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An Independent Public Law

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ARTICLE

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INTRODUCTION

Perhaps the most daunting task in law is seeing it whole, and in few areas is this more formidable than in public law. Professor Sunstein's recent critique, with suggestions for reform, of current standing doctrine enhances understanding of public law and contributes significantly to the development of an independent public law.[1] One of the article's foremost virtues is its ability to forge linkages across public law by identifying phenomena that strike responsive chords in numerous areas of the field.

Certain of these phenomena resonate clearly in the federal judiciary's application of various Federal Rules of Civil Procedure (Federal Rules) to public law litigation.[2] Courts' revival of private law concepts and judicial hostility toward public interest litigants, such as civil rights plaintiffs, in the application of the Federal Rules, as with standing, are singularly ill-advised.[3] The revitalization and hostility in the courts'

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1. Sunstein, *Standing And The Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

2. The phenomena do resonate in other areas, such as the "new due process protecting statutory benefits" as liberty or property, as well as ripeness and reviewability. *See* Sunstein, *supra* note 1, at 1442 n.42 (noting statutorily protected liberty and property interests assume constitutional status); *id.* at 1450 n.85 (listing developments that led to evolution of independent public law). Public law litigation is a lawsuit which vindicates important social values affecting large numbers of individuals and entities. For more treatment of public law litigation and the federal judiciary's application of the Federal Rules of Civil Procedure to such litigation, see Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989).

3. *See* Sunstein, *supra* note 1, at 1481 (concluding that questions of standing are for legislature, and revival of private law notions is inappropriate in context of administrative regulation). A public interest litigant is an advocacy group that pursues public

treatment of questions in these two fields, as well as similar difficulties manifested in the judicial resolution of other public law issues, are part of a larger countermovement that threatens the relatively recent rise of an independent public law.

This Article analyzes the application of numerous Federal Rules in public law litigation to show how the resurrection of private law approaches and hostility toward public interest litigants serves to disadvantage public interest litigants. The assessment is intended to discourage such future enforcement of the Federal Rules and analogous judicial treatment in other areas of public law. The Article is also meant to foster greater appreciation of public law and the articulation of a larger complement of public law principles so as to facilitate the growth of an independent public law.

The first section of the Article briefly describes Professor Sunstein's article, emphasizing those aspects that are particularly relevant to public law litigation and the Federal Rules of Civil Procedure. The second part draws links between the federal judiciary's enunciation of standing law and the courts' application of numerous Federal Rules to public law litigation. The third section evaluates the implications of these developments in the federal courts. The final section offers suggestions for developing a clearer understanding of public law and a more comprehensive set of independent principles of public law.

I. DESCRIPTION OF "STANDING AND THE PRIVATIZATION OF PUBLIC LAW"

In his article entitled "Standing and the Privatization of Public Law," Professor Sunstein initially explores the origins and development of modern standing law[4] by describing the private law origins of standing, the development of novel standing restrictions responsive to the perceived necessities of the New Deal, such as the need to protect agency decisionmaking from overly rigorous judicial scrutiny, and the creation of an independent public law of standing.

Professor Sunstein explains that from the time of the New Deal until the early 1960's, the courts required that litigants possess rights equivalent to those recognized in the nineteenth century, such as rights derived from an interest in real property or contract, before they would

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law litigation or vindicates the interests of many people in administrative agency proceedings. The term includes groups or individuals that pursue civil rights actions, as well as regulatory beneficiaries, who are individuals Congress intends to protect from probabilistic or systemic harm by enacting statutory schemes for regulation.

4. This and the next paragraph describe material in Sunstein, *supra* note 1, at 1434-42.

adjudicate a litigant's claims. This meant that entities subject to regulation, such as members of the communications or airline industries, could vindicate their interests through the judicial process. However, the beneficiaries of regulatory regimes, such as individual consumers or people entitled to public assistance, could pursue their interests only through the political process.

During the 1960's and 1970's, the federal judiciary and Congress rejected this private law approach to standing and the common law notions on which it was essentially grounded.[5] The federal courts and Congress began developing an independent set of principles of public law premised on the concepts that had initially led to administrative regulation, such as recognition that the free market could not adequately protect many members of society.[6] These principles reflected appreciation of considerations such as the relative efficacy of regulation; the risks of administrative inaction, deregulation, and excessively rigorous governmental intervention; the potential for, and danger of, control by courts; and the proper functions of scientific and technical expertise in the administration of laws.[7] Some of these principles supported the federal judiciary's expansion of opportunities for individuals and groups to sue in court and underlay congressional passage of legislation expressly providing for litigation by its intended beneficiaries.[8]

Since the mid-1970's, however, the Supreme Court and certain lower federal courts have invoked private law concepts to deny standing to public interest litigants who seek to challenge administrative decisionmaking that affects them adversely.[9] This judicial application threatens

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5. Federal judges relied upon the Administrative Procedure Act, which states:
> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702 (1988); *see* Sunstein, *supra* note 1, at 1440-44 (illustrating how courts interpreted § 702 to permit regulatory beneficiaries, such as television viewers and users of environment, to vindicate claims of administrative illegality).

6. *See* Sunstein, *supra* note 1, at 1450 n.85 (listing other developments pointing toward emerging independent public law, including new applications of due process doctrine, refusal to differentiate deregulation from regulation, and recognition that probabilistic harms were sufficient justification for regulatory intervention).

7. Sunstein, *supra* note 1, at 1432.

8. *See* Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 754-57 (1987) (tracing rise of "interest representation" model requiring agencies to balance all elements essential to just determination of public interest). Courts also eased restraints on public participation in agency proceedings, while Congress required that agencies both solicit and consider citizen input, as well as provide for citizen involvement in administrative processes. *Id.* at 756-57. *Cf. id.* at 748-59 (explaining historical development prior to 1966 "liberalizing" amendment of party joinder rules governing compulsory joinder, class actions, and intervention).

9. *See* Sunstein, *supra* note 1, at 1451-61 (tracing return of private law approach

to resurrect the discredited distinction between the interests of regulated parties and regulatory beneficiaries, precluding judicial relief for the probabilistic or systemic injuries that congressional regulatory systems were meant to eliminate.[10]

Professor Sunstein finds that these developments can be practically comprehended as manifesting a private law approach to public law. He attributes this approach to judicial hostility toward litigation pursued by regulatory beneficiaries attempting to secure agency fidelity to those statutory commands.[11] He observes that the revival of such hostility would contravene a broad spectrum of case law pointing toward development of an independent public law, would contradict Article III's language and history, would frustrate congressional expectations and understandings, and would improperly skew administrative incentives.[12]

Professor Sunstein argues that the revitalization of private law notions "coexisting with administrative regulation" in the standing context would be mistaken.[13] He suggests that courts defer to congressional resolution of nearly all standing issues—especially when regulatory beneficiaries seek to overturn administrative agency determinations that allegedly violate statutes enacted for their protection—essentially by asking the question whether Congress intended to create a cause of action.

Professor Sunstein briefly alludes to related developments in other areas of public law apart from standing, such as the extension of constitutional protection to statutory benefits like Social Security disability payments as liberty or property.[14] However, he attempts neither to treat those developments thoroughly, nor to link very systematically the phenomena observed in the recent reformulation of modern standing doctrine to issues in other public law fields. In this Article, I shall attempt to link those phenomena, particularly the private law approaches and hostility toward regulatory beneficiaries that are exemplified in standing, to the federal judiciary's application of numerous Federal Rules to public law litigation.

