Book Reviews

The Economics of Bribery

Corruption: A Study in Political Economy. By Susan Rose-Ackerman. *New York: Academic Press,* 1978. Pp. xii, 258. $16.95.

Reviewed by Gary J. Miller†

There are several reasons for economists' growing interest in nonmarket—especially political—behavior. First, the world of classical microeconomics, with its atomistic actors competing in free markets, is an increasingly unrealistic model of economic reality, if not an outright anachronism. Second, the normative challenge of "market failure" forces economists to turn their attention to governmental institutions: even if one could abolish governmental intervention in the marketplace, it would not be desirable ("efficient") to do so in the presence of externalities, public goods, or monopolies. Third, economic assumptions and methods have been found applicable and useful outside of the market. Indeed, the work of Arrow,[1] Downs,[2] Niskanen,[3] and other economists has defined much of the agenda for political science in recent decades.

Rose-Ackerman's recent book is evidence that the second generation of economic analyses will not be less productive of political insights than the first. Her volume does not, I believe, inaugurate a whole new literature in political science, as Arrow inaugurated the literature of social choice and Downs the field of spatial modeling. Yet it is the most complete effort I know of to date to consolidate and extend the accumulated knowledge of political economy by bringing that knowledge to bear on a new subject matter. Her discussion of political corruption demonstrates remarkable understanding of the entire range of approaches to political economy, from spatial modeling to operations

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1. K. Arrow, Social Choice and Individual Values (1951).
2. A. Downs, An Economic Theory of Democracy (1957).
3. W. Niskanen, Bureaucracy and Representative Government (1971).

research. At the same time, she includes a thoughtful analysis of a key question that has not been answered in past decades: what are the limits of usefulness of political economic analysis?

I. The Agency Relationship

The basic unit of analysis in Rose-Ackerman's book is a relationship that is of interest in economics, political science, and law. This relationship is one in which one actor (the principal) purchases the right to direct another actor (the agent) to act in the principal's interest.

This relationship can be found in the marketplace, where, for instance, an agent may put together a portfolio of investments for his or her principal. Although it is not generally recognized, the agency relationship is fundamental in political science. The legislator may be thought of as an agent for a plural principal (the constituency), while the agency head is an agent for another plural principal, the legislature. Both these kinds of agency relationships are examined in the first half of Rose-Ackerman's book. A third agency relationship is found within the hierarchical bureaucratic agency, in which each subordinate acts as an agent for his or her superior. The behavior of subordinate bureaucrats is examined in the latter part of *Corruption*.[4]

As the title suggests, one of the most salient features of the agency relationship is its fragility. The agent has his or her own interests, which do not disappear when the principal purchases the agent's time. For instance, an assembly-line worker in an auto plant may sabotage the work flow. If he does so out of boredom or revenge or other purely self-interested motivation, this could be called "noncompliance." On the other hand, if the auto worker sabotages the work because of a bribe from a third actor, this is "corruption" and is the primary focus of Rose-Ackerman's analysis. Can political institutions be organized in such a way that it is in no agent's self-interest to take a bribe? If so, how? If not, what does this say about the role of economic analysis of political institutions?

II. Legislators

The argument proceeds in the classic economic manner. Each chapter states a set of assumptions; the implications of the assumptions are derived, and then compared with real-world behavior in settings in which the assumptions apply. Succeeding chapters develop more complex sets of assumptions.

4. S. ROSE-ACKERMAN, CORRUPTION (1978) [hereinafter cited by page number only].

The first, bare-bones model assumes a legislature composed of politicians elected from single-member districts. These politicians are interested in reelection and in income. Voters judge incumbents on voting records and candidates on voting platforms. Interest groups can influence politicians' voting income by means of bribes, but bribes influence the politician's voting record and thus may affect chances of reelection. If politicians have perfect knowledge of their constituents' preferences, Rose-Ackerman concludes that they will not budge from a winning platform for the sake of a bribe. But if they have imperfect knowledge of preferences, and hence of the winning platform, they may allow their voting record to be influenced by bribes, with higher bribes necessary in close elections. Electoral competition is thus an imperfect institutional hedge against corruption.

The analysis of interest groups in this section concludes that the group's relative size, resource base, geographical dispersion, and degree of organization all affect the influence of the interest group on policy outcomes. Although many of these observations can also be found in Mancur Olson's study of interest groups,[5] some of Rose-Ackerman's demonstrations are intriguing. For instance, although an organized minority may bribe its way to a legislative majority in many cases, it may not attempt to do so if the majority position is also organized to counter-bribe. By depriving the minority of a "winning strategy," the organized majority acts as an effective guard against corruption.

By allowing voter ignorance and legislative organization into the assumption set, Rose-Ackerman derives still more interesting implications. As she correctly points out, interest groups do not undertake to bribe entire legislatures. The organization of a legislature by party and committee places certain individuals in positions to play key roles in the passage of important legislation. Opportunities for corruption will be focused at these locations. Indeed, if legislators are organized into political parties, corruption may come in the form of parties extorting bribes from interest groups who would not otherwise be motivated to engage in corruption; the rational response may be for interest groups to *refuse* to organize, in order to limit their vulnerability to extortion.

The possibility of voter ignorance and apathy changes the ballgame remarkably. Politicians can then use bribe money not only for personal enrichment, but also to induce apathetic citizens to vote or to convince the uninformed voter that the politician has made the right policy decisions and deserves to be reelected. As Rose-Ackerman might have

5. M. Olson, The Logic of Collective Action (1965).

stressed, the politician's use of selective incentives to get voter support fundamentally changes the nature of the agency relationship that is the starting point of the book's analysis. The voters thus cajoled into supporting the politician are in effect in *his* employ, and the lines of accountability are reversed. This reversal of the asymmetric agency relationship has been a central implicit concern of political science since Michels's study of the Iron Law of Oligarchy;[6] I would have appreciated a more *explicit* analysis of the implications of this phenomenon.

III. High-Level Bureaucrats

Rose-Ackerman recognizes three positions that legislatures may take towards bureaucratic corruption: they may actively attempt to ferret out corruption; they may collaborate with bureaucrats in corruption; or they may be passive, preoccupied with reelection issues that they regard as irrelevant to bureaucratic corruption.

Rose-Ackerman deals largely with the latter two positions. As she argues, the only return for ferreting out corruption may be publicity, and there are easier ways for legislators to get publicity. Her relative neglect of the first possibility leaves her with little to say in this section about her larger concern with institutional means of making honesty the self-interested policy. Yet, although legislators as individuals may find little return in the role of watchdog, the legislature as a whole may find it worthwhile to *hire* watchdogs (agents) to perform that function in their interest.[7] The General Accounting Office, for example, is highly regarded as the Congress's most effective tool in fighting bureaucratic corruption. The possibility that the legislature as a whole may be able to combat corruption effectively, at the same time that legislators as individuals are cooperating with it, leaves me somewhat dissatisfied with Rose-Ackerman's later conclusion that institutional safeguards against corruption can never be adequate.

