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Michael S. Greve

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The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law

I. Introduction

This Article examines the German doctrine of standing to sue (Klagebefugnis) in environmental disputes, as it has developed in legislation and litigation during the past two decades. The standing requirements imposed by German law prevent private parties from litigating on behalf of collective, "public" interests; they even prevent environmental associations from litigating on behalf of their members. Although environmental associations have persistently demanded reforms that would allow them to litigate on behalf of their members and the public, the courts have generally refused to relax standing barriers in environmental disputes. Furthermore, the legislature (Bundestag) of the Federal Republic of Germany has not followed the United States Congress in passing environmental statutes under which “any citizen” or “any person” can bring suit against a private party in violation of the act or against the administrator for failure to perform a non-discretionary duty. In the United States, virtually every major environmental statute contains such a “citizen suit” provision. Considering the two nations’
different legal traditions, West German environmental statutes resemble American laws to a surprisingly large extent. Nevertheless, none of the German environmental statutes authorizes citizen suits; nor does the general administrative code.

Justiciability doctrines—ripeness, mootness, finality, sovereign immunity, and especially standing to sue—are not mere legal technicalities. Their content and application have a significant impact upon governmental organization, especially upon the relation between the bureaucracy and the courts, and upon the channels through which, and the means by which, individual and collective social interests are represented in the political process.

The virtual demise of standing in the United States was the centerpiece of "public interest" litigation, or lawsuits brought for the vindication not of private rights but of collective, "public" interests. The rapid growth of public interest actions was equivalent to what has appropriately been termed "the reformation of American administrative law." In the late 1960s and early 1970s, the focus of American administrative law shifted from the protection of individual rights to the protection of "under-represented interests." The premise of this reformation was that certain non-economic, collective, "public" interests were systematically under-represented in the political process, especially in administrative agencies that were "captured" by the economic interests they were supposed to regulate. Under-represented interests, therefore, had to be afforded special protection by the judiciary. The environment quickly

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4. Cf., e.g., the example of air pollution control, as described by Currie, Air Pollution Control in West Germany, 49 U. CHI. L. REV. 355, 391-99 (1982).


began the focus of public interest litigation, both quantitatively and doctrinally. The indisputably public character of clean air and water made a legal system that protected private rights, but at the same time ignored the negative externalities of production and consumption, approaches which seem clearly dysfunctional. Special legal protection of the public’s interests in a clean and healthy environment seemed particularly urgent.

Although the rapid growth of public interest actions in the United States was unparalleled in any other country, it was widely perceived not as an American peculiarity, but as a reflection of the increasing need to represent vital public interests in a complex, collectivist society. The rather uncritical and, by now, near-universal acceptance of public interest litigation in the United States partially reflects the conviction that lawsuits on behalf of collective interests are a necessary, functional response to social needs and systemic government failures.

If this is true, the law should have become more hospitable to collective plaintiffs and public interests in both the United States and other industrial societies, which are as complex and interdependent as American society and face similar difficulties in protecting broad public and collective interests. Indeed, the author of a 1975 article found a “general and growing trend in much of Western Europe—the supplementation, or integration, of governmental intervention with private initiative in safeguarding emerging collective interests, and the channeling of such initiatives into associative forms.” At least on the surface, it appears that many common law and civil law countries have continued to reduce standing requirements and to create statutory exceptions to restrictive constitutional or common law justiciability doctrines.

West Germany seems to be no exception to this trend. During the

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7. For quantitative data on environmental litigation, see L. Wenner, *The Environmental Decade in Court* (1982).
11. This view underlies Stewart’s influential article, *supra* note 6, at 1712, 1811. Political support for instruments for collective litigation is also partially premised on the idea that such mechanisms are necessary to cope with novel political and substantive problems. E.g., Muskie, *Tort, Transportation, and Pollution: Do The Old Shoes Still Fit?* 7 Harv. J. LEGIS. 477, 491 (1972). Senator Muskie is the principal author of the 1970 Clean Air Act, including its citizen suit provision.
1970s, German administrative courts\textsuperscript{14} expanded private rights\textsuperscript{15} and lowered standing barriers in environmental litigation.\textsuperscript{16} Federal and state legislatures have made some small steps towards increasing the representation of environmental organizations in the administrative process.\textsuperscript{17}

Nevertheless, these trends have been extremely limited, at least in comparison to the reformation of American administrative law. Despite the increased fuzziness of justiciability doctrines, and despite instances of collective litigation under the guise of individual rights, German environmental law still focuses almost exclusively upon the protection of private, individual rights, and is still hostile towards public interest litigation and ideological, “non-Hohfeldian” plaintiffs.\textsuperscript{18} Since the early 1980s, the courts have actually tightened standing requirements and reduced the scope of judicial review of administrative decisions in various areas of environmental law.\textsuperscript{19}

The limited nature of the “collectivization” of German law is instructive because it casts doubt upon the assertion that the development of public interest litigation is a “major trend of universal dimensions”\textsuperscript{20} and a reflection of a functional need of industrial societies. Public interest litigation did not simply fail to come about in the Federal Republic. German courts and legislatures faced considerable political pressure to implement legal reforms that would allow public interest litigation in the environmental protection area.\textsuperscript{21} Nevertheless, the courts considered the option—and rejected it. Thus, we are faced with the paradox that Germany, a country that feels quite comfortable with collective, organized forms of political action, rejected public interest litigation; whereas the United States, a country known for its individualistic political culture and suspiciousness of organized interests, not only allows

\begin{itemize}
  \item \textsuperscript{14} German administrative courts should not be confused with intra-agency tribunals and Administrative Law Judges in the United States. The German administrative judiciary is independent, and \textit{not} a part of the bureaucracy. It is called “administrative” because it deals exclusively with matters of administrative law.
  \item \textsuperscript{15} In German law, legal claims individuals possess against the state are called subjektive öffentliche Rechte ("subjective public rights"): "subjektive," so as to distinguish the "subjective" sense of the word Recht (a right) from its "objective" sense (law); "öffentliche," because these rights exist under public (as opposed to private, \textit{i.e.}, civil) law and against the state (as opposed to other private parties). "Subjektive öffentliche Rechte" are uniformly understood to be individual rights. A literal translation ("public rights") might be mistakenly understood as referring to (presumptive) rights held not by individuals but by the public \textit{qua} public. This is exactly the opposite of the intended meaning. The translation "individual rights" or "private rights" captures the \textit{substantive} meaning of "subjektive öffentliche Rechte."
  \item \textsuperscript{16} \textit{Infra} notes 68-79, 125-26 and accompanying text.
  \item \textsuperscript{17} \textit{Infra} notes 97-100 and accompanying text.
  \item \textsuperscript{18} \textit{Infra} notes 84-85, 128-36, 160-61 and accompanying text. For the concept of a “non-Hohfeldian plaintiff” see Jaffe, \textit{The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff}, 116 U. Pa. L. Rev. 1003 (1968).
  \item \textsuperscript{19} See \textit{infra} notes 80-83, 160-61 and accompanying text.
  \item \textsuperscript{20} Cappelletti, \textit{Vindicating the Public Interest Through the Courts: A Comparativist’s Contribution}, 25 Buffalo L. Rev. 643, 690 (1976).
  \item \textsuperscript{21} \textit{Infra} notes 137-44 and accompanying text.
\end{itemize}
public interest litigation, but encourages it through awards of attorney fees. This Article argues that the reasons for this apparent paradox lie in different legal traditions and institutional arrangements.

II. Public Interest Litigation in West Germany: The Legal and Political Context

West Germany's legal system is built upon a firm distinction between individual private rights, which are protected by an independent judiciary, and political issues, which are committed to other branches of government. The understanding of rights as fundamentally different from the political concerns of groups or the public is constitutionally sanctioned. The Basic Law provides that if someone is violated "in his rights" by a governmental authority, legal redress—access to court—shall be available. "Rights" means private, individual (especially constitutional) rights, and the provision is generally interpreted as a preclusion of litigation on behalf of anything but private rights. Plaintiffs without individual rights—i.e., "public interest" plaintiffs—do not and, according to most scholars of constitutional law, generally must not have access to court. Exceptions can be created only by the legislature and must be limited in scope and number. At the sub-constitutional, administrative level, the general administrative law code prohibits litigation of claims that are not private rights. Unless otherwise determined by statute, lawsuits are admissible only if the plaintiff asserts, with at least some plausibility, that an administrative action has violated his


23. GRUNDGESETZ art. 19, § 4 (W. Ger.) ("Wird jemand durch die öffentliche Gewalt in seinen Rechten verletzt, steht ihm der Rechtsweg offen"). "Öffentliche Gewalt" means executive authority; "Rechtsweg" means access to court.

24. E.g., F. WEYREUTHER, VERWALTUNGSKONTROLLE DURCH VERBAENDE? 17, 93-95 (1975). Cf. also the discussion infra notes 204-19 and accompanying text.

25. The extent of the legislature's authority in this regard is somewhat controversial. Nevertheless, most scholars argue that legislative statutes dispensing with the requirement that plaintiffs assert violations of individual rights have to be carefully limited. E.g., F. WEYREUTHER, supra note 24, at 17-18; Butmester, Die Verbandsklage in verfassungsrechtlicher Sicht, in RECHTSGRAFEN DES GEGENMIGUNGSVERFAHRENS VON KERNKRAFTWERKEN 7-36 (Boerner ed., 1978). But cf., e.g., Breuer, Wirksamer Umweltschutz durch Reform des Verwaltungseurfahrens und Verwaltungsprozessrechts?, 1978 NEUE JURISTISCHE WOCHENSCHRIFT 1558, 1560 (legislature faces no constitutional obstacles in expanding standing and creating instruments of collective litigation).

26. There is an ongoing dispute over the precise scope of the plaintiff's duty to substantiate his claim. The various theories are discussed at length by P. NEUMEYER,
The explicit purpose of this provision is to prohibit public interest litigation (Popularklagen), and to orient judicial review of administrative action towards the protection of individual ("subjective") rights. Judicial control of bureaucracy is not the purpose of litigation under administrative statutes but merely an incidental effect of the protection of private rights.

Under these doctrines and statutes, many bureaucratic decisions on environmental matters are de facto exempt from judicial control. For example, a landowner's decision to cut down trees on his property without a permit, or with an administrative permit granted in violation of the law, is none of his neighbor's legal business. Similarly, an administrator's decision to build a highway through a national park or a recreation area can rarely be reviewed by the judiciary, because no private property rights are violated. Plaintiffs who try to go to court over such matters regularly lose for lack of proper standing to sue.

Nevertheless, environmental values and legal provisions can be enforced through the judiciary if they happen to coincide with someone's private rights. This is generally the case with large construction projects such as airports, chemical and power plants, highways, and particularly nuclear reactors. Because the widespread effects of industrial facilities create a large number of actual and potential plaintiffs, virtually every large-scale project will end up in court sooner or later. Litigation produces frequent delays and, on occasion, the cancellation of construction projects. Since large projects require several permits, each of which can be challenged in court, construction can drag on indefinitely, clogging the courts' dockets for years. This led to particularly serious

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**Footnotes:**

27. Die Klagebefugnis im Verwaltungsprozess 25-29 1976. According to the dominant opinion, a mere assertion is insufficient to confer standing; a violation of the plaintiff's individual rights must at least be possible. In environmental cases, plaintiffs are often subject to tougher requirements. See Baumann, Betroffensein durch Großvorhaben, 1982 Bayerische Verwaltungsblätter 257 and 1982 Bayerische Verwaltungsblätter 292, at 263-65.


29. BVerwG, 1975 Die öffentliche Verwaltung 605. The Court regarded this complaint as a suit brought by quis ex populo.


31. Courts have failed to find ways of avoiding multiple objections to one and the same project. Traditional doctrines of claim and issue preclusion seem inadequate to the task. Rengeling, Umweltschutz im Verwaltungsverfahrens- und Verwaltungsprozessrecht, 1978 Juristen-Zeitung 453, 456-57.
difficulties in the area of nuclear power. By the late 1970s, time-consum-
ing litigation against every reactor\textsuperscript{32} and waste storage facility thwarted the government's energy program—a program based on the extensive use of nuclear power.\textsuperscript{33}

From the perspective of environmental groups and advocates of public interest litigation, however, a legal system that tied the availability of judicial review to individual standing to sue had a decisive disadvantage: challenges to particular permits or licenses do not \textit{per se} ensure vigorous law enforcement. With the exception of nuclear power regulation where, due to the requirements of the licensing process and the large classes of potentially affected parties, every administrative action of consequence can be challenged in court, lawsuits against individual polluters do not lead to systematic judicial control of bureaucratic decision-making. Litigation is generally not a viable option when the bureaucracy refuses to act with sufficient speed or energy; refuses to act at all; or bargains away environmental requirements in negotiations with regulated industries.

When it appeared that the bureaucracy failed to enforce fully the legislature's ambitious substantive statutes, the general lack of a remedy for administrative inaction or lack of zeal became a focal point of the academic and political debate over environmental protection. The case of clean air legislation\textsuperscript{34} indicates that the charge of inadequate enforcement is not unfounded. Under the \textit{BImSchG}, the bureaucracy possesses highly coercive enforcement powers, including partial or complete plant closures.\textsuperscript{35} However, because formal enforcement proceedings entail delay through litigation, high costs, and the risk of losing cases, the bureaucracy usually seeks to implement environmental law through informal bargaining with applicant-firms.\textsuperscript{36} The resulting agreements,

\textsuperscript{32} Ossenbiihl, \textit{Die gerichtliche Uberprufung der Beurteilung technischer und wirtschaftlicher Fragen in Genehmigungen des Baus von Kernkraftwerken}, 1978 \textsc{Deutsches Verwaltungsblatt} 1. By 1980, the courts had already handed down more than 100 decisions concerning nuclear reactors. \textsc{Albers, Genehmigungen des Baus von Kernkraftwerken}, 5-26 (1980). Since then, the flood of lawsuits has continued. Cf. the comprehensive discussion of the case law concerning nuclear and conventional power plants in \textsc{Dreiseroth, Grosskraftwerke vor Gericht} (1986).

\textsuperscript{33} Listl, \textit{Die Entscheidungspragovative des Parlaments fur die Errichtung von Kernkraftwerken}, 1978 \textsc{Deutsches Verwaltungsblatt} 10, 17 (siting and licensing processes “factually collapsed”).

\textsuperscript{34} The principal statute regulating air pollution (as well as noise and certain other environmental problems) is the \textit{Bundesimmissionsschutzgesetz} [hereinafter “\textit{BImSchG}”] (federal environmental protection law), a rough equivalent of the Clean Air Act, 42 U.S.C. § 7401-7642 (1982). Germany has regulated certain problems of air pollution, such as vehicle emissions, not in the \textit{BImSchG} but in other statutes. An overview of air pollution law is Currie, \textit{Air Pollution Control in Germany}, 49 \textsc{U. Chi. L. Rev.} 355 (1982).

\textsuperscript{35} \textit{BImSchG} §§ 20, 21, 25.