II. JUDICIAL APPLICATION OF THE FEDERAL RULES OF CIVIL PROCEDURE

During the last decade, many federal judges have applied a number

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by courts' imposition of requirements of injury, nexus, and causation).

10. Sunstein, *supra* note 1, at 1440-44.
11. *Id.* at 1480.
12. *Id.* at 1461-80.
13. *Id.* at 1481.
14. *Id.* at 1442 n.42, 1450-51 n.85.

of Federal Rules of Civil Procedure in ways that disadvantage and often disproportionately affect individual regulatory beneficiaries, public interest litigants, or groups that represent them, such as the National Association for the Advancement of Colored People (NAACP) or the Natural Resources Defense Council (NRDC). Indeed, judicial application of some rules has limited these persons' and entities' involvement in federal civil litigation or has had a chilling effect on their participation.

The private law approaches identified by Professor Sunstein are expressed most clearly in the federal judiciary's application of two important party joinder amendments to the Federal Rules: Rules 23 and 24.[15] Enforcement of those two rules also may reflect hostility toward, or at least lack of solicitude for, some public interest litigants. Nonetheless, these phenomena are manifested more clearly as to certain regulatory beneficiaries, namely civil rights litigants, in the application of Rules 8 and 11[16] and in the enforcement of rules pertaining to litigation financing, such as Rules 54 and 68.[17]

A. Private Law Approaches in Application of the Party Joinder Amendments

1. Rule 24(a)(2)

Federal courts' application of Rule 24(a)(2), governing nonstatutory intervention of right, and Rule 23, relating to class actions, demonstrates private law approaches. Rule 24(a)(2) requires intervention in a suit when absentees possessing a sufficient interest in the litigation will be both adversely affected and inadequately represented if the case proceeds without them and if a timely intervention request is submitted to the court.[18] The Advisory Committee on the Civil Rules and Congress "liberalized" that portion of the rule with a 1966 amendment.[19] Since

15. FED. R. CIV. P. 23-24.

16. FED. R. CIV. P. 8, 11.

17. FED. R. CIV. P. 54, 68. For a more thorough treatment of the federal judiciary's application of the Federal Rules analyzed below and of numerous other Federal Rules, see Tobias, *supra* note 2, *passim*. The application of certain rules may evince hostility toward litigation pursued by regulatory beneficiaries, or even toward the congressionally created interests they seek to vindicate. These phenomena are impossible to prove, however, and what actually is happening seems more subtle and complex. Nonetheless, application of some Federal Rules clearly reflects insensitivity to, or lack of solicitude for, regulatory beneficiaries.

18. FED. R. CIV. P. 24(a)(2). For a more thorough treatment of judicial application of this rule, see Tobias, *supra* note 2, at 322-29.

19. For contemporaneous analysis of the amendment by the Reporter to the Advisory Committee on the Civil Rules, see Kaplan, *Continuing Work of the Civil Commit-*

that time, numerous courts and commentators have advocated its flexible application to requests for nonstatutory intervention of right, so that they have been rather freely granted.[20] Those developments apparently bear a close relationship, temporally and substantively, to the rise of an independent public law of standing, as documented by Professor Sunstein.[21] However, during the last decade, a significant number of judges has treated the intervention applications of public interest litigants and regulated interests in ways that disproportionately affect the public interest litigants, suggesting the revitalization of private law approaches analogous to those described by Professor Sunstein.[22]

Many lower federal courts have applied the rule's interest criterion restrictively, requiring that applicants possess substantial, direct, and legally protectable interests in the ongoing litigation.[23] In 1986, three Supreme Court Justices subscribed to a similar articulation, observing that Rule 24(a)(2)'s "requirement of a 'significantly protectable interest' calls for a direct and concrete interest that is accorded some degree of legal protection."[24] In fact, numerous appellate and district judges have demanded that potential intervenors possess interests that the "substantive law recognizes as belonging to or being owned by applicants,"[25] or have interests identical to, or in excess of, those necessary for standing.[26] Such interpretations make it more difficult for public

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tee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 HARV. L. REV. 356, 405 (1967). *See also* Advisory Committee Note on 1966 Amendments to Rule 24, 28 U.S.C. app. § 24(a) (1982).

20. *E.g.*, United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 984 (2d Cir. 1984); Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967); 7 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1904, at 238-40 (2d ed. 1986).

21. *See* Sunstein *supra* note 1, at 1451-61.

22. The emphasis here is on regulatory beneficiaries' requests to intervene in suits between the government and private entities. Regulatory beneficiaries have been less successful than have private litigants who sought to intervene in litigation between the beneficiaries and the government. Of course, the comparatively liberal treatment of requests to intervene by private interests can complicate suits that regulatory beneficiaries pursue.

23. *E.g.*, New Orleans Public Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 469-70 (5th Cir. 1984), *cert. denied*, 469 U.S. 1019 (1984); Wade v. Goldschmidt, 673 F.2d 182, 185-86 (7th Cir. 1982); Westlands Water Dist. v. United States, 700 F.2d 561 (9th Cir. 1983).

24. Diamond v. Charles, 476 U.S. 54, 71, 75 (1986) (O'Connor, J., concurring).

25. Athens Lumber Co. v. Federal Election Comm'n, 690 F.2d 1364, 1366-67 (11th Cir. 1982); *accord* Heyman v. Exchange Nat'l Bank, 615 F.2d 1190, 1194 (7th Cir. 1980).

26. *See* United States v. 39.36 Acres of Land, 754 F.2d 855, 859-60 (7th Cir. 1985) (holding there is qualitative difference between "interest" and "direct, significant legally protectable interest," and, thus, to intervene, interest of proposed intervenor must be greater than interest sufficient to satisfy standing requirement), *cert. denied*, 476 U.S. 1108 (1986); Southern Christian Leadership Conference v. Kelley, 747 F.2d

interest litigants to satisfy the interest condition. The kind of general or intangible "public" interest, such as that in a pristine environment, which large numbers of people share and public interest litigants often champion, will appear less palpable than an individual, concrete "private" interest, such as a manufacturer's piece of real property.[27]

Much said about the interest requirement applies to the rule's second component, that potential intervenors' interests be prejudiced as a practical matter.[28] For example, the types of interests, like those in consumer protection, that public interest litigants typically advocate are less likely to seem impaired than a private interest in a contract.

When enforcing the rule's requirement that applicants' interests not be adequately represented by parties to the litigation, judges generally have demonstrated greater willingness to find the government litigant an adequate representative of public interest litigants than of litigants that are regulated entities, relying on the *parens patriae* doctrine, among other tests of inadequacy, to reach such results.[29] Some courts have even stated that the government could fully and fairly represent public interest litigants who sought to champion "public interests" but have suggested that the government would not be a sufficient representative of industry members that attempted to advance "private interests."[30]

777, 779-81 (D.C. Cir. 1984) (United States Senator lacked sufficient standing to challenge protective order covering information that may have helped Senator decide voting issue).

27. United States v. 39.36 Acres of Land, 754 F.2d at 858-59 (regulatory beneficiary's aesthetic and environmental interest in protecting area for inclusion in national lakeshore was not cognizable; the only two interests in eminent domain proceeding were those of government in exercising eminent domain power and of electric utility in property being condemned).

28. *See* FED. R. CIV. P. 24(a)(2) (stating that test is whether "action may as a practical matter impair or impede" applicant's ability to protect its interest should litigation proceed without applicant).

29. For analysis of cases applying several tests of inadequacy which have had this effect, see Tobias, *supra* note 2, at 325-26.

