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 requirements for standing have been vague and unworkable, and often serve 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. Numerous commentators, and some Supreme Court Justices, have therefore suggested that Congress could, or should, provide legislative 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, meaning congressional silence on a point often constitutes discretionary leeway for the agency charged with implementation of the statute. Agencies already have explicit statutory authority to preempt citizen suits or define violations for which parties may sue. The existing statutory framework therefore suggests agencies could promulgate rules for the injury-in-fact and causation prongs of standing in citizen suits. Moreover, agencies have an advantage over courts in terms of expertise about the harms involved and which suits best represent the public interest. On the more delicate question of citizen suits against agencies themselves, agencies could default to the “special solicitude for states” rule illustrated in Massachusetts v. EPA. Finally, this Article explains how standing can function as a beneficial channeling tool rather than an awkward screening device, by allowing agencies to align citizen suits more closely with the larger public interest and established policy goals.

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I. INTRODUCTION

Congress authorizes citizen suits for the enforcement of certain federal laws, but the authorizing statutes do not delineate any criteria 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 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 Supreme Court opinions and focused attention in academic articles.\(^4\) Numerous commentators

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


\(^{3}\) 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) [hereinafter Pushaw, Limiting Standing] (“[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 . . . .”).

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. 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 of the Code, and suits against the agency to compel more

(“Congress [can] grant an express right of action to persons who would otherwise be barred by prudential standing rules.”); see also sources infra note 5 (commentators). In his Lujan concurrence, Justice Kennedy also stated:

“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 will not, therefore, “entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.”

Lujan, 504 U.S. at 580 (citation omitted).

See William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221, 223–24 (1988) (“If a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it.”); 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 define judicial authority to circumnavigate the constitutional minimums Article III standing attempts to protect); Cass R. Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 MICH. L. REV. 163, 178 (1992) [hereinafter, Sunstein, What’s Standing?] (“There is absolutely no affirmative evidence that Article III was intended to limit congressional power to create standing.”); Michael E. Solimine, Congress, Separation of Powers, and Standing, 59 CASE W. L. REV. 1023, 1050 (2009); 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 the Akins decision left significant power with Congress to define standing); Cass R. Sunstein, Informational Regulation and Informational Standing: Akins and Beyond, 147 U. PA. L. REV. 613, 616–17, 645 (2009) (arguing the Akins decision expands congressional authority 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). But see, e.g., John G. Roberts, Jr., Article III Limits on Statutory Standing, 42 DUKE L.J. 1219, 1226 (1993) (“If Congress directs the federal courts to hear a case in which the requirement of Article III standing, that Act of Congress is unconstitutional [because] Article III limits congressional power . . . .”).

We are unaware of any academic literature advocating for this proposal; however, others have contemplated related proposals from a narrower or tangent perspective. See 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 grants the SEC the power to screen Rule 10b-5 class actions and decide who may file them as well as who they may file them against); Brian D. Galle, Can Federal Agencies Authorize Private Suits Under Section 1983?, 69 BROOKLYN L. REV. 1 (2003) (proposing that § 1983 authorizes federal agencies to make their regulations enforceable by citizens).

E.g., 42 U.S.C. § 7413(a)(3) (providing the EPA with primary enforcement authority).

enforcement or regulation. 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), 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” 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, Supreme Court Justices have invited Congress to give guidance about standing for citizen suits, as citizen suits are nearly the only context in which standing is an issue. In addition, there is an emerging scholarly consensus that Congress can, and should, accept this invitation. 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.

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11 See id. at 519.
The most obvious argument supporting this suggestion is the agency’s specialization and expertise. 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 *Chevron* and *Skidmore* accurately presume that agencies have staff with relevant expertise and training, that the agency’s specialized functions provide it with opportunities to analyze the issues deeply, and that they have a repeat-player’s vantage point on the litigation surrounding its governing statute.\(^{13}\) An agency’s mandate from Congress encourages it to conduct extensive research as it formulates its position;\(^ {14}\) agencies also collect vast amounts of useful data via the reporting requirements imposed on the regulated industries.\(^ {15}\) 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\(^ {16}\)) 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.\(^ {17}\) Other commentators have demonstrated that statutory ambiguity and gaps are the actual mechanism by which

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\(^{14}\) See, e.g., *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.”).


\(^{16}\) See, e.g., *Chevron*, 467 U.S. at 843–44 & n.12.

\(^{17}\) See, e.g., id. 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.”).
the laws delegate discretion to administrators.\textsuperscript{18} Statutory precision, by contrast, functions as a constraint, issuing instructions that an administrator must carry out mechanically.\textsuperscript{19} The idea that ambiguity confers discretion is also the essence of the \textit{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.\textsuperscript{20} In fact, the Court’s most recent \textit{Chevron}-based decisions have treated statutory ambiguity as a \textit{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.\textsuperscript{21}

\textsuperscript{18} See, e.g., William N. Eskridge, Jr. & Judith N. Levi, \textit{Regulatory Variables and Statutory Interpretation}, 73 WASH. UNIV. L. Q. 1103 (1995). Eskridge and 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. \textit{See id.} at 1107–08 (they eventually shift to the term “regulatory variability” out of fear that readers will imagine a list of magic words that delegate discretion). 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. Some portions of enabling statutes may be specific and directive, other provisions 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 authority. As Eskridge and Levi observe, “The level of linguistic generality permits an inference about the speaker's willingness to delegate gap-filling discretion to another person (i.e., police officers and judges). The more general the statutory term, the more discretion the directive is implicitly vesting in the implementing official.” \textit{Id.} at 1111 (noting that this discretion may be “vested deliberately or inadvertently”). Stronger examples of regulatory variables are “reasonable,” “substantial,” “good faith,” and the phrase “all deliberate speed.” \textit{See id.} at 1113.


\textsuperscript{20} \textit{E.g.}, \textit{Chevron}, 467 U.S. at 844.

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 contain general principles—“intelligible standards” in the jargon of delegation analysis—and entrust the agency with authority to work out the details, to set standards, create a monitoring and enforcement regime, and so forth. 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, courts have held, impliedly puts the issues under the agency’s discretion and purview. 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. 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; 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

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23 For example, a typical statute provides congressional findings, see, for example, 42 U.S.C. § 7401(a), a congressional declaration, see, for example, id. § 7401(b) (outlining the general purposes of the CAA). Then, the typical statute, such as the CAA, provides for a research initiative and program creation, see, for example, id. § 7403(a)–(b), a system for monitoring, see, for example, id. § 7403(c), and provisions outlining general enforcement by an administrative agency, see, for example, id. § 7413(1), (3).

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


26 See 42 U.S.C. § 7604(b)(1)(B) (“No action may be commenced . . . if the [a]dministrator or [s]tate has commenced and is diligently prosecuting a civil action . . . .”).
under common law doctrines, as seen recently in *American Electric.* Furthermore, agency regulations and standards can define the actual violations for which citizens would sue.

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, which 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, which introduce a democratic aspect into the rulemaking we propose here. 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

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27 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 . . . .”); see also infra Part III.

28 See 42 U.S.C. § 7411(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(c) (“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.”).

29 See 5 U.S.C. § 553(a)–(b) (explaining the scope of the APA’s notice and comment requirements); see also id. §§ 556, 557.

Office of Management and Budget (OMB) review,\textsuperscript{31} and this scrutiny provides another layer of political buffering through the President, who usually supervises OMB rather closely.\textsuperscript{32}

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.\textsuperscript{33} American Electric saw an even split on the Court on the question of standing;\textsuperscript{34} if Sotomayor had not recused herself from the decision, it would apparently have gone 5–4 in favor of recognizing standing,\textsuperscript{35} opening the door for innumerable future suits involving similar parties. Additionally, as citizen suits continue to proliferate in the United States Code\textsuperscript{36} and under common law tort theories (as a way of circumnavigating the Code),\textsuperscript{37} 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.

\textsuperscript{31} See id. § 552a(v).

\textsuperscript{32} See Note, \textit{OIRA Avoidance}, 124 HARV. L. REV. 994, 1001 (2011) (“OMB and OIRA traditionally enjoy a closer working relationship with the President than the other agencies do . . . .”); Christopher C. DeMuth, \textit{Rationalism in Regulation}, 108 MICH. L. REV. 877, 904 (2010) (“The OMB director, who typically represents OIRA in White House councils and before the president when an agency appeals an OIRA decision, invariably has a closer working relationship with the president than has the head of any regulatory agency . . . .”); Mark Seidenfeld, \textit{The Psychology of Accountability and Political Review of Agency Rules}, 51 DUKE L.J. 1059, 1092 (2001) (“This in turn will encourage the agency to formulate rules that are closer to the preferences of the president than the agency would if it were not subject to OMB review.”); James R. Harvey III, \textit{Loyalty in Government Litigation: Department of Justice Representation of Agency Clients}, 37 WM. & MARY L. REV. 1569, 1590 (1996) (noting that the OMB is now used more frequently as the “[c]ounsel for the President” than is the attorney general).

\textsuperscript{33} See Pushaw, \textit{Limiting Standing}, supra note 3, at 52.


\textsuperscript{35} See infra Part III.B.


\textsuperscript{37} E.g., \textit{Am. Elec. Power Co.}, 131 S.Ct. 2527 (2011); Comer v. Murphy Oil USA, 607 F.3d 1049 (2010); AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28 (2011); Korsinsky v. EPA, 192 Fed. App’x 42 (2d Cir. 2006).
At the same time, there is a concern that courts could go in the other direction, and functionally eliminate citizen suits by taking a blunt-instrument approach to standing. In contrast, the specialized federal agencies are more likely to offer nuanced guidelines.\textsuperscript{38} 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{39} Urbanization and globalization have made citizens’ lives and interests intersect (and collide) much more than in previous eras; 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.

