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The Modern Schools of Jurisprudence and Standing to Sue the Government for Failure to Act Against a Third Party: Dissecting Allen v. Wright

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THE MODERN SCHOOLS OF JURISPRUDENCE AND STANDING TO SUE THE GOVERNMENT FOR FAILURE TO ACT AGAINST A THIRD PARTY: DISSECTING *ALLEN V. WRIGHT*

I. INTRODUCTION

In the 1984 *Allen v. Wright* decision, the Supreme Court denied standing to a nationwide class of plaintiffs seeking to enjoin the Internal Revenue Service (IRS) to enact a policy that would deny tax benefits to racially discriminatory private schools.[1] The plaintiffs sued on behalf of black children attending desegregating public schools located near the discriminatory private schools.[2] The Court noted that to have standing to sue in a federal court a party must allege an injury, a chain of causation tracing the injury to the action in question and a sufficient likelihood that the relief sought will redress the injury.[3] While the *Allen* plaintiffs alleged sufficient in-

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[1] Allen v. Wright, 468 U.S. 737, 744, 766 (1984), *aff'g* Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981), *aff'g* Wright v. Miller, 480 F. Supp. 790 (D.D.C. 1979).

[2] *Id.* at 744. The term "desegregating" denotes that the schools were in the process of undergoing desegregation.

[3] *Id.* at 751–52. The doctrine of standing requires that parties have a "case" or "controversy" within the meaning of article III of the Constitution in order for a federal court to have jurisdiction over the claim. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 107 (2d ed. 1988) [hereinafter L. TRIBE, ACL].

Under article III, § 2 of the Constitution:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be

jury, the Court found that the interposition of the defendant IRS between the plaintiffs and the discriminatory schools causing the injury prevented satisfaction of the causation and redressability elements.[4] The Court interpreted these elements of standing through the prism of the constitutional separation of powers,[5] expressing concern over judicial intervention in the tax policy and enforcement realms of the other branches of government.[6]

The *Allen* Court's denial of standing in deference to separation of powers concerns despite "serious" constitutional injury[7] represents a dilemma over the proper role of the judiciary in society. *Allen* indicates that certain injuries are beyond the scope of judicial attention due to the involvement of other branches of government and concern for the institutional position of the judiciary. This dilemma over the judiciary's role is a question of jurisprudence, the science of determining the principles underlying legal rules and guiding the resolution of conflicting norms.[8]

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made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

[4] *Allen*, 468 U.S. at 756–61.

[5] *See* U.S. CONST. art. I–III (allocating legislative power to Congress, executive power to the President and judicial power to the courts).

[6] *Allen*, 468 U.S. at 757–61. Judicial caution over granting standing to allow challenges to the policies of other branches of government has a long history. *See* Frothingham v. Mellon, 262 U.S. 447 (1923) (denying standing to taxpayers seeking to challenge governmental spending policies with which they disagreed); Warth v. Seldin, 422 U.S. 490, 499–500 (1975) (courts should not "decide abstract questions of wide public significance" where "other governmental institutions may be more competent to address the questions"); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (federal judiciary is circumscribed "to a role consistent with a system of separated powers . . . ").

A 1968 decision, however, allowed a group of taxpayers to challenge federal aid to religious schools under the first amendment, finding that standing "does not, by its own force, raise separation of powers problems . . . ." Flast v. Cohen, 392 U.S. 83, 100 (1968). A line of cases has followed this theory to grant standing where governmental actions supported third parties' discrimination against plaintiffs. *See* Coit v. Green, 404 U.S. 997 (1971), *aff'g* Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971) (tax benefits for discriminatory private schools in Mississippi); Norwood v. Harrison, 413 U.S. 455 (1973) (state textbook-lending program to discriminatory institutions); Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (city allowed segregated private schools to use desegregated public parks).

[7] *Allen*, 468 U.S. at 756 (citing Brown v. Board of Educ., 347 U.S. 483 (1954); Bob Jones Univ. v. United States, 461 U.S. 574 (1983)).

[8] BLACK'S LAW DICTIONARY 767 (5th ed. 1979). In a broad sense, jurisprudence is the

The *Allen* Court's use of separation of powers to deny standing provides a focal point for assessing three schools of jurisprudence. Judge Frank Easterbrook, an adherent to the Law and Economics school of jurisprudence, proposes that *Allen* is an example of that school's philosophy of avoiding judicial intervention into administrative agencies where the resulting regulation would be inefficient.[9] The *Allen* Court's circumscription of the judicial role in deference to the pluralistic choices of legislative decision-making is consistent with the Law and Economics school.[10]

The constitutional scholar, Professor Laurence Tribe, provides a second jurisprudential view of the *Allen* decision. Professor Tribe criticizes Judge Easterbrook's thesis, arguing that "[t]he Constitution cannot be cabined in any calculus of costs and benefits."[11] With regard to the *Allen* case, Professor Tribe argues that a cost-benefit analysis is inappropriate in deciding standing to bring an equal protection claim.[12] He maintains that values more important than efficiency are central to constitutional interpretation.[13] The preeminence in Professor Tribe's theory of public values interpreted from the Constitution is consistent with what Professor Robert Weisberg calls the New Legal Process school of jurisprudence.[14] This school advocates an "aggressive and imaginative" judicial role, antithetical to the *Allen* Court's deference to other branches of government.[15]

Justice Brennan presents a third perspective in his dissenting opinion in *Allen*, citing an article by Professor Mark Tushnet, an adherent to the Critical Legal Studies school of jurisprudence.[16]

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philosophy of defining the function, scope and role of law and legal systems in society. *See id.*

[9] Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 40 (1984) [hereinafter Easterbrook, *Foreword*]. According to Judge Easterbrook, regulation is frequently inefficient, because people substitute their conduct to circumvent the regulation, and the regulator frequently does not have the capacity to regulate these substitutions "at the margin." *Id.* at 12.

[10] *See generally* Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982) [hereinafter Posner, *Economics*]; Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975).

[11] Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 592 (1984) [hereinafter Tribe, *Constitutional Calculus*].

[12] *Id.* at 603.

[13] *See generally* Tribe, *Constitutional Calculus*, *supra* note 11.

[14] *See* Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 239 (1983).

[15] *See id.*

[16] *Allen*, 468 U.S. at 782 n.10 (Brennan, J., dissenting) (citing Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977) [hereinafter Tushnet, *The New Law of Standing*]).

Justice Brennan proposes that "the Court's standing inquiry is no more than a poor disguise for the Court's view of the merits of the underlying claims."[17] Although the adherents of Critical Legal Studies have a broad range of views, they tend to examine the law critically to determine what motivates a judge's decision and what the concept of rights truly represents.[18]

Theories of jurisprudence help answer the following questions: What is the proper allocation of power in government? Who should have access to challenge governmental decisions and policies? What is the proper forum for such challenges? What level of accountability should the Court require from different levels of government? What are rights and what, if any, is the mechanism for enforcing them? When the *Allen* Court deferred to the constitutional allocation of powers as justification for denying standing to a group plaintiff asserting constitutional rights, it raised all of these issues. The presentation of these issues, the citation of different jurisprudential authorities and the postmortem debate between Judge Easterbrook and Professor Tribe make the majority and dissenting opinions in *Allen* ideal ground for comparing theories of jurisprudence.

This Note compares the Law and Economics, New Legal Process and Critical Legal Studies schools of jurisprudence and examines their relevance to the *Allen* decision. This Note addresses the implications of the different theories of jurisprudence for both the doctrine of standing and for the realization of the ideals that constitutional rights seem to promise. Part II evaluates the *Allen* decision as an example of Law and Economics jurisprudence. Part III describes how Professor Tribe and the New Legal Process school might decide *Allen*. Part IV asks what the Critical Legal Studies school can add to this debate. In this fashion, the Note assesses the relevance of each theory's assumptions and goals to the American constitutional system.

II. Law and Economics

A. *Maximizing Society's Utility*

The Law and Economics school interprets the American legal system as a mechanism for resolving conflicts by reproducing con-

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[17] *Allen*, 468 U.S. at 782.

[18] *See, e.g.*, Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976); Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983) [hereinafter Unger, *Critical Legal Studies*].

ditions that parties would have bargained to achieve on their own.[19] When the government regulates to prohibit various means of participating in a desired activity, people will bargain and substitute to find an alternative means of participating in the activity.[20] Regulation may raise the cost of the activity but will not eliminate it, since elimination of all means of participation would be too costly.[21] Minimizing restrictions on the freedom of private actors, by contrast, promotes efficiency by keeping governmental resources away from ineffectual restrictions. Law and Economics scholars, thus, aim to use the legal system to promote efficiency by minimizing inefficient regulation.[22]

Law and Economics theorists define legal concepts and the role of the different branches of government so as to promote these goals.[23] Two pioneers of this theory, Judge Richard

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[19] *See, e.g.*, Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. L. & ECON. 201 (1971) (presenting an economic analysis to resolve the issues in Katko v. Briney, 183 N.W.2d 657 (Iowa 1971)).