30. *E.g.*, United Nuclear Corp. v. Cannon, 696 F.2d 141, 144 (1st Cir. 1982); *cf.* Keith v. Daley, 764 F.2d 1265, 1270 (7th Cir. 1985) (public interest litigant's assertion of essentially "personal" interests is insufficient ground for intervention). For analysis of the rule's fourth requirement, timeliness, and how its application has disadvantaged regulatory beneficiaries, see Tobias, *supra* note 2, at 327.

Some judges have applied Rule 24 in ways that are more responsive to the beneficiaries and that evince an appreciation of the need for a "public law vision" of the rules and for an independent public law. *See, e.g.*, United States v. Stringfellow, 783 F.2d 821, 826 (9th Cir. 1986) (Rule 24 should be broadly construed in favor of applicants seeking intervention), *rev'd on other grounds sub nom.*, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987); United States v. 39.36 Acres of Land, 754 F.2d 855, 861 (7th Cir. 1985) (Cudahy, J., dissenting) (arguing concerns for aesthetics and environment are legally protectable interests through which intervention is justified); United States v. Reserve Mining Co., 56 F.R.D. 408, 413 (D. Minn. 1972) (hold-

In short, numerous courts' application of Rule 24(a)(2) effectively requires that public interest litigants possess interests akin to nineteenth century private rights before they can intervene of right. Essentially, courts have afforded representatives of the public interest less judicial protection than they have offered regulated entities.

2. Rule 23

Similar private law approaches seem to be present in courts' enforcement of Rule 23. Rule 23 states that a lawsuit can proceed as a class action when a court determines that plaintiffs are numerous and that their claims have common characteristics, that the claim of the individual pursuing the case is typical, and that the individual will adequately represent the class.[31]

The class action mechanism is the classic device for facilitating public law litigation. Nonetheless, the number of class actions filed has decreased dramatically since the mid-1970's. This development is attributable in part to the federal judiciary's restrictive interpretations of Rule 23.[32]

Most pertinently for the purpose of this analysis, the Supreme Court has essentially adopted a private law approach to class actions by considering class members and representatives as traditional individual claimants when assessing questions of standing, notice, amount in controversy, and representatives' authority.[33] For example, in *Eisen v. Car-*

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ing interest requirement under Rule 24, in context of environmental cases, should be viewed as inclusionary rather than exclusionary device). Ironically, numerous courts have evidenced such appreciation when enunciating a "public rights exception" to another party joinder amendment, Rule 19, one of few Federal Rules applied in a manner that is solicitous of regulatory beneficiaries. *See* Conner v. Burford, 836 F.2d 1521, 1538-42 (9th Cir. 1988) (denying gas and oil lessees' motion to dismiss suit under Rule 19, because public interest organization that brought litigation was not purporting to adjudicate rights of current lessees, but merely seeking public right to administrative compliance with statute). For a full analysis, see Tobias, *supra* note 2, at 330-31.

31. *See* FED. R. CIV. P. 23(a) (class actions must satisfy following criteria: 1) class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to class; 3) claims or defenses of representative parties are typical of claims or defenses of class; 4) representative parties will fairly and adequately protect interests of class). For a more thorough treatment of judicial application of Rule 23, see Tobias, *supra* note 2, at 319-22.

32. For a discussion of the 1966 amendment and its subsequent checkered career, see Miller, *Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979). *See also The Rise and Fall of the Class Action Lawsuit*, N.Y. Times, Jan. 8, 1988, at C1, col. 1 ("[C]ivil rights class actions have declined . . . from 1,586 in 1975 to 798 in 1985 to 185 in 1987").

33. *See* Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) (discussing how Court has tried to impose private law standards of standing, notice, and amount in controversy to public law class action suits).

lisle & Jacquelin,[34] the Court imposed personal notice requirements on an individual plaintiff which were so financially burdensome that the Court could have undermined the efficacy of the small class device in federal question cases.[35]

In sum, private law concepts similar to those that Professor Sunstein detects in standing doctrine are clearly displayed in federal courts' enforcement of nonstatutory intervention of right and class actions. The application of Rules 24(a)(2) and 23 also may evince lack of concern for specific public interest litigants. These ideas, at least as to civil rights litigants, however, are more clearly expressed in enforcement of Rules 8 and 11 and those pertaining to litigation financing.

B. Lack of Solicitude in Application of Rules 8 and 11 and Rules Relating to Litigation Financing

1. Rule 8

Rule 8, relating to pleading, requires the plaintiff to tender a "short and plain statement of the claim showing that the pleader is entitled to relief."[36] The rule, as originally promulgated in 1938, was meant to clarify prior pleading practice and to deemphasize the importance of pleadings.[37] In 1957, the Supreme Court placed its imprimatur on the Federal Rules' flexible, liberal pleading scheme, countenancing notice pleading and repudiating fact pleading.[38] Although it might seem that the Court's pronouncements would have ended pleading practice, all of the circuits now enunciate a "requirement of particularity in pleading for civil rights complaints," and federal district courts have granted

34. 417 U.S. 156 (1974).

35. In some cases, however, the Court has recognized the value of class actions as mechanisms for treating "injuries unremedied by the regulatory action of government." *See* Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("[W]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they employ the class-action device"); *accord* United States Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980) ("The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions. . . . [T]hese elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired").

36. FED. R. CIV. P. 8(a). For a more thorough treatment of the judicial application of Rule 8, see Tobias, *supra* note 2, at 296-301.

37. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440 (1986).

38. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) (all rule requires of pleadings is that there be "short and plain statement of the claim" that will give the defendant notice of what plaintiff's claim is and grounds upon which it rests).

motions to dismiss against civil rights plaintiffs whose pleadings are inadequate.[39]

The elevated standards imposed on civil rights plaintiffs have been variously phrased and characterized. Many judges have found insufficient civil rights complaints which make general, conclusory, or speculative assertions, and these judges have required factual specificity about defendants' conduct, concentrating on assertions regarding intent and motive.[40] A number of courts have been even more demanding. Many judges have required some factual showing of actual intent to discriminate or that claims be supported with references to material facts.[41] Other courts have scrutinized complaints to ascertain if plaintiffs appear able to prove their factual assertions and have dismissed those pleadings found to be deficient.[42]

The imposition of stricter pleading requirements upon civil rights plaintiffs has had detrimental consequences. When a judge dismisses a complaint at the pleading stage because of doubt about a civil rights plaintiff's eventual success on the merits, the court requires that plaintiff to collect evidence before discovery to which the plaintiff is entitled. Requiring such strict pleading contravenes traditional learning about what information a judge may consider and what material a plaintiff might be able to secure at that preliminary stage.[43] It means that nu-

39. *See* Hobson v. Wilson, 737 F.2d 1, 30 (D.C. Cir. 1984) (holding plaintiffs who fail to allege any specific facts to support claim of unconstitutional motive cannot expect to involve government actors in protracted discovery and trial), *cert. denied*, 470 U.S. 937 (1984); *accord* Elliott v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985) (requiring claimant to state specific facts, not merely conclusory allegations).

40. *See, e.g.*, Jones v. Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984) (upholding district court's dismissal of discrimination complaint because allegations were conclusory and unsupported by any facts); United States v. City of Philadelphia, 644 F.2d 187, 205 (3d Cir. 1980) (holding vague, inconsistent allegations of racial discrimination in administration of certain federally funded programs were insufficient to state a claim upon which relief could be granted).