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{40} The last prong, redressability, should probably remain with the courts, as they have superior information and better vantage point about what remedies they can impose—redressability falls squarely within the judiciary’s institutional competence.\textsuperscript{41} 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 (similar benchmarks already permeate the Clean Air Act regulations\textsuperscript{42}).

\textsuperscript{38} See generally PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES (2d ed. 2002) (exploring thematic views of administrative law such as due process and fair hearing).

\textsuperscript{39} See infra Part II.B.

\textsuperscript{40} See, e.g., Lujan v. Defenders of Wildlife, 504 U.S 555, 560–61 (1992). The doctrine itself falls within a much larger concept, through which the Supreme Court interprets the words “cases” and “controversies,” see U.S. CONST. art. III, § 2, to implicate certain limitations on judicial power commonly referred to as justicability doctrines. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 40 (3d ed. 2009).

\textsuperscript{41} See Lujan, 504 U.S. at 581 (Kennedy, J., concurring) (suggesting that if Congress were to adopt standing guidelines that it only do so for injury and causation).

\textsuperscript{42} Cf. 42 U.S.C. § 7479(1) (defining “major” sources under the CAA as those that directly emit or have the potential to emit 100 tons per year or more from twenty-eight listed stationary sources or any other source that could potentially emit 250 tons per year or more); id. § 7472 (defining a Class I area as national wilderness areas larger than 5,000 acres and national parks larger than 6,000 acres); id. § 7412(a)(1) (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
Standing requirements that reference such benchmarks would bring symmetry to this area of law. This Article uses such examples—twenty acres or twenty tons—rather arbitrarily, purely for illustration; the EPA’s actual standard might be far different.43

Similarly, regarding the causation, the Supreme Court has swung widely between extremes—from the SCARP case to Lujan and back to Massachusetts v. EPA.44 Yet the EPA has decades of experience defining chains of causation for liability under CERCLA,45 RCRA,46 TSCA,47 and FIFRA48—tracing lines of ownership and responsibility for both the affected land and the contaminants themselves (manufacturers, sellers, users, and disposers).49 For certain environmental citizen suits, the EPA could give very well-informed, nuanced rules about the appropriate lines for courts to draw on the causation element of standing.

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43 As the congressionally designated “expert” in regulating clean air, see, for example, Am. Elec. Power Co. v. Connecticut, 131 S.Ct. 2527, 2531 (2011) (“The expert agency is surely better equipped to do the job than the federal judges, who lack the scientific, economic, and technical resources an agency can utilize . . . .”), we propose that the EPA is in the best position to determine the most viable and practical scope of enforceable injuries. Cf. City of Milwaukee v. Illinois, 451 U.S. 304, 323 (1981) (“The agency imposed the conditions it considered best situated to further the goals of the Act . . . .”).


49 See infra note 188.
Regarding suits against the agency itself, our secondary thesis, 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. This is the “special solicitude for states” rule. 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 a state attorney general.

This Article proceeds as follows. Part II 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. 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. To some extent, the problem of standing and the nature of citizen suits are inseparable, and the background section 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. The statutory background component of the standing doctrine (that is, 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 III provides a foreground for the discussion: a recent case that is particularly illustrative for the arguments that follow. The Supreme Court’s decision last term in

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50 See Massachusetts v. EPA, 549 U.S. 497, 519 (2007).
51 Cf. id. (awarding deference to state attorneys general because they act in the interest of their constituents).
American Electric included a striking discussion of standing, which reveals both a trend on the Court regarding this issue, as well as the urgent need for extrajudicial input in this area.

Part IV 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. The arguments are partly descriptive and statutory—describing Congress’ implicit delegation of authority to the agencies to promulgate rules on this point—and party 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 statues, and the increasingly 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 V 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. The main thrust of the argument is that these state officials better represent the public interest, in a wholistic sense, than do private-party litigants; but the Supreme Court 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; 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. Part VI recaps and concludes, offering suggestions for future research and academic inquiry.

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

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52 See infra Part III.A.
system. Rather, standing should be viewed as a channeling mechanism, whereby all harmed individuals are channeled through procedural mechanisms that reveal the most egregiously injured plaintiffs, i.e., 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, does so while achieving 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.

II. 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 academicians realize. Compared to procedural protocols inherited from the common law era, the jurisprudence of standing is arguably still in its infancy—it remains under-developed and under-theorized 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 subsections sketch the recent appearance of standing requirements and the simultaneous advent of public interest litigation. This brief background should help

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


explain both the appropriateness and the present urgency for extrajudicial input to develop the boundaries of standing.

**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 *Frothingham v. Mellon* and the *Chicago Junction* decisions. 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 freely implement New Deal goals with essentially no legal hindrances.

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57 262 U.S. 447 (1923) (two consolidated cases).


61 See, e.g., Ho & Ross, supra note 56, at 594–95. Ho and 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.
limitations. Professor Ho and Erica Ross conclude that standing existed without contest among conservative or 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. 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. Many adherents of the insulation thesis, however, believe docket management is present but a secondary factor in standing’s development.

The difference between the insulation thesis and the docket-management theory is a subtle, but fundamental, difference. The docket-management theory (a synonym for “judicial efficiency”) implicitly views standing as a screening mechanism, focusing on the number of plaintiffs before the court, through which certain plaintiffs are screened by the gatekeepers of justice, i.e., the courts. On the other hand, the insulation thesis implicitly views standing as a channeling function, in that it focuses on the nature of the plaintiffs seeking relief before the court. 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. This is essentially what standing alleges to accomplish,

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62 See id. at 595–98 (explaining that liberal Justices believed administrative agencies could best address the economic turmoil of the 20s and 30s). 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. The recently published article by Ho and Ross in Stanford Law Review “provides the first systematic empirical confirmation for the insulation thesis.” Id. at 647.

63 Id. at 648. The 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 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 shows that the doctrine . . . does not speak to any notion that standing is all politics. Id. (emphasis added). But the analysis does not preclude a stronger docket-management thesis, because the evidence suggests that the doctrine did exist before New Deal legislation rose to prominence. See id. at 648.

64 E.g., Pushaw, Limiting Standing, supra note 3, at 10 n.42 (“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)).

65 See, e.g., Ho & Ross, supra note 56, at 648.
plaintiffs whose harms are personal to them. But with such confusing and conflicted decisions, the practical realities of standing in the administrative age simply do not intersect the theoretical purposes the doctrine claims to support. 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 (judicial efficiency theory). If, however, the problem is the nature of the plaintiffs, then standing remedies that through a channeling mechanism (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. 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.

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66 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) ("[T]he party bringing suit must show that the action injures him in a concrete and personal way.")
B. The Modern Doctrine

Arguably, *Lujan* set out an unattainable test for plaintiffs litigating under citizen-suit provisions.\textsuperscript{67} Climate change forced the Supreme Court to address the standing analysis in a new context.\textsuperscript{68} Several state attorneys general, local governments, and private litigants sought to compel the EPA to declare, through rulemaking proceedings, carbon dioxide (CO\textsubscript{2}) emissions from new motor vehicles as an “air pollutant” under CAA § 202,\textsuperscript{69} and in turn craft regulations that will place limitations on those emissions.\textsuperscript{70} The EPA had refused to act,\textsuperscript{71} and the D.C. Circuit denied review on appeal; however, the Supreme Court accepted the writ.\textsuperscript{72}

The first contested issue in *Massachusetts* was the plaintiffs’ standing.\textsuperscript{73} The Court distinguished states from normal litigants for purposes of standing by giving special deference to Massachusetts.\textsuperscript{74} The risks of actual and imminent harm because of global warming focused on the “rising seas . . . swallow[ing] Massachusetts’[s] coastal land.”\textsuperscript{75} The State’s particularized injury derives from its capacity

\textsuperscript{67} See, e.g., Sunstein, *What’s Standing?*, supra note 5, at 165–67.

\textsuperscript{68} Cf. *Massachusetts v. EPA*, 549 U.S. 497, 518–22 (2007) (holding the plaintiffs had standing to sue over a future injury).

\textsuperscript{69} See id. at 532.

\textsuperscript{70} See id. at 510–18.

\textsuperscript{71} See 68 Fed. Reg. 52,922 (2003) (explaining that the EPA questioned whether the CAA authorized the agency to issue regulations addressing global climate change, see id. at 52,925–52,929, and that political pressures from both sides of the issue led the agency to conclude regulations “was not appropriate at this time,” see id. at 52,929–52,931.


\textsuperscript{73} See *Massachusetts*, 549 U.S. at 518. The Court took a narrow approach in reviewing the circuit court’s standing decision, holding that only one of the plaintiffs needs to establish standing for the Court to review the case. See id. (citing Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 447 U.S. 47, 52 & n.2 (2006)).

\textsuperscript{74} 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.”).

\textsuperscript{75} See id. at 522 (citations omitted) (noting the importance of the fact that the State owned a substantial portion of land on the coast).
as a landowner. As the sea level continues rising, the documented severity of injury to the state increases. While the injury technically arises in the future, had the EPA continued its strategy of regulatory delay, a concrete and imminent injury would result. Further, the State demonstrated a causal connection from the coastline injuries to the claimed source of those injuries (CO₂ emissions) because 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 regulate greenhouse gas emissions from new motor vehicles or decide the emissions are not pollutants. The Court interpreted CAA § 202 to provide the EPA statutory authority to regulate CO₂ emissions, ruling that the EPA’s arguments held no weight against the statutory text. After the conclusion of Massachusetts, the EPA initiated a mandate, first releasing an endangerment finding to regulate CO₂ emissions potentially contributing to global warming.

