an agency rule about standing is likely to remain intact despite moderate amounts of agency capture.

Returning to the more developed version of the argument—that citizen-suit provisions assume agency capture and are the legislative remedy for it—it merits observing again that Congress already expressly gave agencies several ways to preempt, displace, and channel citizen

In fact, after [Bernie] Madoff was arrested, his secretary revealed that the few times SEC investigators had come to the firm most of them had asked for employment applications. That was typical. If during an exam investigators found a problem, they would report it and issue a deficiency notice or fine, but most of these people weren’t looking to derail their careers by bringing big, complicated cases that would take years to resolve against the most powerful people in the industry.

Id. Bernie Madoff orchestrated a sixty-five billion dollar Ponzi scheme that the SEC failed, or refused, to discover on numerous occasions. See id.

275 See 5 U.S.C. § 706 (2006) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence . . . or otherwise reviewed on the record of an agency hearing.”).

276 See DAVID SCHOEGBROD, POWER WITHOUT RESPONSIBILITY 109–11 (1993) (arguing that agencies show preference to certain interest groups that essentially pay “rent”); see also Ezra Ross & Martin Pritkin, The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties, 29 YALE L. & Pol’Y REV. 453, 505 (2011) (“There are also great incentives for a captured agency to fail to collect fines because it is a win-win situation. The agency garners the public relations benefit of appearing to be a tough enforcer and spares the regulated firm from bearing the negative effect of the fine.”); Martin Shapiro, Administrative Discretion: The Next Stage, 92 YALE L.J. 1487, 1515–16 (1983); Daniella Evans, Note, Concrete Private Interest in Regulatory Enforcement: Tradable Environmental Resource Rights as a Basis for Standing, 29 YALE J. ON REG. 201, 205–06 (2012) (“The latter part of the twentieth century saw increasing distrust of federal agencies and awareness of the potential for agency capture or laxness, leading to inadequate enforcement of regulatory legislation.”); Hiroshi Motomura, Comment, Choosing Immigrants, Making Citizens, 59 STAN. L. REV. 857, 867 (2007) (“[D]eliberate underenforcement is more a product of political considerations than constitutional ones. . . . Facing irreconcilable tensions between politically visible responses and the underlying urgent need for immigrant labor in many sectors of the economy, decision-makers can defer tough choices and avoid political confrontation.”).
Congressional intent to safeguard citizen suits against agency capture is quite ambiguous; at the least, the principle of citizen suits being a mitigation measure against capture is not absolute.

Finally, judicial review of the administrative record (“hard look” scrutiny) and the democratizing features described above (especially notice-and-comment procedures) provide significant checks on agency capture. Even where capture occurs, agencies must operate within certain boundaries, and this in itself partly answers this objection.

These two objections highlight an asymmetry between the incentives (and, therefore, the agency costs) of the judiciary and the relevant agency on standing. Suppose a conservative activist judge disposes of an environmental citizen suit based on standing. The judge then enjoys the benefit of more free time, as well as the benefit of favoring the corporate defendant and snubbing the environmental activist group who brought the suit. A captured agency, however, cannot get the same double benefit. To the extent that the agency eliminates citizen suits by promulgating insurmountable requirements for standing, those potential enforcement cases become the agency’s responsibility—helping the regulated industry by blocking citizen suits makes more work for the agency in the long run, at least in theory. The captured agency, of

277 See Metzger, supra note 270, at 8–18 (discussing several of the Court’s recent pre-emption decisions). See generally Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority?; Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2007) (discussing the potential dangers of agency preemption of state laws).

278 See Adler, supra note 33, at 79 (arguing that excessive citizen suits can discourage efficient bargaining among plaintiffs and defendants).

279 See Elizabeth Magill & Adrian Vermeule, Allocating Power Within Agencies, 120 Yale L.J. 1032, 1052 (2011) (“Under ‘hard look’ review, agencies have an obligation to provide a reasoned policy analysis for their regulatory choices.”).