41. *See* Slotnick v. Staviskey, 560 F.2d 31, 33-34 (1st Cir. 1977) (holding complaint must state, with specificity, material facts that show existence and scope of alleged conspiracy), *cert. denied*, 434 U.S. 1077 (1978); Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028, 1033 (5th Cir. 1975) (stating appellant has burden of proving actual intent of discrimination against some clearly defined suspect class).

42. *See, e.g.*, Jones v. Community Redevelopment Agency, 733 F.2d 646, 650 (9th Cir. 1984) (holding proposed amended complaint would still lead to dismissal, because court failed to find any facts that would support allegation of constitutional injury based on race); Albany Welfare Rights Org. Day Care Center, Inc. v. Schreck, 463 F.2d 620, 623-24 (2d Cir. 1972) (stating facts alleged in complaint fail to support allegation of retaliation by defendant), *cert. denied*, 410 U.S. 944 (1973).

43. *See* Means v. City of Chicago, 535 F.Supp. 455, 460 (N.D. Ill. 1982) (stating that court is "at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to discovery, acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff's claim . . . ."); Hill v. City of Atlanta, 91 F.R.D. 528, 532 (N.D. Ga. 1981) (high standard left

merous civil rights actions have been improperly dismissed earlier in the litigation process than they otherwise might.

Thus, although it is impossible to prove that the adoption of heightened pleading standards evidences hostility toward civil rights plaintiffs, it clearly evinces lack of solicitude for them. The elevated requirements impose on one category of cases, and a single group of litigants, more burdensome standards based on dubious authority[44] and questionable factual premises about the relative validity or frivolous nature of certain types of lawsuits.[45] The effect of demanding greater specificity is all the more striking when it is remembered, first, that both the Supreme Court and Congress have proclaimed civil rights cases to be fundamental to liberty and deserving of special solicitude and, second, that the use of less draconian mechanisms than heightened pleading requirements, such as Rule 56, can be nearly as efficacious in terminating meritless claims.[46]

2. *Rule 11*

Courts' enforcement of amended Rule 11 demonstrates a similar lack of concern for, if not antipathy toward, civil rights plaintiffs.[47] That

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plaintiff with "all but impossible" task of proving his case before period of discovery delineated by Federal Rules). *See also* Marcus, *supra* note 37, at 463-70 (discussing courts' commonplace practice of holding conclusory allegations insufficient to state claim).

44. *See, e.g.*, Rotolo v. Borough of Charleroi, 532 F.2d 920, 923-27 (3d Cir. 1976) (Gibbons, J., dissenting) (arguing heightened pleadings standard motivated by hostility toward asserting civil rights against "authority figures").

45. For cases espousing questionable factual premises, see Jones v. Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984); Albany Welfare Rights Org. Day Care Center v. Schreck, 463 F.2d at 622; Rotolo v. Borough of Charleroi, 532 F.2d at 922 (quoting Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968)). For challenges to the validity of the proposition that there are too many frivolous civil rights cases, see Rotolo v. Borough of Charleroi, 532 F.2d at 927 (Gibbons, J., dissenting); Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 688 (1984).

46. For Supreme Court pronouncements, see Bounds v. Smith, 430 U.S. 817, 828 (1977); Newman v. Piggie Park Enters., 390 U.S. 400 (1968). For substantive, procedural, and fee-shifting statutes indicating that civil rights cases deserve special solicitude, see Tobias, *supra* note 2, at 284-85. For the propositions that increased use of Rule 56 could be as efficacious as heightened pleadings, but that its application may pose some difficulties, see Tobias, *supra* note 2, at 300. Some judges have applied Rule 8 in ways that are more responsive to regulatory beneficiaries. *See, e.g.*, United States v. City of Philadelphia, 644 F.2d 187, 211-13 (3d Cir. 1980) (Gibbons, J., dissenting) (arguing that in civil rights claims against public officials, trial courts should not limit their consideration to complaint when later submissions may allege requisite facts).

47. For a more thorough treatment of judicial application of amended Rule 11, see Tobias, *supra* note 2, at 301-10; Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485 (1989).

rule, which had fallen into disuse since its 1938 promulgation, was revised in 1983 to curb litigation abuse and in response to the litigation explosion.[48] It requires that courts impose sanctions upon attorneys and litigants who fail to perform reasonable legal inquiries and factual investigations before filing papers.[49]

Recently collected data on reported opinions issued since 1983 show that sanctions have been requested from, and granted against, litigants who bring civil rights cases much more frequently than civil rights defendants. Moreover, civil rights plaintiffs have been sanctioned at a considerably higher rate than plaintiffs in all additional types of civil lawsuits.[50] Courts have applied the requirement of reasonable prefiling legal inquiry with vigor against civil rights plaintiffs and attorneys in numerous cases which have been described as "very close,"[51] although judges in general have treated this requirement generously.[52]

Courts also have strictly enforced the Rule's requirement of reasonable prefiling factual investigation in civil rights actions, finding plaintiffs in violation who filed civil rights cases that were dismissed, even though considerable information necessary to stating a claim would have been available only upon discovery.[53] Judges have levied relatively few large awards against civil rights litigants. Nevertheless, the prospect of satellite litigation involving refined questions of the amendment's meaning and the possibility of incurring sanctions can prevent

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48. Rule 11 was part of a package of amendments relating to the pre-trial process, discovery, and attorney accountability. *See* Order Amending Federal Rules of Civil Procedure, 461 U.S. 1097 (1983). For discussion of the developments that led to these amendments and descriptions of the amendments, see Tobias, *supra* note 8, at 748-59.

49. FED. R. CIV. P. 11.

50. *See* S. BURBANK, RULE 11 IN TRANSITION THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON THE FEDERAL RULES OF CIVIL PROCEDURE (1989). Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327 (1986); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-201 (1988) (studies disclosing that civil rights cases are disfavored compared to other cases).

51. *See* Vairo, *supra* note 50, at 205, 217; *cf.* C. SHAFFER & P. SANDLER, SANCTIONS: RULE 11 AND OTHER POWERS 14 (2d ed. 1988) (numerous sanctions cases could be classified as fact-intensive close calls). An example is Rodgers v. Lincoln Towing Serv., 771 F.2d 194 (7th Cir. 1985).

52. *See* Tobias, *supra* note 2, at 308 n.232; Vairo, *supra* note 50, at 213-14. Civil rights plaintiffs have been sanctioned considerably more often on this basis than have plaintiffs in RICO, securities fraud, and related trade regulation litigation. *See* Tobias, *supra* note 2, at 304 n.207 (citing statistics revealing higher rate of sanctions against civil rights plaintiffs); Vairo, *supra* note 50, at 201.

53. *See* Vairo, *supra* note 50, at 200-202 (stating contradiction between Rule 11 and discovery provisions of Federal Rules); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 635-37 (1987). This phenomenon is also illustrated by the case of Rodgers v. Lincoln Towing Serv., 771 F.2d 194 (7th Cir. 1985), *aff'g* 596 F. Supp. 13, 22 (N.D. Ill. 1984).

parties from pursuing litigation and deter lawyers from taking on clients whose suits need factual or legal elaboration or from aggressively advocating those cases they do accept.[54]

The implications for civil rights plaintiffs of Rule 11's judicial application are similar to those of Rule 8. For example, the enforcement of Rule 11 has effectively demanded increased specificity in pleading, if only to resist sanctions motions, and has chilled the enthusiasm of those who pursue civil rights cases while contravening pronouncements of the Supreme Court and Congress that civil rights actions should receive solicitous judicial treatment.[55] In short, many federal judges, when applying Rules 8 and 11, have exhibited little concern for public interest litigants, namely civil rights plaintiffs.