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76 Id. (emphasis added).

77 See id. at 522–23.

78 See id.

79 Id. at 523–24. 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.

80 Id. at 525 (citing Larson v. Valente, 456 U.S. 228, 244 & n.15 (1982)) (satisfying redressability).

81 Id. at 532. The Court said that if the EPA believes that CO₂ gasses cause no harm to the atmosphere, then “the EPA must say so.” Id. at 534.

82 Id. at 532–33 (refusing to allow the EPA to attempt to avoid its statutory obligations).


The decision’s most logical outcome grants standing to state attorneys general litigating against federal agencies.\(^8^5\) Over time, the role of a state attorney general has shifted from a counsel for the executive branch to the “people’s attorney.”\(^8^6\) The powers granted to state attorneys general reach much farther than simple citizen protection: the state attorney general position affords the citizens of a particular state a method of influencing national policy.\(^8^7\) Additionally, another result from the decision can point to the implicit contrast to previous decisions where the Court customarily granted judicial deference to agency decisions since the Court rejected the EPA’s refusal to regulate.\(^8^8\) The question remained, however, as to whether Massachusetts standing included private organizations, such as special interest groups.\(^8^9\) The conclusion follows that, in regards to standing, interest groups have inferior positioning to state attorneys general.\(^9^0\) That would end this discussion, had the Second Circuit not issued a puzzling discussion on standing two years later.\(^9^1\)


\(^{86}\) See id. at 39. That the state attorney general now represents the people is further evidenced by the fact that currently, forty-three states elect their attorney general. See *About NAAG, National Association of Attorneys General*, http://www.naag.org/about_naag.php (last visited Oct. 9, 2011).

\(^{87}\) See Stevenson, supra note 85, at 40 (noting that electing attorneys general “allows voters an alternative method of influencing national policy”). As Stevenson notes, such an empowering new role that the state AGs could assume, in reality, may have a democratizing effect. See id. at 40–41. While this could create inefficiency, it could also promote checks and balances. See id. at 41.

\(^{88}\) See id. (“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.”).

\(^{89}\) 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.”).

\(^{90}\) See id.

C. Standing’s Role in Public Interest Litigation

The modern trend of standing decisions indicates a liberalization of the standing doctrine. This facilitates increasingly aggressive public interest litigation through citizen-suit provisions. We take a moderate stance on the relative value of public interest litigation; however, in light of cases such as American Electric, that presumably would uphold standing for a private plaintiff, 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.

Citizen suits are a subset of a larger movement of public interest litigation. The common law developed during a time when society was more rural and decentralized, and individual property rights provided the undergirding for the 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. Public interests have greater importance in modern politics due to urbanization, globalization, and infrastructured society. Apart from institutional

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92 We propose, as others have agreed, that the doctrine will continue down this path. See infra Part III.B.

93 See Pushaw, supra note 3, at 32 (noting this phenomenon).

94 Cf. Daniel P. Kessler, Introduction, in NAT’L BUREAU OF ECONOMIC RESEARCH, REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 3 (Daniel P. Kessler, ed. 2011) (“The use of litigation as a means to force companies to accept regulation outside of the normal political processes raised several new questions about litigation’s dynamic costs and benefits.”).

95 See infra Part III.B.

96 See supra Part II.B–C.

97 See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (“[T]he party bringing suit must show that the action injures him in a concrete and personal way.”).

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 properly prosecute a claim, and that parties did not bring claims with first-order impacts on other individuals’ personal property rights.99

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;100 globalization and technical advances have similarly increased individuals’ connectivity.101 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.102 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.103 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

such as globalization and mass culture, psychological phenomena such as bounded rationality and use of heuristics, physical or ecological conditions and processes, unexpected events (e.g., disasters), the iterative nature of American society’s environmental ethics pluralism, and other influences on environmental law.”); cf. George S. McGraw, *Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence*, 8 LOY. U. CHI. INT’L L. REV. 127, 128 (2011) (“Urbanization, explosive consumption and resource pollution have forced human society to devise ever more ingenious ways to extract, treat, and store water.”); cf. Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 485 (2009) (“[G]lobalization has narrowed the options available to nation-states, providing some political and economic room for smaller-scale governments to regulate.”).

99 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)).

100 See Orly Lobel, *Extralegal Activism*, supra note 98, at 942.


become antiquated and unworkable. 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.

III. STANDING IN AMERICAN ELECTRIC

The facts of American Electric involved a group of defendants that plaintiffs claimed, “are the five largest emitters of carbon dioxide in the United States.” The plaintiffs’ assertions, however, differed from those in Massachusetts; the plaintiffs in American Electric asserted that the defendants’ CO₂ emissions violated federal common law public nuisance protections.

On appeal, the Supreme Court considered whether the plaintiffs could maintain federal common law nuisance claims against CO₂ emitters, ultimately deciding the nuisance claim 8–0 in favor of American Electric (AEP) because a future EPA regulation displaces any federal common law right to seek remedy from CO₂ emissions. Unlike the issues of displacement and preemption, an issue of contention among the Justices involved the question of whether New York City, the states, and the private plaintiffs had

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106 The plaintiffs of this case 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 Audubon Society of New Hampshire). See id. at 2534 & n.3–4.

107 See id. at 2534 (“[American Electric’s] 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)).


109 Id. (Justice Sotomayor did not take any part in the decision due to the fact that the American Electric case was a matter in which the Associate Justice had heard while on the Second Circuit).
standing to adjudicate the lawsuit. The deciding eight Justices split on the issue of standing in an ambiguous four-sentence paragraph.

Thus, while 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. The Second Circuit clearly meant to take the analysis a step beyond *Massachusetts*. In *Massachusetts*, the Court avoided the standing analysis for the private conservation groups. In *American Electric*, the Second Circuit tackled the question head-on, holding the trusts sufficiently alleged facts that proved standing.

### 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 owned by the trusts. Petitioners claimed these diminishing harms undermined their ability to promote legitimate goals with the properties: to preserve land for use and enjoyment, and for

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10 See id. at 2535.

11 See id. (Sotomayor, J., recusing). 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. *Id.* Justice Ginsburg may have given a clue as to how the split emerged through her use of “adhered,” noting 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 (June 20, 2011, 1:04 PM), http://volokh.com/2011/06/20/supreme-court-unanimous-that-clean-air-act-displaces-climate-suits/. Also, Justice Alito peculiarly wrote a single-sentence concurrence joined by Justice Thomas. See *id.* at 2540–41 (Alito, J., concurring); see also See Jonathan H. Adler, *Supreme Court Unanimous that Clean Air Act Displaces Climate Suits*, VOLOKH CONSPIRACY (June 20, 2011, 10:45 AM), http://volokh.com/2011/06/20/supreme-court-unanimous-that-clean-air-act-displaces-climate-suits/ (noting the potential strategy of limiting *Massachusetts* standing by Justice Scalia and Chief Justice Roberts by not joining Alito’s concurrence).

12 See *Am. Elec. Power Co.*, 131 S.Ct. at 2534 & n.5. Thus, while the Supreme Court’s decision holds great importance to this Article, the substantive standing analysis comes from the Second Circuit’s opinion.

13 See *Massachusetts*, 549 U.S. at 518.


15 The properties included lands owned by the trusts or lands held in conservation easements. See *id.* at 342.

16 *Id.* Similar to *Massachusetts*, the trusts argued that the rising sea levels caused by global warming, to which the defendants’ emissions contribute, harm properties along the coasts and tidal rivers that the trusts own or hold conservation easements. See *id.*
scientific and educational purposes. The defendants argued that these injuries constitute futuristic injuries and not the kind of injury that the *Lujan* Court referred to as “imminent.”

The court turned to the *Lujan* definition of imminent, which the court interprets does not impose a strict temporal requirement that a future injury occur within a particular time frame of the complaint. The *American Electric* court echoed these sentiments, holding that the plaintiffs’ arguments indicated the certainty of the future injury—as opposed to a mere hypothetical trip that will happen soon as in *Lujan*—confers standing. The emissions that contributed to the harms would continue, and only worsen as time went on, until the injuries manifested into a complete diminution in property value.

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.” Expanding on this, the State argued the defendants’ emissions “directly and proximately contribute to their injuries and threatened injuries.” The defendants relied on an argument of attributing pollution harm to its source; however, *Massachusetts* specifically rejected that argument two years prior. Instead, the court explained that simply proving that the defendant is a contributor suffices to show that the defendants’ acts contribute to the plaintiffs’ alleged injuries, and as such, the defendant may not escape

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117. *Id.*

118. *See id.* at 342–43 (arguing the correct application of the rule requires “a close temporal proximity between the complained-of conduct and the alleged harm” (quoting McConnell v. FEC, 540 U.S. 93, 226 (2003))).


120. *Am. Elec. Power* v. Connecticut, 582 F.3d 309, 343 (2d Cir. 2009), *cert. granted*, 131 S.Ct.813 (2010), *rev’d*, 131 S.Ct. 2527 (2011) (citing *Clinton*, 542 U.S. at 549). *But see Baur*, 352 F.3d at 641 (holding that because the injuries were not currently being exposed to the plaintiffs, and were merely “anticipated,” that the plaintiffs did not meet the Article III standing threshold).