The major contribution of the section on high-level bureaucrats is the exploration of the possibilities for subtle, implicit collusion in corruption. For instance, if it is understood that bureaucrats will use agency budgets either to win votes for legislators (*e.g.*, by building projects and creating jobs in legislators' districts) or to provide personal favors for legislators (*e.g.*, by flying legislators on junkets), then both bureaucrats have a shared interest in increasing budget size. But bu-

6. R. MICHELS, POLITICAL PARTIES (1949).

7. *See* Miller, *Bureaucratic Compliance as a Game on the Unit Square*, 24 PUB. CHOICE 37, 37-52 (1977).

reaucrats' and legislators' interests may conflict with regard to agency flexibility in agenda and project design. Bureaucrats covet the authority to initiate projects in different legislative constituencies in order to increase their bargaining power. Legislators, on the other hand, would prefer *immobile* projects for their districts that will ensure a steady flow of dollars.

IV. Low-Level Bureaucrats

Low-level bureaucrats are defined by Rose-Ackerman as "budget-takers" in that "each one is such a small part of the total organization that he or she acts rationally in refusing to take into account the relationship between individual actions and the legislature's decision on the size of the agency's budget."[8] In this section, her concern shifts from the effects of corruption on policy choices to its effects on the efficient administration of policy.

As in the section on legislatures, Rose-Ackerman begins with a skeletal model to which she later adds more complex assumptions. She views the low-level administrator as serving applicants who have to stand in line to receive the service. The opportunity for corruption lies in the possibility of a bribe for differential treatment in the queue. Higher-level administrators or legal officials may be in a position to punish this corruption, but the model assumes initially that these supervisors act only upon client complaints.

Waiting in line for service imposes different costs on different individuals. Some individuals may lose a great deal of money with each passing minute, while others endure very little cost by waiting. The honest bureaucrat treats all clients alike, and some economists have argued that this is inefficient. Those people who are enduring the highest costs should be served first, and, the argument runs, these costs are accurately indicated by willingness to pay for preferential treatment. Bribery thus becomes an efficient market solution to the problem of waiting in line. The bribes encourage corrupt bureaucrats both to work faster and to serve those most in need first.

Rose-Ackerman's most striking demonstration is to refute this economic defense of bribery. Bribes, she argues, do not guarantee efficiency, except perhaps when a system of perfect bribe-price discrimination is possible and legal, in which case the "officials obtain all of the program's benefits for themselves."[9] With imperfect price discrimina-

8. P. 60.
9. P. 107.

tion, officials may set bribe prices inefficiently. Furthermore, if bribes are illegal, the bureaucrat allocates services partly on the basis of the likelihood a client will complain about the bribe. This causes further inefficient distortions.

More complex bureaucratic services compound the inefficiency of bribery. Suppose, for instance, that the bureaucrat's job is not to serve all applicants, but to choose among a group of applicants according to the government's needs. The opportunity for a bribe then comes from the bureaucrat's discretion over the awarding of the contract. If the bureaucrat-buyer is simply one buyer in a competitive market, he has little opportunity for a bribe. But if the bureaucrat-buyer is in a less than perfectly competitive (and therefore inefficient) market, there are monopoly profits to be shared. These profits can be shared in the form of bribes, but the bribes may increase governmental costs without guiding the bureaucrat to the most efficient supplier.

Competitiveness among bureaucrats may permit clients to choose which bureaucrat to approach for service and may decrease the likelihood that bribery will occur, especially if one or more bureaucrats is personally committed to honesty. But competitiveness does not guarantee the elimination of bribery any more than bribery guarantees efficiency. If bureaucrats have any discretion, as they usually do in a decentralized bureaucracy, clients may prefer the certainty and speed of bribing a dishonest official to the uncertainty and delay of reliance on the honest, conscientious official.

V. The Efficiency of Market-Like Behavior Outside the Market

Welfare economists have demonstrated that individuals' self-interested choice in competitive markets for private goods leads to efficient allocations of resources. Because of this, economists often assume that market-like choice, pricing, and competition may have similarly beneficial effects outside of the normal private market. "Economists typically take for granted that since the creation of a market increases the individual's area of choice it therefore leads to higher benefits."[10] Some thus prescribe "logrolling" in decentralized legislatures to allow for market-like trading.[11] Others advocate metropolitan fragmentation to permit individual choice among local governmental jurisdictions and a "competitive market" for local public services.[12] As sketched in the

10. Arrow, *Gifts and Exchanges*, 1 Philosophy & Pub. Aff. 343, 349-50 (1972).
11. *See* J. Buchanan & G. Tullock, The Calculus of Consent 145 (1962).
12. *See* Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Political Econ. 416, 416-24 (1956).

preceding section, economists have even argued that bribery is beneficial because it gives individuals a market-like opportunity to indicate their preferences with regard to waiting in line.

Rose-Ackerman's book is the latest in a series of analyses that have cast doubt on the universal applicability of the Invisible Hand principle. Logrolling may in fact lead to irrational and inefficient group choice,[13] and the conditions under which market-like metropolitan fragmentation leads to efficiency now seem to be extremely strong and perhaps objectionable.[14] Most convincingly, Sen has demonstrated as a completely general proposition that it is impossible to guarantee efficiency in a decentralized context.[15] Rose-Ackerman's discovery that market-like bribery does not lead to administrative efficiency adds further evidence that market-like behavior may well be appropriate only in the market. Rose-Ackerman herself feels that

> [t]his book's demonstration that widespread corruption can be consistent with even a grossly idealized version of representative democracy is an especially stark version of the general proposition that competition and decentralization in political life do not assure beneficial outcomes. This is perhaps the simplest and most far reaching implication of sophisticated economic models of government.[16]

VI. Economics and Honesty

From first to last, Rose-Ackerman makes the case that microeconomic theory, based as it is on a model of rational, self-interested individuals, provides no solution to the problem of corruption. It seems to be impossible to construct a system in which honesty is always the self-interested policy; in any system, some actors will always be exposed to incentives for corruption.

To Rose-Ackerman, the ever-present incentives to corruption seem to reveal the limits of economic theory. Since some individuals are always exposed to tempting corruption, then we must transcend economic theory to study how we can instill a belief in democratic ideals and honesty in political participants; "the analysis leads one to em-

13. For a summary of this argument, see S. BRAMS, GAME THEORY AND POLITICS 125-56 (1975).

14. *See, e.g.*, Hamilton, Mills & Puryear, *The Tiebout Hypothesis and Residential Income Segregation*, in FISCAL ZONING AND LAND USE CONTROLS 101-02 (E. Mills & W. Oates eds. 1975). This essay shows that a system of exclusionary zoning creating complete income stratification is necessary for market-like choice to result in market-like efficiency in metropolitan areas.

15. *See* A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970).