\textsuperscript{36} There is extensive legal and empirical literature on the informal enforcement of environmental law. \textit{E.g.} \textsc{Bohne, Der informale Rechtsstaat} (1982); \textit{Informales Handeln im Gesetzesvollzug}, in \textsc{Organisation und Recht} 20 (7 \textsc{Jahrbuch fur Rechtssozioologie und Rechtstheorie}; 1980); \textit{Informales Handeln im Gesetzesvollzug}, 75 \textsc{Verwaltungs-Archiv} 343 (1984); \textsc{Eberle, Arrangements im Verwaltungsverfahren}, 17 \textsc{Die
such as extensions of statutory deadlines, solicitation of a promise to clean up an old plant in exchange for a license for a new one, and installation of workable (as opposed to the "best available") pollution control technology, often fall short of what the letter of the law demands.

The charge of an "enforcement deficit," which quickly became the key argument for public interest litigation,\(^\text{37}\) had some basis in fact, but it was brought primarily for the polemical purpose\(^\text{38}\) of discrediting the bureaucracy and justifying demands for public interest litigation and increased judicial intervention in the administrative process. In other words, it served the same purpose as complaints about the "capture" of regulatory agencies in the United States, which were also put to polemical uses\(^\text{39}\) and upon which the German complaints about "enforcement deficits" were based.\(^\text{40}\) There was little evidence to suggest that the enforcement of environmental law differed from the enforcement of other statutes,\(^\text{41}\) or that a bargaining approach is a less effective way of ensuring compliance and of attaining policy objectives than the adversarial, litigious enforcement style of American administrative agencies.\(^\text{42}\) Indeed, the bold assertion that environmental deterioration was caused by the bureaucracy's refusal or reluctance to enforce binding legal requirements was shown to be largely incorrect when the first serious studies of enforcement were conducted.\(^\text{43}\) By then, however, environmentalists as well as many politicians and legal scholars were convinced that ambitious substantive rules and standards were likely to be ineffectivel unless they were accompanied by far-reaching procedural

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\(^{37}\) Cf. Rehbinder, Bürgbacher & Knieper, Bürgerklage im Umweltrecht (1972) [hereinafter "Rehbinder"]. The case against group litigation is made most persuasively by F. Weyreuther, supra note 24.

\(^{38}\) Bohne, Der informale Rechtsstaat 22 (1981).

\(^{39}\) The academic origin of the "capture" theory is M. Bernstein, Regulating Business by Independent Commission (1955). The theory was put to political use by the nascent public interest movement in its efforts to reform the regulatory process. E. Bardach & R. Kagan, Going by the Book (1982) discusses the point and cites examples of reports and studies, conducted by Ralph Nader's organizations, that are based on this theory.

\(^{40}\) The first and most elaborate exposition of the "enforcement deficit" as a compelling rationale for public interest litigation is Rehbinder, supra note 37. The study is based almost entirely upon the American literature and experience. It appeared before much was known about the extent of enforcement deficits in the Federal Republic—in fact, before most German environmental statutes were passed.

\(^{41}\) Skouris, Über die Verbandsklage im Verwaltungsprozess, 1982 Neue Juristische Wochenschrift 100, 104; Bohne, Der informale Rechtsstaat 34 (1982).

\(^{42}\) D. Vogel, National Styles of Regulations 23 (1986) (Britain's emphasis on voluntary compliance with environmental regulation has not proven any more or less effective than the adversarial regulatory approach in the United States); E. Bardach & E. Kagan, supra note 39, at 101-19 (1982).

reforms.44

Some reform proposals centered on the increased participation of environmental groups and voluntary neighborhood associations in the administrative process.45 While administrative proceedings are not nearly as formal in Germany as they are in the United States, some rudimentary participation requirements do exist. General administrative law requires notice and comment for parties whose rights may be affected by a particular bureaucratic decision.46 Environmental statutes frequently contain more elaborate procedures, and expand the circle of participants beyond the narrow bounds of persons whose rights are directly affected. For example, most planning and licensing proceedings for industrial plants and nuclear reactors require hearings which anyone can attend.47 Environmental groups regularly attend these hearings.48 Nevertheless, participation has often proven to be too little, too late. When projects are submitted for public comment, all important decisions have already been reached in informal negotiations between the applicant firm and the bureaucracy.49

It is most unlikely that more extensive procedural requirements, such as more formal proceedings, a more elaborate record, or an additional round of hearings at an earlier stage, would change this situation. In the context of administrative procedure, the sharp distinction between public power and authority on the one hand and the legal rights of private citizens on the other, results in distinctions between those who want to be heard to protect their rights against the state, and those who want to "participate" for other and mostly political reasons.

44. REHBINDER, supra note 37, at 15-17; and Breuer, Wirksamer Umweltschutz durch Reform des Verwaltungsverfahrens- und Verwaltungsprozessrechts?, 1978 NEUE JURISTISCHE WOCHENSCHRIFT 1558, 1559.

45. The literature on participation and the administrative process is voluminous. A good overview of the literature and of legal developments in the area is FRÜHEZEITIGE BÜRGERBETEILIGUNGEN BEI PLANUNGEN (Blümel ed. 1982).

46. Verwaltungsverfahrensgesetz §§ 28, 66-71 (Administrative Procedure Act) [hereinafter "VwVfG"].

47. The pertinent provisions are scattered throughout the BImSchG, the ATG, regulatory statutes issued pursuant to these laws, and the general administrative codes. The general and most relevant provisions are BImSchG § 10, Bundesmissionsschutzverordnung (9. BImSchVO), ATG § 7, Atomrechtliche Verfahrensverordnung §§ 4-7 (nuclear licensing procedures statute) [hereinafter "AVfV"]; and VwVfG §§ 17-19. These procedural arrangements are quite complex and beyond the scope of this Article. General overviews areGRAFFE, DIE BETEILIGUNG DES BÜRGER AM UMWELT-SCHUTZRECHT LICH RELEVANTEN VERFAHREN UNTER BESONDERER BERÜCKSICHTIGUNG DES VERWALTUNGSVERFAHRENSGEGETZES (1980); and SCHMEL, MASSENVERFAHREN VOR DEN VERWALTUNGSBEHÖRDERN UND DEN VERWALTUNGSGERICHTEN (1982).

48. The technical and legal problems posed by these so-called Massenverfahren and by the participation of organized groups are described and discussed by Schmel, supra note 47; Naumann, Verbandsklage und Massenprozess, 1975 GEWERBE-ARCHIV 281; and Gerhard & Jacob, Massenverfahren und Musterprozess vor den Verwaltungsgerichten, 1982 DIE ÖFFENTLICHE VERWALTUNG 345.

49. Schmidt, Organisierte Einwirkungen auf die Verwaltung, 33 VERÖFFENTLICHUNGEN DES VERBANDS DEUTSCHER STAATSRECHTSLEHRER 183, 194 (1975); see also supra notes 36 and 37.
Due process is required when substantive rights are likely to be affected, but concerned citizen participation in bureaucratic processes is discretionary.

This theory is not based on cynicism. Informal hearings, held at the bureaucracy's discretion and in accordance with its own judgment, serve useful purposes: they help the bureaucracy gather information, assess public attitudes, consider objections that, although legally inconsequential, may be important for some other reason, and so forth. If participants whose rights are not affected by the proceedings were allowed to demand and obtain a judicial remedy for any procedural mistakes the bureaucracy may have made, all hearings would be pressed into a straightjacket of formal, legalistic proceedings, which might well defeat their purpose.\textsuperscript{50}

In any event, German administrative law does not normally recognize procedural claims in the absence of substantive private rights. Although the courts and especially the Federal Constitutional Court have increasingly come to recognize the value and importance of adequate administrative procedures for the protection of personal liberty and constitutional rights,\textsuperscript{51} statutory law and judicial doctrines continue to insulate many of the bureaucracy's substantive decisions against procedural challenges. Neither participation in agency proceedings,\textsuperscript{52} nor procedural mistakes automatically confer standing to sue.\textsuperscript{53} Procedural flaws will only render an administrative action null and void when the mistake is "obviously" and "especially grave."\textsuperscript{54} Plaintiffs are permitted to challenge the violation of only those procedures that serve to protect them as individuals—\textit{i.e.}, their own substantive rights. Even violations of procedures designed to protect individuals may not invalidate the bureaucracy's substantive decision. Mistakes may be remedied after the fact.\textsuperscript{55} Furthermore, plaintiffs have the often difficult task of showing

\textsuperscript{50} One may think of these proceedings as the analogue of the kind of hearing held from time to time by Congress or agencies such as the Civil Rights Commission in the United States. No one thinks that these hearings should be subject to due process requirements, and for good reason. Congress has kept them very informal.


\textsuperscript{52} Cf. infra notes 100-04 and accompanying text. The difference to the United States may not seem all that great in this regard. At least one federal appellate court has also said that participation in agency proceedings, absent injury in fact, does not confer standing to sue. Center for Auto Safety v. National Highway Transp. and Safety Admin., 793 F.2d 1322 (D.C. Cir. 1986) vacated, Center for Auto Safety v. Thomas 856 F.2d 1557 (D.C. 1988). But this decision is of less practical relevance than the corresponding doctrine in Germany, since the standards of "injury in fact" are so much lower in the United States. Center for Auto Safety has also been harshly criticized as at odds with numerous other cases. See Connelly, supra note 5, at 149-53.

\textsuperscript{53} Kloepfer, Rechtsschutz im Umweltschutz, 76 Verwaltungs-Archiv 371, 384 (1985) (discussing the Federal Constitutional Court's decisions).

\textsuperscript{54} UwGF § 44(1).

\textsuperscript{55} Id. § 45.
that the bureaucracy could have reached a different result, had it not violated procedural rules. 56

While allowing environmental groups to be heard, then, statutory law and judicial doctrines insulate the bureaucracy's substantive decision against outside interference. These doctrines do not expand the class of qualified plaintiffs; they do not increase the leverage of outside interveners in the bureaucracy; and they do not result in tighter judicial control of administrative decision-making. For these reasons, the advocates of heightened judicial scrutiny regarded the idea of limiting reforms to matters of administrative procedure as insufficient, and insisted that public interest litigation—standing to sue without a private rights test—was the only effective means of eliminating the enforcement deficit.

There are two ways of institutionalizing public interest litigation. First, the concept of individual, private rights can be stretched, by piece-meal judicial expansion, so as to embrace essentially public interests, such as generalized concerns about public health and welfare. Part III discusses the limited developments in this direction in the context of environmental litigation in West Germany. Second, public interest litigation can be instituted by legislative authorizations of individual or collectively organized private attorneys general. Within limits, the German legislature is free to pass statutes that relax standing barriers and other requirements to obtain judicial review. 57 In a few instances, the legislature has made use of this opportunity and extended to groups a statutory right to sue without invoking their own or even their members' rights. 58 Environmental advocates and lawyers sympathetic to their

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56. Id. § 46. A fairly typical application of this rule in the environmental context is OLG Lüneburg, 1978 ENERGIEWIRTSCHAFTLICHE TAGESFRAGEN 36, 37. Plaintiff contested a construction permit for the Brokdorf nuclear reactor on the grounds that the administrator, in clear violation of a non-discretionary statutory provision, had failed to make certain documents pertaining to the reactor available for public inspection and comment. The court upheld the permit because observance (or violation) of the procedural provision would not have affected the administrator's substantive decision. Concerning the significance of § 46 of the nuclear power law, cf. generally Ossenbuehl, Zur Bedeutung von Verfahrensmängeln im Atomrecht, 1981 Neue Juristische Wochenschrift 375. Procedural mistakes and their legal consequences under the BImSchG are discussed extensively by CLOOSTERS, RECHTSSCHUTZ Dritter gegen Verfahrensfehler im Immissionsschutzrechtlichen Genehmigungsverfahren (1986).

57. VwGO § 42(2) demands a claim of violations of rights for the admissibility of a suit only insofar as nothing else is determined by statutory law. It is not entirely clear to what extent the legislature can make use of this option. Limited exceptions are clearly permitted. EYERMANN, FRÖHLER & KORMANN, supra note 28, at 274 (§ 42 no. 127). On the other hand, the introduction of public interest litigation across the board would run afoul of the constitutionally sanctioned principle of individual legal protection. Id. Cf. notes 22-23 supra and accompanying text.

58. Gesetz gegen unlauteren Wettbewerb § 13(1) (Unfair Competition Act) [hereinafter "UWG"], for example, grants competitors in the same line of business, trade associations, and certain consumer associations a right to seek injunctive relief against the unfair trading practices prohibited by the statute. Similarly, Gesetz zur Regelung der allgemeinen Geschäftsbedingungen § 13(2) (Standard Contract Terms Act) [hereinafter
cause argue that similar opportunities for collective litigation should be implemented in environmental law. Legislative efforts in this arena will be described in Part IV.

III. Environmental Litigation

Environmental lawsuits over construction projects have a tripartite structure. Private parties may challenge an administrative license, building or operation permit granted to another private party. Until the 1950s, lawsuits contesting administrative decisions in someone else's favor were inadmissible under German administrative law; only the "addressee" of an administrative action had standing to challenge it. Since then, however, third-party litigation has become quite common. Lawsuits are brought most frequently by real estate owners whose property value deteriorates as a result of an administrative action benefiting someone else (so-called "neighborhood lawsuits"), and by business firms whose competitors are subsidized or otherwise publicly supported. In order to have such a case examined on the merits, the plaintiff must assert a legal interest. Such an interest exists only if he can invoke a "protective norm," i.e., a rule that "intends" his protection. Such protection has to be the purpose of the norm, not merely its effect. Conceptually as well as in practice, these requirements are considerably more restrictive than the "injury in fact" test adopted by American courts.60

"AGBG" eliminates individual standing requirements by allowing consumer associations to seek injunctive relief against certain prohibited clauses in standard contracts. However, these and the few other existing statutory provisions for collective litigation are described by Wolf, Die Klagebefugnis der Verbände (1971); von Falckenstein, Die Bekämpfung unlauterer Geschäftspraktiken durch Verbände (1977); and Urbanczyk, Zur Verbandsklage im Zivilprozess (1981) (with an extensive bibliography, at xv-xxvii). These provisions are part of civil law, and therefore not exactly analogous to a provision permitting environmental association lawsuits under public law. This makes for important differences. Association suits under the UG are authorized because in the absence of such authority, there would be no one to safeguard the public interest. This rationale does not apply to the environmental context, where the bureaucracy is already protecting the public interest as it sees it. See Kloepfer, Rechtsschutz im Umweltschutz, 76 Verwaltungs-Archiv 371, 387 (1985).

Further, a business firm whose standard terms of contract may be challenged by a consumer organization does not act on the basis of a governmental permit. The firm's expectations are very different from those of the owner of, for example, a nuclear power plant, who operates under a public license and must be able to rely on that license even if, unbeknownst to him, it was granted "illegally." This, too, makes an expansion of potential plaintiffs beyond those whose rights are at stake inadvisable. See F. Weyreuther, supra note 24, at 45-54. Weyreuther discusses further reasons why the analogy between existing association lawsuits and the proposed environmental right to sue may be misleading. Id. at 27, 29.