122. *See Am. Elec. Power*, 582 F.3d at 345 (citation omitted).

123. *Id.* Contributing to an ongoing problem such as global warming can suffice as an injury for standing. *See Massachusetts* v. EPA, 549 U.S. 497, 532 (2007).

124. *See Am. Elec. Power*, 582 F.3d at 345 & n.23 (arguing the plaintiffs bear a special burden of proof linking the injuries to the individual defendant’s emissions (quoting Tex. Indep. Producers & Royalty Owners Ass’n v. EPA, 410 F.3d 964, 974 (7th Cir. 2005))).
liability by requiring a special burden of proof to establish standing. The plaintiff does not have to sue every defendant potentially causing their injuries, since the pollution of a single defendant can justify causation—of at least some part—of the plaintiff’s injuries.

The plaintiffs argued that the court can redress the harms caused by the defendants’ substantial emissions of CO$_2$ into the atmosphere by capping the defendants’ emissions to a specific percentage each year for at least a decade. The defendants countered that the plaintiffs cannot prove that capping—by an unidentified percentage—the defendants’ emissions would redress the harms the plaintiffs seek to delay. The American Electric court held, however, that because “[p]laintiffs have sued defendants who, they allege, are directly causing them injury,” the causation is satisfied.

**B. The Plurality Problem: Where do the Nine Justices Stand?**

Justice Sotomayor recused herself from the Supreme Court decision in 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, Sotomayor has voted twice with the liberal block of the Court on the issue of standing: In *Arizona Christian School Tuition Org. v. Winn*, she voted along with Justices Ginsburg, Breyer, and Kagan in favor of standing. In another case, Justice Sotomayor joined a

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125 *See id.*


127 *See id.* at 347–48.


129 *See Am. Elec. Power*, 582 F.3d at 348.


131 131 S.Ct. 1436, 1450 (2011) (Kagan & Sotomayor JJ., dissenting) (arguing in favor of standing in a taxpayer suit alleging Arizona’s tuition tax credit violated the Establishment Clause).
dissenting opinion, along with Justices Ginsburg, Stevens, and Breyer, rejecting Justice Scalia’s arguments against standing. In sum, if Sotomayor had voted, it appears that a five-Justice majority would have favored standing in this case. When similar cases arise in the future, and all the Justices can vote, this majority will likely prevail, despite the opposition from Scalia, Roberts, Thomas, and Alito.

IV. AGENCY-CREATED STANDING REQUIREMENTS FOR CITIZEN SUITS

The primary thesis here is 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. The arguments are partly descriptive and statutory—describing Congress’ implicit delegation of authority to the agencies to promulgate rules on this point—and party 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’ 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 Supreme Court’s early jurisprudence on standing—the doctrine kept courts from creeping too close to legislative functions, such as issuing declaratory judgments and answering political questions. The original idea was not to limit Congress, but rather to limit the courts from stepping in

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132 Salazar v. Buono, 130 S.Ct. 1803, 1830 & n.2 (2010) (Stevens & Ginsburg & Sotomayor, JJ., dissenting) (agreeing with the majority that the plaintiff had standing to allege the public display of a Latin cross in a national park violated the Establishment Clause).

133 U.S. CONST. art. III.


135 See, e.g., Scalia, supra note 2, at 894.
where Congress has not acted. 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’ ability to expand standing, when the statutes in question already had the broadest possible language for which parties can sue, i.e., “any person.” Congress left the standing question completely open in these statutes, leaving courts to navigate without direction, and creating 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’ 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.

Congress has simply remained silent in federal citizen-suit provisions, and standing in general. Rather than viewing the any-person verbiage 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. Congress simply left the question unanswered—a gap in the law.

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137 See, e.g., sources cited supra note 5.

138 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 in his own behalf . . . .”).

139 Some legislative assignments of common law claims to bankruptcy courts through pendent or ancillary jurisdiction have, according to the Court, violated the Seventh Amendment. See, e.g., Stern v. Marshall, 131 S.Ct. 2594, 2613–15 (2011) (“The ‘experts’ in the federal system at resolving common law counterclaims such as [the defendant’s] are the Article III courts . . . .”).
Congress could have answered the question; it would have been within its powers to do so.\textsuperscript{140} For starters, Congress could have left out the citizen suit provision completely, leaving no opportunity to sue at all. Under the Public Rights Doctrine, citizen suits best resemble public rights rather than private rights;\textsuperscript{141} and what Congress giveth, Congress can taketh away. Further, each of the statutes themselves limits the citizen suits to the scope of the relevant Act (such as the CAA).\textsuperscript{142} 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,\textsuperscript{143} limitations on forum or venue (such as giving original jurisdiction to the D.C. Circuit),\textsuperscript{144} or requiring agency acquiescence to the suit (such as the EEOC’s “right to sue” letters).\textsuperscript{145} Congress forbids the suits where the agency has already commenced enforcement.\textsuperscript{146} 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.\textsuperscript{147}

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

\textsuperscript{140} See, e.g., \textit{Lujan}, 504 U.S. at 580 (Kennedy, J., concurring).

\textsuperscript{141} See, e.g., F. Andrew Hessick, \textit{Standing, Injury in Fact, and Private Rights}, 93 \textit{Cornell L. Rev.} 275, 277 (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 that support standing. According to the Court, private individuals may invoke the judiciary only to resolve their private disputes.”).

\textsuperscript{142} E.g., 42 U.S.C. § 7604(a)(1)–(3) (2006) (limiting the provision’s applicability to the CAA).

\textsuperscript{143} E.g., \textit{id.} § 7604(b)(1)(A) (requiring a plaintiff must provide notice to the EPA, the state, and to any alleged violator of an alleged violation sixty days prior to commencement of any suit).

\textsuperscript{144} E.g., \textit{id.} § 7413(d)(4); \textit{id.} § 7524(5).

\textsuperscript{145} \textit{See id.} §§ 2000e-5(f)(1), 1217.

\textsuperscript{146} \textit{See id.} § 7604(b)(1)(B).

\textsuperscript{147} E.g., \textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring); \textit{see also} sources supra note 5 (suggesting Congress acts on Justice Kennedy’s suggestions in \textit{Lujan}).
has primary enforcement authority. Congress already delegated to the agency the power to promulgate regulations,\textsuperscript{148} to spend funds on research and monitoring compliance,\textsuperscript{149} and to bring enforcement actions for violations.\textsuperscript{150}

\textbf{B. Implied Delegation}

Not only \textit{could} Congress delegate to agencies the task of defining standing for citizen suits, arguably \textit{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.\textsuperscript{151} 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,\textsuperscript{152} but normally the opposite is true—agencies function within broad authorizations and have nearly unfettered discretion

\begin{enumerate}
\item See \textit{id.} § 7408(a)(1) (requiring the EPA to publish regulations defining pollutants); \textit{id.} § 7408(f)(1) (requiring the EPA to publish regulations on transporting pollutants); \textit{id.} § 7409(a)(1) (requiring the EPA to publish regulations defining air-quality standards); \textit{id.} § 7411(b)(1)(A) (requiring the EPA to publish a list of stationary sources).
\item See \textit{id.} § 7403(a)–(b) (research); \textit{id.} § 7403(c) (monitoring).
\item See \textit{generally id.} § 7413 (federal enforcement).
\item See, \textit{e.g.}, Heather K. Gerken, \textit{Federalism All the Way Down}, 124 HARV. L. REV. 4, 37 (2010); \textit{see also} Mistretta v. United States, 488 U.S. 361, 372 (1989) (holding Congress may constitutionally “delegate power under broad general directives”).
\item See, \textit{e.g.}, United States v. Security State Bank and Trust, 473 F.2d 638, 641 (5th Cir. 1973); \textit{see also} Interstate Commerce Comm’n v. Brimson, 154 U.S. 447, 484 (1984) (“[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.”).
\end{enumerate}
within those general guidelines.\textsuperscript{153} In other words, Congress more often delegates authority by what it does not say, than by what it specifies.\textsuperscript{154}

The \textit{Chevron} doctrine of judicial deference to agency interpretations of law rests on the idea of statutory ambiguity being an invitation for agencies to exercise discretion; where the statute is ambiguous, courts must defer to agency interpretations and gap-filling as long as it is merely “reasonable.”\textsuperscript{155} \textit{Chevron} deference is a cornerstone of administrative law. In 2009, however, the Supreme Court abruptly turned \textit{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.\textsuperscript{156} The \textit{Negusie} decision’s groundbreaking approach—requiring, rather than merely allowing, agencies to interpret governing statutes—has startling implications for \textit{Chevron} analysis and administrative law in general.\textsuperscript{157} This move by the Court continued a trajectory originating with the \textit{Brand X} case in 2005, explicitly declaring a preference for agencies, rather than courts, to fill in statutory gaps,\textsuperscript{158} but then it took the much bolder step of turning it into a mandate.\textsuperscript{159} For the sake of clarity and convenience, we dub this new approach “injunctive \textit{Chevron}” to


\textsuperscript{154} See, e.g., Lisa Schultz Bressman, \textit{Reclaiming the Legal Fiction of Congressional Delegation}, 97 VA. L. REV. 2009, 2034–41 (2011). Along these lines, Professors Eskridge and Levi have argued persuasively that statutory ambiguity and gaps are the actual mechanism by which the laws delegate discretion to administrators. See Eskridge, Jr. & Levi, \textit{supra} note 18, at 1107–13. Statutory precision and detail, by contrast, often operates as a constraint on executive agencies, as administrators must carry out such instructions rather mechanically. \textit{See id.}


\textsuperscript{156} See \textit{Negusie}, 555 U.S. 511, 516–17 (2009); \textit{see also} Mayo Found. for Med. Educ. & Research v. United States, 131 S.Ct. 704, 715–16 (2011) (holding that because the agency rule was one that Congress has not directly spoken on, and the rule was a reasonable construction of what Congress intended, the agency must receive \textit{Chevron} deference, regardless of which agency promulgated the rule).