16. P. 216.

phasize the importance of personal morality in explaining the viability of democratic government in a market economy."[17] This necessity of personal morality limits the role of economic theory, for economic analysis "cannot explain the origination and transmission of the democratic and personal ideals required to preserve a functioning mixed economy."[18]

The argument runs as follows: despite the fact that corruption is always in the interest of some participants, our society seems to toddle along in a fairly stable way. Therefore, some political actors must be resisting the temptation of personal corruption out of a personal commitment to honesty, or democratic government; "the continuing operation of familiar institutions would be inexplicable in the absence of wide-spread personal commitments to honesty and democratic ideals."[19]

Ironically, I, as a political scientist, found this discussion of the limits of economic analysis the only section of the book in which Rose-Ackerman's argument relies on several unstated and, I feel, dubious assumptions. The missing links are the implicit assumptions that the "viability of democratic government in a market economy" implies that someone out there must be resisting the temptation to be corrupt, and the further assumption that contemporary society is an instance of viable, "stable operation" of such a mixed system. To take the second assumption first, there are certainly people who would doubt that our society is viable, stable, or democratic. And since Rose-Ackerman fails to define these broad terms adequately, it is difficult to resolve the question. But if indeed the doubters are correct, and society is unviable, unstable, or undemocratic, then the paradox that Rose-Ackerman attempts to demonstrate is not a paradox. If the state of the world is corrupt and falling apart, then Rose-Ackerman's economic theory is quite capable of explaining why.

The first implicit assumption raises still graver difficulties, for corruption may in fact be wholly consistent with viable democracy. Why infer from the fact that the trains run on time or that social security checks occasionally appear in the right mailboxes that there *must* be a lot of civil servants and politicians out there resisting the inevitable temptations of evil? Granting the author's conclusion that no political institution can insulate all actors from incentives toward corruption, it does not necessarily follow that society will fall into a state of anarchy if all actors so exposed abandon themselves to temptation. In

17. P. 5.
18. P. 6.
19. P. 5.

any number of societies (perhaps including our own) corruption is an accepted and inevitable part of the functioning of institutions. Many of these societies would be called viable; some, including Italy and Mexico, would even be called "democratic" by some observers. Rose-Ackerman's claim that incentives for corruption would lead to societal decay if political actors were not committed to democratic ideals is completely outside the range of her model-building and is in fact empirically questionable.

It is possible to deplore corruption for ethical reasons without assuming that ethical education is the only hope for democracy. Rose-Ackerman's belief that this first serious attempt to understand the political economy of corruption already has defined the outer limits of usefulness of economic analysis is unduly pessimistic. For me, the import of her book is quite the opposite: since serious study of the economics of corruption is only beginning, we may be able to do a great deal more than we are now doing to limit corruption by changing institutional incentives.

Conclusion

In a sense, Rose-Ackerman's argument regarding the limits of economic analysis is best countered by her own success in *Corruption*. Although the extent to which she advances formal theory is uneven (the discussion of interest groups is largely an informal application of previous theories, for example), her theory of administrative behavior moves that body of literature forward significantly. Furthermore, her ability to summarize, consolidate, and apply the entire range of political economic theory to her subject area is uniformly excellent. I believe the book must be considered as a testament to the expanding scope of political economic theory, rather than as a statement of its limitations.

Standing for Solidarity

Legal Identity: The Coming of Age of Public Law. By Joseph Vining. *New Haven and London: Yale University Press,* 1978. Pp. xiii, 214. $16.00.

Reviewed by Richard B. Stewart†

Imagine, if you can, Pascal, Rousseau, Kierkegaard, Baudelaire, Marx, Wittgenstein writing on standing to secure judicial review of federal administrative action. You will then have some conception of this remarkable, beautifully written, but incompletely realized book.

Professor Vining's story is the "breakdown of individualism as a basis for legal reasoning"[1] and its replacement by communitarian "public values," as illustrated by the evolution of standing doctrine in federal administrative law. The story proceeds, often simultaneously, at two levels: lawyer-like analysis of the doctrine enunciated by courts, and lyric evocation of changes in moral vision that assertedly underlie the development of that doctrine.

I

Traditionally, the interests entitled to judicial protection were defined by the common law. A litigant could challenge official actions infringing his liberty or property if the same actions undertaken by a private individual would constitute a common law tort. The responsible official might seek to justify the infringement on the ground that it was authorized by statute. Litigation challenging a prima facie tort thus became a vehicle for judicial review of the scope of official authority. However, if the official's conduct would not be actionable at common law when performed by a private individual, a citizen assertedly injured would lack standing to challenge such conduct as not authorized by statute.[2]

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1. J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 2 (1978) [hereinafter cited by page number only].

2. Pp. 20-27; *see* Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1667, 1717-18, 1724 (1975). Although he focuses on the private tort model of standing, Vining acknowledges (without exploring) a second traditional basis for judicial review of official action: the common law writs, such as mandamus and certiorari, developed by courts for the specific purpose of controlling official action. *See* L. JAFFE,

Vining chronicles the progressive breakdown in recent decades of this model, which he views as a "myth" created by the common law judges to control the king's servants.[3] The breakdown began when courts agreed to review official inaction even though such inaction would not constitute a common law wrong,[4] and when they relaxed ripeness doctrines to permit review of agency promulgation of regulations not yet coercively enforced.[5] A decisive step was the extension of standing to third parties not themselves subject to coercive government regulation but affected by regulation of others. Under this approach, standing was extended to competitors of regulated firms and beneficiaries (such as airline travelers or television viewers) of regulatory schemes.[6] The common law test of standing received its final coup de grace in the Supreme Court's 1970 decision, *Association of Data Processing Service Organizations v. Camp*.[7]

Vining celebrates this process of disintegration, rejecting any effort to limit standing in administrative law by reference to a private-dispute-resolving model, which he views as "atavistic." In modern society, government policies have a "Donne effect"; their reverberating consequences touch all.[8] Accordingly, he concludes, it is not analytically tenable to limit standing under a statute to a subclass of citizens invested with rights against officials owing them correlative duties.

II

At this doctrinal level, the book's analysis is acute but hardly path-breaking, and could be easily contained in a conventional law review

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 152-96, 459-90 (1965). Vining deals exclusively with standing in the federal courts, where these writs have been used less extensively and less liberally than in many state courts. The writ system, in which standing has sometimes been extended to taxpayers or citizens as such, may well imply a different ethos of public law than the private tort model that the federal courts have characteristically followed. The general assertions that Vining often makes about the nature of public law and its evolution must be qualified by the book's exclusive focus on federal law.

3. Pp. 21-22.

4. *See* pp. 34-35; Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939); Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443, 1466-69 (1971).

5. *See* pp. 70-79; Vining, *supra* note 4, at 1501-31.

6. *See* pp. 35-39; Stewart, *supra* note 2, at 1723-34.

7. 397 U.S. 150 (1970).

8. Pp. 85-86, 102-23. The pervasive effects of government action are termed by Vining the "Donne effect" after the "No Man is an Iland" passage in Donne's *Devotions* XVII, cited by Justice Blackmun in dissent in Sierra Club v. Morton, 405 U.S. 727, 760 n.2 (1972). An alternative metaphor might be economic; we could speak of the "general equilibrium" effect. *See* J. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 951-1053 (1954) (general equilibrium analysis). This metaphor may suggest the continued viability of the private law model when it is suitably adapted to deal with the problems of collective goods.

article. What makes for a remarkable book is Vining's vision of a shifting moral order that underlies doctrinal development, and the richly allusive prose style in which that vision is expressed. To Vining, the common law test assumes an individualist ethic in which values are essentially personal and subjective, and litigation involves "a dispute between individuals over the allocation of means to achieve their privately chosen ends."[9] But this ethic is an essentially false one because values have meaning and existence only insofar as they can be spoken of in a communal language and realized through the scheme of social solidarity that the law secures. Individual self-development is a process of participation in the evolution of shared public values.