281 See Magill & Vermeule, supra note 279, at 1056–61 (discussing the structure and processes of administrative agencies). Arguably, a captured agency is still subject to more procedural limitations than a court crafting procedural standing thresholds. Proof of this can be found in the wide range of standing decisions in the past eighty years. See, e.g., Massachusetts, 549 U.S. at 528 (stating that the EPA’s argument that Congress did not intend for the EPA to regulate greenhouse gases was merely a procedural limitation).

282 An agency has certain nondiscretionary duties of enforcement and rule promulgation. See, e.g., Freedom of Information Act, 5 U.S.C § 552 (2006 & Supp. III 2009) (delineating public disclosure requirements); 42 U.S.C. § 7604(b) (2006) (granting EPA primary enforcement authority). If it promulgates standing rules, those rules should contemplate realistic enforcement goals. If the agency were to create injury and causation rules that contemplated unrealistic determinations of injury and overly complex chains of causation, then the agency could have indirectly placed large burdens on its own administrative functions by forcing both menial and substantial enforcement actions on the agency itself.
course, can decline to pursue those enforcement claims, but eventually could face repercussions for its indolence from the public and from a frustrated legislature. Thus, when the judiciary abuses the standing rules and uses them as a proxy for partisan obstructionism, judges give themselves somewhat lighter dockets as well. If a captured agency attempts the same move, however, it has the opposite secondary effect.

3. Losing the Arbitrage Advantages of Decentralized Standards and Diversified Agendas

A third objection is that uniform, well-developed rules present their own hazards, especially when emanating from a centralized authority instead of geographically and hierarchically dispersed sources like courts. Mistakes in rulemaking become systemic errors—with far greater repercussions—when the rulemaking is more centralized and concentrated. The Supreme Court’s tripartite rules for standing are vague and malleable, allowing lower courts to improvise and innovate within these general standards. Commentators may decry the incon-

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283 See Heckler v. Chaney, 470 U.S. 821, 830–33 (1985) (holding that an agency’s enforcement decisions are entitled to a presumption of unreviewability).

284 See Seidenfeld & Nugent, supra note 121, at 315 (“[C]itizen participation provides a mechanism for controlling agency abuse under the cooperative enforcement model . . . .”).

285 See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S. Code) (promoting stable financial markets by “improving accountability and transparency in the financial systems”). The Dodd-Frank Act was passed, in part, because many believed that Wall Street was being regulated by a captured agency—the SEC. See, e.g., Markopolos, supra note 274, at 63, 127.

286 But see Seidenfeld & Nugent, supra note 121, at 270–71. As Professor Mark Seidenfeld and Janna Satz Nugent note:

Regional [EPA] offices also work closely with state enforcement agencies, and therefore may be prone to take into account state concerns about the cost that strict compliance will impose on companies that provide jobs and other benefits to local economies. . . . [C]entral staff members involved in enforcement are apt to prefer strict compliance with regulatory requirements. Of course, their actions are subject to oversight by political appointees . . . .

Id. (footnotes omitted).

287 See Adler, supra note 33, at 44 (“Centralized regulatory agencies are further limited in their ability to provide optimal enforcement of environmental regulations because they have limited [local] information.”); Metzger, supra note 270, at 30 (“The decisions identify state law as a mechanism to guard against federal agency failure, and federalism presumptions represent an important analytical tool for ensuring that state law is preserved.”).

288 See Pushaw, supra note 3, at 52.
istent application of the current standing requirements, but such inconsistency could function as a type of healthy diversification in the system, allowing for a degree of benevolent legal arbitrage.289

Another version of this objection might emphasize the diversified policy agendas in enforcement actions when citizen suits can proceed without regard to the policy priorities of the agency with primary enforcement authority.290 The idea is that citizen suits themselves inherently allow for some policy hedging or arbitrage—whereas the central agency focuses on a few types of cases, an unspecified number or variety of plaintiffs could help enforcement regimes to branch into other areas.291 In essence, this objection treats the pervasive uncertainty in this area as an opportunity for innovation. If nobody is certain whether a new type of plaintiff will have standing, some plaintiffs with breakthrough ideas or arguments will at least try.292 Detailed new standing requirements, promulgated by a specialized agency, might deter innovative plaintiffs. There is an unknowable, unquantifiable opportunity cost, from a progressive policy standpoint, in having increasingly specific standing rules. In a sense, this objection is a version of the law of unforeseeable consequences—except that it is a concern about unforeseeable consequences.293 To the extent that standing rules are a screening