\textsuperscript{158} See Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982–86 (2005).

\textsuperscript{159} See \textit{Negusie}, 555 U.S. at 516–17; \textit{Mayo Found.}, 131 S.Ct. at 715–16.
distinguish it from classic *Chevron* jurisprudence. Justice Stevens, the author of *Chevron*, dissented in *Negusie* and charged the majority with turning *Chevron* on its head.\(^\text{160}\) In its most recent Term, the Court continued in this direction by making *Chevron* a doctrine of preemption as well, holding in *American Electric* that courts cannot initiate interpretation of a statute where a particular administrative agency has promised to do so instead.\(^\text{161}\)

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.\(^\text{162}\) The larger acts that surround the citizen suits contain general principles—“intelligible standards” in the jargon of delegation analysis\(^\text{163}\)—that guide the agencies in their endeavors.\(^\text{164}\) The statutes give an agency authority to work out the details, to set standards, create a monitoring and enforcement regime, and so forth.\(^\text{165}\) 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.\(^\text{166}\) 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 suggests that Congress intended (or would have intended, had it considered the question) for the agency to move in to fill this gap. For example, the larger statutory framework expressly authorizes agencies to limit all potential citizen suits

\(^{\text{160}}\) *See Negusie*, 555 U.S. at 534 (Stevens, J., concurring in part and dissenting in part) (arguing the Court has applied *Chevron* deference to an agency’s interpretation of a purely statutory question that the Court should decide).


\(^{\text{162}}\) *See id.* at 2538–39; *Negusie*, 555 U.S. at 516–17.

\(^{\text{163}}\) *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) (holding it is constitutionally sufficient if Congress articulates an “intelligible principle [when it] delegate[s] under broad general directives”).

\(^{\text{164}}\) *See supra* note 19.

\(^{\text{165}}\) *See id.*

through preemption and displacement. Any agency litigation against a violator automatically preempts any citizen suits against the same defendant. Thus, agencies have explicit, express statutory authority to forestall (by a preemptive move) any citizen suit that they deem contrary to current administration policy. Similarly, agencies can “displace” related public-interest suits brought under common law doctrines—this applies even where 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 would sue, and through their extensive systems of permits, variances, and specific exemptions for the regulated industry. Arguably, externally delineating standing requirements (as is the case when the courts fabricate the rules) within the agency’s expertise, such as injury and causation contradicts the statutory schema that Congress created.

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168 See, e.g., People of Cal. v. Dep’t of the Navy, 624 F.2d 885, 887 (1980) (holding that the states have broad powers to implement the provisions of the CAA, but that the CAA preempts state regulations).


170 For example, the CAA authorizes a number of suits through its provisions. See 42 U.S.C § 7413(b) (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 CAA); id. § 7477 (providing the EPA authority to enforce “prevention of significant deterioration” (PSD) standards); id. § 7509(d)(2) (allowing the EPA to sanction states not in compliance with their own SIPs); id. § 7511d (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. § 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. § 7411(a) (requiring the EPA to publish regulations defining “new” stationary sources subject to the PSD program); id. § 7502 (requiring the EPA to designate nonattainment areas for “National Ambient Air Quality Standards” (NAAQS)); id. § 7607(d) (requiring the EPA to define NAAQS standards to “allow[] an adequate margin of safety . . . requisite to protect the public health” as provided in 42 U.S.C. § 7409(b)(1)); id. § 7409(a)(1) (requiring the EPA to compile a list of air pollutants “which may reasonably be anticipated to endanger public health or welfare”).

171 See, e.g., id. § 7411(c) (new source performance standards (NSPS) permits); id. § 7411(j) (NSPS waivers); id. § 7503 (nonattainment area permits); id. § 7503(c)(1) (allowing offsets to permit requirements); id. § 7474(b)(1)(B) (PSD program permitting process); id. § 7475(d)(2)(D) (exemptions to PSD permitting requirements); id. § 7661(d) (permitting requirements for hazardous air pollutants).

172 We argue that recent Supreme Court decisions have increasingly viewed the rule of *Chevron* deference as a *mandate*, rather than a discretionary option—meaning the agencies must fill gaps in ambiguous statutory language. See, e.g., Mayo Found. for Med. Educ. & Research v. United States, 131 S.Ct. 704, 715–16 (2011). Following this logic, in conjunction with the clearly ambiguous language of most citizen suit provisions, see, for example, 42 U.S.C § 7604(a) (“[A]ny person may commence a civil action . . . .”), the administrative agency *must* articulate some
**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, suggest that courts would also accede to an agency’s rules about standing. The premise underlying judicial deference under both *Chevron* and *Skidmore* rules is that agencies have staff with relevant expertise and training, and that their specialized functions provide agencies with opportunities to analyze the issues deeply. Agencies conduct extensive research to formulate policy positions and collect large quantities of useful data via the reporting requirements imposed on the regulated industries.

As the Supreme Court itself recently opined, “The expert agency is surely better equipped to do the job than the federal judges, who lack the scientific, economic, and technical resources an agency can utilize . . . .”\(^{174}\) Regarding standing for citizen suits, agencies have superior information (compared to private plaintiffs) about how to rank or prioritize various violators (potential defendants), 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.\(^{175}\)

The requirements for standing primarily focus on the traits of the plaintiff—more precisely, the nature of the plaintiff’s injury.\(^{176}\) 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, which is partly a question of how the violation fits into the larger context of environmental preservation standards by which private persons may sue private industry members violating the statutory scheme, *id.* § 7604(a)(1), a private industry member operating without the necessary permits, *id.* § 7604(a)(3), or the administrative agency itself, *id.* § 7604(a)(2). The proposed bifurcated thesis we argue in favor of seems the most logical solution to both the statutory ambiguity as well as solving the standing “crisis” as explained in this Article.


\(^{175}\) Cf. *City of Milwaukee*, 451 U.S. at 323.

and the total aggregate of violations.\textsuperscript{177} Suppose, for example, that for citizen suits over air pollution, the EPA proscribed 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 (say, more than 100,000 tons of emissions). Similar benchmarks already permeate the Clean Air Act regulations.\textsuperscript{178} The agency, of course, would select the appropriate levels, and would put its determination through the usual notice-and-comment procedures (soliciting public comment and addressing the more serious submissions), and would develop a detailed administrative record to show how it reached this decision.\textsuperscript{179}

The APA’s standards for judicial review of agency actions (“arbitrary and capricious” is the default rule\textsuperscript{180}) force agencies to develop thorough records of their decision-making and to demonstrate thoughtful consideration of alternatives.\textsuperscript{181} This standard of review both suggests that agencies normally serve as more consistent and articulate decision-makers than courts, at least within the agencies’ domains of expertise,\textsuperscript{182} and also ensures that agency rules on standing would derive from extensive deliberation and consideration of multiple alternatives.\textsuperscript{183}

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 would help

\textsuperscript{177} See id.

\textsuperscript{178} See supra note 42.


\textsuperscript{181} See, e.g., Penzoil Co. v. Fed. Power Comm’n, 534 F.2d 627, 632 (1976) (holding the agency had to consider, during rulemaking, possible alternatives that would promote the same outcome while protecting the same interests).

\textsuperscript{182} 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.”).

\textsuperscript{183} Cf. Chamber of Commerce v. SEC, 443 F.3d 890, 894 (2006) (holding the SEC must consider a “facially reasonable alternative”).
safeguard against potential abuses of the citizen suit provisions.\textsuperscript{184} 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{185} 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{186} As Congress clearly contemplated citizen suits to fill gaps in agency enforcement, to supplement the agency’s own efforts,\textsuperscript{187} 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{188} 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


\textsuperscript{185} See Alder, supra note 30, 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{187} See 5 CLEAN AIR ACT AMENDMENTS 1970 221, 353 (1970) (“A citizen suit provision is based on the assumption that the [f]ederal and [s]tate agencies will be incompetent, corrupt or otherwise not discharge their responsibilities.”).

\textsuperscript{188} See, e.g., 42 U.S.C. § 6903(5) (2006) (requiring the EPA to define “hazardous wastes”—so that it may regulate their generation, transportation, disposal, etc., see id. § 6922 (setting out the responsibilities of “generators”—that may “cause or significantly contribute to, an increase in mortality or an increase in a serious irreversible illness, or incapacitating, reversible illness . . . .”)); United States v. Alcan Aluminum Corp., 964 F.2d 252, 257, 264–65 (3rd Cir. 1992) (holding that under CERCLA § 107, 42 U.S.C. § 9607, a plaintiff must show a causal connection between a contamination and a “potentially responsible party”).
and an overly strict approach. In almost any type 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 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.

For example, similar arguments were brought to light during oral argument in American Electric:

JUSTICE SCALIA: You’re lumping [the emissions contributors] all together. Suppose you lump together all the cows in the country. Would — would that allow you to sue all those farmers? . . . [D]on’t you have to do it defendant by defendant? . . . Cow by cow, or at least farm by farm?