The decline of the common law test and the consequent stripping away of limits on standing deserve celebration, Vining believes, because they make more explicit the foundation of the legal order in a community of public values. Why this development should have occurred is obscure. Extension of standing to those speaking for "noneconomic" values such as environmental quality can be explained in part by the increasingly apparent "spillover" effects in an industrialized society, and the consequent recognition of widely shared interests—such as the interest in a healthy environment—in resources that cannot be privately appropriated and can be secured only through collective action.[10] But the recognition in standing doctrine of community solidarity also reflects a Kuhnian shift in legal consciousness, a consciousness that now "sees" the social world as more "connected." Vining confesses that this shift cannot be wholly explained.[11]

With the breakdown of the private-dispute-resolving model, courts determine standing by assessing the values for which litigants speak. Standing is conferred if the value is sufficiently widely shared to constitute a public value that warrants protection and advancement through the law's disposition of social force. In deciding the merits, courts reconcile the various public values that have been recognized through rulings on standing. Other institutions, including the legislature and administrative agencies, also serve to confirm and adjust public values. But judges play a special, higher role: "that of the priest or elder, associated with the role of the judge long before the necessities of feudal life produced, and the doctrines of laissez faire reinforced, the assumption that a judge sits only to resolve private disputes."[12]

9. P. 44.
10. Pp. 28-29.
11. Pp. 49-51.
12. P. 52.

For Vining, the special virtue of judges is their institutional capability to "look continuously at the whole" fabric of public values:

> As other institutions that also shared the priestly tradition have disappeared, the importance of this aspect of the notion of what it is to be a judge has grown. No society pursuing a multitude of public values of different weight through a multitude of largely independent agencies has ever tried to do without such central coordination. . . . The process of perceiving, announcing, reconciling, and choosing between the values at stake in particular situations—the judicial process—affects planning and, more important, affects the choice of values to be served by planning. It is an integral part of government.[13]

The courts' function is a "priestly" one because the life of the individual is an evolutionary sharing of public values through a succession of roles or identities: environmentalist, investor, homemaker, agitator, nonsmoker. In ruling whether a given individual has standing to secure judicial protection of a value for which he or she claims to speak, the court decides whether potential new roles or identities will be given social recognition and validation through the legal system. For the individual, the proliferation of new identities or value-roles brings enrichment but also frustration because "death or burial" beckons and all roles cannot be fully realized:

> Men are made equally restless by the lack of realization of one or another of their desires. They drive for security and then drive for challenge. They sacrifice for generations to build smiling landscapes. They sacrifice landscapes to the thrill of war and triumph. They withdraw to brood about how they might have both.[14]

The courts, however, are immortal even though judges are not. They steadily pursue Marx's utopian vision of the potential fullness of life by articulating the evolving harmonies among superficially divergent roles, identities, and values, thus fostering a "larger symbiosis of desires."[15]

Vining develops this vision in dialectic with doctrinal analysis through writing that is by turns epigrammatic, dandified, oracular, ironic. The orderly straightforward "roadmap" character of most legal academic writing is replaced by a circuitous, affective, subterranean exploration of legal consciousness. Vining's elliptical style reflects ap-

13. *Id.*
14. P. 162 n.
15. Pp. 89, 113, 151-68.

preciation of a journey not yet completed, a consciousness that is immanent but unrealized. Evolution of external doctrine is more readily perceived than potential transformation in underlying vision, a transformation often conveyed through asides and *aperçus*.

Consider, for example, Vining on the Kantian, noninstrumental character of legal analysis: "[W]hen we contemplate a concept, we have in mind a mirror instead of a tool."[16] He rejects the notion that historical or economic necessities determine the evolution of legal doctrine:

> [N]ecessity has a recognized place, a place in law. It does not prowl unleashed and sub rosa through the prediction, explanation, or making of judicial decisions. It is dealt with explicitly through numerous doctrines courts and lawyers use in judicial review, such as the substantial evidence rule; and doctrines that incorporate notions of necessity are not less subject to intellectual analysis for being "pragmatic." They present to the mind the paradoxes of a Heraclitean world filled with too little time.[17]

Or consider the problems faced by courts in untangling causal responsibility for past events:

> The bird that flies across the evening sunset would be flying elsewhere if the nearby road had not been built. What will the bird do now? Eat the mosquito that might give your child encephalitis? The consequences of an event radiate out in . . . myriad directions. . . . The present is a pulsating, organic whole; the past is a succession of states like the present, and the future is unknown. Of course courts find difficulty in discussing what they perceive. It threatens the atomistic premise of legal thought and language, which divides reality into cases, structures them into bipolar form, arrests the passage of time . . . .[18]

The difficulties in structuring the past are sometimes overwhelming:

> Causal chains do not run in parallel straight lines into the future, to be clipped or moved here and there by the remedial hand. They grow, branch, intertwine, curl back, some faster and some slower but all at a rate that seems breathless in relation to our capacity to follow them. Even the materials a court has directly in hand, under its "jurisdiction," change and dissolve while the court is in the process of reshaping them . . . .[19]

16. P. 50.
17. P. 46.
18. Pp. 85-86.
19. P. 89.

In extreme cases, judges grown fearful escape by an inarticulate denial of plaintiff's standing to maintain suit: "Fear may make it too difficult to admit, except by allusion, that one is swimming in the sea and that one's behavior is a reaction to it. Denial is a normal defense of the human mind against great fear; the legal mind is not peculiar in this regard."[20]

At the end of the journey, Vining speculates that the disintegration of the private-dispute-resolving model of administrative law may lead us to understand that public values underlie not only public law but private law as well. Although private law seems to postulate merely personal ends, "the role of the *legal system* has always been to maintain the primacy of public values in social decision making."[21] The legal system cannot rest on ethical solipsisms; it can only protect those values that men and women can articulate to one another and recognize one another as bearing. "The active pursuit of shared and evolving ends . . . animates the judicial role. . . . The language of rights has become increasingly foreign to a description of the process, both in its suggestion of rigidity and its emphasis upon the separateness of human beings."[22] The expansion of standing in public-law litigation to those who speak for community values encourages us to see the entire legal system as driven by an instinct of solidarity:

> The latin tag for standing, still used in Britain, was *locus standi*, a place to stand. The natural image was geographical. . . . How easy it was to assume that the purpose of courts was the defense of property and that individuals were separate. A litigant argued from a spot that, because it was geographical, no two could occupy at once. The image of the litigant today is quite different. Standing means standing *for*, representing, and in this there is no suggestion of necessary exclusivity and property, or of the separateness of men.
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> . . . .
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> . . . Litigation can now bring home as forcefully as any religious ritual that each of us is in fact involved in mankind. Public law has come of age.[23]

20. P. 94. Judges themselves have alluded in troubled tone to this "trackless ocean." *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166 (1921).