[20] *See* Easterbrook, *Foreword*, *supra* note 9, at 14 (citing Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960)).

[21] *See id.*

[22] *See* Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 763–64 (1975); *see also* Easterbrook, *Foreword*, *supra* note 9, at 12 ("if legal rules can create larger gains . . . the claim from fairness becomes weaker"). The resulting protection of private choices is central to Law and Economics theory. Eskridge & Frickey, *Legislation and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 704 (1987).

Keeping government from interfering with individuals' abilities to use what capabilities they have to fulfill their wants appears to promote highly individualistic and libertarian values. Such values have deep roots in American political thought, originating with Thomas Jefferson. *See* R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 25–26 (Vintage Bks. ed. 1989). Law and Economics, thus, may draw support from those who maintain that American political rhetoric has never escaped the confines of individualism and that not even the rise of bureaucratic government in the twentieth century could extirpate this ideal. *See generally* R. HOFSTADTER, *supra*; *see also* Judis, *Herbert Croly's Promise*, THE NEW REPUBLIC, Nov. 6, 1989, at 84, 87.

Individualism, however, is not necessarily incompatible with a more affirmative governmental role. For instance, by focusing on "internal constraints on the choices of the self," government may "promot[e] . . . the conditions of effective individuality." M. PHILLIPS, THE DILEMMAS OF INDIVIDUALISM: STATUS, LIBERTY, AND AMERICAN CONSTITUTIONAL LAW 7 (1983). Society would seem to posit a role for government in occasionally constraining the liberty of some so that all may enjoy a more equal measure of liberty. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 266–78 (1977). Government may constrain an individual's liberty to prevent that individual from injuring another. *Id.* at 274. Government may also constrain liberty to effectuate the policy goals over which the community has achieved consensus *or* to prevent the community from dictating how some of its citizens should conduct their lives. *Id.* at 274–78.

[23] This "monocausal" view of the legal system bears some resemblance to the turn-of-the-century legal science movement, which tried to discern scientific methods for deciding cases according to immutable principles. *See* R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN

Posner[24] and Professor William Landes, advance a market theory of legislation. Under this theory, interest groups bidding on favorable legislation constitute the demand component of the market, while legislators' pursuit of potential votes, contributions and other benefits constitutes the supply component.[25] To incorporate an issue into its platform, an interest group must surpass the costs of organization.[26] If people feel that an issue does not affect them directly, they will have less incentive to organize and more incentive to let others resolve the issue.[27] When an interest group pursues a generalized, broad-based policy, not only will the policy affect more opposing groups, but other groups with a positive but tangential interest will attempt to reap benefits from the policy initiative without incurring the costs of joining a coalition—"free riding."[28]

Under this theoretical structure, small, narrowly-defined groups, often single-issue groups, will be most effective at achieving their policy goals.[29] Public policy will include the occasional compromise between diverse groups,[30] but will consist primarily of legislation embodying narrow gains by small groups.[31] These gains and occasional compromises collectively tend toward a maximization of overall societal wealth.[32] Public policy is the equivalent of the equilibria arising from various political struggles.[33]

AMERICA FROM THE 1850s TO THE 1980s 272 (1983); G. GILMORE, THE AGES OF AMERICAN LAW 62 (1977); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 535 (1973). By taking the received common law and its arbitrary allocation of power as its normative base for developing the law, the legal science theory perpetuated those groups favored by the received order. R. STEVENS, *supra*, at 55. The Law and Economics school similarly favors the status quo by taking as its normative base human wants as measured by actions that are limited by the existing distribution of wealth and power. *See* Leff, *Commentary—Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 462–63 (1974).

[24] Professors Eskridge and Frickey attribute most of the responsibility for the development of a legal theory based on economics to Judge Posner. *See* Eskridge & Frickey, *supra* note 22, at 703.

[25] *See* Landes & Posner, *supra* note 10, at 877–79; Eskridge & Frickey, *supra* note 22, at 705. The Law and Economics school assumes that all decision-making units are selfish maximizers of wealth competing for the greatest gains. *See* Eskridge & Frickey, *supra* note 22, at 703.

[26] Posner, *Economics*, *supra* note 10, at 266.

[27] *Id.*

[28] Eskridge & Frickey, *supra* note 22, at 705; Posner, *Economics*, *supra* note 10, at 266; Landes & Posner, *supra* note 10, at 877.

[29] Posner, *Economics*, *supra* note 10, at 266.

[30] *See* Eskridge & Frickey, *supra* note 22, at 705–06.

[31] The Law and Economics school theorists assert that public policy tends not to incorporate the public interest with its unpopular demands on societal wealth. Posner, *Economics*, *supra* note 10, at 266.

[32] Posner, *Economics*, *supra* note 10, at 266.

[33] Eskridge & Frickey, *supra* note 22, at 703.

Public policy is, thus, ephemeral as well as non-rational and non-purposive.[34]

Because the legislature is an elected body, Judge Easterbrook describes it as a "mechanism for aggregating preferences."[35] The Law and Economics school posits the judiciary, by contrast, as a counter-majoritarian force that should defer to the political compromises of the legislature.[36] The value of the judiciary lies in its ability to preserve the legislature's political compromises and, thus, to promote stability and continuity.[37] Judge Easterbrook poses as a corollary that courts should interpret legislation narrowly, as contracts between special interests, being careful not to infer rights of action.[38] He asserts that courts should not "spur the other branches on to ever greater reconstitutions of society."[39]

B. *Constitutional Interpretation*

Judge Posner and Professor Landes view the Constitution as having two purposes: (1) it establishes the procedures for conduct-

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[34] *Id.* In the Law and Economics model, it is more appropriate for courts to conceive of legislation as a product of legislators' diverse motives rather than a single legislative intent. Posner, *Economics*, *supra* note 10, at 272, 275. By minimizing the purpose of a law, courts will, thus, be poised to interpret it narrowly so as to refrain from interfering with private preferences. *See* Nagel & Nagel, *Theory of Choice*, THE NEW REPUBLIC, July 23, 1990, at 15, 15–16.

[35] Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622, 627 (1985) [hereinafter Easterbrook, *Method, Result, and Authority*].

[36] Eskridge & Frickey, *supra* note 22, at 707. The nomination and confirmation process, however, results in some political control over the shaping of the judiciary. *See generally* L. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY (1985). Should the Supreme Court decide an area of law so as to undermine its popular legitimacy, Congress can, moreover, excise that area from the Court's jurisdiction. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 128 (1982). Article III of the Constitution provides that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

[37] Landes & Posner, *supra* note 10, at 878. The Law and Economics school claims that if courts do not adhere to this narrow role, they will lose their value and "the imposition by the current legislature of coercive measures that impair the courts' effective functioning will not be perceived as highly costly, and such measures will therefore be imposed more often." *Id.* at 885.

[38] Easterbrook, *Foreword*, *supra* note 9, at 18.

[39] Easterbrook, *Method, Result, and Authority*, *supra* note 35, at 627. Judge Easterbrook cites the arguments for judicial review in *The Federalist* and *Marbury v. Madison* as standing for the proposition that the judiciary's only function is to act as a brake on the other branches of government. *Id.* (citing THE FEDERALIST NOS. 78, 79 (A. Hamilton); 5 U.S. (1 Cranch) 137 (1803)).

ing interest group politics; and (2) it provides a special, durable type of legislation to those groups able to incur the substantial costs involved in obtaining passage of a constitutional provision.[40] A constitutional right is merely a device for "imparting durability to an initial legislative judgment protecting some group."[41] Tension arises out of the contrast between the durable nature of this legislative bargain and both the institutional concern for a narrow judicial role and the desire to minimize inefficient legal regulation.

Since large groups encounter significant difficulty in organizing to obtain favorable legislation,[42] they stand to benefit the most from obtaining passage of a constitutional amendment.[43] The durable gains in a constitutional amendment relieve the large group of having to reorganize periodically to protect short-term legislative gains.[44] This argument interprets the Constitution as protecting any groups powerful enough to procure constitutional protection for their interests.[45] Because the coalition that passes a constitutional amendment does not last indefinitely, Judge Posner argues that where constitutional rights are not clear, courts should construe them narrowly so as not to interfere with the preferences of the current majority.[46]

Law and Economics theorists, drawing on a conservative tradition, look to the Constitution's division of powers to justify a narrow role for the judiciary. Supreme Court Justice Antonin Scalia and former circuit court Judge Robert Bork argue for limiting judicial intrusions into the prerogatives of the other branches of government. They assert that separation of powers concepts should play a significant role in deciding whether parties have standing to bring suits challenging other branches of government.[47] Justice

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[40] Landes & Posner, *supra* note 10, at 892.

[41] *Id.*

[42] *See supra* notes 25–29 and accompanying text.

[43] Landes & Posner, *supra* note 10, at 893.