The irregular structure of tripartite litigation entails restrictions upon the availability and scope of judicial review. In contrast to plaintiffs in strictly adversarial proceedings, third-party plaintiffs have to substantiate their claims in order to be granted standing to sue. The scope of judicial review is also narrower in third-party litigation than in cases brought by addressee-parties who claim to be adversely affected. Courts will not review the agency action in all its aspects, but only its compatibility with the protective norm the plaintiff invoked.⁶¹

Some provisions of environmental statutes fulfill the traditional standards of protective norms, and they have been recognized as such by the judiciary.⁶² As early as the mid-1950s, the Federal Administrative Court admitted neighborhood suits in the context of industrial emissions; the court reaffirmed this position in a carefully worded opinion in 1967.⁶³ Plaintiffs are granted standing if they are “neighbors” of the beneficiary of administrative action, and if they can invoke a rule that protects their interests. Nevertheless, even plaintiffs who live within the “neighborhood” must establish an individual relationship between themselves and the dangers allegedly emanating from a particular facility.⁶⁴ There must be some showing of potential individual damage; general objections to the use of nuclear energy, for example, do not confer standing.⁶⁵

These doctrines are of limited effectiveness in lawsuits directed against large construction projects requiring permits and licenses. The way lawsuits against nuclear power plants are fought, argued, and decided makes the presence of a nominal plaintiff all but superfluous. Many lawsuits arising over licenses and permits for industrial facilities, though private and individual in form, are de facto collective, public interest actions.⁶⁶ The nominal plaintiffs are normally found by citizen groups and then presented to independent attorneys. Qualified individ-

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⁶¹ E.g., BVerwG, 1969 DIE ÖFFENTLICHE VERWALTUNG 142 (case brought by a private builder whose construction permit was revoked by a lower court in response to a neighbor’s complaint, while conceding that the permit was granted in violation of statutory law. The Federal Administrative Court reinstituted the permit since the violated norm did not “intend” the neighbor’s protection).
⁶² BImSchG § 5(1)(a) (which mentions the “neighborhood”); VGH Mannheim, 1974 DIE ÖFFENTLICHE VERWALTUNG 706; OVG Koblenz, 1975 GEBERBE-ARCHIV 165; OVG Hamburg, 1975 DEUTSCHES VERWALTUNGSBLATT 207; OVG Muenster, 1976 NEUE JURISTISCHE WOCHENSCHRIFT 2360.
⁶⁴ This condition does not apply where the individual relationship is obvious because plaintiff lives in close proximity to the construction site. Albers, GERICHTS-ENTSCHEIDUNGEN ZU KERNKRAFTWERKEN 17 (1980).
⁶⁵ E.g., VG Schleswig, 1974 ENERGIEWIRTSCHAFTLICHE TAGESFRAGEN 445. Not even a claim that a potentially catastrophic accident would endanger a plaintiff’s health is sufficiently individualized and substantial to confer standing. BVerwG, 1985 DEUTSCHES VERWALTUNGSBLATT 401. Cf. also notes 160-61 infra and accompanying text.
⁶⁶ Legal scholars refer to these actions as “regionally limited citizen suits” (regional begrenzte Popularklage). See Kloepfer, RECHTSSCHUTZ IM UMWELTSCHUTZ, 76 VERWALTUNGS-ARCHIV 371, 381 (1985).
ual plaintiffs cannot be denied standing simply because they are backed by organized groups. Indeed, in many cases, the plaintiffs do not matter and are rarely consulted. Barring unusual occurrences, such as the nominal plaintiff's death in the course of litigation, the judiciary's insistence upon the veneer of private rights does not obstruct litigation against large-scale projects.67

Under these circumstances, justiciability doctrines could easily have collapsed under the weight of litigation. Trends in this direction became visible in the mid-1970s. Perhaps under the impression that large-scale construction projects would inevitably end up in court, some judges began to accept cases arising from such projects as long as the claims raised were not clearly without merit.68 Courts determined that the "neighborhood" of an industrial facility is not merely its immediate vicinity but the area in which a plant has a measurable effect, an area which can extend for many miles.69 At the same time, explicit reflections upon plaintiffs' duty to substantiate individual complaints became comparatively rare in environmental litigation concerning large projects.70 Then, too, the courts displayed a strong tendency to equate administrative regulations per se with subjective claims on the part of third parties. Plaintiffs obtained standing under provisions without a recognizable protective purpose, including some that state explicitly that they serve to protect the public, language that typically precludes third party standing.71 At least some cases, especially in the environmental area but also in more traditional fields of administrative law, suggest that judicial control of the bureaucracy is no longer merely

67. In recent years, environmental organizations have also begun to buy small patches of land near construction sites and in ecologically valuable areas. The organizations are then entitled to the same legal protection as any other property owner. This technique of circumventing standing barriers is described by Neumeyer, Erfahrungen mit der Erbautenklage aus der Sicht der Verwaltungsgerichte, in Wahrnehmung von Naturschutzinteressen in gerichtlichen Verfahren 44, at 50-51 (Kopp ed. 1988).

68. Fischerhof, Ergebnisse der Rechtsprechung über die Genehmigung von Atomreaktionen, in Drittes Deutsches Atomrechtsymposium 19, 23 (Lukes ed. 1975) (duty to substantiate claims very low in nuclear power litigation).


70. In some cases, questions of admissability are not discussed at all.

71. E.g., AIG § 7(2)(vi). Although the clause explicitly refers to public interests, at least one court opined that it is protective and others did not want to exclude this possibility. In 1982, the Federal Administrative Court answered this question in the affirmative. BVerwG, 1982 Die öffentliche Verwaltung 820, 821. BImSchG § 5(1)(ii) used to be a similarly embattled provision. Although the clause makes no mention of third parties, some courts granted standing and relief under the provision. OVG Münster, 1976 Deutsches Verwaltungsblatt 793; OVG Lüneburg, 1980 Gewerbe-Archiv 203 and 1981 Gewerbe Archiv 341. Eventually, the Federal Administrative Court ruled that BImSchG § 5(1)(ii) generally offers no protection to third parties. 65 BVerwGE 37, 42 (1984). These decisions are discussed by Sellner, Immissionsschutzrecht und Industrieanlagen 55-59 (2d ed. 1988).
incidental to the protection of private rights.\textsuperscript{72}

The increased availability of judicial review led, quite predictably, to an expansion of its scope.\textsuperscript{73} Courts have undertaken comprehensive examinations of reactor safety, including precautions against complete melt-downs and explosions—issues far removed from the grounds on which the plaintiffs obtained standing.\textsuperscript{74} Doctrines limiting the scope of judicial review of discretionary agency action have also partially eroded.\textsuperscript{75} Again, these developments are most pronounced in environmental cases, but competitors’ and land use litigation also show signs of increased judicial interventionism.\textsuperscript{76}

To some extent, the trend towards public interest litigation under the cover of private lawsuits and the concurrent erosion of restrictions upon the availability and scope of judicial review resulted from the application of traditional doctrines to a new, complex and technical subject-matter. For example, the geographical expansion of “neighborhood” was substantially justified, inasmuch as it sought to afford those who suffer tangible losses, though not immediate neighbors of a facility, the same remedies available to neighbors under traditional land use law. But the concept did change in the process of geographical expansion. In contrast to its restrictive function in land use law, it rarely serves to limit the class of potential plaintiffs in environmental cases.\textsuperscript{77} Similarly, judicial efforts to limit the class of qualified plaintiffs forced the courts to look at the substance of cases in the context of discussing their admissability. Through this backdoor, some plaintiffs obtained rulings on the merits of cases they were not entitled to bring.\textsuperscript{78} These and similar difficulties arising from the peculiar nature of large projects are an important reason why judicial review expanded most rapidly and spectacularly in cases arising over nuclear reactors.

There are also indications, though, that the novel and intrinsically difficult character of environmental cases does not fully explain the expansion of the judicial function, and that the courts strayed from their traditionally deferential stance to a more aggressive review of administrative fact-finding and decision-making. At least some courts, appar-

\textsuperscript{72} See Berger, Grundfragen umweltrechtlicher Nachbarklagen 153 (1982).
\textsuperscript{73} Id. at 169.
\textsuperscript{74} Cf. examples discussed in Ossenbühl, Die gerichtliche Überprüfung der Beurteilung technischer und wirtschaftlicher Fragen in Genehmigungen des Baues von Kernkraftwerken, 1978 Deutsches Verwaltungsblatt 1, 2-4. This separation of the grounds on which plaintiffs obtain standing from the subject-matter of litigation has, of course, occurred in the United States as well. E.g., Duke Power v. North Carolina Environmental Study Group, 438 U.S. 59 (1978).
\textsuperscript{75} This was noted as early as 1974 in Ossenbühl, Von unbestimmten Rechtsbegriff zur letztverbindlichen Verwaltungsentscheidung, 1974 Deutsches Verwaltungsblatt 309.
\textsuperscript{76} Burmeister, Die Verbandsklage in verfassungsrechtlicher Sicht, in Rechtsfragen des Genehmigungsverfahrens von Kernkraftwerken 7, 11 (Boetier ed. 1978).
\textsuperscript{77} Berger, Grundfragen umweltrechtlicher Nachbarklagen 132 (1982) (litigation against large projects not “typical neighborhood lawsuits”).
\textsuperscript{78} Czajka, Inhalt und Umfang der richterlichen Kontrolle im technischen Sicherheitsrecht, 1981 Energiewirtschaftliche Tagesfragen 537, 537-38.
ently determined to offer the public maximum protection under existing law, replaced the search for a legally protected interest with the search for some actual effect that the challenged facility might have on the plaintiff. The Court of Appeals in Lüneburg, for example, attempted to improve the safety of nuclear reactors in this fashion.79

But whatever the motives and the precise extent of these doctrinal shifts may have been, they can by no stretch of the imagination be interpreted as a general tendency towards collective, public interest forms of litigation. The trends towards the acceptance of de facto public interest cases and towards judicial control of administrative decision-making even in the absence of clearly discernible individual rights has been partially reversed. Beginning in the early 1980s, the judiciary stopped the expansion of private environmental rights and limited environmental litigants' access to court by imposing very substantial pleading requirements upon plaintiffs seeking to obtain standing.80 The Federal Administrative Court ruled that substantial provisions of nuclear power law and of the BImSchG, held to be “protective” by many lower courts, served no such purpose.81 The Federal Constitutional Court also explained that the legislature’s decision to promote nuclear power was constitutionally permitted, and that the existing legal provisions sufficed to protect the populace.82 This decision proved extremely influential; the administrative courts took it as a signal to further limit the scope of individual legal protection in cases brought against nuclear reactors.83

This judicial change of direction was relatively easy to accomplish because even at the height of judicial assertiveness—during the second half of the 1970s—the courts never revoked their basic commitment to the principles of private rights litigation. Although lawsuits brought by environmental groups would hardly differ from the present pattern of litigation over large construction projects, the courts have upheld the facade of adversarial, individual litigation. Citizen groups qua groups, have never been granted standing to sue.84 There is still no general

80. See generally Eiberle-Herm, Tendenzen im verwaltungsgerichtlichen Rechtsschutz-Rechtsschutzdefizite durch Kontrollverzicht, 15 Demokratie und Recht 264 (1987); and Baumann, supra note 26, at 260-63.
81. 65 BVerwGE 313, 320 (1982) and 69 BVerwGE 37, 42 (1984) (BImSchG § 5(1)(ii) not protective); 61 BVerwGE 256 (1981); ATG § 7(2)(iii). The latter decision is discussed infra note 160-61 and accompanying text.
82. 49 BVerfGE 89 (1978) (“Kalkar”). In another decision concerning the interpretation of the ATG, the Federal Constitutional Court greatly curtailed the scope of judicial review in nuclear power licensing proceedings. 1986 Deutsches Verwaltungsblatt 190 (“Wyhl”).
83. Baumann, supra note 26, at 261.
84. No group has ever been granted standing. In one case, an appellate court denied poverty relief to an individual plaintiff against a nuclear power plant because the plaintiff was used by the local environmental group in order to litigate at the public’s expense. VGH Baden-Württemberg, 1974 Energiewirtschaftliche Tagesfragen 259.
judicial remedy against administrative lack of action or zeal, still no
standing to sue and, hence, no control over the bureaucracy in the
absence of a protective norm and a plausible private rights claim. Ger-
man environmental litigation has remained almost exclusively limited to
private challenges to licenses for large industrial facilities under nuclear
and air pollution control law.85 American environmental litigation, of
course, has gone far beyond such "NIMBY" (not-in-my-backyard) suits.

IV. Legislation

Although proposals for legislative authorizations of public interest liti-
gation have accompanied the German debate about environmental law
and policy ever since the early 1970s, the reform has stopped short of
the more liberal American policy.86 The reason is that the vindication
of public interests and control of administrative activity that does not
infringe upon individual rights are considered inherently public, polit-
cal functions. Individuals must not be allowed to act in lieu of the state,
as they would if they were allowed to act as private attorneys general.
Most advocates of increased judicial control over the bureaucracy there-
fore argued that associations of individuals should be granted standing
to sue without invoking their own or even their members' rights. This
was a somewhat more plausible and promising proposal than individual
citizen standing because under German law, some associations (Ver-
bände) are entrusted with certain public functions that could not be con-
ferred upon individuals.87 There is no a priori reason why the vindication
and control of the bureaucracy by means of litigation could not fall into this category of public but transferable functions.

Nevertheless, a transfer of law enforcement authority to associa-
tions would constitute an exception to the individualistic principles
upon which German administrative law is based. As a general matter,
associations can challenge only those administrative actions that violate
its rights as an association. Restrictions of the constitutionally protected
freedom to associate and to assemble, for example, are contestable by
group litigants.88 But associations cannot invoke others' rights in an
administrative lawsuit,89 unless this opportunity is provided for by statu-

85. Kloepfer, Rechtsschutz im Umweltschutz, 76Verwaltungs-Archiv 371, 374
(1985).
86. Faber, Die Verbandsklage im Verwaltungsprozess 39-40 (1972). For a typ-
cical example of pronounced judicial distaste of the private attorney general cf.
87. Cf. generally Lessman, Die öffentlichen Aufgaben und Funktionen privat-
rechtlicher Wirtschaftsverbände(1976).
88. The Basic Law protects the right to associate. Grundgesetz, art. 9, § 1.
However, the Federal Constitutional Court has held consistently that Article 9 does
not convert an association's (factual) interests into legally recognized rights but pre-
supposes the latter. E.g., 16 BVerfGE 147, 158 (1963).
89. Collectives can be sued and sue on behalf of others under civil law but not
under administrative law. Further, there are three exceptions to the general prohibi-
tion on collective litigation under administrative law. First, collective legal entities
(such as business corporations) that possess a correlate of strictly individual, private
tory law. "Others" means not only third parties or the public at large, but also an association's members. In contrast to American law, which permits groups to sue on behalf of their members,\textsuperscript{90} German administrative law is based upon the premise that the interests of association members are different from the association's own interests.\textsuperscript{91} For example, an environmental organization cannot claim that a nuclear power plant endangers the lives of the group's members and thus its existence as a group.\textsuperscript{92} If members of a group think an administrative action has violated their rights, they have to bring a suit on their own.\textsuperscript{93} Associations thus possess the same rights as any individual, but they possess no special litigation rights.\textsuperscript{94}

Nevertheless, the legislature can make, and occasionally has made, exceptions to the general prohibition on public interest lawsuits.\textsuperscript{95} While conceding that such authorizations of association lawsuits were rare and limited in scope, advocates of public interest litigation argued that an expansion of collective litigation into the environmental area would not constitute a radical break with the legal tradition.\textsuperscript{96}