MS. UNDERWOOD: Courts sometimes aggregate joint contributors to pollution, particularly where the remedy that’s sought is injunctive relief. If this were a damage action there would be no different problem of allocating to each individual defendant. But the relief that’s sought here is the same as an injunction.

JUSTICE SCALIA: So you can lump everybody together, so you can lump together all the people in the United States who breathe . . .

MS. UNDERWOOD: No. I think that breathers are not really — for one thing, they don’t even really contribute to carbon dioxide because they absorb as well as exhale it. For another thing, there’s no way that breathing could be found unreasonable.

. . .

JUSTICE ALITO: [A]nybody who is a substantial contributor could be sued?

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.


Compare Sierra Club v. Franklin Cnty. Power of Ill., 546 F.3d 918, 927 (7th Cir. 2008) (holding the plaintiffs sufficiently alleged standing despite the fact that “no one knows the ultimate magnitude” of their injury), with 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.”).

See Valley Forge Christian Coll. v. Americans 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 . . . ”).
Unlike the injury-in-fact inquiry, the causation prong of standing shifts the focus to the defendant and the etiological connection between the supposed perpetrator and the result. Agencies have a superior vantage point on this point 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; 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.

As mentioned in the Introduction, the redressibility 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 first-hand 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

192 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 v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (noting 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).

193 See supra note 43.

194 See 42 U.S.C. § 7413(a)(3) (providing the EPA with primary enforcement authority).

195 See Lujan, 504 U.S. at 580 (Kennedy, J., concurring) (holding that Congress could define injury and causation, but making no mention of redressability).
of the APA;\textsuperscript{196} these rules not only enrich the agency decisions with more thorough deliberation, but also introduce a healthy democratic component into administrative rulemaking.\textsuperscript{197} Any rules that agencies promulgate about standing for citizen suits would involve substantial periods of public comment,\textsuperscript{198} and responsive discussion by the agency to the received comments when the final rule appears in the \textit{Federal Register}.\textsuperscript{199} Activist groups that regularly bring citizen suits would have an opportunity to weigh in on the standing rules for future public-interest lawsuits;\textsuperscript{200} their participation in setting their own boundaries for future litigation would not only yield useful information, but would enhance the perceived legitimacy of the rules by those they affect the most. Another source of political accountability for the agencies is the rigorous OMB and OIRA review that proposed regulations must undergo;\textsuperscript{201} OMB and OIRA work under closer supervision by the President,\textsuperscript{202} who is more sensitive to national public sentiment than either the courts or the agencies.\textsuperscript{203} These valuable, democratizing sources of input on the standing requirements—


\textsuperscript{197} See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 66 (1969) (describing notice-and-comment procedures as the most “democratic” regulatory procedure because of the open access by the public); cf. Cajun Elec. Power Coop., Inc. v. FERC, 28 F.3d 173, 180 (D.C. Cir. 1994) (per curiam) (holding that the agency’s failure to conduct an evidentiary hearing resulted in a substantively flawed decision whereby the agency inadequately explained its administrative decision).

\textsuperscript{198} See 5 U.S.C. § 553(c) (requiring the agencies give interested persons an opportunity to participate in the rulemaking process); see also Richard J. Pierce, \textit{Rulemaking and the Administrative Procedure Act}, 32 TULSA L.J. 185, 185–88 (1996).

\textsuperscript{199} See 5 U.S.C. § 553(c); see also Stephen M. Johnson, \textit{The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet}, 50 ADMIN. L. REV. 277 (1998).


\textsuperscript{202} See supra note 32.

\textsuperscript{203} See Christina 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); 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.”); 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
public comment submission and OMB review—are missing from our current regime of ad-hoc judicial choices.\footnote{204}{See Mariano-Florentino Cuellar, \textit{Rethinking Regulatory Democracy}, 57 \textit{Admin. L. Rev.} 411, 428–35 (2005) (an empirical study on the democratic effects of administrative notice-and-comment procedures).}

\textbf{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.\footnote{205}{See Pushaw, \textit{Limiting Standing}, \textit{supra} note 3, at 52; \textit{see also supra} note 190.} Potential plaintiffs and defendants alike confront an inappropriate level of uncertainty or 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 expertise and specialized knowledge about the proper role of citizen suits. Agencies could provide better-informed rules, and the statutory framework suggestions that this falls within their delegated powers from Congress. As citizen suits continue to proliferate in the United States 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.\footnote{206}{See \textit{id.} at 10 n.42 (arguing docket control facilitates a necessity for prudential standing limitations).} Agencies are better able than courts to fulfill Congress’ intentions regarding citizen suits. Courts necessarily must take taking a blunt-instrument approach to standing.\footnote{207}{Cf. Virginia G. Maurer, \textit{Antitrust and RICO: Standing on the Slippery Slope}, 25 \textit{Ga. L. Rev.} 711, 747 (1991) ("[C]ourts and parties to a legal dispute employed crude tools for evaluating the standing of civil plaintiffs.").} 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.\footnote{208}{See \textit{supra} Part III.B.} Ultimately, liberalized standing rules facilitate that courts are completely isolated from political pressures. Recent empirical work shows courts are responsive to political trends.”

increased citizen-suit activity. Thus, we argue, new parameters from an appropriate extrajudicial source would be particularly timely at this point. The issues surrounding questionable standing cases grow increasingly complex, and the courts have haphazardly solved them with conflicting and ambiguous rulings.

E. Anticipated Objections

This section anticipates a few objections to the proposal, and attempts to offer at least preliminary responses. Three primary objections seem most pertinent.

1. Judiciary as the Gatekeepers for the Courthouse

The most obvious objection to the proposal suggested here would argue 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 the plaintiffs prevailed. An institutional-competence version of this argument might posit that judges have insider’s expertise to flag cases that will create unseemly problems.

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


212 See id. (“It preserves the validity of the adversarial process . . . .”).

213 See Scalia, supra note 2, at 894.

214 E.g., Ho & Ross, supra note 56, at 596. But see Bradley S. Clanton, Standing and the English Prerogative Writs: The Original Understanding, 63 BROOK L. REV. 1001, 1007–08 (1997) (arguing scholars overstate the public’s access to the courts at the time the Constitution was founded).

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, or separation-of-powers issues. The judiciary inherently has the greatest institutional competencies, and superior information, to screen cases that the courts should not adjudicate. 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 caseload. 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 cases. 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 are rather Herculean.

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216 See Pushaw, Limiting Standing, supra note 3, at (“[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 . . . ”).

217 See id.

218 See, e.g., Mark Gabel, Generalized Grievances and Judicial Discretion, 58 HASTINGS L.J. 1331, 1343–44 (2007) (discussing the Court’s view of the judiciary’s institutional competence as the background of recent decisions on standing); The Supreme Court, 2003 Term, Leading Cases: Standing, 118 HARV. L. REV. 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.”); William W. Buzbee, Standing and the Statutory Universe, 11 DUKE ENVTL. L. & POL’Y F. 247, 271 (2001); see also Richard H. Fallon, 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.”). 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 ENVTL. L. & POL’Y F. 207, 229 (2001) (discussing a contrary view, reflecting the views of the authors).

219 See Pushaw, Limiting Standing, 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)).

220 See Pushaw, A Neo-Federalist Approach, supra note 2, at 458–59 (“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 . . . ”).
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.\(^{221}\) The consistent breakdown along partisan lines of Supreme Court Justices on the issue of standing lends strong support to this idea, that 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.\(^{222}\) In its worst form, judicial standing requirements could be merely a means of thwarting Congressional intent, especially in the domain of social reform legislation.\(^{223}\) In the wake of the *Lujan* decision, in fact, several 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.\(^{224}\) A short version of this reply 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 conceive of standing primarily as a channeling device, and secondarily as a screening device;\(^{225}\) 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

\(^{221}\) See, e.g., F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 304–06 (2008); see also Transcript of Oral Argument, *supra* note 189, 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.”).


\(^{223}\) See *Pushaw, Limiting Standing*, 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.”).

\(^{224}\) E.g., Sunstein, *What’s Standing?*, supra note 5, at 217–18.

\(^{225}\) *Cf.* infra note 276.
courts.\textsuperscript{226} 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{227} 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{228}

2. Agency Capture Will Limit Citizen Suits Excessively

While the last objection focused on the incentives and competencies of judges, a second objection would be that agencies would have a perverse incentive to promulgate overly restrictive standing rules and thereby 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 respective arena.\textsuperscript{229} More common and more likely, however, are versions of this objection that assume agencies are

\textsuperscript{226} See Air Pollution–1970: Hearings on S. 3229, S. 3466, and S. 3546 Before the Sub. Comm. on Air and Water Pollution of the Comm. of Public 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 [s]tate and local agencies should fail in their responsibility, the public would be guaranteed the right to seek vigorous enforcement action under the citizen suit provisions of [S]ection 304.”).

\textsuperscript{227} Cf. Chevron, U.S.A., Inc. v. Natural Res. Def. Couns., Inc., 467 U.S. 837, 843–44 (1984) (“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.”).

\textsuperscript{228} See S. REP. No. 91-1196, at 21 (1970) (“[T]he committee believes that public participation should not be limited to the development of standards and plans.”).

prone to capture by the regulated industry itself, who would then seek to shield itself from lawsuits by having its puppet agency promulgate insurmountable standing requirements. A 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, 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, would be 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.

Yet 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 for agency capture to occur is through presidential appointments of agency directors; the rank-and-file civil servant workforce at the agency remains largely intact through election cycles. For a newly appointed

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230 Cf. Gillian E. Metzger, Federalism and Federal Agency Reform, 111 COLUM. L. REV. 1, 26–27 (2011) [hereinafter Metzger, Federal Agency Reform] (noting forms of agency capture, including industry capture, the classic form).