[44] *See id.*

[45] *Id.*

[46] Posner, *Economics*, *supra* note 10, at 282–85. This theory would not read the Constitution so as to protect disenfranchised minorities that cannot attain the political strength necessary to achieve constitutional protection. Landes & Posner, *supra* note 10, at 893.

[47] *See, e.g.*, Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 881 (1983) ("standing is a crucial and inseparable element of" separation of powers); Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting) (because of separation of powers principles, standing should be denied to individual members of Congress suing the Executive Clerk of the White House, seeking an injunction against the President's use of the pocket veto), *vacated*, 479 U.S. 361 (1987).

Scalia maintains that such suits will convert the courts into "political forums."[48] Similarly, in his dissenting opinion in *Barnes v. Kline*, Judge Bork stated that the only role for courts is to resolve disputes and that the "case" or "controversy" requirement of article III is not just a "convenient vehicle" for allowing courts to correct governmental actions inconsistent with the Constitution.[49] This approach to standing prevents losers in the political process from using the courts to overturn the legislature's bargains.

For Law and Economics theorists, these article III concerns serve as a doctrinal basis for broader, economic concerns over the judiciary's institutional functioning. Judge Easterbrook argues that the inefficiency of judicial regulation should be a factor in the Court's standing calculus. He believes that the Court should restrain itself from making economically inefficient decisions that would intrude into the realms of other branches.[50] Because of a burgeoning caseload, the Supreme Court must expand its rule-making function to accommodate the cases it cannot now decide.[51] The Court, continues Judge Easterbrook, makes rules in an attempt to prevent future disputes by "seek[ing] to induce people to become informed or change their positions."[52] To prevent conduct that would give rise to the future dispute, the Court must foresee all of the instances in which people might bargain and substitute to find alternative ways of engaging in the activity.[53] The Court must incur enormous costs in regulating each of these instances of possible bargaining and substitution.[54] The Law and Economics school will hesitate to enforce constitutional rights of minorities that are unclear in order to avoid this costly process. Where enforcement of these rights may involve the spheres of other branches of government, the Law and Economics school will favor denying standing. The principle of deference to durable bargains struck in constitutional amendments, thus, collides with these concerns for efficiency and for the institutional role of the judiciary.

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[48] Scalia, *supra* note 47, at 892.

[49] 759 F.2d at 52 (Bork, J., dissenting). Under article III's "case" or "controversy" requirement, for a case to be justiciable, there must be an adversarial dispute that the judiciary is capable of resolving without intruding on the prerogatives of the other branches of government. L. TRIBE, ACL, *supra* note 3, at 67. *See* U.S. CONST. art. III, § 2.

[50] *See generally* Easterbrook, *Foreword*, *supra* note 9, at 40–42.

[51] *Id.* at 6.

[52] *Id.* at 5.

[53] *Id.* at 14 (citing Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960)).

[54] *See id.*

C. *Dispute-Resolution, Deference, Efficiency and Denial of Standing in* Allen v. Wright

The *Allen* decision displays several facets of the Law and Economics model.[55] These facets include concern for the institutional role of the judiciary,[56] deference to the public policy equilibrium achieved in the political arena[57] and an implicit awareness of the costs of judicial intervention.[58] The Court in *Allen* emphasized the role of separation of powers in the doctrine of standing, thereby limiting the potential for judicial transgressions with regard to these issues.[59]

The plaintiffs in *Allen*, a nationwide class, neither sought to have their children admitted to racially discriminatory private schools nor alleged denial of admission to such schools.[60] Rather, they contended that the IRS's conferral of tax advantages to these schools resulted in a direct injury to them as well as "injury to their children's opportunity to receive a desegregated education."[61] The

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[55] *See, e.g., id.* at 40.

[56] *Cf.* Landes & Posner, *supra* note 10, at 879; Scalia, *supra* note 47, at 892; Barnes v. Kline, 759 F.2d 21, 52 (D.C. Cir. 1985) (Bork, J., dissenting).

[57] *Cf.* Eskridge & Frickey, *supra* note 22, at 703.

[58] Easterbrook, *Foreword*, *supra* note 9, at 41.

[59] 468 U.S. at 746.

[60] *Id.*

[61] *Id.* The plaintiffs in *Allen* sought a stricter and nationwide version of a previous injunction against the IRS for the state of Mississippi. Wright v. Regan, 656 F.2d 820, 825 (D.C. Cir. 1981), *aff'd sub nom.* Allen v. Wright, 468 U.S. 737 (1984) (referring to injunction issued in Green v. Connally, 330 F. Supp. 1150, 1179 (D.D.C. 1971)). The Internal Revenue Code provides private schools with an exemption from taxation. I.R.C. §§ 501(a), 501(c)(3) (1990). The Code also provides deductions for all gifts to private schools. I.R.C. §§ 170(a)(1), 170(c)(2)(B) (1990). Following the *Green* injunction, the IRS promulgated guidelines to determine if a private school is discriminatory and, thus, ineligible for the exemption and deductions. Wright v. Regan, 656 F.2d 820, 824 n.7; *see* Rev. Proc. 72–54, 1972–2 C.B. 834; Rev. Proc. 75–50, 1975–2 C.B. 587. The district court consolidated *Allen* with the reopened *Green* case and then dismissed only the *Allen* case for want of standing. Wright v. Miller, 480 F. Supp. 790, 793 & n.1 (D.D.C. 1979).

The requested injunction would have barred exemptions and deductions on gifts to all private schools:

> "which have insubstantial or nonexistent minority enrollments, which are located in or serve desegregating public school districts, and which either —
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> (1) were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating;
>
> (2) have been determined in adversary judicial or administrative proceedings to be racially segregated; or
>
> (3) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems . . . ."

Allen, 468 U.S. at 747 (quoting App. 40).

IRS directly injured the plaintiffs by conferring benefits on racially discriminatory schools, "denigrat[ing] the standing and dignity of black Americans in their home communities."[62] The conferral of tax advantages also injured the plaintiffs by "enhancing the degree to which discriminatory private schools can provide a haven for white children avoiding desegregating public schools."[63]

For the Law and Economics school, however, when a group plaintiff seeks to enforce a broad right against the government, the claim is suspect as an interest group's attempt to gain in the courts what it failed to win in the legislature.[64] Allowing such claims would impinge upon the aggregation of preferences in the legislative marketplace. Separation of powers concepts, thus, break down the nexus between the group plaintiff and the governmental defendant in evaluating the causation and redressability elements of standing.

Justice O'Connor declared that the standing doctrine "is built on . . . the idea of separation of powers,"[65] relying upon Judge Bork's concurring opinion in *Vander Jagt v. O'Neill*.[66] Judge Bork believes that the only role of the courts is to decide disputes—not "to pronounce upon the law."[67] Accordingly, a court should not

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[62] Wright v. Regan, 656 F.2d at 829 n.24.

[63] Wright v. Miller, 480 F. Supp. at 794.

[64] Thus, the Court dismissed *Allen* even though a suit for an identical injunction confined within the State of Mississippi was able to proceed. *See* Wright v. Regan, 656 F.2d at 822, 826 (explaining Green v. Miller, No. 1355–69 (D.D.C. May 5, 1971) (clarified and amended June 2, 1980)); *see also supra* note 61. Plaintiffs won the Mississippi injunction, resulting in different IRS policies in Mississippi and the rest of the United States. *See* Wright v. Regan, 656 F.2d at 826. The Court's opinion seems to express concern over the national policy implications of *Allen*. It notes that plaintiffs did not identify any discriminatory schools allegedly receiving a tax exemption, but only identified four discriminatory schools operating "under the umbrella of a tax-exempt organization." *Allen*, 468 U.S. at 758 n.23. In dissent, however, Justice Brennan argued that the plaintiffs named thirty-two discriminatory private schools receiving tax benefits, twenty of which were in desegregating public school districts. *Id.* at 775 (Brennan, J., dissenting). He wrote that even if the Court were correct, denial of standing would be inappropriate, since "the proper disposition would be to remand in order to afford the respondents an opportunity to amend their complaint." *Id.* at 775–76 n.6.

[65] *Allen*, 468 U.S. at 752.

[66] Justice O'Connor quoted from Judge Bork's appellate opinion:

> "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."

Id. at 750 (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)).