21. P. 47.

22. P. 130. Vining elsewhere suggests that "most of the valued end states of life are shared rather than private, achievements of a life beyond oneself and escapes from loneliness and alienation." P. 32. The entire book is suffused with the elegiac mood of the intellectual in search of community. *Cf.* Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) (developing relations between law and personal identity that resemble some of Vining's themes).

23. P. 181.

III

Vining's vision is arresting, evocative, extravagant, even a touch mad. But is it true to our understanding of legal thought and the social order? Certainly it is selective and one-sided. The clash of contending interests in litigation and legislation, the distributional struggles that so occupy the world, are presented as mere surface flux that obscures the underlying, evolving harmony of human interests. The priestly role that Vining posits for the courts will understandably strike many as sanctified tyranny, implausible humbug, or just plain silly. Yet how do we measure insight, truth, verisimilitude in the study of legal consciousness?

Insofar as legal consciousness is understood as moral vision, the measure is most difficult to identify. One might turn to the rhetoric of the opinions in the principal decisions that expand standing; but this rhetoric betrays little or nothing of Vining's vision.[24] Alternatively, one might assess the congruence between Vining's approach and more general trends in legal and political thought. Vining's communitarian ideal finds important confirmation in other recent writing.[25] Yet we are also witnessing a remarkable resurgence of individualist premises in legal and political thought,[26] which suggests that the private-law model has roots far deeper than the necessity for a myth through which judges could control the king's servants. A third alternative is introspection: the reader can examine the extent to which Vining's themes find resonance in his own thought and understanding of law. Here each reader must answer individually.

At the doctrinal level, shortcomings in Vining's thesis are easier to document. That thesis finds at best shaky support in the decisional law. Developments since *Data Processing* undercut Vining's claim that

24. *See* United States v. SCRAP, 412 U.S. 669 (1973); Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970). The judicial language that provides clearest support for Vining's "public values" vision is the quotation from Donne in Justice Blackmun's *Sierra Club* opinion. *See* note 8 *supra*. Significantly, this opinion was written in dissent from the Court's refusal to extend standing to organizations claiming to speak for widely shared ideological values.

I am indebted to my colleague Richard Parker for the thesis that the rhetoric in judicial opinions both expresses and reflects links between doctrine and legal and political consciousness. In an article in progress he develops this thesis in the context of constitutional adjudication.

25. *See, e.g.*, R. UNGER, KNOWLEDGE AND POLITICS (1974); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978).

26. *See, e.g.*, C. FRIED, RIGHT AND WRONG (1978); R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977). *But see* note 25 *supra* (citing sources); Karst, *supra* note 22.

the decision has ushered in a new era of standing doctrine based on public values. In several more recent decisions the Supreme Court has limited standing to instances involving direct invasions by government officials of concrete interests in personal autonomy establishing "injury in fact"—a telltale harkening back to the private-law model.[27] In a closely analogous doctrinal field, not discussed by Vining, the Court has repeatedly invoked the model of private entitlements to limit sharply the availability of procedural due process protections in administrative decisionmaking.[28]

Data Processing itself—which Vining celebrates as the key step in the emergence of public values—was, I believe, a disastrous decision. As elaborated below, it has brought unnecessary confusion by wantonly destroying pre-existing law that was sound in principle, reasonably coherent, and capable of accommodating desirable extensions of standing. Vining fails to come to grips with these problems, or to address adequately the doctrinal and institutional implications of his "public values" thesis.

At the outset of his book, Vining argues that the law of standing is a worthy vehicle by which to study legal thought and the social community because of its immediate impact on the exercise of government power to further societal values:

> Each day, in a thousand courts, judges ask the simple, practical question: Do I have legal authority to listen to your arguments? If an answer to that question cannot be given at all, either Yes or No, social life ceases and organization crumbles, because no man can go far to achieve his ends alone and without the ultimate sanction of a body disposing of social force.[29]

27. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972). In Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977), the Supreme Court reiterated the requirement, established in *Sierra Club*, that an organization must establish particular injury to one of its members or to itself as an organization in order to secure standing. This requirement has created potential standing problems for "public interest" organizations challenging federal agency action. *See* Hager, *Nader Hit with Challenge to Standing*, Legal Times, Feb. 19, 1979, at 1, col. 4; *cf.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (rejecting lower court ruling that federal courts enjoy general power to award attorneys' fees and litigation expenses—payable by private defendants—to plaintiffs who represent "public interests" and who successfully challenge administrative action as contrary to statute).

28. *See, e.g.*, Meachum v. Fano, 427 U.S. 215 (1976); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). However, Vining might take aid and comfort from the breakdown of the individualist model in public-law litigation in the federal district courts. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

29. P. 7.

He also explicitly recognizes that such a study must be grounded in doctrinal mastery.[30] But these salutary injunctions are ignored by Vining once he finishes chronicling the collapse of the common law model of standing and begins to elaborate his competing vision. The "simple practical" questions of standing continue. When may environmental groups challenge governmental decisions authorizing or encouraging private conduct that threatens environmental harm? When may the poor invoke regulatory or tax measures assertedly provided for their benefit? The judges' answers conflict, vacillate, confound.

Data Processing announced two prerequisites to standing: that a litigant suffer "injury in fact" as a result of the challenged official action, and that he be "arguably within the zone of interests protected or regulated" by the organic statute governing the controversy.[31] Since *Data Processing*, the Supreme Court has tacitly abandoned the "arguably within the zone" test as unintelligible or unenforceable, and has manipulated the opaque "injury in fact" concept in furtherance of its discretion to grant or deny standing in particular cases.[32] The decisions have not been adequately explained or reconciled, and have restored in full measure to federal standing law its celebrated obscurity.[33] Vining makes no serious effort at elucidation. He welcomes *Data Processing* and the wreckage of the past but is unable or unwilling to relate the doctrinal and institutional problems of today to his vision of courts' priestly role in the evolution of moral life in society.

In Vining's account, courts in the post-*Data Processing* era will (or should) grant standing when (a) judges see a value as sufficiently closely identified with an individual's activities or beliefs that he can sincerely speak for it, and (b) judges also see the value as sufficiently widely shared to justify recognition as a public value. But Vining admits that "we do not know how a value becomes a public value."[34] Nor can Vining offer useful criteria for their identification. Apparently judges just know a public value when they see it. "Public values" become

30. *See* p. 7 ("The study of law is a powerful means of access to the communal mind, and we have only a few. But it must be particularized. Depart from the law's doctrinal structure, the language in which law actually speaks, and the method loses its strength.")

31. 397 U.S. at 152-53.

32. *Compare* Warth v. Seldin, 422 U.S. 490 (1975) *and* Sierra Club v. Morton, 405 U.S. 727 (1972) *with* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) *and* United States v. SCRAP, 412 U.S. 669 (1973).

33. *See* Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such.") This insight did not deter the Court in that case from advancing sweeping changes in standing doctrine. *Cf.* United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 156 (1953) (standing as "complicated specialty of federal jurisdiction").