The most serious legislative attempt to institutionalize group standing rights in the environmental area was made during the debates over a federal nature protection statute.\textsuperscript{97} Environmentalists concentrated their efforts on this statute because the subject-matter made it very hard to find plaintiffs who could obtain standing under the "protective norms" and "neighborhood" tests. In contrast to statutes regulating the construction of nuclear reactors and industrial facilities, a law protecting forests, plants, and wildlife hardly ever creates qualified plaintiffs. Environmentalists offered the restriction of group standing to the \textsc{BNatSchG} as a concession to critics who warned that the political effects

\begin{itemize}
\item rights are treated like individuals. \textsc{Faber, supra} note 86, at 39-40. Second, collective litigation is permitted in certain real enforcement proceedings over property rights: \textsc{Redeker \& von Oertzen, Kommentar zur Verwaltungsgerichtsordnung} \S 42 (8th ed. 1985). Third, \textsc{VwGO} \S 42(2) enables the legislature to make statutory exceptions to individual standing requirements. \textit{See supra} notes 24-25, 57-58 and accompanying text.
\item 90. \textit{See, e.g.,} Sierra Club v. Morton, 405 U.S. 727, 739 (1971) ("It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review"). The requirements for "associational standing"—which, compared to German doctrines, are very lax—are stated most clearly in \textsc{Hunt v. Washington State Apple Advertising Comm'n}, 432 U.S. 333, 343 (1977). \textit{Cf. International Union, United Automobile, Aerospace and Agricultural Implement Workers v. Brock}, 477 U.S. 274, 281-82 (1985).
\item 91. \textsc{Faber, supra} note 86, at 22.
\item 92. The Federal Constitutional Court denied standing. \textsc{BVerfG}, 1981 \textsc{Neue Juristische Wochenschrift} 362.
\item 93. A typical judicial application of this approach is \textsc{VGH Mannheim}, 1972 \textsc{Neue Juristische Wochenschrift} 1101. An association of private citizens had challenged the application of a zoning ordinance. The court denied standing, on the grounds that the organization invoked not its own rights but those of its members.
\item 94. \textsc{F. Weyreuther, supra} note 24, at 4.
\item 95. \textit{Supra} notes 24-25, 57-58 and accompanying text.
\item 96. \textit{E.g.,} \textsc{Meyer-Tasch, Umweltrecht im Wandel} 72-77, 84 (1978).
\item 97. \textit{Bundesnaturschutzgesetz} [hereinafter \textsc{BNatSchG}].
\end{itemize}
of a general environmental group right to sue were unpredictable and potentially disastrous.\textsuperscript{98}

The \textit{BNatSchG} turned out to be a far cry from what environmentalists had lobbied for. Section 29(1) grants certain environmental protection groups a right to participate in administrative proceedings, unless another statute provides for an identical or a broader form of participation. This right, however, is subject to restrictions. Environmental groups desiring to participate have to be licensed by the bureaucracy. In order to obtain a license, an association has to show, \textit{inter alia}, that it furthers, on a permanent basis, the protection of natural resources; that it is organized on a regional or national, not merely a local, basis; and that it can guarantee an adequate performance of its tasks.\textsuperscript{99} Moreover, and more important, the right to participate does not entail a right to challenge the resulting agency decision in court; the Bundestag explicitly rejected the idea of public interest litigation when debating the statute.\textsuperscript{100}

Environmentalists reached somewhat more favorable results at the state level. Section 42(2) \textit{VwGO} and section 29(1) \textit{BNatSchG} leave it open to the states to adopt more extensive agency and judicial procedures than are available under federal law. Five states (Bremen, Hamburg, Berlin, Hesse, and Saarland) have decided to allow environmental groups to challenge administrative actions without invoking private rights. In all five states, participation in agency proceedings and bureaucratic licensing are necessary to obtain standing. Federal laws and federal agency actions cannot be challenged by groups, and all five states have restricted group litigation to cases arising under their nature protection statutes.

Although these provisions for collective litigation are very limited in scope, and have been used only infrequently,\textsuperscript{101} they have provoked expressions of pronounced judicial distaste for group litigation: in several decisions, appellate courts read the relevant provisions as narrowly as the statutory language would allow. The most restrictive decisions, issued under Hesse’s statute, became part of the battle against a projected runway at the Frankfurt airport, one of the most intense fights over a construction project West Germany has seen. The plan for the runway was issued amidst heated controversy and public resistance.\textsuperscript{102} The bureaucracy, complying with statutory requirements, allowed a licensed citizens group to participate in the administrative planning process. In the course of construction, though, the bureaucracy failed to take care of some details of water distribution and of several changes in

\textsuperscript{98} See \textit{infra} notes 165-67 and accompanying text.
\textsuperscript{99} \textit{BNatSchG} § 29(1)-(2).
\textsuperscript{100} Rehbinder, \textit{Argumente für die Verbandsklage im Umweltrecht, 1976 Zeitschrift für Rechtspolitik} 157, 158.
\textsuperscript{101} P. Neumeyer, \textit{infra} note 26, at 44-49.
\textsuperscript{102} The account of the facts is taken from Rehbinder, \textit{Die hessische Verbandsklage auf dem Prüfstand der Verwaltungsgerichtsbarkeit, 1982 Neue Zeitschrift für Verwaltungssrecht} 666, 667.
the plans for local facilities. Instead of regulating these matters in a planning proceeding, which would have mandated interest group participation, the agency followed an informal procedure that did not require intervenors to be heard. A licensed citizen group challenged the resulting decision in court, arguing that it had been illegally excluded from the proceedings.

The group won in trial court, but in a very restrictive opinion, the Court of Appeals reversed, on the theory that since group participation in agency proceedings was not a prerequisite for the validity of administrative action, the plaintiff-group could not enforce participation through the judiciary. The court further held that the group had no standing to raise the question of whether the agency had illegally evaded a procedure with higher participation requirements. Hesse's statute explicitly provides for public interest litigation against decisions and omissions affecting the environment, but it also requires that a group challenging administrative action must have participated in the administrative decision-making process to be entitled to sue. Where there is no participation, the court held, there can be no interest group standing to sue the agency for its refusal to adopt formal procedures. Under this approach, even licensed citizen groups cannot object to an agency's illegal evasion of formal procedures. Nor can they sue an agency for complete inaction.

The appellate court's opinion was the first of a line of cases that severely limited interest group standing under statutory law. In fact, the courts have dismissed every lawsuit brought by environmental associations under the Hesse statute as inadmissible, occasionally on the basis of questionable interpretations of the pertinent provisions. Not surprisingly, the judiciary's reluctance to even admit association lawsuits has discouraged environmental organizations from bringing further suits. Berlin's authorization of group litigation has also been subject to a very narrow judicial interpretation, albeit for different reasons.

103. VGH Kassel, 1982 Neue Zeitschrift für Verwaltungsrecht 689.
105. Cf. the very harsh criticism by Sening, Zur Verbandsklage im Hessischen Naturschutzgesetz, 1983 Natur und Recht 146; Rehbinder, supra note 102; Neumeyer, supra note 26, at 49-50.
107. In an effort to make association lawsuits compatible with the principles of individual legal protection, the Berlin legislature permitted group litigation only when no individual plaintiff existed. Berliner Naturschutzgesetz § 39(a) [hereinafter BlnNatSchG]. The appellate administrative court in Berlin considered this arrangement too unclear to be compatible with the constitutional principles of the rule of law, and declared it null and void. OVG Berlin, 1986 Neue Zeitschrift für Verwaltungsrecht 318. Subsequently, the Federal Administrative Court held the provision constitutional, but ruled that association lawsuits are precluded if anyone who has been heard in the administrative proceedings had (or would have) standing to sue, even if no one did in fact bring suit. 1988 Deutsches Verwaltungsblatt 492, 494. This narrow reading was held to be a faithful implementation of the legislature intent to permit "only a very limited association right to sue." Id. at 495.
Very few suits have been brought under the Hamburg, Bremen, and Saarland statutes. On the whole, then, the existing provisions for environmental association lawsuits have fallen far short of effecting a transformation of the legal system.

Nor is it likely that the federal legislature will broaden environmental groups access to courts. Although environmental organizations, the Greens, and many SPD leaders have sustained their demands for public interest litigation, chances that such reforms will be passed are slim. In 1978, the government publicly expressed its regrets over the defeat of group standing rights in the BNatSchG, and proposed to introduce it into amendments to a statute regulating the construction of nuclear power plants, which were then under consideration.\textsuperscript{108} This attempt failed, as did all others. Before the 1983 elections, a planned revision of the BNatSchG died amidst sharp controversy over a provision for interest group standing advocated by the SPD/FDP government.\textsuperscript{109} Despite the opposition's and environmentalists' clamor and although election day was near, the liberal-conservative government did not include group rights in its most recent proposals to amend the BNatSchG.\textsuperscript{110}

A second set of proposals to expand environmental rights and the judiciary's role in environmental protection has revolved around the constitutionalization of private claims to a clean and healthy environment. Although this idea has been debated and advocated less intensely than proposals for statutory public interest litigation, it has been a standard component of the environmental debate over the past fifteen years. Several legal scholars argue the existence of a constitutional right to a clean and healthy environment in the penumbras of the Basic Law.\textsuperscript{111} Then Chancellor Brandt alluded to a “right” to environmental protection in his 1973 governmental address, albeit without actually mentioning the Basic Law. The political party most strongly committed to such a right was the FDP. On various occasions, then-FDP Chairman and Minister for Domestic Affairs, Hans Dietrich Genscher, postulated a right to “undisturbed sleep, clean water, and pure air.”\textsuperscript{112}

\textsuperscript{108} Bundesministerium des Inneren, Umwelt No. 2, at 2 (1978).
\textsuperscript{109} Presse- und Informationsamt der Bundesregierung (Press and Information Office of the Federal Government) (W. Ger.), Bulletin No. 107 (Nov. 11, 1982).
\textsuperscript{110} Frankfurter Allgemeine Zeitung, Nov. 7, 1986. The use environmental groups tried to make of their standing rights in the Frankfurt airport controversy may well have contributed to mounting political opposition to statutory authorizations of environmental group litigation. Rehbinder, \textit{Die hessische Verbandsklage auf dem Prüfstand der Verwaltungsgerichtsbarkeit}, 1982 \textit{NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT} 666, 667.
\textsuperscript{111} However, they are a decided minority. See generally von Münch, \textit{1 Grundgesetz-Kommentar}, 148 (art. 2, no. 61) (3d ed. 1985). A concise summary of arguments against a right to a clean environment can be found in Rauschning, \textit{Staatsaufgabe Umweltschutz}, 38 \textit{VERÖFFENTLICHUNGEN DES VERBANDS DEUTSCHER STAATSOBERHANA FÜR RECHT UND KUNDSRECHTSINTERPRETATIONEN} (1979). A recent comprehensive discussion of proposals to constitutionalize environmental protection is Michel, \textit{STAATSSCHUTZ, STAATSSZIELE UND GRUNDRECHTSINTERPRETATIONEN} (1986).
The debate about a constitutional right to a clean environment has been refuelled by the Greens’ victories in state and federal elections, and by widespread public concern over the degradation of the German forests (Waldsterben), commonly believed to be the result of acid rain. The Greens have submitted to the federal legislature a proposal for a constitutional amendment guaranteeing a basic environmental right. But legal scholars are almost uniformly opposed to the recognition of an environmental right in the Basic Law, and there is insufficient political sentiment to make a federal constitutional right to a clean environment a realistic possibility. State governments have also refused to add a private, litigable right to a clean environment to their state constitutions.

Even if the federal government recognized a constitutional environmental right, this would not necessarily lead to successful collective litigation. In all likelihood, courts would construe a constitutional right to a clean environment as an individual right, and still require plaintiffs to substantiate their individual claims. Since it is extremely hard to see how demands for public goods such as clean air could be made individual, and thus be distinguishable from a generalized demand for a more aggressive environmental policy, an individual environmental right would still not bring about public interest litigation. The Bavarian constitution does contain a private right to “enjoy nature,” but collective claims have been almost as ill-fated in Bavaria as in any other state. A court of appeals has held that environmental organizations cannot sue under the provision. Furthermore, an environmental right could, at most, be a negative, defensive right; it would not likely entitle private parties to affirmative governmental action, such as more extensive environmental legislation. For these reasons, environmentalists and lawyers sympathetic to their cause have generally recognized that the effects

114. In a 1987 hearing before the Bundestag Committee on Legal Affairs, for example, legal experts representing a broad spectrum of political opinions opposed the idea of a justiciable environmental right in the Basic Law. Bericht, 1988 NATUR UND RECHT 80, 81. Cf. note 111 supra and accompanying text.
115. Bavarian Constitution, art. 143, § 3.
116. BayVGH, 1975 DEUTSCHES VERWALTUNGSBLATT 665. This decision is somewhat at odds, though, with two previous decisions by the same court: 1973 Bayerische VERWALTUNGSBLÄTTER 211, and 1974 Bayerische VERWALTUNGSBLÄTTER 545.
117. Kloepfer, ZUM GRUNDRECHT AUF UMWELTSCHUTZ 27-28 (1978) (with regard to a basic environmental right in the “penumbras” of the Basic Law). The situation would be no different if an explicit environmental right were inserted into the Basic Law. Even with regard to the enforcement of existing statutes, a constitutional right to a clean environment may be of limited effectiveness. No constitutional right entails a further, general right to have the law enforced. Such a claim would elevate the courts to an instrument of total control over public administration, an idea that is alien to the Basic Law. MAUNZ & DÜRIG, GRUNDESETZ-KOMMENTAR, art. 19(4), no. 122 (1985).
of a constitutional environmental right would probably be limited.\textsuperscript{118}

Another way of constitutionalizing environmental protection would be to add such a right to the "goals of state" mentioned in the Basic Law—for example, in article 6(1) and, most prominently, in Article 20.\textsuperscript{119} A constitutional statement of intent would be even less effective than an environmental "right"; the goals enumerated in articles 6 and 20 obligate the state to act in ways conducive to those ends, but they are not rights and thus not directly justiciable. Still, a constitutional statement of intent might influence judicial interpretations of particular statutes. It might also increase the extent to which environmental values have to be considered in complex administrative planning decisions, such as zoning ordinances. Conceivably, it could also lead to an expansion of standing to sue.\textsuperscript{120}

Many states have considered adding such a statement of intent to their constitutions,\textsuperscript{121} and Bavaria has actually done so.\textsuperscript{122} Several states have urged the federal government to change the Basic Law accordingly, and the SPD opposition (in the Bundestag) as well as the government (through the Bundesrat) have submitted bills to this effect.\textsuperscript{123} Under pressure from the FDP, and in order to demonstrate their commitment to environmental protection, the Christian Democrats have endorsed an environmental "goal of state," at least in principle. But the constitutional amendment proposed by the government is very narrowly drawn, so as to prevent any possibility of judicial interpretations that might force the legislature to toughen or amend environmental statutes.\textsuperscript{124} The amendment is thus too limited to be accepted by the opposition parties, and therefore in serious danger of failing to muster the necessary two-thirds majority. On the other hand, any statement of

\textsuperscript{118} E.g., MEYER-TASCH, UMWELTRECHT IM WANDEL 17 n.16 (basic environmental right would have "merely propagandistic value"); and REHBINDER, supra note 37, at 117 (positive environmental right would not necessarily lead to collective litigation).

\textsuperscript{119} Art. 6(1) provides that "[m]arriage and the family are under the special protection of the state (staatlichen Ordnung)." Art. 20 contains four principles of governance: democracy and popular sovereignty; federalism; the rule of law (Rechtsstaat); and, somewhat more nebulously, a "social state" (Sozialstaat).