[67] Barnes v. Kline, 759 F.2d 21, 52–53 (D.C. Cir. 1985) (Bork, J., dissenting); *see supra* notes 30–32, and accompanying text.

indulge in defining the scope of legal rights if it does not confront an actual dispute between adversary parties.[68]

The *Allen* plaintiffs' claim is not judicially cognizable to a jurisprudential view holding the sole purpose of the judiciary to be the resolution of disputes between adversary individuals. Far from being a suit between two adversary individuals, *Allen* was a suit between a nationwide class of plaintiffs and a governmental agency.[69] Plaintiffs sought an injunction, not to change the conduct of the IRS toward them, but rather to change the IRS's conduct toward numerous third party school officials.[70] The Court viewed the complaint as a dispute between the plaintiffs and third parties not before the Court and as an effort to change national tax policy.[71]

Although there was sufficient allegation of injury,[72] the Court, following its separation of powers analysis, ruled that the chain of causation was too weak.[73] Despite the degree to which private schools rely on deductible charitable contributions, the Court could not link plaintiffs' alleged injuries to the tax benefit given to racially discriminatory schools.[74] The majority was concerned that finding a direct chain of causation would open the door to suits challenging the policies and programs of agencies, thereby impinging on the constitutional separation of powers.[75]

In denying standing, the Court avoided a judicial intrusion into the executive branch. It also avoided upsetting a political bargain

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[68] *Barnes*, 759 F.2d at 52. By limiting the judiciary's involvement in the creation of public policy, the doctrine of standing "cushions the clash between the Court and any given legislative majority . . . ." *Id.* at 53 (quoting A. BICKEL, THE LEAST DANGEROUS BRANCH 116 (1962)).

[69] *Allen*, 468 U.S. at 743–45.

[70] *See id.* at 759.

[71] *See id.*

[72] *Id.* at 756.

[73] *Id.* at 759.

[74] Allen v. Wright, 468 U.S. 737, 759 (1984). In his dissent, Justice Stevens found "a restatement of elementary economics" to provide a much more direct chain of causation:

> If racially discriminatory private schools lose the "cash grants" that flow from the operation of the statutes, the education they provide will become more expensive and hence less of their services will be purchased. Conversely, maintenance of these tax benefits makes an education in segregated private schools relatively more attractive, by decreasing its cost. Accordingly, without tax-exempt status, private schools will either not be competitive in terms of their cost, or have to change their admissions policies, hence reducing their competitiveness for parents seeking "a racially segregated alternative" to public schools, which is what respondents have alleged many white parents in desegregating school districts seek.

Id. at 788 (Stevens, J., dissenting).

[75] *Id.* at 759.

struck in Congress. Following the commencement of *Allen*, the IRS proposed stricter guidelines for determining whether a school is discriminatory.[76] Congress, however, responding to pressure from religious organizations,[77] specifically prohibited the funding of any IRS attempt to tighten the requirements for private schools to qualify for tax exemptions.[78] Against this background, Justice O'Connor declared that "'[a] federal court . . . is not the proper forum to press' general complaints about the way in which the government goes about its business."[79]

In reaching its conclusions, the Court relied on the type of efficiency and substitution analysis advocated by Judge Easterbrook suggesting that individuals prohibited by regulation from using a specific means to an end will simply choose another means to the same end.[80] Thus, if the goal is to curtail circumvention of the

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[76] *Allen*, 469 U.S. at 747–48 n.15 and accompanying text; *see generally Proposed IRS Revenue Procedure Affecting Tax-Exemption of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. (1979) [hereinafter *Hearings*]; 43 Fed. Reg. 37296 (1978); 44 Fed. Reg. 9451 (1979).

[77] On the pressure against new IRS guidelines, see Pine, *IRS Softens Proposal Aimed at 'Segregation Academies'*, Wash. Post, Feb. 10, 1979, at A12, col. 4; L.A. Times, Feb. 10, 1979 § 1, at 1, col. 2; Wash. Post, Sept. 7, 1979, at A23, col. 1.

[78] Treasury, Postal Service, and General Government Appropriations Act of 1980 §§ 103, 615, 93 Stat. 562, 577. Congress reinstated these restrictions for 1981. H.J. Res. 644, Pub. L. 96–536, §§ 101(a)(1), (4), 94 Stat. 3166, as amended by Supplemental Appropriations and Rescission Act of 1981, § 401, 95 Stat. 95. When the Court decided *Allen*, no spending restrictions were in force. *Allen*, 468 U.S. at 748 n.16.

[79] *Allen*, 468 U.S. at 760 (quoting Los Angeles v. Lyons, 461 U.S. 95, 112 (1983)). Economic analysis of tax grants, however, casts doubt on the claim that the government is not the real cause of the injury here. *See* S. SURREY, P. MCDANIEL, H. AULT, S. KOPPELMAN, FEDERAL INCOME TAXATION: CASES AND MATERIALS 248 (succ. ed. 1986).

> [N]ow that (a) Congress has defined special tax provisions as spending programs, (b) both Congress and the executive branch publish lists of tax expenditures, and (c) tax committees are required to identify new tax expenditures, it is difficult to see how the courts could refuse to apply direct spending tests to tax expenditure provisions.

Id. at 249. In testimony before a congressional hearing, W. Wayne Allen, the intervening defendant and chairman of one of the private school systems in dispute, stated that removal of tax benefits

> will be the demise of hundreds or maybe thousands of private schools.
>
> Private schools are heavily dependent on tax-free contributions. Our school is within this month raising $400,000 to build a new football stadium on tax deductible gifts.
>
> This would not be possible if this proposed regulation is passed.

Hearings, *supra* note 76, at 388. Justice Stevens, recognizing this direct economic nexus, wrote that the injury in *Allen* is fairly traceable to tax benefits because subsidization of an activity "increase[s] . . . the ability to engage in the activity." 468 U.S. at 786 (Stevens, J., dissenting).

[80] *See* Easterbrook, *Foreword*, *supra* note 9, at 40–41; *see also supra* notes 50–54 and accompanying text. A good example of this substitution is the "white flight" into private

attempt to desegregate public schools, removal of governmental support for private schools that aid this circumvention may result in little change as the schools seek other means of support such as higher tuition.[81] Justice O'Connor observed these "substitutions at the margin,"[82] noting that if the IRS removes favorable tax treatment, it is "speculative" as to whether any school will change its policies.[83] Even if discriminatory schools change their policies, these changes alone may not lead parents to send their children back to desegregating public schools.[84]

In addition to the traditional standing requirement of stating an effective remedy, Judge Easterbrook's proposition and Justice O'Connor's opinion, thus, may add the requirement that the remedy be efficient. The remedy requested by the *Allen* plaintiffs would be effective in terms of removing governmental support and its stamp of approval from discriminatory institutions. The remedy, however, is inefficient in that it allocates resources for an ostensible goal, ending "white flight" from desegregating public schools, the attainment of which is unlikely due to substitutions at the margin.

Judge Easterbrook justifies the use of separation of powers to deny standing in *Allen* because of the enormous reallocation of resources that would supposedly follow from a ruling for the plaintiffs.[85] He argues that a court cannot perform this reallocation

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schools to maintain segregation in education. *See, e.g.*, Jordan, *Free Ride on Tax Train Is Over for America's 'Seg Academies,'* L.A. Times, Jan. 26, 1979, § II, at 5, col. 1.

[81] Economic analysis can cut the other way as well. As tuitions rise, some students will have to return to public schools. *See supra* note 74.

[82] Easterbrook, *Foreword*, *supra* note 9, at 40.

[83] *Allen*, 468 U.S. at 758.

[84] *Id.*

[85] Judge Easterbrook writes:

> [The Court] must be prepared to determine how vigorous the enforcement will be. (The plaintiffs attacked the supposed lack of enthusiasm and dispatch at the IRS, not the IRS's articulation of the legal rule.) To control the agency's vigor, the Court must allocate resources. It might say, for example, that the IRS should transfer 200 agents from audits of drug stores to audits of private schools. It would need to impose deadlines and quotas (for instance: "review at least 10,000 cases annually, give monthly reports to the court and the plaintiffs, and justify your decisions in detail if you do not terminate the exemptions of 1,000 schools"). It might need to order the transfer of resources out of other programs.

Easterbrook, *Foreword*, *supra* note 9, at 41.

Loopholes in regulation, however, may be grounds for more thorough regulation, catching the substitutions at the margin, as Judge Easterbrook seems to recognize. *See id.* at 40. Thus, a more efficient implementation of desegregation might have no regard for such arbitrary boundaries as city-suburb and public-private. *Cf.* L. TRIBE, ACL, *supra* note 3, at 1495 (criticizing the Court's prohibition of a metropolitan interdistrict busing plan in Milliken v. Bradley, 418 U.S. 717 (1974)).

efficiently, because it cannot see the IRS's "menu" of choices as circumscribed by the budget.[86] Judge Easterbrook would, accordingly, require a chain of causation much more direct than in *Allen* to justify such drastic intervention.[87]

Justice O'Connor incorporated this argument when she cited the principle that "the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'"[88] Justice O'Connor wrote:

> When transported into the Art. III context, that principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the Laws be faithfully executed."[89]

Justice O'Connor held that the monitoring of executive action is a congressional and not a judicial function.[90] Congress's prevention of the IRS's proposed changes in its guidelines may have influenced the Court here.