34. P. 171.

noumena the existence or nonexistence of which can only be inferred by observers from the judges' result. When the Supreme Court in *Simon v. Eastern Kentucky Welfare Rights Organization*[35] denies low-income individuals standing to challenge a tax ruling that relaxes free-care requirements for hospitals seeking tax-deductible charitable status, Vining concludes that the Court did not "see" poverty as a public value.[36] By the same token, when in *United States v. SCRAP*,[37] the Court grants standing to a group of law students protesting a nation-wide railroad rate increase as an obstacle to recycling, the justices have thereby indicated that they "see" environmental values as public.[38] But when the same Court a year earlier denied standing in *Sierra Club v. Morton*,[39] it must have failed to see environmental values as public.[40]

This approach is unhelpful and unenlightening, not least because it ignores or minimizes the institutional and prudential considerations that play an important role in standing decisions, regardless of the "public values" asserted to be at stake.[41] To explain all standing decisions as judicial recognition or nonrecognition of public values is excessively reductionist. *Simon* was clearly informed by considerations, admittedly inarticulate, as to the appropriate role of courts in the evolution of tax policy. *Sierra Club* and *SCRAP* are in part distinguished by the fact that plaintiffs' counsel manufactured the standing issue in *Sierra Club*, because they wished the Court to make a radical extension of standing doctrine that the Court viewed as unnecessary to the disposition of the case at hand.[42] In *SCRAP*, on the other hand,

35. 426 U.S. 26 (1976).
36. Pp. 175-76 n.
37. 412 U.S. 669 (1973).
38. P. 175.
39. 405 U.S. 727 (1972).
40. Vining castigates *Sierra Club* as "bizarre." Pp. 158-59 n. For an attempted explication and justification of *Sierra Club*, see Stewart, *supra* note 2, at 1737-47.
41. Near the outset of the book Vining notes Alexander Bickel's view (developed in the context of constitutional cases) that judges adjust doctrines of standing in response to institutional constraints and objectives. P. 10 (discussing A. BICKEL, THE LEAST DANGEROUS BRANCH (1962)). Vining notes the plausibility of the thesis, but brands it "Machiavellian" and does not pursue its implications. He discusses the institutional limitations of courts in the restricted context of damage remedies in cases involving major efforts to unravel complex causal issues. Pp. 80-101. However, he does not address the institutional and remedial concerns that inform recent Supreme Court decisions restricting access to federal court. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976); Warth v. Seldin, 422 U.S. 490 (1975). Although these are constitutional cases, in which institutional and remedial problems are more acute, similar concerns are reflected in rulings limiting standing to review federal administrative action as contrary to statute. *See* Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976).
42. *See* Sierra Club v. Morton, 405 U.S. 727 (1972). Counsel for the Sierra Club had deliberately refrained from alleging (as was in fact the case) that Club members visited the Mineral King Valley, the commercial development of which was being challenged by the Club. Counsel apparently did so in an effort to obtain a broad ruling that environmental

plaintiffs had based standing on a recent statute—the National Environmental Policy Act[43]—in which Congress had strongly affirmed its recognition of environmental values. By ignoring or discounting such factors, Vining overplays his insight that rulings on standing also reflect judicial assessments of emerging societal values.

Vining is certainly correct in viewing *Data Processing* as a decisive step in the evolution of standing law. But while he celebrates the decision, I view it as an unredeemed disaster. Prior to *Data Processing*, federal standing law was divided into three parts. In the absence of specific statutory provisions entitling designated persons or parties to judicial review, standing could be based upon present or threatened official infringement of an interest protected at common law; upon an interest substantively protected by a relevant organic statute (the statutorily protected-interest test); or upon an adverse economic impact when a relevant statute afforded standing to persons "adversely affected" or "aggrieved."[44] This triad provided a perfectly rational and sensible doctrinal structure affording ample flexibility for recognition of emerging societal interests through judicial expansion of the statutorily protected-interest test. For example, during the 1960s some judges shared with other observers a developing disquiet over the apparent failure of regulatory agencies to protect consumers, television viewers, or environmental interests. In response, they expanded the statutorily protected-interest rationale to afford representatives of such groups standing.[45]

Data Processing inexplicably ignored this established doctrinal structure and plucked the "arguably within the zone" and "injury in fact" tests out of thin air. In post-*Data Processing* decisions, "injury in fact" has become an unpredictable catchall to tag conclusions based on factors not adequately articulated or explained.[46] The test of "injury" has been confused with the Article III "case or controversy" requirement, thereby raising unjustified doubt as to the constitutionality of

organizations have standing to challenge any administrative complicity in environmental degradation. The Court, fearful of the implications of a broad ruling that would allow organizations standing based on ideological interests, insisted that an organization establish tangible injury to its members or to itself as an organization. *See id.* at 735-36 n.8, 739-40. Subsequently the Sierra Club successfully moved to amend its complaint to include allegations of its members' use of the Valley and thereby obtained standing.

43. 42 U.S.C. §§ 4321-4347 (1976).

44. *See* Association of Data Processing Serv. Organizations v. Camp, 406 F.2d 837 (8th Cir. 1969), *rev'd*, 397 U.S. 150 (1970); Stewart, *supra* note 2, at 1723-37.

45. *See* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

46. *See* notes 27 & 32 *supra* (citing cases).

statutory "citizen suit" provisions.[47] In a reversal of sound practice, standing is now granted *more* readily in constitutional cases than in nonconstitutional cases.[48]

Despite these developments and his own failure to provide a post-*Data Processing* structure for standing law, Vining would clearly oppose any resurrection of the pre-*Data Processing* triad as an "atavistic" return to the private-dispute-resolving model. He raises three objections to the statutorily protected-interest rationale as an elastic framework for according standing to representatives of emerging societal interests. These objections do not shake my preference for that framework over the unstructured "public values" alternative offered by Vining.

The first objection is that the rationale admits of no logical stopping

47. *Data Processing*'s "injury in fact" test was a gloss on the statutory provision for standing found in the Administrative Procedure Act, 5 U.S.C. § 702 (1976). The equation of "injury in fact" with the constitutional "case or controversy" requirement was adumbrated in *Data Processing* and made explicit in *Simon, see* 426 U.S. at 39-46. This equation has the highly undesirable effect of transforming into constitutional cases the everyday rulings on standing to challenge administrative action as violative of a given statute. If the equation were taken literally, Congress would be precluded from overturning restrictive standing rulings such as *Simon*.

Further confusion is created by use of the same injury-in-fact label in ruling on standing to challenge official action as contrary to constitutional provisions. This common use of "injury in fact" is unfortunate. In cases in which official action is challenged as unconstitutional, more restrictive principles of standing (whether mandated by Article III or merely prudential) are warranted because the constitutional ruling on an issue represents a complete and final judicial override of the political process. By contrast, when a statutory issue is involved, Congress can effectively reverse the court's ruling on the merits. The fact that constitutional rulings entirely displace the political process justifies more stringent threshold requirements with respect to whether a controversy has fully matured and whether plaintiff's interest is sufficiently concrete and substantial to serve as a basis for judicial intervention.