The Supreme Court and lower federal courts have displayed a similar lack of solicitude for these and additional public interest litigants in interpreting several other rules that pertain to litigation financing. The financing of litigation is particularly important to public interest litigants, because most of them have comparatively few resources for participating in federal civil litigation.[56]

3. Rule 68

Rule 68 governs offers of judgment or settlement and the payment of costs.[57] The rule was intended to promote settlement and to reduce lengthy litigation by compelling plaintiffs who refuse pretrial settlement offers that are more favorable than judgments they recover to pay

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54. *See* Tobias, *supra*, note 47, at 505-06.

55. For analysis of increased specificity demanded to repel sanction motions, see Tobias, *supra* note 2, at 308 & n.234. For discussion of the chilling effect, see Tobias, *supra* note 47, at 503-06. For the pronouncements of the Court and Congress, see sources cited *supra* note 46. Some judges have applied Rule 11 in ways that are more responsive to civil rights plaintiffs, evincing appreciation of the need for a public law vision of the rules and an independent public law. *E.g.*, Kraemer v. Grant County, 892 F.2d 686, 690 (7th Cir. 1990). *See* Tobias, *supra* note 2, at 306 n.219.

56. Litigation financing also was implicated in the application just witnessed. Heightened pleading requirements disadvantage regulatory beneficiaries who have relatively few resources with which to gather facts prior to filing, even when they have access to those facts. Correspondingly, rigorous application of Rule 11 could chill certain beneficiaries' enthusiasm for litigation because their lack of resources makes them risk-averse. For discussion of the beneficiaries' resources and litigation costs, see Tobias, *supra* note 8, at 765 & n.105.

57. *See* FED. R. CIV. P. 68. For a more thorough treatment of the judicial application described below, see Tobias, *supra* note 2, at 310-19. That examination includes consideration of Supreme Court cases interpreting Rules 23(e) and 54(d). The opinion applying Rule 68 is only assessed here because the litigation financing issues it treats are similar to those in the opinion treating Rule 23, while the case involving Rule 54 is narrower in scope.

post-offer costs.[58] However, Rule 68 fell into desuetude. From the time of its 1938 adoption, attorneys and courts believed that "costs" did not encompass attorneys' fees, so that the small sum at issue was inadequate to trigger Rule 68's invocation.[59] Nevertheless, the Supreme Court read the rule in ways that could adversely affect public interest litigants in the 1985 case of *Marek v. Chesny*.[60]

The Court addressed the relationship between Rule 68 and the Civil Rights Attorneys' Fees Award Act of 1976 (Fees Act),[61] which recognizes the need to promote worthy civil rights actions and the existence of resource discrepancies among parties by requiring that defendants pay prevailing plaintiffs' attorneys' fees. A majority of the Court considered Rule 68 "costs" to encompass attorneys' fees under the Fees Act and additional fee-shifting statutes defining costs as including such fees. This reading means that "civil rights plaintiffs—along with other plaintiffs" who refuse pretrial settlement offers larger than judgments they win at trial—cannot recover attorneys' fees for work performed after rejecting the pretrial offers.[62]

The majority asserted that "merely subjecting" public interest litigants to the rule would not "curtail their access to the courts or significantly deter" their pursuit of litigation, finding neutral Rule 68's policy of promoting settlement of all cases.[63] The Court did recognize, however, that its interpretation of the rule would require civil rights "plaintiffs to 'think very hard' about whether continued litigation is worthwhile."[64]

Justice Brennan, in his dissent, delineated a number of detrimental consequences that the majority's approach could have for public interest litigants.[65] He claimed that the majority's substitution of Rule 68's

58. Proposed FED. R. CIV. P. 68, Advisory Committee Note, 98 F.R.D. 363 (1983).

59. *See* Marek v. Chesny, 473 U.S. 1, 20-21 (1985) (Brennan, J., dissenting); proposed FED. R. CIV. P. 68, Advisory Committee Note, 98 F.R.D. 363 (1983). The Advisory Committee responded to the mounting dissatisfaction with Rule 68's disuse and to the litigation explosion by proposing amendments to the rule in 1983 and 1984. Neither attempt, however, came to fruition. For discussion of the amendment travails, see Tobias, *supra* note 2, at 310-13.

60. 473 U.S. 1 (1985).

61. 42 U.S.C. § 1988 (1982).

62. *See* Marek v. Chesny, 473 U.S. at 7-11 (stating congressional intent in Fees Act does not override Rule 68 of Federal Rules of Civil Procedure).

63. *Id.* at 10.

64. *See id.* at 11. The Court considered this effect consistent with fee-shifting legislation, because those statutes make the degree of success the most important factor in determining fees. *Id.* at 11.

65. Marek v. Chesny, 473 U.S. 1, 21-22 (1985) (Brennan, J., dissenting) (stating Court's opinion violates most basic limitations on Court's rulemaking authority).

mechanical inquiry for the Fees Act's discretionary approach, which considers reasonableness under the circumstances, would preclude awards for public interest litigants in some situations previously found appropriate.[66]

Justice Brennan also argued that reading Rule 68 to include attorneys' fees would produce a number of skewed settlement incentives. For instance, the rule's ten-day limit for rejection or acceptance of settlement offers could force plaintiffs to accept deficient offers made early in litigation before they have sufficient information to evaluate them because of the substantial risk of having to assume post-offer attorneys' fees incurred.[67]

In short, the Court's application of Rule 68, by creating uncertainty over attorneys' fees, could force public interest litigants, whose resource deficiencies make them risk-averse, to settle prematurely or even deter them from initiating litigation. The Court's lack of concern for these litigants could inhibit exactly that activity the Congress intended to facilitate with fee-shifting statutes: the vigorous enforcement through litigation by private attorneys general of nonmonetary values, especially civil rights and constitutional and statutory commands.[68]

III. Implications of Judicial Activity

The federal court activity examined above has had many significant ramifications. The judicial treatment observed has made it more difficult for public interest litigants to institute, participate in, and win litigation important to them. Furthermore, such federal court activity has even precluded their involvement or led to the exclusion of information and perspectives relevant to the accurate resolution of questions at issue.[69]

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66. *Id.* at 29. For instance, a plaintiff who recovered only slightly less than the proposed settlement figure could not automatically recover fees, even if the plaintiff had achieved a result very beneficial to the public interest.

67. For a thorough discussion of such an example, see *id.* at 32 & n.48 (Brennan, J., dissenting). Another example is the problem of comparing settlement offers made in monetary terms with nonmonetary injunctive relief that regulatory beneficiaries typically secure. *Id.* at 32. For a recent example of the difficulties this can create, see Spencer v. General Elec., 894 F.2d 651 (4th Cir. 1990) (disallowing all post-offer-of-judgment attorney's fees for plaintiff who brought Title VII action against employer because court's final damage award was less than amount offered by defendant and was rejected by plaintiff as settlement of claim under Rule 68).

68. Justice Brennan recognized these ideas in his *Marek* dissent and in another Rule 23(e) case. *See* Evans v. Jeff D., 475 U.S. 717, 745 (1986) (Brennan, J., dissenting) (stating that Congress intended fee awards to promote respect for civil rights).