289 See Mary Garvey Algero, A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions, 70 Tenn. L. Rev. 605, 620–21 (2003) (noting the arguments for and against inconsistent rulings in the federal courts of appeals); cf. The Supreme Court, 1997 Term—Leading Cases, 112 Harv. L. Rev. 122, 239 (1998) (“[C]areful consideration of the nature of scientific evidence helps to explain why such inconsistencies are acceptable and perhaps even necessary.”).

290 See Adler, supra note 33, at 44 (“Since citizen-suit provisions entitle members of the public at large to bring suit, subject to minimal constraints, there is little danger that political considerations will prevent the initiation of a suit necessary to address pressing environmental harm.”).

291 See id. As Professor Jonathan Adler notes:

The environmental impact of various activities will vary from place to place, and local knowledge and expertise is necessary to identify those environmental impacts which are of greatest concern. This sort of location-specific information is inherently beyond the reach of centralized regulatory agencies. Local citizen groups, on the other hand, may be in a better position to observe these effects and act accordingly.

292 See, e.g., Massachusetts, 549 U.S. at 505–06.

device, the ambiguity in the current regime introduces an element of Knightian uncertainty\(^{294}\) into the screening of cases—this uncertainty can be an environment that fosters breakthrough innovations.

This is a very problematic objection, probably the most difficult of the three to answer. Ultimately, this is a situation with unavoidable policy tradeoffs, especially a tradeoff between the known value of agency technocrats and the unknown value of citizen activists as innovators.\(^{295}\) There is also a question of whether Congress places more trust in agencies than it does in the citizenry to carry out its original legislative objectives. The fact that Congress gave the agencies primary enforcement authority—and the ability to preempt, displace, and channel public interest litigation by citizens—suggests that the legislature trusts the agencies more.\(^{296}\) Moreover, many of the citizen-suit provisions have been on the books for three or more decades, allowing ample time to see the types of claims that citizen plaintiffs bring.\(^{297}\) The citizen-suit provisions tend to be underutilized, and innovative claims seem to cluster in the first decade or so after enactment of a citizen-suit provision, plateauing after that, as path dependence besets the activist groups who bring most of the suits.\(^{298}\) In other words, although no one can quantify the unknown opportunity costs, we also have little evidence to suggest

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\(^{294}\) “Knightian uncertainty” in economic theory refers generally to unquantifiable risks or changes; it originated with economist Frank Knight. See generally Frank H. Knight, Risk, Uncertainty and Profit (1921) (introducing Knight’s theory). Knight drew a distinction between “uncertainty” (unknowable odds or range of possibilities) and “risk” (known probabilities) for purposes of illustrating the difference between net revenues and windfall profits for entrepreneurs. The distinction between risk and uncertainty has become a useful analytical tool in a number of fields. See, e.g., Ronald J. Gilson et al., Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration, 109 Colum. L. Rev. 431, 433 n.2 (2009); Dru Stevenson, Toward a New Theory of Notice and Deterrence, 26 Cardozo L. Rev. 1535, 1575–76 n.180 (2005) (“[K]nightian uncertainty . . . involve[s] a finite set of reasonable possibilities where it is impossible to ascertain beforehand which is more likely, or how much more likely.”); see also Daniel Ellsberg, Risk, Ambiguity and Decision 4 (2001) (discussing the claim “that for a reasonable man all ‘uncertainties,’ in Knightian terms, may be expressed numerically as ‘risks’”); Joseph Greenberg, The Right to Remain Silent, in Uncertainty in Economic Theory: Essays in Honor of David Schmeidler’s 65th Birthday 521, 521–30 (Itzhak Gilboa, ed., 2004) (discussing Knightian uncertainty in the context of individuals’ communications with the police).

\(^{295}\) See Adler, supra note 33, at 40–41.