231 See, e.g., 5 CLEAN AIR ACT AMENDMENTS 1970 221, at 353 (1970) (“A citizen suit provision is based on the assumption that the [f]ederal and [s]tate agencies will be incompetent, corrupt or otherwise not discharge their responsibilities.”).

232 See e.g., Alder, supra note 30, at 65–66 (noting the regulatory inefficiencies that hinder agencies). But cf. Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,822 (Jan. 21, 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 . . . .")

233 See, e.g., HARRY MARKOPOLOS, NO ONE WOULD LISTEN: A TRUE FINANCIAL THRILLER 63 (2010) (“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 were[ not] looking to derail their careers by bringing big, complicated cases that would take years to resolve against the most powerful people in the industry.). Bernie Madoff orchestrated a $65 billion Ponzi scheme which the SEC failed, or refused, to discover on numerous occasions.
director who wants to adopt an indulgent approach toward the regulated industry, abstaining from enforcement is nearly costless; repealing or changing regulations is costly in terms of time and resources, as courts will require a well-developed administrative record for any changes in the rules. Favors for the industry, therefore, usually will take the form of agency non-enforcement, as it demands no resources and is relatively invisible politically.\(^{234}\) 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 suits.\(^{235}\) 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.\(^{236}\)

Finally, judicial review of the administrative record (“hard look” scrutiny)\(^{237}\) and the democratizing features described above (especially notice-and-comment procedures) provide significant checks on

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\(^{234}\) See David Schoenbrod, Power Without Responsibility 109–11 (1993) (arguing agencies show preference to certain interest groups that essentially pay “rent”); see also Danieli 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.”); Ezra Ross, The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties, 29 Yale L. \\

\(^{235}\) See Metzger, Federal Agency Reform, supra note 230, at 8–17 (discussing several recent preemption decisions by the Court); see also Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority?: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2007).

\(^{236}\) See Alder, supra note 30, at 79 (arguing excessive citizen suits can encourage cooperation, and potentially capture).

\(^{237}\) See Elizabeth Magill & Adrian Vermeule, Allocating Power Within Agencies, 120 Yale L.J. 1032, 1051–52 (2011) (“Under ‘hard look’ review, agencies have an obligation to provide a reasoned policy analysis for their regulatory choices.”).
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 with regards to 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 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, the judges give themselves somewhat lighter dockets as well; if a captured agency attempts the same move, it has the opposite secondary effect.


239  See generally Magill & Vermeule, supra note 237, 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.

240  The agency has certain nondiscretionary duties of enforcement and rule promulgation. If they promulgate standing rules, those rules would 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, the EPA would have indirectly placed large burdens on its own administrative functions by forcing both menial and substantial enforcement actions on the agency itself.

241  See Seidenfeld & Nugent, supra note 104, at 315 (“[C]itizen participation provides a mechanism for controlling agency abuse under the cooperative enforcement model . . . .”).

242  See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (promoting stable financial markets by “improving accountability and transparency in the financial systems,” which many believed at the time was regulated by a captured agency, see, for example, MARKOPOLOS, supra note 234, at 63, 127).
3. Losing the Arbitrage Advantages of Decentralized Standards and Diversified Agendas

A third objection would be 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.\textsuperscript{243} Mistakes in rulemaking become systemic errors—with far greater repercussions—when the rulemaking is more centralized and concentrated.\textsuperscript{244} 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 inconsistent 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.\textsuperscript{245}

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.\textsuperscript{246} The idea is that citizen suits themselves inherently allow for some policy hedging or arbitrage—while the central agency focuses on a few types of cases, an unspecified number or variety of plaintiffs could help enforcement regime to branch into other areas.\textsuperscript{247} In essence, this objection

\textsuperscript{243} But see Seidenfeld & Nugent, supra note 104, at 270–71 (“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 political oversight . . . .” (citation omitted)).

\textsuperscript{244} See Metzger, Federal Agency Reform, supra note 230, at 30 (noting federalism concerns revolving around administrative preemption decisions); Alder, supra note 30, at 44 (“Centralized regulatory agencies are further limited in their ability to provide optimal enforcement of environmental regulations because they have limited [local] information.”).

\textsuperscript{245} 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 (2003) (noting the arguments for and against inconsistent rulings in the federal circuit courts); 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 explain why . . . inconsistencies are acceptable and perhaps even necessary.”).

\textsuperscript{246} See Alder, supra note 30, 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.”).

\textsuperscript{247} See id. (“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
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. 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. To the extent that standing rules are a screening device, the ambiguity in the current regime introduces an element of Knightian uncertainty into the screening of cases, and Knightian 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. 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, suggest that the legislature trusts the agencies more. Moreover, many of the citizen suits provisions have been on the books now for three or more decades, allowing ample time to see the types of claims that citizen plaintiffs bring. The citizen suit provisions tend to be underutilized, and innovative claims seem to cluster in the first decade of litigation-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.”).

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250 See Alder, supra note 30, at 40–41 (discussing some of these concerns).

251 See id. at 43 (“[S]tarting in 1970[,] Congress enacted environmental citizen-suit provisions . . . .”.)
so after enactment of a citizen suit provision, plateauing after that, as path dependence besets the activist groups who bring most of the suits. In other words, while no one can quantify the unknown opportunity costs here, we also have little evidence to suggest that refined rules for standing would have an undue chilling effect on new categories of claims. Even so, this is an area where 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 created by agencies would inherently create. Take, for example, a hypothetical situation where private parties brought suit under an agency that has implemented this Article’s primary thesis and has promulgated specific and narrow rules defining injury and causation for standing. Any private parties intending to make arguments for standing that do not necessarily comport with the current views on standing as determined by the agency, will have no ability to reach federal court. The parties do, however, have the option of using the same public interest that originally planned to sue the harm-causing-industry-member, can direct that interest to their state attorney general. 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 of Massachusetts. Thus, the public interest is still channeled, it is just no longer channeled through the administrative and judicial system, rather; it is first channeled through the executive branch of its state government, where it must convince its state attorney general that their cause is compelling.

V. SPECIAL SOLICITUDE FOR STATES

The second prong of our proposal pertains to actions against the federal regulatory agencies themselves,253 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 by the Supreme Court in Massachusetts v. EPA;254 it would bring greater clarity, and uniformity, to citizen suits around the country if agencies endorsed this rule formally in the Federal Register.255 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.256 This second prong of the proposal is an extension of the idea that standing requirements should serve a channeling function more than a mere screening function. Favoring states in these types of suits is an explicit application of idea, channeling most suits through the state attorneys’ general.257

As mentioned in the Introduction, these suits raise issues of standing often enough to merit discussion together with the first type of citizen suits; on the other hand, they are legally distinct enough 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

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256 This would parallel the Massachusetts decision, since the majority did not exempt private parties from their decision, they simply awarded special deference to the state through their procedural standing and quasi-sovereign interest. Others have agreed that the Court may have viewed the state as an agent for its citizens, rather than a sovereign protector of 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.”).

257 See, e.g., Stevenson, supra note 85, at 37.
define standing for citizen suits against third parties.\textsuperscript{258} Suits against agencies have important features in common with citizen suits against violators. Both types of actions originate from statutory authorizations to sue;\textsuperscript{259} both types contemplate injunctive relief rather than damages as the primary remedy;\textsuperscript{260} and both focus on matters primarily entrusted to the relevant agency by Congress.\textsuperscript{261} Claims against the agency, as well as claims brought in the shoes of the agency (so to speak),\textsuperscript{262} 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.

They 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.\textsuperscript{263} The suits we discuss primarily challenge agency inaction\textsuperscript{264}—or, in some cases, challenge an

\textsuperscript{258} This would be consistent with standing jurisprudence issued by the Supreme Court. \textit{See}, e.g., \textit{Warth v. Seldin}, 442 U.S. 490, 449 (1975) (“[E]ven when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, the 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 and interests of third parties.”). We do not propose changes in the substance of the judiciary’s prudential limitations; we merely propose administrative agencies take the Supreme Court up on its offer to define the injury and causation prongs of Article III standing.

\textsuperscript{259} \textit{E.g.}, 42 U.S.C \textsection 7604(a) (2006).

\textsuperscript{260} \textit{E.g.}, id. \textsection 7604(g) (“Penalties received under subsection (a) of this [S]ection shall be deposited in a special fund in the United States Treasury for licensing and other services.”).

\textsuperscript{261} \textit{Cf. id.} \textsection 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 an act or duty under this chapter which is not discretionary with the Administrator . . . .”).

\textsuperscript{262} This is known as private parties acting as “private attorneys general.” \textit{See} William B. Rubenstein, \textit{On What a “Private Attorney General” is—And Why it Matters}, 57 \textit{VAND. L. REV.} 2129, 2130–2133 (2004).

\textsuperscript{263} \textit{Compare} 42 U.S.C. \textsection 7604(a)(1) (authorizing citizen suits against “any person”), \textit{with id.} \textsection 7604(a)(2) (authorizing citizen suits against the EPA).