\textsuperscript{120} See Kloepfer, Umweltschutz und Verfassungsrecht, 1988 DEUTSCHES VERWALTUNGSSBLATT 305, 316. The author correctly stresses, that the consequences of a constitutional statement of intent (or for that matter, of a basic environmental right) are very hard to anticipate. An attempt to do so—and a very negative assessment of the constitutionalization of environmental values—is Michel, Umweltschutz als Staatsziel?, 1988 NATUR UND RECHT 272.

\textsuperscript{121} These are Schleswig-Holstein and Saarland (Das Parlament March 17, 1984), Bremen (Die Welt, July 10, 1984), and Rheinland-Pfalz (Frankfurter Rundschau, May 15, 1984).

\textsuperscript{122} Frankfurter Rundschau, 6 April 1984.

\textsuperscript{123} Bericht, 1988 NATUR UND RECHT 80. Again, the tenor of scholarly opinion concerning a constitutional statement of environmental intent has been "predominantly skeptical." Id. at 82.

\textsuperscript{124} The Bundesrat proposal (which represents the government's ideas concerning a statement of intent) contains a "balancing clause," which would permit legislatures to balance environmental values against other governmental goals and objectives. 11 Bundestag Drucksache 885.
intent acceptable to the CDU/CSU would fail to strengthen the hands of individual environmental plaintiffs, to say nothing of instigating public interest litigation.

V. The Reformation That Did Not Happen

German administrative law has not remained entirely untouched by attempts to legitimize public interest litigation in theory and to institute it in practice. Citizen groups play more of a role in litigation now than they did twenty years ago. The judiciary's understanding of private rights has become quite broad in the environmental area.\textsuperscript{125} Traditional, highly individualistic doctrines have been stretched or diluted. Distinctions between private rights and public policies, between the judiciary's task to protect private rights and the bureaucracy's task to determine the public interest, have become less rigorous and clear-cut.\textsuperscript{126}

German legal scholars have criticized these developments, often in very harsh terms, as a "perversion" of the existing system of individual legal protection.\textsuperscript{127} By comparison with the United States, however, the trends in the direction of greater collective interest representation that have occurred in the Federal Republic appear very modest. The American legal system accommodates "non-Hohfeldian plaintiffs"—plaintiffs who assert no private rights but only "public interests"—and public (as opposed to private) actions.\textsuperscript{128} It systematically strengthens the hand of public interest constituencies in the administrative process. The vindication of public interests is not merely incidental to the protection of rights in the process of judicial review of administrative action; it is the very purpose of judicial oversight. Collective interests and "concerned citizens" act as "private attorneys general," supplementing governmental law enforcement.\textsuperscript{129}

These doctrines and practices—constitutive elements of the reformation of administrative law—have been rejected by the Federal Republic. Despite public interest litigation under the cover of private lawsuits and the concurrent dilution of legal doctrines, German administrative law has shown a remarkable stability. "Big" environmental cases did not cause the entire doctrinal system to explode. Although current German civil law offers a few opportunities for collective interest representation

\textsuperscript{125} BERGER, GRUNDFRAGEN UMWELTRECHTLICHER NACHBARKLAGEN 155 (1982).
\textsuperscript{126} E.g., DEGENHART, KERNENERGIERECHT: SCHWERPUNKTE, ENTSCHEIDUNGS-STRUKTUREN, ENTWICKLUNGSLINIEN 177-78 (1981) (increased judicial tendency in nuclear power litigation to equate administrative regulations \textit{per se} with subjective third-party claims).
\textsuperscript{127} \textit{Cf}. infra notes 154-55 and accompanying text.
\textsuperscript{128} The concept of "public actions" is defined and discussed by I. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, ch. 12 (1965).
\textsuperscript{129} See, e.g., Boyer & Meidinger, Privatizing Regulatory Enforcement, 34 BUFFALO L. REV. 833, 836 (1985). The West German legal system has seen some modest expansion of private actions, but they are still, unquestionably, private remedies for private wrongs. In citizen suits, there is no attempt to define or remedy a private wrong.
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in court, these continue to be recognized as extremely limited exceptions, and have no "spillover effects" into administrative law. The legal system is still oriented towards protecting private rights, not towards the vindication of collective interests. Judicial control of bureaucracy is still incidental to the protection of private rights. The private attorney general is still viewed with profound suspicion. Organized interests can still use the courts only within the context of individual, private rights.

The Federal Republic of Germany is not the only country whose recent legal history casts doubt on the assertion that the United States is leading a worldwide trend towards collective interest representation in the legal process. England and Canada, for example, also appear to have made only marginal adjustments towards accommodating collective interests in the legal process. They also have failed to accept the propositions upon which public interest litigation in the United States is built. What is remarkable about the Federal Republic is how decisively and conclusively the option of collective, public interest litigation in environmental law was rejected. Environmental protection was the policy arena where public interest litigation was most vocally demanded, where the arguments for it seemed most persuasive, and where, due to widespread and intense public concern, its advocates found the most favorable political climate. Environmental public interest litigation could eventually have affected all areas of environmental administrative decision-making. Even if public interest litigation had been limited to a few statutes, a precedent for the collective legal representation of important social interests would have been created. In short, environmental law, and only environmental law, offered an opportunity for a reformation of German administrative law.

That opportunity has passed. The debate about statutory public interest litigation, which dominated the literature on environmental law reform during much of the 1970s, is largely settled. The arguments for and against association lawsuits have been known for a decade. A few legal scholars have continued to press for collective litigation, but neither they nor their far more numerous opponents have shown much

131. F. Weyreuther, supra note 24, at 40.
133. Breuer, Wirksamer Rechtsschutz durch Reform des Verwaltungsverfahrens- und Verwaltungsprozessrechts?, 1978 NEUE JURISTISCHE WOCHENSCHRIFT 1558, 1560 ("New arguments are hardly to be expected").
134. E.g., Langer, Der Mensch im Umweltrecht, Plädoyer für ein kollektives Umweltrecht, 1986 NATUR UND RECHT 270 (1986); Gassner, Treuhandklage zugunsten von Natur und Landschaft (1984). Gassner's book is the only contribution that does not simply rehash arguments that have been made (and rejected) since the early 1970s.
readiness for compromise. Overwhelmingly, the legal profession has maintained its position that public interest lawsuits in the environmental area would unnecessarily undermine the foundations of the existing system of administrative law. Political opposition towards group litigation has intensified, and the prospects for statutory authorizations of collective litigation are much worse now than in the 1970s. The defeat of collective interest representation in environmental disputes makes it extremely unlikely that the Federal Republic will, in the near future, institutionalize public interest litigation to any significant extent.

The reformation that did not happen was not a victim of disadvantageous political circumstances. To the contrary, the political and legal climate was quite favorable to the proponents of group litigation during the 1970s. For the entire decade, West Germany was governed by an SPD/FDP coalition that had made the reform of outdated and anti-democratic legal structures, doctrines, and statutes a centerpiece of its political agenda. At the same time, political institutions came under severe pressure to facilitate access to the courts, as this strategy held the promise of pacifying an increasingly militant environmental movement. Popular unrest and resistance to nuclear power plants were often diffused by judicial decisions, even “negative” ones. Environmentalists argued that the refusal to heed their call for expanded standing rights had contributed to the protest movement. Representatives of citizen groups warned that the state should not “force” citizens into permanent opposition by denying them “basic rights.” Hesse was the first state to introduce interest group standing in environmental litigation because the long controversy over the Frankfurt airport runway had unnerved local and state politicians. Dumping political responsibility for controversial policies on the courts must have seemed an equally tempting option elsewhere; governors were in considerable trouble, and at least one of them (the Mayor of Hamburg) stumbled over resistance to nuclear power. At a time when Green Party delegates were beginning to win seats in local and state assemblies, it would have been natural for legislators to focus environmentalists’ attention on litigation.

At the same time, the federal legislature engaged in what has been called a “hectic legislative ecstasy of action” on environmental matters. It passed acts regulating industrial emissions; waste removal; the protection of animals, plants, and forests; clean water; hazardous chemi-
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cals; air traffic noise; and several other matters.\textsuperscript{141} Provisions for environmental protection were added to various administrative statutes; as well as to the criminal and civil codes.\textsuperscript{142} Given the hectic pace of legislation and the highly emotional political climate, the Bundestag might well have passed proposals for environmental public interest litigation—an idea that was widely portrayed and perceived as “pro-environment” and “pro-democratic.”

As for the courts, they had more than one excuse to expand private rights and standing to sue to a much greater extent. The strictures of protective norms, neighborhood, and claim substantiation did not effectively prevent citizen groups from bringing cases against licenses for nuclear power plants and other industrial facilities, even though such lawsuits always had to be couched in the language of individual rights as they were commonly and traditionally understood. At least in the environmental context, a move towards less formalistic and individualistic justiciability doctrines might thus have appeared not as a revolution but as a natural adaptation of the legal system to more complex technologies and social realities.\textsuperscript{143} Finally, the expectation of increased political popularity could have easily tempted judges to expand the scope of judicial review, and to admit political constituencies into court.\textsuperscript{144} In contrast to legal scholars, the public viewed even the judges’ more adventurous forays into the jungle of nuclear reactor safety policy as legitimate, and a vocal constituency of citizen activists and environmentalists demanded the judiciary’s help.

To an extent, the judicial and legislative hostility towards public interest litigation is explained by pragmatic considerations and political partisanship. The judiciary’s reluctance to facilitate court access was caused in part by the experience of de facto public interest litigation over nuclear power plants, a scenario which did little to spark the courts’ enthusiasm. The sheer size of these lawsuits creates difficulties; plaintiffs in cases against nuclear power plants may number in the hundreds of thousands, and controversies over airports, highways and similar projects are equally difficult to handle.\textsuperscript{145} The cases demanded more expertise than the courts could marshal, and more time than an already overburdened administrative judiciary could afford. Legal recognition

\textsuperscript{141} The statutes are compiled in H. Steiger, The Law and Practice Relating to Pollution Control in the FRG xix-xxiii (1976).

\textsuperscript{142} The addition to the penal code is a section entitled “Criminal Actions Against the Environment,” Strafgesetzbuch, §§ 324-30. New civil law provisions include the Bürgerliches Gesetzbuch, §§ 862, 906-07.

\textsuperscript{143} Some legal scholars suggested that a judicial recognition of citizen standing would be no more than an adaptation to the social realities created by pervasive pollution. Meyer-Tasch, supra note 140, at 72. Along similar lines, the courts have been urged to rid administrative law of the “fraud” of public interest lawsuits under the guise of individual litigation. Rebinder, Argumente für die Verbandsklage im Umweltrecht, 1976 Zeitschrift für Rechtspolitik 157, 159 (1976).

\textsuperscript{144} Kloepfer, Rechtsschutz im Umweltschutz, 76 Verwaltungs-Archiv 371, 375 (1985).

\textsuperscript{145} Cf. supra note 48.
of interest groups would only complicate matters. It is very much an open question which and how many interest groups should be admitted, what precisely their function would be, and whether their claims would preclude claims brought by individual private parties.\textsuperscript{146} The current law allows courts to sidestep these intricate issues.

Furthermore, the judges drew severe political and scholarly criticism for the role they played in environmental protection, and in particular for their activist approach to nuclear power cases. Throughout the 1970s and much of the 1980s, all major parties—the Christian Democrats, the SPD, and the FDP—remained firmly committed to the peaceful use of nuclear energy. Judicial review delayed the construction of reactors by years and threatened to derail a governmental energy program based on the extensive use of nuclear power. Not surprisingly, then, protracted litigation did not incline the legislature towards expanding litigation rights. Since the mid-1970s, there have been governmental attempts to curtail access to court, not exclusively but primarily in environmental cases over large construction projects. Even when the Bundestag expanded participation requirements, as it did under the BNatSchG, it made clear that such provisions did not entail the participants’ right to challenge the resulting decision in court.\textsuperscript{147} Further, the federal government seriously considered the possibility of constructing nuclear reactors under legislative, rather than administrative permits, so as to immunize nuclear reactors against judicial challenges.\textsuperscript{148} The Chancellor and some cabinet members advocated this idea, and some state legislatures moved in the direction of greater legislative control over the licensing process.\textsuperscript{149} The proposal to build reactors by legislative enactment, which may have been unconstitutional,\textsuperscript{150} did not come to pass, largely because increased regulation and a growing body of case law had already made the licensing process more predictable.\textsuperscript{151} But the legislature did pass a law providing that administrative decisions concerning the construction and operation of large industrial facilities, such as nuclear reactors, incinerators, highways, and airports could no longer be appealed in administrative trial courts but must be taken

\textsuperscript{146} This problem was the source of the dispute over association lawsuits under the BlnNatSchG, \textit{supra} note 107.

\textsuperscript{147} With regard to the BNatSchG, \textit{cf.} \textit{supra} notes 97-100 and accompanying text. In the case of the Federal Construction Law (which regulates land use and therefore is of very considerable importance to environmental plaintiffs), the legislature drastically curtailed judicial review of procedural mistakes. \textit{See} Baugesetzbuch \S\S 214-15 [hereinafter BauGB] (formerly Bundesaubsatz: \S\S 155(a) & (b) [hereinafter BBauG]).

\textsuperscript{148} \textit{Meyer-Tasch, supra} note 118, at 136-57.


\textsuperscript{150} \textit{See} Rengeling, \textit{Umweltschutz im Verwaltungsverfahrens- und Verwaltungsprozeßrecht}, 1978 \textit{Juristen Zeitung} 453, 455. The most extensive discussion of the legislature’s role in nuclear law and policy is in Löffler, \textit{Der Parlamentsvorbehalte im Kernenergirecht} (1985).

\textsuperscript{151} Ipsen, \textit{Die Genehmigung technischer Großanlagen}, 107 \textit{Archiv des öffentlichen Rechts} 259, 260 (1982).
directly to administrative appellate courts. By eliminating one level of judicial review, this provision simplifies and accelerates the licensing process of nuclear reactors and other facilities.

These, and other less drastic reforms, were generally supported by what Germans commonly call the “dominant opinion” (herrschende Meinung)—that is the majority of legal experts. Although a handful of commentators, particularly those convinced of the life-threatening quality of even the safest reactor, have criticized the existing framework of legal protection as woefully inadequate, the mainstream of scholarly opinion has consisted largely of arguments that the courts had “perverted” the rule of law and transformed the system of individual rights “practically beyond recognition.” The harshest scholarly criticisms were directed against the judiciary’s role in nuclear power litigation: the courts’ willingness to engage in detailed examinations of reactor safety was widely perceived as politically motivated.

Concerns over a “politicized judiciary” had been voiced before in the Federal Republic, but the developments in environmental litigation during the 1970s gave the debate a new impulse and a new twist. For the first time, criticism focused not on the Constitutional Court but on the administrative judiciary. Articles in the legal literature began to refer to judges as “investment brakes” and “censors of civilization.” At least in part, these accusations reflected not doctrinal, theoretical concerns but a generally favorable attitude towards nuclear power and industrial development on the part of a majority of the legal

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152. Gesetz zur Entlastung des Gerichts in der Verwaltungs- und Finanzgerichtsbarkeit, § 2(9) (Law for the Relief of the Court in the Administrative and Financial Judiciary) [hereinafter Entlastungsgesetz].