\(^{296}\) See supra notes 175–177 and accompanying text.

\(^{297}\) See Adler, supra note 33, at 43 (“[S]tarting in 1970[,] Congress enacted environmental citizen-suit provisions . . .”).

that refined rules for standing would have an undue chilling effect on new categories of claims. Even so, there is little empirical research on the fluctuations in innovation among citizen suits over time and the etiology of such trends; this is an area deserving further research.

An additional response, intertwined within our channeling theory, is that the proposed secondary thesis, the special solicitude rule, fills the “innovative gap” that any channeled, streamlined standing rule crafted by agencies would inherently create. Take, for example, a hypothetical situation in which private parties bring suit after an agency has implemented this Article’s primary thesis by promulgating specific and narrow rules defining injury and causation for standing. Any private parties intending to make arguments for standing that do not comport with the standing rules as determined by the agency will have no ability to reach federal court. The private parties would, however, have the option of petitioning their state attorney general to pursue the public interest claim on their behalf. The state attorneys general, as our secondary thesis proposes, would create opportunities for potentially innovative and progressive standing arguments because the attorneys general receive special deference under the special solicitude rule articulated in the 2007 Supreme Court decision in *Massachusetts v. EPA*. Thus, although the public interest is still channeled, it is no longer channeled through the administrative and judicial systems; rather, it is first channeled through the executive branch of its state government, where the state attorney general must be convinced that the cause is compelling.

IV. Special Solicitude for States

The second prong of our proposal pertains to actions against the federal regulatory agencies themselves, as opposed to citizen suits against private-sector violators that supplement the agency’s own enforcement. The thesis here is rather simple: states should have relaxed standing requirements, compared to private parties or activist groups, for suing federal agencies. This is the “special solicitude for states” rule adopted in 2007 by the U.S. Supreme Court in *Massachusetts v. EPA*. The rule would bring greater clarity, and uniformity, to citizen suits around the country if agencies endorsed this rule formally in the Fed-

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300 See, e.g., 42 U.S.C. § 7604(a)(2) (providing for a citizen cause of action against the Environmental Protection Agency (EPA) under the Clean Air Act).
eral Register.302 It would also be helpful to courts and potential litigants for the agencies to delineate that this is a rule of preference, not an outright bar to suits by non-state plaintiffs.303 This second prong of the proposal is an extension of the idea that standing requirements should serve a channeling function and thus more than a mere screening function. Favoring states in these types of suits is an explicit application of the channeling idea, as most suits would be channeled through the state attorneys general.304

Suits brought against federal agencies by state attorneys general raise issues of standing often enough to merit discussion together with the first type of citizen suits;305 yet, they are sufficiently distinct to require a different rule for standing. In addition, this prong is logically severable from the first—readers could disagree with the proposed rule regarding suits against agencies, but still accept that agencies should define standing for citizen suits against third parties.306 Suits against agencies have important features in common with citizen suits against violators. Both types of actions originate from statutory authorizations to sue;307 both types contemplate injunctive relief rather than damages


303 This would parallel the Massachusetts decision because the majority did not exempt private parties from their decision but simply awarded special deference to the state due to its quasi-sovereign interest. See 549 U.S. at 518–20; Gregory Bradford, Note, Simplifying State Standing: The Role of Sovereign Interests in Future Climate Change Litigation, 52 B.C. L. Rev. 1065, 1096–1100 (2011) (arguing that the Supreme Court’s decision in Massachusetts identified concrete injuries to the State’s unique interests, not only in protecting its citizens but also in preserving its territorial integrity). Others have agreed that the Court may have viewed the State as an agent for its citizens, rather than as a sovereign protector of its citizens. See Calvin Massey, State Standing After Massachusetts v. EPA, 61 Fla. L. Rev. 249, 264–68 (2009) (“[T]he Court . . . was actually saying that a state has standing to assert the rights of its residents under federal law.”).