The *Allen* Court held that the plaintiffs' injury—"their children's diminished ability to receive an education in a racially integrated school"—was judicially cognizable under the fourteenth amendment.[91] In spite of this injury, the Court found the constitutional system of separated powers and its implicit protection of the maximizations of political wealth made by the legislative and executive branches to be of paramount importance.[92] The decision

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[86] Easterbrook, *Foreword*, *supra* note 9, at 41–42.

[87] *Id.*

[88] *Allen*, 468 U.S. at 761 (quoting Rizzo v. Goode, 423 U.S. 362, 378–79 (1976) (quoting Sampson v. Murray, 415 U.S. 61, 83 (1974) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961)))).

[89] *Id.* at 737 (quoting U.S. CONST. art. II, § 3); *but see infra* notes 204–05 and accompanying text.

[90] *Allen*, 468 U.S. at 760 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).

[91] *Id.* at 756 (citing Brown v. Board of Educ., 347 U.S. 483 (1954); Bob Jones Univ. v. United States, 461 U.S. 574 (1983)). The Court characterized this type of injury as "one of the most serious injuries recognized in our legal system." *Id.*

[92] In *Allen*, finding causation may require adopting the perspective of the minority group, whose collective disadvantage results from a continued pattern of government-sponsored discrimination. The "monocausal" perspective of Law and Economics fails to see causation where the structures of government and society perpetuate inequities. The resulting underinclusive legal vision can promote injustice, as the feminist movement in legal thought has exposed how too often courts fail to take all relevant perspectives into account. *See, e.g.*,

displays a keen sensitivity to the institutional role of the judiciary and to the inefficiency of judicial regulation. This result coincides with the Posner-Landes conclusion that the Constitution does not "protect the powerless, unrepresented elements of society."[93]

III. Public Values and New Legal Process

A. *Substance Through Process*

Professors Robert Weisberg, William Eskridge and Philip Frickey identify a legal theory that they call "New Legal Process."[94] The New Legal Process school starts with the premise that in addition to defining structures of government, "[t]he Constitution also identifies the values that will inform and limit this governmental structure."[95] In the American constitutional system, judges have an active role in defining these public values.[96] These scholars argue that confining judges to the enforcement of procedural rights[97] would deprive the Constitution of its meaning—a meaning with an inherent substantive content.[98] The New Legal Process school rejects extreme deference to the legislature's political compromises and majoritarian decision-making.[99] Many private decisions that representative branches of government tend to voice will "perpetuate

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Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 Harv. L. Rev. 10, 16 (1987). When the judiciary continually views cases with the same perspective, the outcomes of constitutional decisions may favor status quo interests. *Id.* at 54–55.

[93] *See* Landes & Posner, *supra* note 10, at 893; *see also supra* notes 42–46 and accompanying text.

[94] Eskridge & Frickey, *supra* note 22, at 717–25; Weisberg, *supra* note 14, at 239–49. New Legal Process builds on the Legal Process school of the 1950s, which focused on statutory and administrative sources of law, tracing the process through which public policy forms and seeking rational purposes to guide the interpretation of statutes. *See* R. Stevens, *supra* note 23, at 270–71; Eskridge & Frickey, *supra* note 22, at 694–701.

[95] Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 1 (1979).

[96] Weisberg, *supra* note 14, at 241 (quoting Fiss, *supra* note 95, at 17).

[97] The original Legal Process theory of interpreting statutes outlined the process through which policies generated and limited the judicial role to ensuring compliance with proper procedures and occasional "interstitial" lawmaking. Eskridge & Frickey, *supra* note 22, at 694–701.

[98] L. Tribe, Constitutional Choices 9–20 (1985) [hereinafter, L. Tribe, Constitutional Choices]; Weisberg, *supra* note 14, at 241.

[99] Eskridge & Frickey, *supra* note 22, at 718. *See also* Fiss, *supra* note 95, at 15. Like the Law and Economics school, New Legal Process scholars rely upon the public choice critique of legislative decision-making to de-emphasize legislative intent and to lend normative support for their interpretive maxims. *See, e.g.*, L. Tribe, ACL, *supra* note 3, at 12 n.6; *see also* Nagel & Nagel, *supra* note 34, at 16.

undesirable social hierarchies" in light of the Constitution's substantive values—particularly those private decisions based on race or gender discrimination.[100]

To justify preference of substantive constitutional values over the legislature's aggregation of private preferences, New Legal Process theorists interpret the Constitution as a device by which to control factions, rather than as a means for establishing factional dominance.[101] Professor Cass Sunstein looks to James Madison's writings to support a process that promotes "deliberation and dialogue about the public good," rather than factionalism and interest group politics.[102] The New Legal Process school sees this "dialogue about the public good" as an institutional constraint on judges that outlines the judges' role in defining public values.[103] These scholars see "law as a process by which we actualize our potential . . . through . . . community discussion."[104] Through this "dialogic" process, the legal system upholds substantive values.[105]

On one level, dialogue exists between the branches of government, shaping and reshaping public values.[106] The legislature "transform[s] private preferences," identified through the political process, into statements of public policy.[107] Because the legislative

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[100] Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 440 (1987).

[101] Eskridge & Frickey, *supra* note 22, at 718; Sunstein, *supra* note 100, at 430–33.

[102] Sunstein, *supra* note 100, at 430–31 (citing THE FEDERALIST No. 10 (J. Madison)). Professor Sunstein writes that "Madison believed that politics should not consist of a series of unprincipled trade-offs among self-interested factions." *Id.* at 431.

[103] *See* Weisberg, *supra* note 14, at 241–46.

[104] Eskridge & Frickey, *supra* note 22, at 719. One objection is that the community from which New Legal Process derives the values relevant to constitutional interpretation appears to be a narrow elite. *See* Eskridge & Frickey, *supra* note 22, at 724–25.

[105] *See* Weisberg, *supra* note 14, at 239. In a similar vein, Justice Brennan refers to Thomas Jefferson's *Dialogue Between My Head & My Heart* to support a concept of judicial interpretation that balances reason with passion to guide an evolving Constitution. Brennan, *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 9 (1988) (citing T. JEFFERSON, WRITINGS 874 (M. Peterson ed. 1984). Legal historian G. Edward White argues that there is a tradition in American law of popular conceptions of natural rights propelling through the structures of government until they reach the Supreme Court, whereupon they become constitutional law. *See generally* White, *The Path of American Jurisprudence*, 124 U. PA. L. REV. 1212 (1976). Under this theory, legislatures, administrative agencies and trial courts respond to popular attitudes, and the Supreme Court eventually "constitutionalizes" these areas of nonconstitutional law, adopting the popular attitudes as constitutional values in the process. *Id.*

Originalists, who claim that the framers intended a narrow and static Constitution, oppose the derivation of such broad interpretive maxims from the framers' writings. *See, e.g.*, Berger, *Justice Brennan vs. The Constitution*, 29 B.C.L. REV. 787 (1988); R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139–67, 219–21 (1990).

[106] *See* Eskridge & Frickey, *supra* note 22, at 719.

[107] *Id.*

pronouncements may not reflect constitutional values accurately, the courts must intervene to "give our public morality an inner coherence."[108] The form of action a court takes determines how the legislature, in turn, can respond.[109]

The courts contribute to public policy by "interpret[ing] authoritative statements of law . . . in light of the underlying principles of the community."[110] Professor Tribe writes that there is a "constitutive dimension" to this process.[111] "A court not only chooses how to achieve pre-existing ends, but also affects what those ends are to be and who we are to become."[112] The public can evaluate judicial decisions according to their "contribution to the principled integrity of the community."[113]

At another level, legal dialogue takes place between a court and the parties before it.[114] A judge interprets this communication through the institutional constraints surrounding the court, deriving the public values applicable to the resolution of disputes.[115] Professor Owen Fiss asserts that the institutional constraints on the judiciary,[116] including an uncontrollable agenda, the flow of infor-

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[108] Fiss, *supra* note 95, at 13–14; *see also* Eskridge & Frickey, *supra* note 22, at 720. Judge Bork counters with the argument that regardless of deficiencies the legislature may have in aggregating individual preferences, it still performs that function better "than a majority of a committee of nine lawyers sitting in Washington." R. BORK, *supra* note 105, at 201.

[109] *See* Weisberg, *supra* note 14, at 244. A court can interpret broadly or narrowly with varying degrees of deference to legislative history; it can carry out the harsh results of a legislative action in an effort to force the legislature to respond; or it can remand to the legislature by dismissing for want of jurisdiction. *Id.* A "landscape of legal principle," which includes legislative statements, however, constrains the court's options. *Id.*

[110] Eskridge & Frickey, *supra* note 22, at 721–22. How far can the meaning of the Constitution expand under this theory? Different jurisprudential views combine to pose this challenge. Critical Legal Studies scholar Mark Tushnet cynically writes that when asked how he would decide a case, he responds that he would reach an outcome that would promote socialism and ground the language of the opinion in "some currently favored version of Grand Theory." Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981) [hereinafter Tushnet, *Dilemmas*]. Judge Bork writes that "Tushnet is at least candid about the fact that he would as a judge make a political decision and then deceive us. But also implicit in his statement is his confidence that Grand Theory can be made to reach any result. Indeed it can." R. BORK, *supra* note 105, at 214.