155. Ossenbühl, Aktuelle Probelme der Gedanteileitung, 1980 Die öffentliche Verwaltung 545, 548. A 1982 article by a proponent of extensive judicial review contains a long list of scholarly arguments and invectives against the administrative judiciary’s approach to environmental cases. Baumann, supra note 26, at 257-58. Despite the judiciary’s more deferential stance in recent year, scholarly criticism has not become much more restrained. Cf., e.g., Püttner, Handlungsspielräume der Verwaltung und Kontrolldichte gerichtlichen Rechtsschutzes, in DIE ÖFFENTLICHE JERWTALUNG ZWISCHEN GESETZEGEBUNG UND RICHTERLICHER KONTROLLE 131 (Goetz ed. 1985).

156. Fairly typical examples of the tenor of scholarly criticism and comment include Ossenbühl, Die gerichtliche Überprüfung der Beurteilung technischer und wirtschaftlicher Fragen in Genehmigungen des Baues von Kernkraftwerken, 1978 Deutsches Verwaltungsblatt 1; DEGENHART, KERNENERGIRECHT: SCHWERPITNKTE, ENTSCHEIDUTS- STRUETUREN, ENTWICKLUNGSLINIIEN (1981). See also infra note 158.

157. PAPIER, DIE STELLING DER VERWALTUNGSGERICHTSBARKEIT IM DEMOKRATISCHEN RECHTSTAAT 7-9 (1979); see also supra note 156.

158. von Holleben, Der Standort industrieller Anlagen unter dem Gesichtspunkt des Pana. 5 NR. 1 BImSchG, 1977 GEBERDE-ARCHIV 45; and Schock, Richter als Zivilisationszensoren, 1977 Energiewirtschaftliche Tagesfragen 253, respectively.
Tactical and political considerations, however, were probably not decisive. Rather, the tenor and content of judicial opinions suggest that the judiciary's insistence upon existing standing barriers was motivated by a more general desire to stabilize public law against politicization. While standing barriers rarely matter very much in nuclear power litigation, they do play an important role in environmental lawsuits not directed against large projects, and for exactly this reason, the Federal Administrative Court has taken care that "big" environmental lawsuits do not generate new legal doctrines that could spill over into other fields of administrative law. Adherence to traditional standing doctrines has allowed the judiciary to stem the tide and to control the development of case law.

The Court’s defense of the protective norms doctrine illustrates this point. Attacks on this doctrine and its allegedly implausible results have accompanied it since its creation. Lawyers sympathetic to the environmental movement proposed to do away with the doctrine altogether, and to replace the search for a legally protected interest (i.e., a right) with a search for the factual effect upon third parties. The proposal to replace protective norms with what would have amounted to an “injury-in-fact” test would have led to drastically lower standing barriers. In a very doctrinaire 1981 opinion, regarding the Stade nuclear power plant, the Federal Administrative Court rejected any such suggestion. It ruled that exposure to ionized rays below an administratively determined level was not a litigable claim. The Court held further that statutes and provisions dealing with the removal and storage of nuclear waste were not “protective,” and hence did not confer private rights. It limited the geographical boundaries of “neighborhood,” and

159. E.g., Isensee, Widerstand gegen den technischen Fortschritt, 1983 DIE ÖFFENTLICHE VERWALTUNG 565; and Neumann, supra note 154. Cf. Hofmann, Atomgeset und Recht auf Leben und Gesundheit, 1983 BAYERISCHE VERWALTUNGSBLÄTTER 33 (1983). This article is a review of DEGENHART, KERNENERGIERECHT, SCHWERPUNKTE—ENTSCHEIDUNGSSHUKTUREN—ENTWICKLUNGSLINIEN (1981), which is an ambitious and influential attempt to demonstrate that the peculiar problems arising in mass litigation over nuclear power plants can and should be solved within the context of traditional, highly individualistic legal doctrines. The reviewer (one of the few outspoken opponents of nuclear power among legal scholars) notes that Degenhart makes no attempt to conceal his positive attitude towards the use of nuclear power and appears unperturbed by the social disruption that accompanies nuclear power litigation, and comments that Degenhart's legal "edifice remains unshaken (by those disruptions) and fits well into the broad outlines of the dominant legal opinion." Id. at 33.

160. E.g., Sening, Abschied von der Schutznormtheorie im Naturschutzrecht, 1980 NATUR UND RECHT 102 (1980), and Sening Neue Literatur zu Umweltfragen—und einige ergänzende Gedanken zur Neuersungs-unfähigkeits der Rechtsprechung, 1982 NATUR UND RECHT 94 (1982). The author, a judge on a Bavarian administrative court, goes so far as to assert that a demise of the protective norms doctrine would have "saved" the environment. An overview of the rather hostile responses to Sening is Keller, Rettung der Umwelt durch Aufgabe der Schutznormtheorie? 1981 BAYERISCHE VERWALTUNGSBLÄTTER 681.

tightened the requirements for third parties' claim substantiation. The Court's decision reversed a lower court's holding to the effect that in principle, every provision of construction law could be protective. While this reversal disappointed legal scholars who had read environmental case law as evidence for an upcoming revolution in third party litigation, the "dominant opinion" celebrated it as an overdue correction and clarification.162

Further examples of the judiciary's adherence to traditional, individualistic legal principles could be added. Whatever aspect of public law one examines, it turns out that German courts prefer somewhat implausible rules and distinctions—such as the one between "protective" and "non-protective" provisions—to no rules at all.

The defeat of public interest litigation in the legislative arena was marked by a similar combination of political calculation and more general, principled considerations. The CDU/CSU was able to block statutory provisions for group litigation because environmental statutes required changes in the constitutional distribution of competences between the federal and state governments. Since these changes required two-thirds majorities in both houses of parliament, environmentalists and SPD/FDP parliamentarians who favored group litigation had to compromise. Controversial provisions for public interest litigation might have kept environmental statutes from being enacted in the first place, a result which proponents of the statutes wanted to avoid.163

Still, the legislature's failure to facilitate environmental groups' access to court was not simply a matter of partisanship. The SPD/FDP government could have overcome the CDU/CSU's opposition to collective litigation—for example, by introducing provisions for group litigation into statutes that did not require constitutional changes and two-thirds majorities. The SPD was divided over public interest litigation,164 however, and the government did not seriously pursue it.

Beyond an immediate desire to "rescue" the government's energy program, the legislators' aversion to environmental association lawsuits was based upon considerations of the broader consequences. Legislators realized that uninhibited court access would open the system not only to environmentalists but to non-environmental groups as well.165 The likely result—a system of pervasive judicial oversight exercised at the behest of private attorneys general166—was considered undesirable.

162. The decision has approvingly been described as a "decisive" point in the Court's efforts to preserve the principles of individual legal protection and to exclude public risks and concerns from judicial consideration. Kloepfer, Rechtsschutz im Umweltschutz, 76 Verwaltungs-Archiv 371, 383 (1985).
166. This fear is voiced by, e.g., F. Weyreuther, supra note 24, at 26-30, 41.
by the legislature. Even the reforms, proposed or realized, that were intended to simplify the nuclear licensing process were not entirely a matter of a ruthless, unprincipled push for more nuclear power. The proposal for the construction of reactors by legislative permit, for example, was advanced not only because parliamentary decisions seemed easier to achieve than the generation of consensus in the implementation phase, but also because it had the potential of increasing the legitimacy of political decisions concerning the construction of nuclear facilities. The legal experts who advised the legislature and the government on matters of association standing in environmental disputes were not concerned with the future of nuclear energy but rather with the legitimacy of collective litigation and judicial oversight of administrative activity.

Both the depth and the principled quality of the judicial, legislative, and scholarly hostility towards public interest litigation in West Germany show that the legal barriers to collective litigation are not accidental or politically motivated. They were purposefully designed, and consciously maintained, so as to keep organized interests out of court. What explains this premeditated exclusion of environmental and other "underrepresented" interest groups from West Germany's legal system?

From a comparative perspective, this is the wrong question to ask. By comparison to any country but the United States, Germany's legal system is quite hospitable towards both environmental plaintiffs and private challenges of agency action in general. Thus, in examining the causes of the rejection of public interest litigation in the Federal Republic, it is crucial to examine the causes of such litigation's rapid and widespread acceptance in the United States. A reasonably complete examination of this subject would fill a book. The cursory remarks in the remainder of this article are intended to suggest that the development of German and American administrative law with regard to standing to sue and public interest litigation has been profoundly affected by two interrelated factors: institutional organization, that is, the difference between Germany's parliamentary system, and the presidential system in the United States; and different legal traditions.

167. The fear of a complete transformation of administrative law was not altogether unwarranted. When Hesse authorized environmental groups to sue under its nature protection statute, associations of taxpayers, parents, radio and television users, trade unions and employers, as well as the national automobile club argued that the restriction of interest group litigation to environmental issues was illegitimate. Frankfurter Allgemeine Zeitung, Sept. 28, 1979.


169. Infra notes 204-18, 222-29 and accompanying text.

170. This is regularly stressed in the German legal literature. E.g., Kloepfer, Rechtsschutz im Umweltschutz, 76 VERWALTUNGS-ARCHIV 371, 379 (1985): "It can hardly be disputed that in its scope and intensity, the legal protection currently provided in environmental law (in the Federal Republic) likely [wohl] represents a phenomenon that is singular in the world" (Author's trans.). The one exception is public interest litigation in the United States.
VI. The Origins of Public Interest Litigation

The genesis of public interest litigation in the United States and its rejection in the Federal Republic were marked by calculations of power, and can be explained in part in terms of power. Public interest litigation increases the frequency and scope of judicial review of agency action. This strengthens the power of the courts and the hands of outside intervenors in the administrative process. 171 The virtual demise of standing in the United States has transferred discretion from administrators to private interests, who come to be in a position to decide which lawsuits to bring and which legal standards to enforce. 172 Simultaneously, public interest litigation has reduced executive control and leadership.

In the 1960s, the American judiciary showed little reluctance to increase its powers by drastically expanding the class of potential plaintiffs and the circumstances under which they could sue. 173 Some scholars have argued that this development reflected the Supreme Court's orientation towards dominant political constituencies; 174 others have interpreted it as a reaction to manifest failures of the political process, especially of administrative agencies. 175 Whatever the correct explanation may be, the judiciary showed a remarkable confidence in its authority and competence to oversee and, occasionally, to reform administrative agencies. For example, the Court of Appeals for the District of Columbia took it upon itself "to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." 176 This enterprise represented a marked expansion of the judiciary's mission and purpose.

However, public interest litigation was not simply a unilateral judicial grab for power. Congress could easily have imposed statutory restrictions on standing to sue. But Congress has done exactly the opposite. Since the early 1970s, it has persistently expanded statutory

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171. The new, "reformed" administrative law is, of course, intended to give "underrepresented interests" an opportunity to counteract the "capture" of agencies by regulated industries. Cf. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975). R. Melnick, Regulation and the Courts (1983) is an instructive account of the ways in which public interest litigation strengthens the influence of environmental interest groups in the regulatory process.


174. The argument that the Supreme Court's jurisprudence has been motivated by a strategy of building and maintaining a political constituency has been advanced most forcefully by M. Shapiro, The Supreme Court: From Warren to Burger, in The New American Political System 179-212 (A. King ed. 1980).


rights to sue, most notably in environmental law, but also in other areas, such as consumer protection. It has ensured that public interest intervenors will make use of their opportunities to seek judicial review of agency action by legislating more than 150 provisions for court-awarded attorney's fees.

This phenomenon is understandable only in the context of the theory of separation of powers, which locks the legislature and the executive in a persistent struggle for power. The United States Congress has an institutional interest not only in usurping executive power for itself but also in delegating it to others, including the judiciary and special interest groups. Wary of an "imperial presidency" and suspicious of a "run-away bureaucracy," Congress has used judicial adjudication as an instrument of control over government agencies. Partisan-political considerations have amplified its institutional interests. Not by coincidence, the growth and consolidation of the citizen suit mechanism fall in a period of American history during which the Congress has been dominated by the Democratic party, and the presidency, with the exception of the Carter years, by the Republicans.

The legislative motive to use judicial oversight as a mechanism of controlling the executive does not exist in a system where the executive is elected (and can be dismissed) by the legislature. West Germany's parliamentary government is such a system. The legislature has no reason to curtail the authority of what is, after all, "its" executive. Throughout the 1970s and 1980s, the German legislature's restrictive position towards not only collective litigation but also environmental interest group participation in the administrative process betrayed a desire to preserve the integrity of the political process, and to protect the government bureaucracy from unwarranted, uncontrollable interference. Even the SPD/FDP government, which was firmly committed to "more democracy" and to the liberalization of the legal system, failed to implement proposals for public interest litigation.

177. See supra note 3 and accompanying text.
179. See supra note 22 and accompanying text.
180. This strategy may even be preferable to a straightforward congressional arrogation of (formerly) executive power. Members of congress cannot be held directly accountable for the public interest lawsuits they authorize, and can plausibly deny responsibility when the results, though liked by some members, are politically unpalatable. This might not work if public interest plaintiffs undertook actions that inflict serious harm upon important constituencies. Cf. R. Melnick, Regulation and the Courts 18-23 (1983). But Melnick's meticulous study of the Clean Air Act shows that this rarely happens. Public interest groups and courts have a very good sense of how far they can go without weakening congressional support for the legislation. Built-in safeguards, then, allow Congress to control the political damage that might be entailed by the delegation of authority to courts and public interest groups.
In both countries, the legislature's attitude towards judicial oversight of bureaucracy has influenced the extent to which the judiciary has been willing to exercise its powers. When in doubt, American courts generally have been very generous in granting standing and attorneys fees to public interest interveners, because they know that Congress wants the respective statutory provisions to be interpreted liberally. The German judiciary, on the other hand, has been influenced by harsh legislative and scholarly criticism of its approach to nuclear power litigation and by legislative attempts to "correct" instances of judicial overreach in these cases.

Despite its apparent simplicity, this explanation is a little too mechanistic. The development of administrative law in the United States and West Germany has been influenced, not only by calculations of power, but also by ideological conceptions and expectations about democratic government and law.

Naturally, the legal establishment, most prominently scholars and judges, has significantly influenced the direction of administrative law development in both the United States and West Germany. In the United States, there has been a broad consensus for public interest litigation among legal scholars, judges, and the legal establishment in general. In the Federal Republic, there is a similarly broad consensus against it. Judges on the Federal Constitutional Court and the Federal Administrative Court voiced their opposition to association lawsuits not only on the bench but also in legal periodicals and in public. The scope of individual rights and judicial review in environmental litigation have been a standard topic at the conventions of important professional legal organizations. On these occasions, proposals for association standing have been regularly defeated. Suggestions for an expansion of individual rights have been defeated with equal regularity, often amidst complaints that the existing framework of legal protection was already excessive.
It may be that German judges and scholars are politically somewhat more conservative than their American colleagues (although we lack data to test this hypothesis), but the views of the German legal profession concerning public interest litigation are not simply more restrictive than those of the American legal elite. In West Germany, positions analogous to those espoused by mainstream American legal scholars and embodied in the justiciability doctrines of American courts\textsuperscript{185} have been denounced as the result of ecological extremism, ideological zealotry, or worse.\textsuperscript{186} This difference is much too sharp to be accounted for by whatever differences may exist between the political views of the legal elites. It can only be explained in the context of the very different legal traditions within which the debate about public interest litigation took shape in the two countries.