The Court's equation of "injury in fact" with Article III requirements and its failure to distinguish constitutional and statutory cases cast an unjustified cloud on federal environmental statutes that authorize "any person" to bring suit for nonenforcement of statutory duties. *See* Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1274-80 (1977). Although injury-in-fact rulings such as *Simon* threaten the validity of these citizen-suit provisions, the better view would hold them constitutional. *See* Flast v. Cohen, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting); Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?* 78 YALE L.J. 816 (1969); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

48. In Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72-78 (1978), the Court apparently abandoned for most constitutional cases the "zone of interests" test that, at least in theory, governs challenges to government action as violative of statute. Although nominally broadening standing doctrine in favor of environmental plaintiffs, the evident purpose of the Court's ruling was to enable it to reach the merits in order to sustain the constitutionality of the statute in question. *See* 438 U.S. at 102-03 (Stevens, J., concurring in judgment). The decision is thus an illustration of Alexander Bickel's "Machiavellian" thesis. *See* note 41 *supra*.

Sound analysis, however, would dictate the reverse of *Duke Power:* more restrictive judge-made standing rules in constitutional than in statutory cases. *See* note 47 *supra*.

point because of the inclusive "Donne effects" of government decisions and because Congress cannot be assumed indifferent to any such effect. Legions of interests are affected by a given legislative choice, and all are implicitly, contextually "protected."[49] Yet Vining acknowledges the need for limits to standing; he would not embrace the "public action" framework in which any citizen could challenge any assertedly unlawful action by any official.[50] Considerations of sound administration and decision counsel limits on those who can compel judicial assessment (with concomitant procedural formalities at the agency level) of an administrator's treatment of their interests.[51]

Relevant organic statutes are the most appropriate starting point for the choice of limits. Although I agree with Vining that it is unrealistic and unwise to require specific congressional "intent" as a prerequisite to recognizing new classes of interests as statutorily protected, the statutory framework provides a necessary and useful point of reference. It reminds judges and scholars alike that Congress, save in exceptional cases, is entitled to the last word on standing. Even when Congress has not ruled explicitly, courts should be encouraged to grant standing more liberally in favor of interests for which Congress has voiced strong support.[52] The statutory framework also encourages judges to assess the standing issue in light of the impact of judicial review on the operation of a particular system of statutory administration. Such an assessment may produce a grant of standing to an interest in the context of one statutory scheme, and the denial of standing to the same interest in the context of a different statutory scheme.[53]

Second, Vining objects to the statutorily protected-interest rationale because it implies a bilateral, individualistic system of rights on the

49. Pp. 106-17.

50. Pp. 130-35. For discussion of the "public action" framework, see Jaffe, *supra* note 47. Recognition of the "public action" framework would obviate the need to identify values that are sufficiently widely shared to serve as a basis of standing from those that are not, since any person (or, perhaps, citizen) could bring suit regardless of his or her interest. The "public action" framework would thus erase the dialectic of values that Vining champions, and would imply a formal equality of all citizens before the law that smacks of the individualist ethic.

51. *See* Stewart, *supra* note 2, at 1731-33, 1735-36.

52. For example, the decision in United States v. SCRAP, 412 U.S. 669 (1973), granting standing to an unincorporated group of law students to challenge asserted agency noncompliance with the National Environmental Policy Act (NEPA), may be properly explained on the ground that NEPA was enacted in part to require the dissemination of information to groups of citizens with an active interest in the environmental consequences of government action. *See* Scientists' Inst. for Pub. Information v. AEC, 481 F.2d 1079, 1086 n.29 (D.C. Cir. 1973). The statutes involved in Sierra Club v. Morton, 405 U.S. 727 (1972), did not betray any comparable purpose to benefit environmental groups in general.

53. *See* note 52 *supra*.

part of those whose interests are protected, and duties on the part of officials. Vining believes this framework to be inconsistent with the emerging importance of interests—such as interests in environmental quality—in resources the benefits of which are collectively shared rather than exclusively owned by one individual or another. Vining supposes that such shared interests establish the existence of communal "end values" that should be recognized as such.

Economists have taught the pervasive importance of collective goods that cannot be made available to one person without simultaneously being made available to others.[54] However, the nonexcludability factor that defines collective goods does not by itself establish shared end-values. The naturalist may value clean air for the enhanced bird-watching opportunities it affords, the housebound emphysematic for its healthful qualities. The recognition of rights in collective goods admittedly imposes strains on traditional legal thinking, but to suppose, as Vining does, that entitlements can only be created through a system of exclusive ownership may be anachronistic.[55] Courts have based standing on individuals' statutorily protected interest in collective goods;[56] Vining does not establish why such an approach is untenable or inferior to an untethered conception of "public values."

Third, Vining argues that limiting standing to defined classes of beneficiaries under a statutory entitlement rationale is inconsistent with the asserted judicial practice of permitting a litigant, once afforded standing, to advance any conceivable public policy consideration that might support the result on the merits sought by that litigant.[57] In light of this practice, Vining argues, it is illogical to base standing on the narrower ground of whether the litigant's private interests are protected by a relevant statute. He appears instead to suggest that standing should be granted to any person who can sincerely speak for the various public values that might be addressed on the merits.[58]

The fault in this argument lies in its premise regarding practice on

54. *See, e.g.*, M. OLSON, THE LOGIC OF COLLECTIVE ACTION 5-16 (1965); Davidson, *The Valuation of Public Goods*, in ECONOMICS OF THE ENVIRONMENT 345-55 (R. Dorfman & N. Dorfman eds. 1972).

55. For example, the Environmental Protection Agency has developed proposals to create transferable rights to use air basins (common properties) for pollutant discharge; these proposals have been legislatively endorsed in the Clean Air Act, 42 U.S.C. §§ 1857-1857*l* (1976). *See* R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 587-95 (2d ed. 1978).

56. *See, e.g.*, note 45 *supra* (citing cases).

57. Pp. 117-19.

58. *Id.* Although Vining rejects the possibility of identifying discrete classes of statutory beneficiaries, he apparently assumes that standing requires some link between the value asserted by a litigant and the operation of the relevant statutory scheme. Pp. 118, 121. However, Vining fails to discuss explicitly the nature of that link.

the merits; I am not persuaded that the practice is or should be as Vining claims. True, the Supreme Court in *Sierra Club* stated that a private injury was necessary for standing but that once standing was granted a litigant could argue the "interests of the general public."[59] But I do not believe that this statement, which concerns the criteria for the courts' exercise of equitable discretion, can be read in the sweeping way that Vining supposes.[60]

The considerations that a litigant may advance on the merits should normally be no broader or narrower than those that the litigant may assert to secure standing.[61] Those considerations, however, should relate to the interests of that litigant. Once he has obtained standing, a litigant may argue any aspect of public policy relevant to the court's assessment of whether an administrator owes a duty to act on or give weight to the litigant's interest. But with rare exceptions a litigant may not argue, as a ground for an administrative or judicial ruling in his favor, duties or consideration owed to the interests of others.[62]

59. *See* Sierra Club v. Morton 405 U.S. 727, 740 n.15 (1972) ("Once . . . standing is established, the party may assert the interests of the general public in support of his claims for equitable relief.")