69. Some of the enforcement observed has had multiple effects. For example, application of Rules 8 and 11 can chill the initiation of litigation and inhibit the successful

The judicial activity apparently has been more problematic for civil rights litigants, as witnessed, for instance, by the plummeting number of class actions, an important vehicle for pursuing civil rights cases.[70] In comparison, certain other public interest litigants—such as the NRDC—which challenge federal administrative agency decisionmaking involving the environment, consumer products, and public health and safety, seem to have been affected less and to have assumed a relatively institutionalized role in federal civil litigation.[71]

When public interest litigants lose opportunities to commence suit or participate in litigation, there can be many detrimental consequences. The litigants and those members of the affected public whom they represent may be comparatively unwilling to accept and may have relatively little confidence in governmental decisionmaking,[72] while the federal courts may lose data or viewpoints they need to render the most accurate decisions.[73] These factors are particularly important when judges are attempting to complete the complex, delicate task of formulating workable decrees in litigation seeking the reform of massive bureaucracies, like prisons or mental institutions, as to which the ideas and cooperation of everyone involved will be vital to success.[74] Another problem can be the potential reduction in governmental accountability for its actions. Citizens may be unable to correct past mistakes, or to deter future misbehavior, of bureaucracies which too often seem unresponsive, insulated, or recalcitrant.[75] Finally, and perhaps most impor-

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conclusion of litigation that has been initiated.

70. *See The Rise and Fall of the Class Action Lawsuit*, *supra* note 32 (showing decrease in number of civil rights class actions). The application of the rule also may be more problematic for individuals or small groups of people than for a public interest litigant, such as the NAACP.

71. This certainly is true of the rules assessed, except for Rule 24. Indeed, much litigation challenging agency decisionmaking today is at least "tripolar," involving public interest litigants, like the Sierra Club; the government; and industry members or their representatives, such as trade associations, like the American Petroleum Institute, or conservative public interest litigants, like the Pacific Legal Foundation.

72. *See* Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972) (arguing that broadened public participation will improve administrative decisions and give them greater legitimacy and acceptance); Furrow, *Governing Science: Public Risks and Private Remedies*, 131 U. PA. L. REV. 1403, 1422-24 (1983) (emphasizing value of public participation in resolving technological problems).

73. *See* Tobias, *supra* note 2, at 329 (asserting that judges are generalists and may lack sufficient expertise, especially in technical areas, such as engineering).

74. For instance, prison guards may best understand how the institution in which they work functions, and, thus, be in the best position to frustrate any decree's practical implementation. For elaboration on these ideas, see Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474 (1982).

75. Government accountability is no mere abstract concept. *See* Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1374-75

tantly, the judicial treatment has slowed efforts to develop an independent public law.

IV. NOTES TOWARD AN INDEPENDENT PUBLIC LAW

A. Building an Independent Public Law

The threat to an independent public law demonstrates that there are compelling needs for clearer appreciation of public law and for a more thorough set of independent principles of public law. An important way to achieve these objectives is for federal courts, Congress, administrative agencies, and commentators to continue working on discrete issues in numerous substantive and procedural areas of public law, as Professor Sunstein has done so competently in his scholarship.[76] These issues arise in many fields, such as public participation in administrative proceedings, standing, jurisdiction, venue, reviewability, ripeness, judicial review, and the Federal Rules' application to public law litigation.[77]

Judges, Congress, agency officials, and commentators should identify problems, formulate solutions, and forge links across public law.[78] The

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(1988) (observing that six people died "while the legal system failed adequately to respond" to the claim in City of Los Angeles v. Lyons, 461 U.S. 95 (1983), that chokeholds were unconstitutional use of force). For more discussion of accountability, see Furrow, *supra* note 72, at 1422-24; Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 986-87 (1982).

76. *See, e.g.*, Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407 (1989); Sunstein, *Constitutionalism After The New Deal*, 101 HARV. L. REV. 421 (1987) [hereinafter Sunstein, *Constitutionalism*] (arguing for supervisory role of all three federal branches in reviews of agency action); Sunstein, *Deregulation and The Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 [hereinafter Sunstein, *Deregulation*]; Sunstein, *supra* note 75.

77. This is not intended as a comprehensive catalog. Moreover, the emphasis in this list and in this section is on public interest litigants' involvement in courtroom litigation, rather than public participation in administrative proceedings. The difficulties that attend courtroom litigation are more problematic, and much said as to it applies equally to public participation in administrative proceedings. For analysis of participation in agency proceedings, see Cramton, *supra* note 72; Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906 (1982). For a recent, valuable analysis which focuses on courts' interpretation of "case" in many areas of public law, see Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990).

78. I realize that the activity of numerous judges has threatened an independent public law and that a number of them are unlikely to apply the Federal Rules more solicitously to public interest litigants. Other judges, however, have evidenced appreciation of the need for a "public law vision" of the rules. *See, e.g., supra* notes 30, 46 & 54 (evincing judicial responsiveness to public law litigants). That work should continue and expand. I also recognize that the Advisory Committee and Congress have evinced little interest in amending the Federal Rules in ways that would be solicitous of the needs of public interest litigants. If judicial application of the Rules fails to improve, Congress should scrutinize the Rules closely with an eye toward possible amendment. Congress also may want to revisit its prior valuable efforts in areas other than the

resolution of specific difficulties ultimately should lead to a clear, comprehensive public law jurisprudence and to the development of a thorough set of independent principles, which could be efficaciously applied to issues that remain problematic and to new ones as they arise.

Indeed, numerous principles should help to resolve questions in areas other than the fields in which they originally were espoused.[79] For example, recent judicial resolution of standing and intervention issues which have confused many, including members of the Supreme Court, and promising new scholarly work on the questions demonstrate an important need, and considerable potential, for articulating a more coherent theory of parties.[80] Such a theory could be applied to issues in additional areas that implicate parties, such as compulsory joinder and public participation in administrative proceedings.[81]

The federal Constitution and statutes are essential sources of independent public law. Congress clearly intended in much substantive, procedural, and fee-shifting legislation that public interest litigants vindicate interests of large numbers of people in enforcing the Constitu-

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Federal Rules, which federal courts have eroded. A prominent example is the Civil Rights Fees Act, which may now warrant amendment. Another example would be the procedural aspects of employment discrimination legislation, which were narrowly interpreted by the Supreme Court in the 1988 Term. *See* S. 2104 (Civil Rights Act of 1990), 101st Cong., 2d Sess., 136 CONG. REC. S108 (daily ed. Feb. 7, 1990). As to regulatory beneficiaries and standing, of course, one problem with the Supreme Court's constitutionalization of certain aspects of the standing doctrine is that some congressional activity may be precluded. In short, much of this work may be relatively theoretical and be undertaken primarily by writers during the short term. Nonetheless, legislative, judicial, and agency officials should seriously consider active participation in the work and its practical implementation, especially over the long term. For one example of what I envision, see Tobias, *supra* note 2, at 335-46.

79. I realize that the articulation of generic principles having the potential for relatively broad applicability may not be precisely what Professor Sunstein contemplated when he called for the development of more independent principles of public law. The idea of generic principles fits comfortably with his work, however, which seeks to enunciate principles that apply to specific issues in particular areas of public law. *See supra* note 74 (showing need for reforms in public law so as to allow individuals who are aggrieved to provide information to tribunal that is critical to formulation of effective decree). Moreover, Professor Sunstein does explore the possibility of broader applicability of such principles. *See* Sunstein, *supra* note 1, at 1450 n.85; Sunstein, *Constitutionalism*, *supra* note 76, at 474-77.