As has been mentioned, German public law distinguishes sharply between law and politics, rights and policies.\textsuperscript{187} These distinctions arise from, and are central to, the tradition of a sovereign state that, standing above warring social interests, determines the public interest: law is the most basic mechanism by which the state's sovereign authority is segregated from private rights and interests. Restrictive standing rules are one of the legal instruments that maintain the categorical distinction between law and politics, rights and the public interest. They prevent the politicization of legal claims, the judicialization of executive decision-making, and the arrogation of sovereign law-enforcement authority by private parties.\textsuperscript{188}

The United States, of course, has no comparable tradition of sovereign authority. Indeed, the central insight of the framers was that sovereignty could be split among different branches of government. Consequently, the division between public authority on the one hand and private interests on the other has never been particularly sharp, and the distinction between law and politics, rights and policies, has far less doctrinal and political support than it does on the European continent.

The long-standing tradition of sovereign authority goes a long way towards explaining the remarkable stability German public law has shown over the past two decades. Conversely, the rapid, full-scale acceptance of public interest litigation in the United States may in large

\textsuperscript{185} Cf. supra notes 5-11 and accompanying text. Note, in particular, that many justiciability decisions that appear extreme from a "German" perspective were handed down by the moderately conservative Burger Court; \textit{e.g.}, United States v. Students to Challenge Regulatory Agency Procedures (SCRAP I), 412 U.S. 669 (1973).

\textsuperscript{186} See also Chayes, supra note 5.

\textsuperscript{187} Specifically, these doctrines have been labelled totalitarian. Cf. infra note 212.

\textsuperscript{188} The argument that high standing barriers and the widespread hostility towards collective forms of litigation stem from the sharp distinction between state and society that has shaped the history of legal theory in Germany is also made by Faber, supra note 86, at 7-8; and Goerlitz, \textit{Verwaltungsgerichtsbarkeit in Deutschland} 24-48, 73-75 (1970).
part be attributed to the lack of such a tradition.\footnote{189} To begin with, the mere existence of a highly doctrinal public law system in Germany, and the much less doctrinal character of American administrative law, have made a difference in terms of stability. German administrative law developed during the nineteenth century as a series of compromises between monarchies which controlled large centralized bureaucracies, and a liberal bourgeoisie which sought to secure its property rights against the proletarian mob.\footnote{190} Accordingly, Germany's administrative legal system has historically placed a high premium upon the integrity of political control over bureaucracy. Under no circumstances could independent courts be permitted to interfere with the state's sovereign authoritative political decision-making and centralized executive control over the bureaucracy. If judicial review by independent courts was to be permitted at all,\footnote{191} it had to be strictly confined to the defense of private, individual rights. A system of public law based upon these principles was in place by the early twentieth century,\footnote{192} which meant that a great deal of theoretical ingenuity and practical political interest had gone into it before it was challenged by democratic (primarily socialist) forces. To this day, the highly doctrinaire, systematized body of public law is the core and pride of German jurisprudence. For almost a century, German public law has proven highly resistant to democratic demands raised in the name of substantive values, such as social equality and welfare or a clean environment. To put it bluntly, the doctrinal baggage of more than a century does not go overboard because

\footnote{189. It has been argued that restrictive standing doctrines on the European Continent stem from the tradition of an autocratic monarchy, which still dominates the executive. See L. JAFFE, supra note 128, at 477-78. The argument in the text is a variation on this theme.}

\footnote{190. GOERLITZ, Verwaltungsgerichtsbarkeit in Deutschland (1970).}

\footnote{191. This question was extremely controversial. Cf. infra notes 207-08.}

\footnote{192. The most important contribution to this system—and in many respects its basis—was Otto Mayer's imposing work, DEUTSCHES VERWALTUNGSRECHT (3d ed. 1924). The first systematic treatises on the core of administrative law, the system (or the "concept"—\textit{Begriff}) of subjective public rights (i.e., individual rights against the state) were JELLINEK, \textit{Das System der subjektiven öffentlichen Rechte} (2d ed. 1905), and Ottmar Bühler's even more influential work, \textit{Die subjektiven öffentlichen Rechte und ihr Schutz in der deutschen Verwaltungsrechtsprechung} (1914). To be sure, the case law was somewhat messier than these "systems" may suggest. Still, Bühler claimed, in the positivist spirit of the times and with considerable justification, that his book was nothing but a systematic description of the existing case law. Four decades later, the author claimed, again with considerable justification, that his conception of subjective public rights had proven a sound and practicable basis of administrative jurisprudence and that it was bound to blossom fully under the conditions of liberal democracy. Bühler, \textit{Altes und Neues über Begriff und Bedeutung der subjektiven öffentlichen Rechte}, in \textit{Forschungen und Berichte aus dem öffentlichen Recht} (GEDÄCHTNISCHRIFT W. JELLINER) 269, 270-74, 286 (1955). Bühler's writings are still considered the basis for the contemporary theory of subjective public rights. \textit{Cf.} H. Bauer's exhaustive and illuminating treatment of the history and theory of the system of subjective public rights, \textit{Geschichtliche Grundlagen der Lehre vom subjektiven öffentlichen Recht} (1986).}
people get upset about carcinogens or acid rain.193

American administrative law has never had such a secure foothold.194 During the nineteenth century there were federal governmental bodies which we now would think of as bureaucracies. The Post Office is an example. But, these institutions and the law that governed them were thought of as separate and distinct from the common law and they were somewhat suspect as a source of general legal principle. No attempts were made to reconcile the rule of law systematically with the existence of a bureaucracy. When, around the turn of the century, administrative law became its own field, it was largely the law of independent agencies, whose shape and structure was more a matter of legislative improvisation and experimentation than of systematic thought or action. The resulting law was again a series of uneasy compromises between the common law tradition, a Constitution hostile to big government, and the alleged needs of the administrative state. Although attempts were made, well into the 1920s, to systematize the law on the basis of general principles, these were brought to an end by the New Deal and Realist jurisprudence, which were not interested in abstract principles and system-building, but celebrated the virtue of “expertise” in government.195 From the need of rational administration, everything else followed: broad delegations of authority, bureaucratic flexibility, and a narrow scope of judicial review. The independent regulatory commission, which embodied this theory of administrative law, bore the marks of an institution squeezed into a legal framework neither made nor meant for large bureaucracies. The Administrative Procedure Act of 1946 ("APA"),196 which comes closer to a general administrative code than any other piece of legislation, was a compromise between the New Dealers and their opponents. It was built largely upon the case law that had grown around independent agencies up to that point.197 The APA was emphatically not a system of administrative law; it was, at best "a formula upon which opposing social and political forces have come to rest."198

193. The fact that Germany became a democracy only after it had become a Rechtsstaat has been considered significant not only with regard to public law and especially collective litigation (e.g., Faber, Die Verbandsklage im Verwaltungsprozess 64 (1972)), but also for the country's political development in general. Dahrendorf, Society and Democracy in Germany 196-97 (1967).

194. This paragraph is based upon B. Ackermann, Reconstructing American Law 7-14 (1984), who conveys a much better sense of the development of the law and legal thought before the New Deal than I am able to provide here. Among the many sources Ackermann cites, particular mention must be made of W. Chase, The American Law School and the Rise of Administrative Government (1982).


This formula, moreover, was largely dismantled by the courts only two decades after it had been enacted. In the United States, neither bureaucracy nor its supposed raison d'etre—expertise—have ever been accorded the measure of legitimacy which the executive bureaucracy enjoys in many European countries. When in the 1960s, disorientation and uneasiness gave way to hostility and distrust towards the "experts," it seemed sound policy to replace them with judges and "concerned citizens," that is to say amateurs and dilettantes. Politicians, legal scholars, judges, and public interest advocates hoped detailed participation procedures and disclosure requirements, a broader scope of judicial review, and citizen standing would make administration more lawful, less susceptible to "special interests," and more beneficial to "the public interest." Since American administrative law was not nearly as doctrinal and as highly systematized as German public law, it lacked the resilience to withstand political pressure for its transformation.

One may easily discern the force of these different traditions in the academic and political discussion about public interest law, which was considerably more thorough and fundamental in West Germany than in the United States. In America, the debate about public interest litigation has, to a much larger extent than in the Federal Republic, revolved around pragmatic questions, such as the judiciary's increased workload and its institutional competence to handle difficult technical questions. The legitimacy of extensive judicial review of administrative action has, with few exceptions, been taken for granted. Concerns over the potentially anti-democratic implications of public interest litigation have been met with far more frequent and vocal assurances that public interest litigation is compatible with, or is an expansion of, democratic principles.

In sharp contrast, the discussion in West Germany primarily focused not on the anticipated practical problems with public interest provision, states that a person is entitled to judicial review when "adversely affected or aggrieved by agency action within the meaning of a relevant statute" (emphasis added). The unifying, systematizing force of this provision is obviously very limited.


202. This, in fact, was the very premise of increasing the representation of "underrepresented interests" by means of public interest litigation. The public interest law movement understands itself emphatically as a democratic force. E.g., G. Harrison & S. Jaffe, The Public Interest Law Firm: New Voices for New Constituencies (1973); and M. McCann, Taking Reform Seriously (1986).

203. E.g., Denzir, Towards a Political Theory of Public Interest Litigation, 54 N.C. L. Rev. 1133, 1160 passim (1976).
but on the institutional consequences of judicial control of administrative action outside the context of private rights. Standing requirements in the form of credible private rights claims are defended with great scholarly determination not only because they preserve the integrity of executive control over the bureaucracy, but also because they safeguard the independence of the judiciary. Again, this concern is best understood in its historical context.

During the formative period of German public law and until the Nazi seizure of power, two very different models of administrative jurisprudence emerged. The “objective legality” model, associated mostly with the works of Rudolf von Gneist, was based upon bureaucracy’s strict adherence to positive legal norms. A system of comprehensive judicial oversight would be required to attain this goal. This meant, inter alia, that a principled doctrine of standing was not only unnecessary but undesirable: private suits in the defense of individual rights cannot bring about systematic judicial control of administrative decision-making. The defenders of the other, “individual rights” model—most prominently, Bähn and Sarwey—stressed that perfect legality of administrative behavior was not required. Rather, the protection of private, individual rights against the government was needed. This had to be the exclusive purpose of the judiciary vis-à-vis the government.

The two models entailed very different consequences for the organization of the (administrative) judiciary. Defenders of the objective legality model argued that administrative courts should be an integral part of the bureaucracy. The advocates of the individual rights model never thought that there was something theoretically inconsistent or politically impracticable about such an arrangement. But they considered courts “inside” the bureaucracy to be incapable of protecting indi-

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204. Although concerns such as overcrowded court dockets were voiced on occasion: e.g., FABER, DIE VERBANDSKLAGE IM VERWALTUNGSPROZESS 83-84 (1972); and F. WERREUTHER, supra note 24, at 69-70.
205. See infra notes 224-28 and accompanying text.
208. BÄHR, DER RECHTSSTAAT (1864); von SARWEY, DAS ÖFFENTLICHE RECHT UND DIE VERWALTUNGSRECHTSPFLEGE (1880).
209. The dispute was complicated by a split among advocates of the subjective rights model. Some of them wanted specialized (but independent) administrative courts to protect individual rights against the state, arguing that (1) the ordinary (i.e., civil) courts lacked a sufficient understanding of public administration; and (2) the structure of lawsuits against the state was altogether different from that of civil litigation. Others feared that courts with special expertise in public administration might have too much sympathy with the bureaucracy, and therefore wanted suits against the government to be handled by ordinary courts. A discussion of this dispute is beyond the scope of this Article. The Federal Republic, of course, opted for the model of independent administrative courts.
individual rights. Only an organizationally and personally independent judiciary would be in a position to perform this task. In order to do so, however, the administrative judiciary would also have to be *substantively* independent from the bureaucracy. It would have to adjudicate cases strictly from the perspective of private rights, rather than from the bureaucracy's perspective of regularity, feasibility, or convenience. Public interest litigation—that is, judicial authority not grounded in private rights—would eliminate the distance between judges and bureaucrats that is a precondition of judicial independence.210

Both sides to this historic controversy, then, shared the premise that an administrative judiciary that provided comprehensive control of objective legality was unthinkable as an independent judiciary: it would be an intrinsically political institution, and too powerful to be permitted to escape the government's control.211 Precisely because they acknowledged the inescapable institutional consequence of the objective legality model, the advocates of the individual rights model argued that the protection of private rights had to be the administrative judiciary's exclusive purpose. This required, *inter alia*, a rigorous, principled doctrine of standing.212

The controversy over the nature of the administrative judiciary had a profound influence upon public law and judicial institutions in the German states. The objective legality model and its institutional manifestation, the administrative judiciary "inside" the bureaucracy, were implemented in Prussia and other Northern states; the individual rights model and independent courts, in several Southern states. This continued to be the case during the Weimar Republic. Neither model existed in its pure form.213 But despite the somewhat muddled institutional

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210. The argument that the administrative judiciary has to have a different (i.e., subjective rights) "perspective" in order to gain a substantive and institutional "distance" from the bureaucracy and its standpoint of feasibility goes back to BÆHR, DER RECHTSSSTAAT 54-55 (1864) and has been a standard *topos* of German legal theory ever since. The reasoning that only an administrative judiciary that has some "distance" to the bureaucracy can be truly independent and protect the rights of individuals underlies the individualistic interpretation of Basic Law, art. 19(4) and VwGO § 42(2) (discussed *supra* notes 23-28 and accompanying text), and is still very much a part of legal discourse. E.g., Krebs, *Subjektiver Rechtsschutz und objektive Rechtskontrolle*, in SYSTEM DES VERWALTUNGSGERICHTLICHEN RECHTSSCHUTZES (FESTSCHRIFT MENGER) 191, 194 (Erichen ed. 1985); Schmidt-Assmann, *Verwaltungskontrolle und Verwaltungsgerichtsbarkeit*, 34 VERÖFFENTLICHUNGEN DES VERBANDS DEUTSCHER STAATSRECHTSLEHRER 211, 244-45 (1975); and Kloepfer, *Rechtsschutz im Umweltschutz*, 77 VERWALTUNGSARCHIV 30, 34-35 (1986).

211. See *supra* notes 206-10 and accompanying text.

212. The subjective rights model further entailed substantial restrictions on the scope of judicial review. Administrative discretion, violations of rules without "external force,“ and even potential violations of rules that do not directly affect the plaintiff before the court were subject to no judicial review. Again, this was considered necessary to preserve the judiciary’s distinctive perspective. Krebs, *Subjektiver Rechtsschutz und objektive Rechtskontrolle*, in SYSTEM DES VERWALTUNGSGERICHTLICHEN RECHTSSCHUTZES, *supra* note 210, at 191, 192-96.

213. The Prussian system in particular was a hybrid between the two models. The lower courts were part of the bureaucracy; the highest administrative court (the
reality, and despite an increasing awareness that there was a considerable overlap between the two systems, it continued to be well understood that the models were different and, in fact, incompatible. A judiciary that possessed both institutional independence and the authority to ensure abstract legality continued to be considered an impossibility.

The Nazi years did nothing to change this perception. Building upon, and often distorting, the ideas of Prussian legal theorists, Nazi jurists denounced the subjective rights model as a liberal-bourgeois monstrosity. The objective legality model, on the other hand, was found to be at least theoretically compatible with the organization of the “New State.” An administrative judiciary under the state’s tutelage and a roving commission to ensure strict legality would see to it that the Führer’s purposes would not be lost or misdirected in the vast hallways of the Reich’s bureaucracy.