60. Pp. 118-19. In context, the Court's statement seems to indicate no more than that the public's interest will be taken into account in determining whether to grant a preliminary injunction against an administrative action. This, of course, is traditional doctrine. *See, e.g.*, Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 193 (4th Cir. 1977); Virginia Petroleum Jobbers' Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

61. Exceptions to this statement include instances in which a litigant bases standing on infringement of an interest protected at common law, and those rare cases when it is appropriate to allow a litigant to assert the interests of another through surrogate standing or jus tertii. *See* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425 (1974); Stewart, *supra* note 2, at 1742-47; Note, *The Environmental Impact Statement Requirement in Agency Enforcement Adjudication*, 91 HARV. L. REV. 815, 835-39 (1978) [hereinafter cited as *Environmental Impact*]. For discussion in the context of constitutional claims, see Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

Vining and I apparently agree, with Professor Albert, that the grounds for standing and the grounds that a litigant may argue on the merits should normally be the same. However, Vining would read those grounds broadly to include public values, whereas I would limit them to the statutorily protected interests of the particular litigant.

62. *See* note 61 *supra* (citing authorities). A private utility threatened by increased competition from a new TVA generating plant could not obtain standing to challenge its construction on the ground that the plant would cause local environmental damage. *See Environmental Impact*, *supra* note 61 at 836-38. Even if the private utility could obtain standing on the ground that the plant's construction assertedly violated a statute protecting TVA's competitors, *see* Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968), there is no reason why the utility should be permitted to rely upon the local environmental damage as a point in its favor on the merits. If a representative of one interest is permitted to argue for an administrative obligation based on considerations that would only be relevant to establish such an obligation with respect to some other interest, conflicts of interest in advocacy and poor decisions by agencies or reviewing courts are likely to result. This analysis explains and justifies rulings such as United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970), noted by Vining at p. 133, in which the competitor of an agricultural cooperative was denied standing *qua* consumer to challenge

Vining would abandon these limitations by permitting a litigant to obtain standing on the basis of general "public values" and to advance such values as a ground for a decision in his favor on the merits. This approach would set judicial decision utterly at large. Litigation and the parties to it would become contrivances to float public values for judges to endorse or reject for purposes unknown. We could hardly call such a process adjudication. Administrative decision is appropriately viewed—at least in the context of judicial review—as an alignment or accommodation of societal interests borne by particular classes of litigants, rather than as an unstructured quest for "legality" vel non or for "public values."

IV

Admittedly, the conclusion of this doctrinal analysis raises anew the general question posed by Professor Vining. Is the persistent tendency to view legal determinations as resolving competing interests held by individuals simply the atavistic afterglow of a private-dispute-resolving model whose day is past? Or does it reflect a conception of law that is ineluctable because we can understand "law" in no other terms? The features that we view as most deeply characteristic of a legal system—the rule of law, like treatment of like cases, due process—also seem rooted in a model of individual rights and obligations. If Vining is indeed correct in his perception of an emergent jurisprudence of public values, quite revolutionary changes may be expected.

the cooperative's conduct under the antitrust laws because of "conflicting and divided interest[s]" between the competitor and consumers, 312 F. Supp. at 321.

Support for a broader approach might be found in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), or FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). *Duke Power* stated that a sufficiently close causal nexus between government action and injury-in-fact to the plaintiff would enable the plaintiff to challenge that action's validity under any applicable law. 438 U.S. at 72-81. *Duke Power*, however, purportedly adopts this rule only for constitutional cases, *id.*, and for reasons stated in note 48 *supra* the decision must be regarded as a "sport." In *Sanders Bros.*, as I have explained elsewhere, *see* Stewart, *supra* note 2, at 1730-32, 1742-47, surrogate standing was granted when an interest protected by statute might otherwise have gone completely unrepresented. Given the variety of environmental litigating groups active today, this danger does not seriously exist with respect to environmental interests.

Vining argues that a litigant, once having gained standing, may invoke any public value in arguing the illegality of government action, subject to the apparent qualification discussed in note 58 *supra*. Yet analysis elsewhere in the book suggests that Vining might well deny the public utility in our hypothetical the right to invoke local environmental damage when opposing TVA expansion. In chapter eight, *see* pp. 124-35, Vining develops the thesis that litigants may speak for public values only when they sincerely hold such values. The utility company presumably would not meet this requirement. Allowing it to invoke environmental values would erode rather than advance public respect for such values by turning them into a nominal rationalization for obstruction based on calculations of private gain.

Vining's account of the breakdown of the common law model of standing carries conviction because his general claims are articulated and buttressed by incisive doctrinal and institutional analysis. Such analysis is largely lacking in those parts of the book which assert that "public values" is the appropriate basis for standing law. I have advanced my own view of doctrinal questions in order to suggest that current standing law could well be explained in terms of an ongoing private-law model, suitably modified to deal with the problem of collective goods in a highly regulated economy. The decisional data points are too few and too smudged either to confirm or refute decisively the public-values model or the private-dispute-resolving model, although I believe that the available evidence favors the latter. If Vining is to make his case, he must establish a methodological link between the level of doctrine and the level of underlying vision of the legal order, and explicate that link in sufficient detail to provide additional confirmation of the public values model and to indicate more concretely the form of its future evolution. This is a task of exceptional difficulty, which has recently attracted the energies of legal scholars in related fields, much of whose work was published after Vining's manuscript went to press.[63]

As I have earlier indicated, the link that Vining advances to explain the interactive development of doctrine and legal consciousness consists in shifts in judges' perceptions of the moral and social universe. But the nature of this particular link is obscure and its operation is unexplained. We are left with two realms of discourse, lawyers' doctrine and poetic invocation of the moral life, whose connection remains nearly as mysterious as Berkeley's clocks. In putting to one side distributional struggle in economics and politics, the role of institutions, the manipulation of doctrine by judges and counsel, and contemporaneous scholarly efforts in other fields of law, Vining has neglected the materials with which he might build stronger and more persuasive links in support of his thesis.

The reader must ultimately be persuaded, if at all, by the suggestive richness and insight of Vining's writing. Old or newly converted believers will be buoyed by the call to faith, discounting the need to address questions of doctrine or institutional responsibility as secondary

63. For examples of recent attempts to relate legal doctrine to underlying intellectual models, see B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977); Kennedy, *supra* note 25; *cf.* Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 YALE L.J. 90 (1977); Klare, *supra* note 25.

to the paramount task of discrediting and destroying the individualist ethic. Agnostics will be alternately bemused and enticed by Vining's affectionate and inviting irony. Disbelievers will be discomforted by his bone-cutting wit.

The evocative and ironic quality of the book and its specialized doctrinal subject may at the same time impair its accessibility: the book has the makings of a connoisseur's piece. But it would be a pity if a larger audience were not encouraged to read it. The book beckons us to put aside for a while the baggage of daily contention for a vision that intimates beneath the weary strife of factional division and doctrinal struggle a moral universe that is *luxe, calme,* even *volupté.*