\textsuperscript{264} \textit{E.g.}, \textit{Massachusetts v. EPA}, 549 U.S. 497 (2007). But note that \textit{Massachusetts} is a unique case because it challenged agency inaction to promulgate rules, while the previous challenges to inaction centered around failures to enforce. \textit{See} Metzger, \textit{Federal Agency Reform, supra} note 230, at 41 & n.189.
agency for acting but not going far enough—"and accusing a defendant of omission results in a very different type of case than accusing 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 approach to standing is appropriate. The Supreme Court drew this same distinction in *Massachusetts*, adopting the special solicitude rule regarding states’ standing to sue federal agencies—in *Massachusetts*, a consortium of states was suing the EPA to compel it to regulate greenhouse gases. The Court based its holding on three legal disadvantages confronting states: the Constitution’s prohibitions 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 statutory preemption, rooted in the Supremacy Clause, that limits states’ ability to address certain problems through local legislation. Each state voluntarily joined the Union, Justice Stevens observed, surrendering rights they would otherwise have had in each of these three domains (threatening force against contiguous neighbors, consummating treaties with other countries, and even passing some of their own laws and regulations) in order to participate in the greater Nation. States thus left themselves somewhat helpless and vulnerable, relying upon the federal government to provide commensurate protections in return. Special solicitude for states applies more to agency refusals to regulate than to

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268 See *id.* at 519–20.

269 See *id.* at 519.

270 See *id.* at 519–20.
lack of enforcement. Typically, it is easier to find a statutory mandate or duty for rulemaking.\footnote{See id. at 572 (“[Agency] discretion is at its height when the agency decides not to bring an enforcement action.”); Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985) (indicating that abdication of statutory responsibilities was a genuine concern, even if the facts in \textit{Heckler} did not rise to this level, as refusals to regulate might do).} Rulemaking is more time-consuming and costly for the agencies than enforcement proceedings,\footnote{Compare \textsc{Office of Management and Budget}, \textsc{2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities} 11 tbl.1-1 (2010) (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), \textit{with} U.S. EPA, \textsc{FY 2011 Budget in Brief} 3 (2011) (noting the EPA’s enforcement-and-compliance budget for the 2011 fiscal year is $618 million).} agencies are resistant to investing resources into new rulemaking, especially in controversial areas.\footnote{See, e.g., John M. Broder, \textit{E.P.A. Delays Rule on Power Plant Emissions}, \textsc{N.Y. Times} (June 13, 2011, 4:23 PM), http://green.blogs.nytimes.com/2011/06/13/e-p-a-delays-rule-on-power-plant-emissions/} The rulemaking process, being more tedious and less flexible than enforcement, is therefore less responsive to genuine crises or public outcry for government action.\footnote{See \textit{Massachusetts v. EPA}, 549 U.S. 497 (2007) (forcing the EPA to initiate a rulemaking process). But see Exec. Order No. 13,514, 74 Fed. Reg. 52,117, 52,117–51,118 (Oct. 8, 2009) (requiring the EPA to set a GHG emissions target). Thus, ultimately \textit{Massachusetts} sparked the need for rulemaking, but President Obama’s executive order actually set the wheels in motion.} Agencies are more likely to need prodding from the courts for rulemaking more than they would for enforcement.\footnote{See \textit{Margaret H. Lemos, State Enforcement of Federal Law}, 86 N.Y.U. L. REV. 698, 746 (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 state attorneys general compared to specialist federal agencies . . . . Enforcement authority is also different from regulatory authority as a \textit{channel} for state influence.”) (emphasis added); see also \textit{Cuomo v. Clearing House Ass’n}, 129 S.Ct. 2710, 2718 (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.”]).} 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.\footnote{See \textit{Alfred C. Aman, Jr. \& William T. Mayton, Administrative Law} 99–110 (2d ed. 2001).}

While 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, through the attorney general of each state. State attorneys general can better represent the interests of the public as a whole, rather than individualistic, private concerns that could motivate private
plaintiffs.\textsuperscript{277} Most states have an elected attorney general who directly represents the voters—a statewide constituency—and the remaining attorneys general are political appointees by the governor.\textsuperscript{278} 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.\textsuperscript{279} From an overarching policy standpoint, such representativeness, political accountability, and prioritizing would be healthful contributions to this field of litigation.\textsuperscript{280} Moreover, state attorneys general often collaborate with their counterparts in other states in bringing these suits against the federal government, as in \textit{Massachusetts}.\textsuperscript{281} These consortiums allow the representativeness 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).\textsuperscript{282}

There are other policy reasons to channel these 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.\textsuperscript{283} Many of these cases against the federal agencies involve difficult questions of federal power,\textsuperscript{284} the extent of statutory delegations to agencies,\textsuperscript{285} and the fine line between political questions and appropriate inquiries for adjudication,\textsuperscript{286} meaning that the cases are likely

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\item \textsuperscript{277} See Lemos, \textit{supra} note 276, at 702; Stevenson, \textit{supra} note 85, at 40.
\item \textsuperscript{278} See Stevenson, \textit{supra} note 85, at 39.
\item \textsuperscript{279} See Lemos, \textit{supra} note 276, at 721–30.
\item \textsuperscript{280} See Stevenson, \textit{supra} note 85, at 40–41; Lemos, \textit{supra} note 276, at 702.
\item \textsuperscript{281} Lemos, \textit{supra} note 276, at 720.
\item \textsuperscript{282} See id. at 721 (“[E]lected state attorneys general have strong incentives to serve their local constituencies.”).
\item \textsuperscript{283} See Stevenson, \textit{supra} note 85, at 50–51.
\item \textsuperscript{285} E.g., \textit{Massachusetts} v. EPA, 549 U.S. 497 (2007).
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to reach the circuit courts and often the Supreme Court, as in *Massachusetts*. States, especially working in
consortium, have greater lasting power or litigation endurance than private plaintiffs.287

Similarly, state AGs often have superior information about the subject matter compared to private
plaintiffs.288 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 CAA);289 every state government has an ongoing relationship with the relevant federal agency,
exchanging information, negotiating approval of parts of its implementation plan and permitting systems,
and so forth.290 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—state attorneys general have first-hand knowledge of the process of
promulgating regulations and bringing enforcement actions against violators.291

Private plaintiffs, such as the Sierra Club or the NRDC, can easily collaborate with the state
attorneys general in bringing these suits.292 Rather than encumbering these activist groups, joining with
the state attorney general broadens the suit in scope and resources.293 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 offering their own evidence and

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287 Stevenson, *supra* note 85, at 51 (noting this trend favoring collaborative efforts).
288 Lemos, *supra* note 276, at 721.
290 See Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2038 & n.54 (2007);
(2009).
291 See generally Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in
292 See generally Symposium, *The Role of State Attorneys General in National Environmental Policy: Global
support.\textsuperscript{294} In the event that the state attorneys general declines the overture, the citizen group is free to pursue the claim as it would have before, but will have to do more than the state would in order to demonstrate that it should have standing.\textsuperscript{295} The rule proposed here would incentivize citizen-action groups to cooperate with the state attorneys general, giving valuable input for the attorneys general, and indirectly more incentive to cooperate with each other, as a united coalition of citizen groups is more likely to attract the attention and support of the attorneys general.\textsuperscript{296}

Citizen suits against agencies are part of the statutory scheme and can bring healthy pressure to bear on indolent officials—but at the same time, these suits present inherent policy concerns that color the court decisions on standing.\textsuperscript{297} These suits necessarily divert agency resources into defensive litigation—resources that could have gone towards more enforcement, policy research, and so forth. The special solicitude rule does not bar private plaintiffs,\textsuperscript{298} 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.\textsuperscript{299} 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 \textit{DuPont}

\textsuperscript{294} Cf. Lemos, \textit{supra} note 276, at 722 (“[S]tate attorneys general are heavily monitored by political considerations. . . . [E]lected attorneys general have incentives to take actions that will respond to the interests of their constituents.”).


\textsuperscript{296} See Stevenson, \textit{supra} note 85, at 50 (“Another possible manifestation of the same phenomenon would be an increase in litigation partnerships between activist groups and state AG’s offices . . . .”).

\textsuperscript{297} See Alder, \textit{supra} note 30, at 63–69.

\textsuperscript{298} See \textit{supra} note 256.

\textsuperscript{299} E.g., Bond v. United States, 131 S.Ct. 2355 (2011) (8–0 decision favoring Article III standing); Thompson v. N. Am. Stainless, LLP, 131 S.Ct. 863 (2011) (7–0 decision favoring zone-of-interest standing).
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 though their own promulgated rules? First, if agencies are going to promulgate rules about standing for third-party citizen suits, it could generate confusion 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. 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.

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300 E.g., E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977). In DuPont, the EPA had taken a practical approach to regulation under the CWA by establishing industrial categories for direct discharges of pollutants and correlating effluent limitations for each category. See id. at 136. 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 found the EPA’s limitations to be reasonable. See id.

301 See Pushaw, Limiting Standing, supra note 3, at 8 (discussing the liberalization of standing and how it has frustrated the Court’s “stated purposes”).

302 See Lemos, supra note 276, 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.”).

303 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 CO₂ is a hazardous pollutant under CAA § 202, and if so issue regulations placing limitations on its emissions. See Massachusetts. v. EPA, 549 U.S. 497 (2007). Then, in American Electric the Court allowed the EPA’s future action of promulgating this new source regulation to displace any common law nuisance action, despite the concerns that the EPA’s rulemaking process was taking too long. See Am. Elec. Power Co. v. Connecticut, 131 S.Ct. 2527 (2011).
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 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.

VI. 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 potential litigants. Courts and commentators have called for Congress to give guidance on this point, so far without avail.

In every case where Congress has authorized citizen suits, it has given primary enforcement powers to a particular federal agency, such as the EPA. Congress’ 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

304 See supra note 54.
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.