[111] Tribe, *Constitutional Calculus*, *supra* note 11, at 595.

[112] *Id.*

[113] Eskridge & Frickey, *supra* note 22, at 719 (citing R. DWORKIN, LAW'S EMPIRE 209–11 (1986)).

[114] *See* Weisberg, *supra* note 14, at 241–42.

[115] *See id.*; Fiss, *supra* note 95, at 13.

[116] According to Professor Fiss:

> (a) Judges are not in control of their agenda, but are compelled to confront grievances or claims they would otherwise prefer to ignore. (b) Judges do not have full control over whom they must listen to. They are bound by rules requiring them to

mation in the adversary system and the responsibility to respond to claims and justify decisions, assure a principled enunciation of public policy.[117]

Professor Bruce Ackerman focuses on parties' statements of facts as an element of the dialogue between courts and litigants.[118] Professor Ackerman argues that, given the growth of what he calls "activist government,"[119] "the lawyer must . . . develop a *structural* statement of the facts that reveals the ways an activity might be feasibly reorganized to avoid or ameliorate the *inefficiencies and injustices* [the activity] may be generating."[120] Professor Ackerman welcomes the Law and Economics school's contribution of efficiency analysis to the legal conversation, but he finds economics language incomplete without a consideration of injustices.[121] For instance, the Court's mandate in *Brown v. Board of Education II* that public schools desegregate[122] shows that efficiency does not rank as the highest priority in the American legal system.[123] *Brown II* mandates that

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listen to a broad range of persons or spokesmen. (c) Judges are compelled to speak back, to respond to the grievance or the claim, and to assume individual responsibility for that response. (d) Judges must also justify their decisions.

Id. See also Weisberg, *supra* note 14, at 242.

[117] The New Legal Process school's conception of the legal system mixes natural rights with the constraints of positivist, structured governmental processes. Eskridge & Frickey, *supra* note 22, at 725. The natural law theory of St. Thomas Aquinas held that societal rules imitate moral principles discernible from divine law. *See* M. GOLDING, PHILOSOPHY OF LAW 30–33 (1975). By contrast, the positive law theory of John Austin defines law as the commands of the sovereign, regardless of morality. *See id.* at 24–29. New Legal Process, thus, benefits from legal philosophers' positing of a natural and positive law mix. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 188–89, 199–200 (1961) (recognizing the role of morality in constitutional interpretation within a positive law legal system). Perhaps more apposite is a theory that analogizes law to a chain novel, equating new legal decisions and developments to new chapters written along the different perspectives of many authors. *See* Eskridge & Frickey, *supra* note 22, at 722; R. DWORKIN, LAW'S EMPIRE 225–75 (1986).

Practically, New Legal Process receives support from the Declaration of Independence's assertion of "unalienable Rights" (The Declaration of Independence para. 1 (U.S. 1776)) and the Constitution's structures, which define both governmental processes and individual rights. This view contrasts with Law and Economics, which tends to de-emphasize the Constitution's substantive content in deference to its allocations and procedures.

[118] Ackerman, *Foreword: Law in an Activist State*, 92 YALE L.J. 1083, 1084 (1983).

[119] The term "activist state" describes the modern form of government, spawned by the New Deal and typified by the penetration of administrative agencies into myriad facets of everyday life. *See id.* at 1083–84.

[120] *Id.* at 1089 (emphasis added).

[121] *See id.* at 1120–21.

[122] 349 U.S. 294 (1955). In *Brown II*, the Court mandated abolishment of legally enforced apartheid within public schools. *Id.* at 298.

[123] Ackerman, *supra* note 118, at 1120–21; *see also* L. TRIBE, CONSTITUTIONAL CHOICES, *supra* note 98, at 357 n.249 ("Recognition that majoritarian political processes cannot be

courts address structural, as well as individual, injustices.[124] Thus, inefficiency, injustice and structural reform are all a part of the legal vocabulary that develops public values through legal "conversations."[125]

B. *Identifying Proper Participants in the Legal Conversation*

In his writing on structural injunctions, Professor Owen Fiss notes that only non-traditional forms of litigation can remove threats to constitutional values in large scale organizations.[126] Professor Fiss argues that in school desegregation cases the real victims are a larger group than just black children.[127] Such a large group can better represent the claim than an individual, who "must be a minor hero to stand up and challenge the status quo . . . ."[128] The outcome of the litigation affects groups as a whole—not just named parties.[129]

For Professor Fiss, the standing test should focus on whether the spokesperson before the court adequately represents the group.[130] On the defendant's side of the litigation, the named party may not adequately represent all of the potentially implicated parties with differing interests.[131] To insure the fullest degree of ad-

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relied on to protect the basic rights of all citizens is at the core of modern theories of judicial review" (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938))).

[124] *See* Ackerman, *supra* note 118, at 1120–21. *Brown II* mandated a change from an educational structure promoting apartheid to a structure of desegregation. *See Brown II*, 349 U.S. 294 (1955). The injustice in *Brown* is not against a specific individual. The injustice is the government-enforced structure of apartheid, which impinges upon blacks as a group.

[125] *See* Ackerman, *supra* note 118, at 1126. Structural reform poses the problem of impinging upon the Law and Economics conception of individualism, although it does so to promote a more equal participation in liberty and, thus, perhaps an alternative conception of individualism. *See supra* note 22. In the twentieth century, however, other values may be tempering the individualism of the American character. *See* Walzer, *Socialism Then and Now*, THE NEW REPUBLIC, Nov. 6, 1989, at 75, 76 (pointing to the noncontroversial character of numerous "safety nets" of the modern administrative state as evidence of some degree of collective responsibility underpinning the American system of government); *see generally* D. REISMAN, N. GLAZER & R. DENNEY, THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER (1953) (positing the American character as having transformed with post-industrialization from "inner-directed" and individualistic to "other-directed" and concentrated on social groups); G. GILMORE, THE DEATH OF CONTRACT (1974) (tracing the gradual merger of tort and contract law, impinging greater responsibilities on individuals, which may hinder pursuit of private preferences).

[126] Fiss, *supra* note 95, at 17.

[127] *Id.* at 19.

[128] *Id.*

[129] *Id.* at 21–22.

[130] *See* Fiss, *supra* note 95, at 20.

[131] *Id.* at 25.

verseness, the judge should invite all interested and relevant parties to participate—either by joining the suit as parties or by filing amici curiae briefs.[132]

In response to concerns about whether this model would endanger or transcend the judiciary's traditional institutional role, Professor Fiss argues that although the Constitution provides a formal separation of powers between the branches of government, it neither requires this separation to be functional nor confines any branch to a single function.[133] He maintains that the Constitution does not require federal courts to adhere to a traditional dispute-resolution model.[134]

Professor Cass Sunstein explores the ways in which the rise of an administrative branch of government has created new problems of factionalism. He argues that one of the great failures of the New Deal reforms has been the exemption of administrative agencies from checks and balances.[135] Administrative agencies, largely free from control by either the President or the Congress, lack accountability both to the electorate and to the three branches of government.[136]

Although administrative agencies may declare preferences with regard to public policy, only courts have the institutional qualities necessary to inform the dialogic process that "give[s] meaning to public . . . values."[137] In this respect, the New Legal Process theory opposes Judge Easterbrook's contention that the courts should not "spur the other branches" of government to "reconstitute" society.[138]

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[132] *Id.* at 26. The New Legal Process school's focus on the problem of multiple perspectives in structural injunction cases seems appropriate given the growing diversity of American society.

[133] *See* Fiss, *supra* note 95, at 32. *But see supra* note 47.

[134] *See* Fiss, *supra* note 95, at 32. Although dispute-resolution has alternative forums such as arbitration, structural reform cases have no alternative other than the courts. *Id.* at 33. Even administrative agencies, likely alternatives, lack the institutional constraints that enable the judiciary to give meaning to constitutional values. *Id.* at 35.

[135] Sunstein, *supra* note 100, at 443. Professor Sunstein writes:

> The problem of faction . . . has played a central role in administrative law in the last two decades. The absence of either true insulation or electoral safeguards has made administrators susceptible to the influence of well-organized private groups. Findings of agency "capture" are common . . . . The ultimate concern is one of lawmaking by private groups . . . .

See id. at 448–49.

[136] *See id.*

[137] *See* Weisberg, *supra* note 14, at 240–41 (quoting Fiss, *supra* note 95, at 17); Eskridge & Frickey, *supra* note 22, at 719; Fiss, *supra* note 95, at 13.

[138] *See supra* note 39 and accompanying text; *see* Tribe, *Constitutional Calculus*, *supra* note 11, at 595.