304 See, e.g., Stevenson, supra note 102, at 37–38.

305 See supra notes 57–59 and accompanying text.

306 This would be consistent with the Supreme Court’s standing jurisprudence. See, e.g., Warth v. Seldin, 422 U.S. 490, 499 (1975) (“[E]ven when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”). We do not propose changes in the substance of the judiciary’s prudential limitations; we merely propose that administrative agencies take the Supreme Court up on its offer to define the injury and causation prongs of Article III standing.

as the primary remedy; and both focus on matters primarily entrusted to the relevant agency by Congress. Claims against the agency, as well as claims brought in the shoes of the agency (so to speak), touch on underlying political and philosophical issues of the agency’s competence, optimal levels of regulation, and the judiciary’s competence to evaluate matters entrusted to the expertise of specialists.

The two types of claims also differ in several important ways. The most important is the nature of the defendant—a private party as opposed to the government itself, which has innumerable implications for litigation resources, incomplete waiver of sovereignty, political accountability, and procedural protocols. Different statutory provisions furnish the basis for the two types of actions, though the subject matter is largely the same. The suits we discuss primarily challenge agency inaction—or, in some cases, challenge an agency for acting but not going far enough—and accuse a defendant of omission, which results in a very different type of case than accusing an agency of a transgression of the law, as with polluters.

Given the differences between actions against agencies and actions supplementing the agency’s own enforcement efforts, a different ap-

308 E.g., id. § 7604(g) (“Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services.”).
309 Cf. id. § 7604(a)(2) (“[A]ny person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . . .” (emphasis added)).
312 See, e.g., Massachusetts, 549 U.S. at 505. But note that Massachusetts is a unique case because it challenged agency inaction to promulgate rules whereas the previous challenges to inaction concerned refusals to enforce. See, e.g., Heckler v. Chaney, 470 U.S. 821, 832–33 (1985); Metzger, supra note 270, at 41 & n.190.
314 See Bennett v. Spear, 520 U.S. 154, 166 (1997) (confirming standing to petition the Court to prevent application of environmental restrictions); Heckler, 470 U.S. at 846–49 (Marshall, J., concurring) (emphasizing that agencies cannot justify the unreviewability of agency inaction by relying on prosecutorial discretion).
proach to standing is appropriate. The Supreme Court drew this same
distinction in Massachusetts, adopting the special solicitude rule regard-
ing states’ standing to sue federal agencies.\footnote{See 549 U.S. at 519–20.} In Massachusetts, a con-
sortium of states sued the Environmental Protection Agency (EPA) to
compel it to regulate greenhouse gases.\footnote{Id. at 505.} The Court based its holding
on three legal disadvantages confronting states: the Constitution’s pro-
hibitions on individual states signing treaties with foreign powers,
states’ inability to take punitive action against other states to retaliate
over negative externalities (such as cross-border pollution), and statu-
tory preemption, rooted in the Supremacy Clause, which limits states’
ability to address certain problems through local legislation.\footnote{See id. at 519.} Each
state voluntarily joined the Union, Justice John Paul Stevens observed,
and surrendered rights they would otherwise have had in each of these
three domains (threatening force against contiguous neighbors, con-
summating treaties with other countries, and even passing some of
their own laws and regulations) in order to participate in the greater
Nation.\footnote{See id. at 519.} States thus left themselves somewhat helpless and vulner-
able, and relied upon the federal government to provide commensu-
rate protections in return.\footnote{See id. at 519–20.} Special solicitude for states applies more
to agency refusals to regulate than to lack of enforcement.\footnote{See id. at 532–35.} Typically,
it is easier to find a statutory mandate or duty for rulemaking.\footnote{Id. at 527 (“[Agency] discretion is at its height when the agency decides
not to bring an enforcement action.”); Heckler, 470 U.S. at 833 n.4 (indicating that abdica-
tion of statutory responsibilities was a genuine concern, even if the facts in Heckler did not
rise to this level, as might refusals to regulate).} Rule-
making is more time-consuming and costly for the agencies than en-
forcement proceedings.\footnote{Compare Office of Mgmt. & Budget, Exec. Office of the President, 2010 Report
to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal
www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report .pdf (estimating select agency rulemaking costs to be between $42.7–$54.597 billion, and
estimating rulemaking costs for the EPA to be between $25,789–$29,227 billion), with EPA,
FY 2011 Budget in Brief 7 (2011), http://nepis.epa.gov/Adobe/PDF/P10069PG.PDF (not-
ing that the EPA’s enforcement-and-compliance budget for the 2011 fiscal year is $618 mil-
ion).} Thus, agencies are resistant to investing re-
sources into new rulemaking, especially in controversial areas. The rulemaking process, being more tedious and less flexible than enforcement, is therefore less responsive to genuine crises or public outcry for government action. Agencies are more likely to need prodding from the courts for rulemaking than they would for enforcement. In any case, the fact that the Supreme Court adopted the special solicitude rule for states would seem to show that the Court is prepared to treat standing as a channeling device, not merely a screening device.