80. For recent examples of the Supreme Court's ambivalence on these issues, see the majority and concurring opinions in Diamond v. Charles, 476 U.S. 54 (1986), and the majority and dissenting opinions in Martin v. Wilks, ___ U.S. ___, 109 S.Ct. 2180 (1989). Examples of recent scholarly work are J. VINING, LEGAL IDENTITY (1978); Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975); Marcus, Public Law Litigation and Legal Scholarship, 21 U. MICH. J.L. REF. 647 (1988); Winter, *supra* note 75; Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463 (1987).

81. This theory of parties operates at a somewhat higher level of abstraction and has somewhat broader applicability than the principles espoused below.

tion, in improving administrative decisionmaking, and in promoting governmental fidelity to statutory mandates that are often aimed at probabilistic or systemic harms.[82] The fundamental congressional purposes themselves may be considered organizing principles of public law, while they in turn can support numerous independent public law principles.

One such general principle is that administrative agency and judicial decisionmakers should be solicitous of public interest litigants. Courts ought to afford their interests at least as much protection as those of regulated entities, perhaps, for instance, permitting public interest litigants to initiate regulatory action when agencies have failed to act.[83]

Analysis of certain issues arising in several areas of public law, such as administrative decisionmaking, standing, and nonstatutory intervention of right, demonstrates that public interest litigants' involvement in agency proceedings and courtroom litigation has fostered better administrative decisionmaking and promoted agency accountability, which leads to the principle that such participation should be facilitated.[84] These public interest litigants frequently seek to prevent or redress probabilistic or systemic harms, thus prompting the principle that concepts like "interest" and "injury," important to securing access to agency and court processes, be applied flexibly to take into account comparatively intangible values.[85] For instance, citizens' interest in wilderness preservation is likely to appear abstract and relatively unharmed when they seek to intervene of right in courtroom litigation over natural resource development between the government and the petroleum industry. Courts considering these intervention applications should remember the comparatively intangible nature of the interests

82. Congress similarly intended that the litigants foster agency accountability, deter administrative misbehavior, and improve judicial decisionmaking. *See supra* notes 72-75 and accompanying text.

83. *See* Sunstein, *Constitutionalism*, *supra* note 76, at 474-77 (arguing distinction between reviewability for agency action and inaction creates incentives for agency inaction); Sunstein, *Deregulation*, *supra* note 76, at 212 (predicting regulatory beneficiaries will receive same protection as regulated industries). *See generally* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (examining judicial remedies available to regulatory beneficiaries and regulated industries). *But see* Heckler v. Chaney, 470 U.S. 821 (1985) (holding agency inaction unreviewable); Block v. Community Nutrition Inst., 467 U.S. 340 (1984) (holding individual consumers may not obtain judicial review of milk market orders where such consumer participation is not explicitly provided for in legislative scheme).

84. *See* Sunstein, *supra* note 74, at 986-88 (showing how courts have adopted "interest representation" in reviewing agency actions); *See generally* Tobias *supra* note 77 (arguing for reimposition of public participation funding by agencies).

85. These ideas pertain principally to intervention of right but also have applicability to standing. *See* Bandes, *supra* note 77, at 250-58, 311-14.

which Congress intended to protect from injury and, thus, should view broadly the interests and injuries potential intervenors claim while liberally granting their intervention requests.[86]

Moreover, public interest litigants often attempt to vindicate the interests of many people who are not participants in the administrative or courtroom proceedings. This engenders the principle that the interests of those absent be fully taken into account, if not formally represented.[87] For example, in institutional reform litigation involving the desegregation of public schools, numerous parents of school children who are not parties to the suit may differ significantly with litigants over the appropriate remedial measures. Judges should be certain that they have secured and thoroughly considered the perspectives of all interests that might be affected by any relief ultimately granted.[88]

Correspondingly, work on some issues in certain of these areas and on judicial application of federal rules relating to pleading, sanctions, and litigation financing indicates that most public interest litigants have much less time and money to spend on participating in proceedings than do the government and private entities.[89] This leads to the principle that decisionmakers should take into account parties' relative resources when appropriate.[90] For instance, if courts find that civil rights litigants have failed to conduct reasonable prefiling inquiries and, thus, violated amended Rule 11, judges should seriously consider the parties' available resource for complying with the rule and their ability to pay in assessing the size of any sanction awards to be imposed.[91]

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86. For more analysis of these issues and suggestions for their solution, see Tobias, *supra* note 2, at 328-29.

87. This implicates the requirements of Federal Rules 23 and 24(a)(2) that absentees' interests be adequately represented, but it also suggests that decisionmakers remember these interests when rendering their determinations.

88. For helpful discussion of concrete cases and the difficulties entailed, for example, in creating representative party frameworks, see Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 505-11 (1976) (detailing development of school desegregation litigation with particular emphasis on need to monitor differing interests of class); Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982). For a valuable case example, see Bradley v. Milliken, 828 F.2d 1186 (6th Cir. 1987).

89. Tobias, *supra* note 8, at 765 n.105.

90. I realize that this proposal is controversial and that courts frequently act as if all litigants possess equal resources, even though that ignores reality. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947). For analysis of these ideas and of parity, see Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 516-20 (1986).

91. Rule 11 and its accompanying Advisory Committee Note authorize such consideration. *See* 97 F.R.D. 198 (1983) (Advisory Committee Note); *see, e.g.*, Cruz v. Savage, 896 F.2d 626, 634 (1st Cir. 1990). For examples of judicial consideration of financial hardship in the context of applying the party joinder amendments, see Coali-

Many issues in additional areas of public law that implicate public interest litigants somewhat less directly can contribute to the development of independent principles of public law. One prominent illustration is judicial review of administrative action. For example, considerable evidence suggests that close judicial scrutiny has improved the quality of administrative decisionmaking that significantly affects public interest litigants.[92] This yields the principle that courts' review should be relatively stringent when regulatory beneficiaries challenge agency determinations important to them.[93] More specifically, judges should attempt to control the exercise of administrative discretion by requiring that agency officials thoroughly consider the relevant statutory objectives to be achieved and alternatives for attaining them and should require that agencies fully explain their decisions.[94] Concomitantly, one essential purpose of judicial review should be to facilitate the identification and implementation of regulatory and public values.[95]

Another valuable source of independent principles of public law is considerable recent research exploring the meaning of, and values inherent in, modern agency and courtroom proceedings.[96] Some of the

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tion on Sensible Transp., Inc. v. Dole, 631 F. Supp. 1382, 1386-88 (D.D.C. 1986) (increased costs of new litigation if case were to be dismissed because plaintiff is not joined as "necessary" party under Rule 19), and Defenders of Wildlife v. Andrus, 77 F.R.D. 448, 451 (D.D.C. 1978) (potential financial hardship to plaintiffs of requiring plaintiff to litigate case separately rather than joining all parties under Rule 19).

92. Sunstein, *Deregulation*, *supra* note 76, at 210-11; Tobias, *supra* note 77. Others have questioned this proposition. *See, e.g.*, J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) (examining process of hearings and appeals in Social Security disability program); Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973) (suggesting it is only wishful thinking to believe judicial scrutiny will enhance administrative process).

93. Essentially, "hard look" judicial review should be applied in most public law litigation. For a full analysis of such judicial review, see Sunstein, *Deregulation*, *supra* note 76 (defining comprehensive rationality and comparing to "incrementalism," alternative model of policymaking).

94. For analysis of these aspects of hard look review and the idea of "technocratic" or "comprehensive rationality," see Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981) (suggesting judicial review will not be exercised properly when agencies fail to offer detailed explanations for their decisions); Sunstein, *Deregulation*, *supra* note 76, at 181-83, 187.