The New Legal Process school sees the courts as providing a foundation in constitutional values for communication between the branches of government over the realization of rights.

C. Allen v. Wright: *Interrupting the Conversation*

An examination of the history of the rights at stake in *Allen* provides an excellent example of how public policies arise by different branches of government spurring each other to act, with the Supreme Court taking a prominent role as the interpreter of constitutional values. In 1954, the Supreme Court held in *Brown v. Board of Education*[139] that the equal protection clause of the fourteenth amendment forbids government-enforced segregation in public education.[140] Congress responded to the Court by declaring a policy of nondiscrimination in the Civil Rights Act of 1964.[141] Congress, however, also had declared a policy of providing tax-exempt privileges to charitable institutions, including private schools.[142] As Representative Sam Gibbons noted during the 1979 hearings on proposed revisions in the IRS's procedures, the Court reconciled these values by holding "that certain conditions must be imposed, including nondiscriminatory policies, as the price for winning tax-exempt status and the assistance it provides."[143]

In 1965, the IRS responded to judicial and legislative pronouncements of public policy by re-examining the impact of tax-exempt status on racially discriminatory private schools.[144] In 1967, the IRS announced "that racially discriminatory private schools receiving State aid were not entitled to tax-exempt status."[145] In 1971, a three-judge panel of the District of Columbia District Court in *Green v. Connally* extended this policy to preclude tax-exempt status for all racially discriminatory private schools in Mississippi.[146] That year, the IRS responded to the district court's injunction by declar-

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[139] 347 U.S. 483 (1954).

[140] *Id.* at 495.

[141] *See Hearings*, *supra* note 76, at 1 (remarks of Rep. Sam Gibbons (chairperson)).

[142] *Id.*

[143] *Id.* (general summary of the courts' response to the policy of nondiscrimination declared in the Civil Rights Act of 1964 (42 U.S.C. § 2000d (1988))).

[144] *See Hearings*, *supra* note 76, at 3 (statement of Jerome Kurtz, Commissioner of Internal Revenue) (discussing 1965 re-examination of policy).

[145] *Id.* (citing IRS News Release, August 2, 1967).

[146] 330 F. Supp. 1150, 1179 (D.D.C. 1971), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). *See Hearings*, *supra* note 76, at 4 (statement of Jerome Kurtz).

ing a general nondiscrimination policy, and, in 1972, the IRS published guidelines for private schools to follow.[147]

During the early 1970s, the Supreme Court further clarified the right to freedom from government-sponsored discrimination by granting injunctions in three cases challenging governmental assistance to racially discriminatory third parties.[148] Professor Tribe reads these cases as not requiring "a precise causal relationship" for standing.[149] He notes that the Court has cited its summary affirmance in *Green* as supporting the proposition that "[t]his Court has consistently affirmed decisions enjoining State tuition grants to students attending racially discriminatory private schools."[150] The *Green* Court treated the grant of tax-exempt status to racially discriminatory private schools as the equivalent of "a forbidden tuition grant."[151]

Professor Tribe also argues that Congress endorsed the *Green* decision by adding § 501(i) to the Internal Revenue Code.[152] This section prohibits tax-exemptions for social clubs that "discriminat[e] against any person on the basis of race, color, or religion."[153] Professor Tribe cites the Senate Report for § 501(i) as affirming that *Green* remains good law for § 501(c)(3) institutions and as attempting to bring social clubs under the same rule.[154]

In response to criticism from the U.S. Commission on Civil Rights, the IRS required private schools to adopt formally and to make public a nondiscriminatory policy in order to retain tax-exempt status.[155] The *Green* plaintiffs reopened their case, however, to challenge the efficacy of the IRS's measures and to seek an

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[147] *Hearing*, *supra* note 76, at 4 (citing Rev. Rul. 71–447, 1971–2 C.B. 230 and Rev. Proc. 72–54, 1972–2 C.B. 834).

[148] *See supra* note 6. These three cases include the Supreme Court's affirmance of Green v. Connally, 330 F. Supp. 1150, 1179 (D.D.C. 1971).

[149] Tribe, *Constitutional Calculus*, *supra* note 11, at 604 n.72 (discussing Gilmore v. City of Montgomery, 417 U.S. 556 (1974) and Norwood v. Harrison, 413 U.S. 455 (1973)).

[150] *Hearings*, *supra* note 76, at 367 (statement of Laurence H. Tribe, Professor of Law, Harvard University (quoting *Norwood*, 413 U.S. at 463)).

[151] *Id.* Each form of economic assistance provides governmental support in violation of the Constitution. According to Professor Tribe, the courts have interpreted the Constitution to prohibit "the extension of economic benefits with public funds, direct or indirect, including through the vehicle of a tax benefit, to racially discriminatory institutions, private or public." *Id.* at 366.

[152] *Id.* at 370.

[153] *Id.* (quoting I.R.C. § 501(i)).

[154] *Id.* at 371 (citing S. Rep. No. 94–1318, 1976–2 C.B. 597, 601 n.5).

[155] *Hearings*, *supra* note 76, at 4 (statement of Jerome Kurtz) (citing Rev. Proc. 75–50, 1975–2 C.B. 587).

injunction for more effective guidelines.[156] The *Allen* plaintiffs sought the same injunction on a nationwide basis.[157] The IRS Commissioner agreed that the guidelines were "ineffective,"[158] as the *Allen* plaintiffs underscored by naming thirty-two discriminatory private schools with tax-exempt status in their complaint.[159]

Up to this point, a clear policy of a right to freedom from the incidents of any governmental sponsorship of discriminatory institutions was emerging from communication between the litigants, the judiciary and the other branches of government.[160] This process, however, soon ended. Two events signaled the end. First, Congress prevented the IRS from adopting more effective guidelines.[161] Next, the Court invoked the separation of powers doctrine and denied the *Allen* plaintiffs standing.[162] These actions left the *Allen* plaintiffs without a remedy for what the Court conceded was "one of the most serious injuries recognized in our legal system."[163]

Judge Easterbrook accurately reads a cost-benefit analysis[164] into the Court's reluctance to "restructur[e] . . . the apparatus established by the Executive Branch to fulfill its legal duties."[165] Professor Tribe, however, argues that the *Brown v. Board of Education II* command to desegregate public schools accomplished much without putting "a federal judge in the principal's office."[166] In contrast

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[156] Wright v. Regan, 656 F.2d 820, 825 (D.D.C. 1981).

[157] *Id. See supra* note 61 for the text of the injunction sought.

[158] *Hearings, supra* note 76, at 5 (statement of Jerome Kurtz). According to Commissioner Kurtz, in spite of existing guidelines, "a number of private schools continue to hold tax exemption, even though they have been held by Federal courts to be racially discriminatory." *Id.*

[159] Allen v. Wright, 468 U.S. 737, 775 (1984) (Brennan, J., dissenting) (citing Complaint ¶¶ 24–27, 45, App. 26–27, 35–36).

[160] The evolution of the rights contested by the *Allen* plaintiffs, through litigation and action taken by Congress and the IRS, indicates that the dialogic approach may accurately describe the way constitutional rights come to realize their full potential in a modern world. *But see* J. PELTASON, 58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1971) (an empirical study during the early years of desegregation of the willingness and effectiveness of courts in utilizing their institutional advantages to further the development of equal protection, portraying a few successes amid many obstacles).

[161] *See supra* notes 76–78 and accompanying text.

[162] *Allen*, 468 U.S. at 761.

[163] *Id.* at 756.

[164] Easterbrook, *Foreword, supra* note 9, at 41.

[165] *Allen*, 468 U.S. at 761; *see supra* notes 80–87 and accompanying text (describing how the Court has inadequate resources to meet the costs of regulating an activity so thoroughly as to catch all behavioral substitutions at the margin).

[166] Tribe, *Constitutional Calculus, supra* note 11, at 604 (discussing *Brown II*, 349 U.S. at 294); *but see* Scales-Trent, *A Judge Shapes and Manages Institutional Reform: School Desegregation in Buffalo*, 17 N.Y.U. REV. L. & SOC. CHANGE 119 (1989) (describing the large role a judge

to the *Brown* command, which addressed thousands of school boards, the injunction sought in *Allen* would have addressed only a single agency.[167] In the New Legal Process system, placing efficiency—in this case, efficient management of a governmental agency—above all other values affronts the Constitution.[168]

Allen involved the outer boundaries of equal protection[169] and presented nationwide policy implications. It is, thus, the type of case in which Law and Economics theorists would invoke their canon of narrow interpretation in order to avoid interfering with the aggregation of private preferences by the elected branches.[170] If Congress's actions[171] did influence the Court, the New Legal Process school would object to the Court's deference to factionalism at the expense of constitutional values.

Whether the motivating factor was fear of the judiciary's inability to regulate the IRS's policy or deference to congressional control in this area, the *Allen* Court displayed a great concern for

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must play to implement desegregation successfully). On the difficulties in implementing desegregation, see generally Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983); J. LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985).