In the light of this historical experience, the Federal Republic opted explicitly and resolutely for the subjective, individual rights model and an independent administrative judiciary. The objective legality

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215. Cf., e.g., Kersten, Die Entwicklung und Ausgestaltung der Verwaltungsgerichtsbarkeit (Diss. Freiburg, 1996); and Nagler, Die Verwaltungsgerichtsbarkeit im nationalsozialistischen Rechtsaufbau (Diss. Breslau, 1987). These volumes, which differ in the degree of their offensiveness, illustrate that the legal scholars who during the 1970’s noted an affinity between proposals for collective environmental litigation and Nazi jurisprudence were not hysterical. See infra note 219. Kersten and Nagler (as well as numerous authors whose works they cite) denounce the theory of subjective rights against the state as incompatible with the principles of the Führerstaat; Kersten, supra at 34; Nagler, supra at 66-74. Kersten explains that a Führerstaat more than any other political system depends upon an administration that implements the common will with the utmost rigor, and that comprehensive judicial oversight by a reliable administrative judiciary is conducive to this goal. Kersten, supra at 22-38. In order to demonstrate that administrative law serves not the protection of private rights but the “realization of the legal order per se,” id. at 38, 78, and in order to maximize judicial oversight, the bureaucracy should be permitted to sue itself when it is uncertain about the legality of an envisioned action. Id. at 77-78.

Nagler describes proposals to permit public interest litigation (Popularklagen) as theoretically compelling from a nationalist-socialist point of view. Nagler, supra at 70-71. Fearing “a flood of unjustified and frivolous lawsuits,” he considers public interest litigation impracticable. However, he emphatically rejects standing requirements in the form of a private rights test, and proposes to grant standing to everyone whose “interests” are somehow “affected.” Cf. Meyn, Zur Frage der Abgrenzung von Justiz- und Verwaltungs-zuständigkeit im neuen Staat (Diss. Münster, 1937).

216. Grundgesetz, art. 19(4) and VwGO, § 42(2) are the most important manifestations of this fundamental decision. Cf. supra notes 23-28 and accompanying text. The controversy between Gneist on the one hand and Bähr and Sarwey on the other was not some obscure historical dispute to the legal scholars who shaped German public law after World War II. There was an acute awareness that the new administrative judicial system could be designed along the lines of either model. The decision for a system of individual legal protection and independent courts was heavily influenced by Walter Jellinek and other prominent scholars who had been staunch defenders of the subjective rights model during the Weimar Republic. On the formative period of West German administrative law, see Ule, Die neue Verwaltungsgerichts-
model became irrevocably associated with authoritarian and totalitarian regimes. Throughout the history of the Federal Republic, the administrative courts (and the Federal Constitutional Court) have greatly expanded the rights that individual citizens can claim against the state. These efforts were applauded and promoted by the vast majority of legal scholars; a generous theory of individual rights was regarded as the cornerstone of a legal and political system that viewed private individuals not as the sovereign’s subjects but as free and independent citizens. Nevertheless, judges and scholars alike continued to insist that judicial review of administrative action had to be tied strictly to the protection of individual rights, and that control of administrative behavior could be no more than incidental to that protection. This explains the judiciary’s aversion to collective litigation and its painstaking efforts to separate individual rights from public interest claims. This also explains the occasionally shrill tone of scholarly criticism of judicial decisions in environmental cases that seemed to go beyond the bounds of individual legal protection.

The recognition that courts cannot venture beyond the bounds of individual rights, then, is based upon painful historical experience and a great conceptual clarity. The nearly universal acceptance of the intrinsically political nature of judicial review outside the private rights context presupposes a sharp, intuitively plausible distinction between law and rights on the one hand, and politics and public authority on the other. The absence of similar conditions in the United States goes a long way towards explaining the existence of public interest law—a phenomenon in the twilight of law and politics, rights and interest representation. It is never quite clear whether collective legal claims are an expansion of private rights and actions, or whether they are intrinsically public, polit-

217. Perhaps the single greatest expansion was the acceptance, in the 1960s, of third party lawsuits, which effectively abolished the old doctrine that only the addressee of an administrative action could challenge it in court. Another expansion came with the discovery of so-called “indeterminate legal concepts” (unbestimmte Rechtsbegriffe). The interpretation of such concepts, formerly considered a matter of administrative discretion, was now held to be subject to de novo judicial review. Finally, constitutional rights came to be interpreted very broadly. These developments and the role of legal scholars are described by Ossenbühl, Die Weiterentwicklung des Verwaltungsrechts und der Verwaltungswissenschaft, in Deutsche Verwaltungs geschichte, supra note 216 at 1144.

218. F. Weyreuther, supra note 24, at 82-84.

219. Cf supra notes 154-59 and accompanying text. Occasionally, judges and legal scholars have gone beyond complaining about the “perversion” of the rule of law and denounced public interest litigation and association lawsuits as part and parcel of authoritarian, totalitarian, national-socialist legal theory. E.g., OVG Münster, 1953 Monatschrift des Deutschen Rechts 572 (association lawsuit dismissed for lack of standing and criticized as an impermissible delegation of public power that smacks of fascism); Weyreuther, in Contra und Pro Verbandsklage 28-30 (1976). F. Weyreuther, supra note 24, at 82-84.
ical actions and, as such, instruments of interest representation. But neither the argument that public interest law constitutes an unwarranted interference with sovereign authority, nor the related argument that it endangers the judiciary's independence, possess much plausibility in the American context. These arguments are too theoretical and too far removed from the experimental spirit of the legal tradition and the pragmatic concerns of contemporary administration to play much of a role in the United States.

By the same token, and for many of the same reasons, discourse about the place of organized interests in the political and legal process has been much less systematic and focused in the United States than it has been in West Germany. In the United States, the urgency to "represent underrepresented interests" is regarded as a sufficient basis to allow collective interest representation in court. Practical concerns over "interlopers" and frivolous litigation subsided when it turned out that the overwhelming majority of public interest lawsuits were brought not by "busybodies" but by highly professional advocacy organizations. The democratic legitimacy of these groups, although occasionally questioned in the literature,\textsuperscript{220} has in practice been taken for granted.

In Germany, proponents of collective litigation made arguments similar to those raised by American public interest advocates. They claimed that "public" interests were routinely underrepresented in the political process; that the environmental movement had a proven basis of popular support; and that the government should not alienate the public by denying it the opportunity to assert its basic rights in court.\textsuperscript{221} These claims to democratic legitimacy, however, which were sufficient in the United States, proved unacceptable in the Federal Republic. The numerous opponents of public interest law argued that collective entities suing on behalf of the public would have arrogated the government's power to enforce the law, and undermined an administrative system based on political, not judicial control.\textsuperscript{222} Time and again, scholars and politicians argued that environmental and other citizen groups were insufficiently representative of the public, or of the segment of the public they claimed to represent; that they lacked a sufficient degree of internal democratic organization; and that therefore, their participation in administrative decision-making, not to mention collec-

\textsuperscript{220} In the early years of public interest law, a few liberal observers questioned the public interest movement's heavy emphasis on legal strategies and expertise, on the grounds that attorneys might not always be able to represent the genuine interests of their constituencies. \textit{E.g.}, Cahn & Cahn, \textit{Power to the People or to the Profession? The Public in Public Interest Law}, 79 YALE L.J. 1005 (1970). Nevertheless, this criticism never had any practical influence. The same is true of conservative critiques of the movement's claims to represent underrepresented interests. \textit{E.g.}, Rabkin, \textit{Public Interest Law: Is It Law in the Public Interest?}, 8 HARV. J. LAW & PUB. POL'Y 341 (1985).

\textsuperscript{221} \textit{See supra} notes 138-39 and accompanying text.

The persistence and success with which these arguments were made cut to the heart of the apparent paradox that a comparatively collectivist country such as West Germany largely prohibits collective litigation, whereas the United States, a considerably more individualistic country, encourages it. Organized interests do indeed occupy a prominent status in the Federal Republic. Parties, for example, are guaranteed a constitutional status as participants in "the formation of the political will." However, because interest group influence upon political institutions is perceived as participation in the exercise of intrinsically public, sovereign authority, West Germany has been preoccupied with the where and how of organized interest representation in the political and legal process to a much greater extent than the United States. Organized interests must not be allowed to arrogate public authority without, in turn, being subject to the public standards of accountability and conformity with democratic principles. This means, at a minimum, that they must be democratically organized and representative. Periodic elections, organizing statutes, and clear membership criteria are required. It also means that the points at which organized interests intervene and the ways in which they participate in politics must be compatible with the principles of representative democracy.

For this reason, the few groups that are allowed to litigate without claiming a violation of private rights are subject to certain legal requirements and restrictions. Even the environmental groups that are permitted to intervene in the administrative process under the BNVatSchG...

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224. Grundgesetz art. 21(1). The requirements parties have to satisfy in order to conform to a liberal, representative order are specified in a statute, the Parteiengesetz. The status of interest groups is neither constitutionally determined nor regulated in a single statute. But cf. infra note 225 and accompanying text.

225. Lange, Zur Anhörung im verwaltungsgerichtlichen Genehmigungsverfahren, 1975 Deutsches Verwaltungsblatt 130, 132. This article concerns the participation of citizen groups in administrative proceedings. During the 1970s, this was only a small part of an intensive debate concerning the legal and political status of interest groups in a representative democracy. Cf. Staatsführung, Verbandsmacht und innere Souveränität (Biedenkopf ed. 1977); Böckenhörde, Die politische Funktion wirtschaftlich-sozialer Verbände und Interessenträger in der sozialstaatlichen Demokratie, 1976 Der Staat 457; Lessmann, supra note 87; K. Scheltem, Demokratisierung der Verbände (1976); H.J. Schröder, Gesetzgebung und Verbände (1976); Teubner, Organisationsempiratie und Verbandsverfassung (1978). The powerful influence of interest groups in the Federal Republic and the emergence of a "citizen group movement" led to widespread—though ultimately unsuccessful—demands for an "association statute" (Verbändegesetz) which would do for interest groups what the Parteiengesetz (cf. supra note 224) had done for the parties—namely, clarify their constitutional status and obligations. A good overview of legislative proposals to this effect and the debate surrounding them is von Alemann & Heinze, Verbände und Staat (2d ed. 1981).

226. These are described by Koch, Class and Public Interest Actions in German Law, 5 Crv. Just. Q. 66 (1987).
must be licensed and meet certain standards of accountability and representativeness. If groups were allowed to litigate under the statute, they likely would be subject to considerably more stringent requirements.

West German insistence on democratic accountability demonstrates a desire to separate law from politics and prevent the politicization of law. If collective litigation is a legal instrument, the litigator must show that he is asserting private rights. Those who claim to litigate on behalf of others can rarely do so. This explains the strong presumption against collective litigation. The environmentalist conception of collective litigation as a means of increasing the effective participation of collective interests is, at bottom, a confusion between interest representation and legal rights. Such use of legal instruments for political purposes must be narrowly circumscribed, and the participants must be democratically organized, so as to make their participation compatible with the representative-democratic organization of government as a whole.

In the United States, there have been no comparable attempts to separate law from politics, to distinguish among different senses of participation, and to hold collective litigants and intervenors to standards of representativeness and democratic organization. American public interest organizations have an ambiguous status. It is never quite clear whether they are “concerned citizens” who happen to assert their rights in unison, or whether they are organizations that represent, in a meaningful sense, some political constituency or other. Proposals to license public interest groups, to limit their number, and to require them to meet strict standards of internal democratic organization, which in Germany are considered unobjectionable and are sometimes explicitly supported by the advocates of associational standing, would, no doubt, be met by the argument that such restrictions on the “rights” of “concerned citizens” is out of the question. On the other hand, suggesting that public interest lawyers really represent no one in particular is routinely countered by the argument that their organizations have hundreds of thousands of members.

This hybrid form of political-legal influence seems acceptable because there is no clear sense of sovereign, intrinsically public author-

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227. See supra note 99 and accompanying text.
228. The literature on association lawsuits strongly suggests this conclusion. Bettermann, Zur Verbandsklage, 85 ZEITSCHRIFT FÜR ZIVILPROZESS 133, 144 (1972) (association lawsuits, if to be permitted at all, can only be considered for representative, democratic organizations). See also Breuer, Wirksamer Umweltschutz durch Reform des Verwaltungsverfahrens und Verwaltungsprozessrechts?, 1978 NEUE JURISTISCHE WOCHENSCHRIFT 1558, 1562, 1566; FABER, DIE VERBANDSKLAGE IM VERWALTUNGSPROZESS 64-66, 91 (standing to sue could be offered as a kind of reward for groups with democratic structure); W. Schmidt, Bürgerinitiativen—politische Willensbildung—Staatsgewalt, 1978 Juristen-Zeitung 293, 297 (supports and documents scholarly consensus that association standing should not be permitted and could, at most, be considered for organizations with democratic structure); and Teubner, ORGANISATIONSDEMOKRATIE UND VERBANDSVERFASSUNG 214-21 (1978).
ity. In contrast to the "German" concerns over precisely who is entitled to participate in the exercise of public authority, on what conditions, and in what form, the American debate about public interest litigation has been dominated by concerns over the balance of forces within the political process. Accordingly, the legitimacy of collective litigation is said to stem from the fact that it helps to balance the influence of organized interests.

VII. Conclusion

The determined rejection of collective litigation on behalf of "under represented interests" in the Federal Republic may strike American observers as unduly restrictive and perhaps a bit authoritarian. If for no other reason, two final remarks are in order. First, the concerns that motivate the rigorous separation of law and politics, rights and interests, and, hence, high standing barriers in the Federal Republic are neither purely metaphysical nor primarily authoritarian. German law excludes public interest claims in order to protect political control over executive decision-making. While this may sound autocratic, it is based upon the insight that without political control, there can be no democratic accountability. German law further excludes public interest claims to maintain the judiciary's orientation towards rights and its substantive distance from the bureaucracy. While this may appear to imply an unduly narrow conception of the judicial function, the underlying objective the preservation of the judiciary's independence is not only legitimate but well-advised in a country where judicial independence has been very tenuous. German law requires that the organized participants in political decision-making be democratically organized. While this insistence discourages spontaneous citizen action, it channels discontent into organizations and institutions that conform to standards of representative democracy, and prevents the usurpation of public authority by movements which merely claim to speak for the public.

Second, it may seem that the prohibition on public interest litigation betrays an indifference to substantive public concerns such as a clean environment. It certainly did seem that way to German environmentalists and to scholars sympathetic to their cause. The answer they received was that the remedy lay in the political process, not in litigation and in the courts. As it happened, Germany did offer a political remedy. At the same time proposals for collective litigation were rejected, the established parties became considerably more sensitive to environmental concerns, and an environmentalist party, the Greens, gained access to state legislatures and to the Bundestag. The rejection of public interest litigation did not inhibit this development. If anything, it encouraged it by directing the attention of environmental activists away from the courts and towards the electoral process.

230. E.g., Rehbinder, Argumente für die Verbandsklage im Umweltrecht, 1976 Zeitschrift für Rechtspolitik 157, 159; Sening, supra note 160.
There may, then, be a functional need to represent collective, "under represented" public interests in representative democracies. But the case of West Germany illustrates that complex industrial democracies can adjust to this need in more than one way. The American adjustment of collective litigation is not an inevitable trend but the outcome of particular institutional arrangements and legal-political traditions.