Although the Court based its special solicitude rule entirely on the legal handicaps that states must endure, there are also positive policy reasons for channeling these suits through the state governments—in practice, state attorneys general can better represent the interests of the public as a whole, rather than individualistic, private concerns that could motivate private plaintiffs. Most states have an elected attorney general who directly represents the voters—a statewide constituency—and the remaining attorneys general are appointed by the governor. State attorneys general have an incentive to prioritize their actions and sue when the agency’s neglect affects the largest number of people and the broadest geographic area. From an overarching policy standpoint, such representativeness, political accountability, and prioritization would be healthful contributions to this field of litigation.

325 See, e.g., Massachusetts, 549 U.S. at 535 (requiring the EPA to initiate a rulemaking process). But see Exec. Order No. 13,514 § 2, 3 C.F.R. 248, 249 (2009) (requiring the EPA to set a greenhouse gas emissions target). Thus, Massachusetts sparked the need for rulemaking, but President Obama’s executive order actually set the wheels in motion.
326 See Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. REV. 698, 737 (2011) (“State enforcement is distinguished not only by the familiar divisions between state and federal interests, but also by features that are peculiar to enforcement: the characteristics of elected attorneys general compared to specialist federal agencies . . . . Enforcement authority is also different from regulatory authority as a channel for state influence.”(emphasis added)); see also Cuomo v. Clearing House Ass’n, 557 U.S. 519, 530 (2009) (“Channeling state attorneys general into judicial law-enforcement proceedings (rather than allowing them to exercise ‘visitorial’ oversight) would preserve a regime of exclusive administrative oversight by the Comptroller while honoring in fact rather than merely in theory Congress’s decision not to pre-empt substantive state law.”).
327 See Lemos, supra note 326, at 702; Stevenson, supra note 102, at 40.
328 See Stevenson, supra note 102, at 39.
329 See Lemos, supra note 326, at 721–30.
330 See id. at 702; Stevenson, supra note 102, at 40–41.
Moreover, state attorneys general often collaborate with their counterparts in other states in bringing these suits against the federal government, as in Massachusetts. These consortiums allow the representation to reach a regional scale—cases representing the citizens in several states and hundreds of thousands of square miles (geographic coverage is very relevant for pollution cases).

There are other policy reasons to channel cases against federal agencies primarily through the states. States have more resources than private citizen groups to pursue long-term, highly complex litigation against the federal government. Many of these cases against federal agencies involve difficult questions of federal power, the extent of statutory delegations to agencies, and the fine line between political questions and appropriate inquiries for adjudication, meaning that the cases are likely to reach the courts of appeals and often the Supreme Court, as in Massachusetts. States, especially those working in consortium, have greater litigation endurance than private plaintiffs.