95. Sunstein, *Deregulation*, *supra* note 76, at 187-88. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (concluding close involvement of judge is inevitable if justice is to be done); Fiss, *The Supreme Court, 1978 Term-Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (examining need for judiciary to give meaning and content to public values).

96. *See* Burbank, *supra* note 80, at 1466-71 (cataloging recent research on values in courtroom litigation). The focus in this paragraph remains courtroom litigation, but for discussion of agency proceedings, see Cramton, *supra* note 72 (focusing on need, desire, limitation, and methods for broadening public participation in agency proceedings); Furrow, *supra* note 72 (contending public participation, at least in area of scientific decisionmaking, needs to be generated in order to ensure public representation in

work on the civil litigation process suggests that the values embedded in public law litigation are so important that the participants rarely should be forced to settle or be relegated to any of the comparatively informal, relatively private mechanisms for resolving controversies, namely measures falling under the rubric of Alternative Dispute Resolution (ADR).[97] For example, in certain types of mass tort litigation, such as those cases involving women seriously hurt by diethylstilbestrol (DES), many of the victims apparently consider the opportunity to tell their stories in a public forum equally important as recovering compensation for the injuries suffered.[98]

Moreover, public law litigation generally is said to foster a sense of community,[99] while in some specific public law cases the chance to participate in the civil litigation process may empower poor citizens or disenfranchised members of society. In certain public law litigation, the publicity generated may outweigh any substantive victory ultimately attained. These concepts lead to the specific application in public law litigation of principles said to underlie the 1938 promulgation of the Federal Rules: disposition of litigation on the merits by trial after opportunity for full disclosure through discovery.[100]

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agency proceedings). *Cf.* Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 902-04 (1981) (stating participation is inherently desirable way of acknowledging dignity of persons affected by decisionmaking).

97. *See* Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986) (examining dangers of ADR mechanisms); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); *cf.* Liebermann & Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986) (suggesting ADR settlements are not preferable to judgments).

98. This is Professor Finley's preliminary conclusion derived from interviewing many "DES Daughters." Interview with Professor Lucinda Finley, State University of New York at Buffalo, School of Law (Jan. 11, 1989). *Cf.* Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 98 HARV. L. REV. 849 (1984) (analyzing mass tort litigation).

99. Sunstein, *supra* note 75, at 995 n.88 (citing early work endorsing communitarian approach to litigation). For recent similar work, see Bone, *The Idea of Adjudicative Representation* (1989) (unpublished manuscript on file with author); Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (communities form through shared commitment to specific moral tradition). Of course, there are numerous other values in litigation not discussed or only alluded to here. *See* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect Ones Rights—Part I*, 1973 DUKE L.J. 1153 (analyzing dignity, participation, deference, and effectuation values).

100. Marcus, *supra* note 37, at 439. This is a paraphrase of Professor Marcus' characterization of the view of Charles Clark, Reporter to the Advisory Committee, took of the 1938 Federal Rules. Since the time Clark espoused his "liberal ethos," federal civil litigation has changed substantially, some believe for the worse or because of the liberal ethos. *See* Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984) (examining litigation explosion and offering reforms for existing system). Of course, considerable public law litigation seeking review of agency

Other sources of public law principles are work outside strictly legal disciplines, such as research in the fields of organizational theory and political science.[101] Work which offers insights into administrative incentives and bureaucratic behavior could yield principles pertinent to the stringency of judicial review. Correspondingly, research on the dynamics of group litigation may lead to principles about how best to represent fully and fairly those who participate in such litigation.[102]

B. Countertendencies

Of course, these ideas are intended to be suggestions, rather than exhaustive recommendations, and much work remains to be undertaken. Although I have assumed throughout this piece that the rise and expansion of an independent public law are positive developments, those assumptions have not gone uncontroverted, as the countertendencies mentioned above indicate. Thus, there is need to address as systematically as possible the controversial, unresolved questions raised by federal judges and others about particular issues, such as the "litigation explosion," litigation abuse, and judicial economy.[103]

Expression of these concerns may reflect dissatisfaction with public interest litigants and the growth of an independent public law. Such responses to the litigation explosion and litigation abuse have unjustifiably hindered public interest litigants and may have been part of the recent reaction against development of an independent public law. For instance, overly vigorous judicial enforcement of Rule 11 has chilled unnecessarily the enthusiasm of civil rights litigants.[104]

I do not underestimate the seriousness of additionally burdening an already overworked federal judiciary with frivolous cases or abusive

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action involves neither discovery nor trial.

101. *See, e.g.*, M. DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY (1986) (examining law's treatment of large scale bureaucratic organizations); M. Olson, *The Logic of Collective Action* (1965) (analyzing development of group behavior and incentives to organize for collective good); G. Schubert, *The Public Interest* (1962).

102. M. DAN-COHEN, *supra* note 101; Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); Rhode, *supra* note 88.

103. Of course, there are numerous important unaddressed issues of public law other than the litigation explosion and litigation abuse which warrant analysis. Because the litigation explosion and litigation abuse remain controversial and unresolved, and because the issues are important to the future of public law and public law litigation, they are examined below. For a valuable early assessment of judicial economy in the intervention context, see Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701 (1978) (justifying need for efficient rules of civil procedure specifically with respect to Rule 24).

104. *See supra* notes 47-54 and accompanying text.

lawyering. Considerably more reliable data will have to be assembled, analyzed, and synthesized, before it will be possible to answer with much accuracy numerous questions that have not been satisfactorily resolved to date. For instance, how many filings, and of what kind, constitute a litigation explosion?[105] What is litigation abuse, exactly how much is there, and how can it be remedied most effectively?

Even if future, rigorous research clearly shows a sufficient increase in civil litigation to constitute a litigation explosion for which public interest litigants bear substantial responsibility, would a mere rise in the number of filings necessarily be detrimental and, if so, would any new restrictions on public interest litigants be warranted? Correspondingly, were that research to yield a defensible definition of litigation abuse and to indicate clearly that there was too much litigation, for what amount would public interest litigants actually have to be found responsible before additional limitations could be deemed proper? In short, this is a recommendation that an independent public law not be eroded *sub silentio*, for example, on the basis of anecdotal evidence. Any remedial action should be premised on forthright, careful consideration of the real questions at issue after reliable data have been collected.[106]

V. CONCLUSION

This Article is an attempt to augment the work of Professor Sunstein and other writers, as well as federal legislative, judicial, and executive branch officials. It is meant to enhance understanding of public law and to forge linkages across public law by demonstrating that the countertendencies detected in the area of standing are not isolated. As Professor Sunstein admonishes, developing a "set of independent principles of public law is a large task indeed."[107] The valuable work of constructing those principles, however, must continue to be pursued vigorously and expanded. Failing to do so would have detrimental im-

105. For citation to numerous authorities that challenge the existence of a litigation explosion, see Tobias, *supra* note 2, at 288-89; *cf.* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 642-43 (1987) (reporting national data and research about important federal district courts that suggests image of civil rights litigation explosion is overstated and borders on myth); Galanter, *The Life and Times of the Big Six: or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921 (finding business contract cases contribute to so-called litigation explosion).

106. *See* Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285, 291-92 (1988); Fiss, *supra* note 97, at 1087-90; Resnik, *supra* note 90.

107. Sunstein, *supra* note 1, at 1480.

plications far beyond the doctrine of standing, perhaps permitting the countermovement to gain momentum and even jeopardize an independent public law.