Similarly, state attorneys general often have superior information about the subject matter compared to private plaintiffs. Most of the major federal environmental statutes include detailed provisions for state cooperative enforcement, regulatory, and monitoring efforts (for example, state implementation plans under the Clean Air Act); every state government has an ongoing relationship with the relevant federal agency, exchanging information, negotiating approval of parts of its

331 Lemos, supra note 326, at 720.
332 See id. at 721 (“[E]lected state attorneys general have strong incentives to serve their local constituencies.”).
333 See Stevenson, supra note 102, at 51.
334 See Cuomo, 557 U.S. at 533–34 (rejecting a claim that state enforcement was preempted on federalism-based preemption grounds); Wyeth v. Levine, 555 U.S. 555, 558–59 (2009) (providing that the Food and Drug Administration’s drug warning label approval process does not preempt state law failure-to-warn product liability claims); Altria Grp., Inc. v. Good, 555 U.S. 70, 73 (2008) (providing that the Federal Cigarette Labeling and Advertising Act did not preempt plaintiffs state law claim regarding “light” cigarettes).
335 See, e.g., Massachusetts, 549 U.S. at 505.
337 Stevenson, supra note 102, at 51 (noting a trend favoring collaborative efforts).
338 See Lemos, supra note 326, at 721 (noting the states’ superior resources).
implementation plan and permitting systems, and so forth. The states, in other words, have experience doing much of the same work that the defendant federal agency does, and even have experience doing the type of thing that the lawsuits allege the agency has neglected. Finally, state attorneys general have firsthand knowledge of the process of promulgating regulations and bringing enforcement actions against violators.

Private plaintiffs, such as the Sierra Club or the Natural Resources Defense Council (NRDC), can easily collaborate with the state attorneys general in bringing these suits. Rather than encumbering these activist groups, joining with the state attorney general broadens the suit in scope and resources. At the same time, a state attorney general is more likely to commence an action if large, reputable citizen action groups (Sierra Club, etc.) approach the official requesting cooperation and assistance, and offer their own evidence and support. In the event that the state attorney general declines the overture, the citizen group is free to pursue the claim as it would have before, but it will have to do more than the state would in order to demonstrate that it should have standing. The rule proposed here would incentivize citizen action groups to cooperate with the state attorneys general, giving valuable input to the attorneys general, and with each other, because a united coalition of citizen groups is more likely to attract the attention and support of the attorneys general.

Citizen suits against agencies are part of the statutory scheme and can bring healthy pressure to bear on indolent officials—but at the

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342 See e.g., Symposium, The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part II, 30 COLUM. J. ENVTL. L. 351, 369–70 (2005) (comments of Jeffrey Sachs, Dir., Columbia Earth Inst.) (noting that private plaintiffs and nongovernmental organizations often have scientific expertise relevant to environmental litigation).

343 See Stevenson, supra note 102, at 50–51.

344 Cf. Lemos, supra note 326, at 722 (“[S]tate attorneys general are heavily motivated by political considerations... [E]lected attorneys general have incentives to take actions that will respond to the interests of their constituents.”).


346 See Stevenson, supra note 102, at 50 (“Another possible manifestation of the same phenomenon would be an increase in litigation partnerships between activist groups and state [attorney general’s] offices...”).
same time, these suits present inherent policy concerns that color court decisions on standing. These suits necessarily divert agency resources into defensive litigation—resources that could have supported more enforcement, policy research, and so forth. The special solicitude rule does not bar private plaintiffs, and courts still have leeway to allow the most important cases to proceed—those where the injury is the greatest and causation is most proximate. Nevertheless, encouraging coalitions between citizen action groups and state attorneys general exploits the channeling effects of the standing requirements, rather than merely excluding cases or screening plaintiffs. The current regime, in contrast, gives courts a perverse incentive to use standing to screen out the biggest cases—those that would impose the greatest cost on agency resources if successful, as in the 1977 Supreme Court case *E. I. DuPont de Nemours & Co. v. Train.* At the same time, the current standing rules may encourage courts to allow more picayune claims against the agency, as these claims will seem more concrete and particularized, even though they are less representative and less concerned about the public interest. The special solicitude rule does the opposite, favoring the cases that affect the most people and the largest area, and requiring plaintiffs with more idiosyncratic views to demonstrate why they should have standing in a case that affects the public at large.

If the Supreme Court already adopted a rule of special solicitude for states, why do agencies need to bother reiterating it through their own promulgated rules? First, if agencies are going to promulgate rules about standing for third-party citizen suits, it could generate confusion

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347 See Adler, supra note 33, at 63–69.
348 See supra note 303 and accompanying text.
350 See, e.g., 430 U.S. 112, 115 (1977). In *DuPont*, the EPA had taken a practical approach to regulation under the Clean Water Act by establishing industrial categories for direct discharges of pollutants and correlating effluent limitations for each category. See id. at 135–36 & n.25. The purpose of this was to avoid the daunting task of establishing effluent limitations for each individual direct discharge. See id. The use of this method was challenged. Fortunately, the Supreme Court considered the “impossible burden” of regulating 42,000 direct dischargers seeking permits and determined that the EPA’s limitations were reasonable. See id.
351 See Pushaw, supra note 3, at 8 (discussing the liberalization of standing and how it has frustrated the Court’s “stated purposes”).
352 See Lemos, supra note 526, at 701 (“Elected, generalist state attorneys general share little in common with the appointed, specialist agency officials who are the typical agents of federal enforcement. The result is a brand of public enforcement that differs markedly from the more familiar federal model.”).
if they do not specify that a different rule would apply to suits against the agencies themselves. To allay concerns about self-interest when the agency is making a rule about suits against itself, the agencies can explicitly adopt the exogenous rule proposed by the Supreme Court—special solicitude for states.353 If agencies do not differentiate between standing for suits against third-party violators and suits against the agency, courts could easily assume that the same agency self-interest has tainted the rule for private citizen suits, which is not the case.

It is also important for the agencies to provide a united front with the Massachusetts Court in shifting from treating standing as a screening device toward using it as a way to channel suits through the best-equipped, most representative parties. Channeling is a conceptual challenge to the paradigm many players in this arena have been using. A united front between the agencies and the Supreme Court on this point not only sends a signal to potential plaintiffs (such as the Sierra Club and NRDC), but will also foster quicker uniformity among the courts. It also signals to agency personnel that inaction or negligence on their part could trigger state attorney general actions, giving agencies an incentive to be more proactive and diligent in discharging their statutory duties.

Conclusion

The requirements for standing are a relatively recent development in the American legal system, arising at the same time as various forms of public interest litigation. The historical trajectory is a jagged, nonmonotonic trend toward liberalized rules for standing, but a lack of guidance from Congress combined with the politically controversial nature of public interest litigation has led courts to reach haphazard results as they implement the rules. The meandering pattern is due in part to courts using standing as a screening device or docket management mechanism rather than as a channeling tool to maximize the overall societal benefit from such litigation. The current state of the law presents too much uncertainty for judges and unpredictability for po-

353 The Supreme Court has a history of willingness to award great deference to administrative agencies when the agencies comply with previous judicial rulings. For example, the Court held in Massachusetts that the EPA must decide whether carbon dioxide is a hazardous pollutant under Section 202 of the Clean Air Act, and if so, issue regulations placing limitations on its emissions. See 549 U.S. at 534–35. Then, in the 2011 case American Electric Power Co. v. Connecticut, the Court allowed the EPA’s plan to promulgate a new source regulation to displace any common law nuisance action, despite concerns that the EPA’s rulemaking process was languishing. See 131 S. Ct. 2527, 2538–39 (2011).
potential litigants. Courts and commentators have called for Congress to give guidance on this point, so far without avail.

In every case in which Congress has authorized citizen suits, it has given primary enforcement powers to a particular federal agency, such as the Environmental Protection Agency. Congress’s silence on the question of standing for citizen suits is a statutory gap that the relevant agency can and should fill, using its specialized expertise in that area. Agency input would be particularly helpful on the questions of injury-in-fact and causation. Promulgated rules for standing would give the courts concrete benchmarks, tailored for the particular type of citizen suit to accomplish its statutory goals most effectively. It would also make the process of fashioning the standing requirements more democratic and representative, due to the obligatory notice-and-comment period and development of an administrative record that comprise such agency rulemaking. Even for suits against agencies themselves, there would be significant benefits in having agencies adopt the Supreme Court’s “special solicitude for states” approach as a rule for such cases. Most importantly, standing could serve more of a channeling function than merely being a screening mechanism, aligning citizen suits more completely with the public interest.