[167] Tribe, *Constitutional Calculus*, *supra* note 11, at 604. Judge Easterbrook's assumption that effective relief would require a judicial takeover of the IRS seems somewhat unrealistic. *Id.* at 603–04.

[168] *See* Ackerman, *supra* note 118, at 1120–21. Professor Ackerman writes: "Rather than serving as an *alternative* to 'distributional' judgments, 'efficiency' is just one way of talking about the distribution of costs and benefits imposed by the legal system, and an *obviously* inadequate way of making sense of our existing legal system." *Id.* (emphasis in original). The Supreme Court has stated that efficiency should not trump constitutional rights. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (noting that the equal protection clause prohibits state use of gender discrimination solely to achieve "administrative efficiency" and citing Reed v. Reed, 404 U.S. 71, 76 (1971)). In another setting, the Court's jurisprudence has suggested that the separation of powers doctrine is designed to promote inefficiency rather than efficiency, so as to prevent arbitrary exercises of power that might endanger rights and liberties. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 613–14 (1952) (Frankfurter, J., concurring) (citing Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

[169] Section 1 of the fourteenth amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[170] *See* Posner, *Economics*, *supra* note 10, at 282–85.

[171] Congress had achieved an equilibrium here when it prohibited funding of IRS proposals to tighten guidelines for determining if discrimination disqualifies schools from tax benefits. *See supra* note 78 and accompanying text. The District of Columbia District Court denied standing in deference to this political deal. *See* Wright v. Miller, 480 F. Supp. 790, 798–99 (D.D.C. 1979) (holding that congressional spending restrictions on IRS preclude judicial action). When the Court ruled on *Allen*, the congressional restrictions had expired, and the Court did not address their significance for precluding judicial relief. *See Allen*, 468 U.S. at 748 n.16.

the institutional role of the judiciary in a system of separated powers. Professor Sunstein writes that the *Allen* Court's suggestion that "probabilistic or systemic injuries created by tax deductions" are not judicially cognizable is a "misguided approach to the Constitution and the judicial role."[172] The Constitution's allocation of the duty of executing the laws to the executive branch does not authorize administrative agencies to violate constitutional rights through direct action.[173] Accordingly, administrative agencies should not be able to invoke the constitutional scheme for allocation of power to defend violations of constitutional rights through inaction.[174]

Thus, for the New Legal Process school, definition, interpretation and enforcement of constitutional values are of paramount concern.[175] In deciding *Allen*, New Legal Process scholars would trace the evolution, through the dialogic process, of a right to freedom from government-sponsored incidents of desegregation. They probably would conclude that the logical extension of this process would recognize a nexus between the plaintiffs and the IRS sufficiently tight to satisfy the causation and redressability elements of standing.

IV. Critical Legal Studies

A. *Deconstructing the Legal Order*

The Critical Legal Studies (CLS) school identifies the Law and Economics and New Legal Process schools as variants of longstanding and opposed traditions in the law.[176] Professor Duncan Kennedy, a leading "Crit," equates conservative legal thought (the current variant of which is Law and Economics) with "individualism," or a self-interested attitude opposing help from others in defining individual objectives and favoring the individual's entitlement to the fruits of that individual's efforts.[177] On the other hand, Professor Kennedy views liberal legal thought (the current variant of which is New Legal Process) as "altruism," or the preference of self-sac-

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[172] Sunstein, *supra* note 100, at 476.

[173] *Id.*

[174] *Id.*

[175] *See generally* Fiss, *supra* note 95.

[176] Eskridge & Frickey, *supra* note 22, at 711 ("The central dilemma in our constitutional system arises from the fact that on most issues the polity is committed both to majority rule and to the protection of minority rights").

[177] Kennedy, *supra* note 18, at 1713, 1713 n.74.

rifice for others and redistribution of wealth.[178] Because "there is no neutral way to draw the line between majority rule and minority rights"[179] in any given situation, jurists try to conform completely to one or the other school's utopian scheme in order to avoid making political decisions.[180]

Another leader of the CLS movement, Professor Roberto Unger, assesses traditional jurisprudence by deconstructing[181] formalist and objectivist tendencies in the law. He defines formalism as "a commitment to," and "belief in the possibility of," finding nonideological, nonpolitical and impersonal principles for deciding the law.[182] He describes objectivism as "an intelligible moral order," whereby "laws are not merely the outcome of contingent power struggles or of practical pressures lacking in rightful authority."[183] Formalism presupposes objectivism as a moral order from which jurists can derive a self-contained system of policies and justifications.[184]

Law and Economics, thus, may build its objective moral order on deference to private preferences, while New Legal Process looks to the values implicit in rights such as equal protection. From their respective moral orders, each school derives formalistic theories of how to decide cases.[185] Law and Economics orders its legal hierarchy around the market, and New Legal Process strains to find a relationship between moral values and the received legal order.[186] CLS scholars contend that judges cannot ignore the inherently value-laden choice between these competing world views that every "occasion for lawmaking" presents.[187] Judicial attempts to identify legitimate means and ends are, thus, mere "retrospective glosses on decisions that had to be reached on quite different grounds."[188]

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[178] *Id.* at 1717.

[179] Eskridge & Frickey, *supra* note 22, at 711.

[180] Kennedy, *supra* note 18, at 1722, 1766; *see also* Eskridge & Frickey, *supra* note 22, at 711.

[181] The term deconstruction implies dismantling an object that achieved its present state through a mechanical construction rather than through "organic" growth. *See* Lurie, *A Dictionary for Deconstructors*, N.Y. REV. BOOKS, Nov. 23, 1989, at 49 (discussing literary deconstructionists).

[182] Unger, *Critical Legal Studies*, *supra* note 18, at 564.

[183] *Id.* at 565.

[184] *Id.* at 565–66.

[185] *See id.* at 574.

[186] *Id.* at 574–75.

[187] Kennedy, *supra* note 18, at 1766.

[188] Unger, *Critical Legal Studies*, *supra* note 18, at 569.

Professor Unger argues that a critique of the law should derive from a theory independent of the legal system and that a formalist critique of current law is flawed in its reliance on the received legal order.[189] By critiquing legal developments based on the past body of law, Professor Unger argues that a formalist analysis amounts to "sanctification of the actual," limiting opportunities to transform the legal system.[190] Critiquing a legal system without a normative base independent from that legal system results in perpetuation of the status quo.

Proponents of individualism and altruism have each gained some victories in the political realm that the opposing interest had linked to numerous evils[191]—evils that never occurred.[192] Neither interest, however, can achieve a meaningful portion of its agenda through politics.[193] Professor Unger argues that this deadlock has its roots in an inefficient constitutional system that deflates innovative programs of their momentum by filtering them through a scheme of checks and balances and separated powers—a scheme of alleged safeguards infiltrated by factions.[194] The system of checks and balances and separated powers, however, does not prevent accumulation of power in factories, bureaucracies, offices, hospitals and schools. This accumulation insulates these institutions from accountability to democratic ideals.[195] Professor Unger proposes comparing existing institutions, structures and rights to "ideals of democracy" and working toward establishment of institutions that

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[189] *Id.* at 571.

[190] *Id.*

[191] Examples are restraints on the market system or policies favoring business instead of labor. *See* Kennedy, *supra* note 18, at 1722.

[192] *Id.*

[193] Unger, *Critical Legal Studies*, *supra* note 18, at 590–91; *see also* Kennedy, *supra* note 18, at 1722.

[194] Unger, *Critical Legal Studies*, *supra* note 18, at 590; R. UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 455 (1987) [hereinafter R. UNGER, FALSE NECESSITY]. Professor Unger states that:

> Because of the system of checks and balances, a faction bent on an ambitious program must capture more or less simultaneously the different departments of government. And the leaders of each branch of government can usually be counted on to be so jealous of the prerogatives of their offices that pride of place becomes identical with resistance to every bold plan. Indeed, the most noticeable feature of the system is to establish a rough equivalence between the transformative reach of a political project and the obstacles that the constitutional machinery sets in its way.

R. UNGER, FALSE NECESSITY, *supra*, at 455.

[195] Unger, *Critical Legal Studies*, *supra* note 18, at 589.

will allow greater experimentation and the elimination of biases from policy-making.[196]

B. *Deconstructing Equal Protection*

Critical Legal Studies scholars often criticize rules and rights as not being "natural, and necessary, and just," contrary to their presentation.[197] One critic of CLS argues that in CLS's view "[r]ights legitimize society's unfair power arrangements, acting like pressure

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[196] *Id.* at 588; R. UNGER, FALSE NECESSITY, *supra* note 194, at 455 ("a theory that wants to show all the ways in which a contingent, revisable institutional order forms the occasions and instruments of conflict and shapes assumptions about identities, interests, and possibilities"). An ultimate goal may be the replacement of separated powers with a hierarchical system whereby each branch has absolute authority over the branches below it, and each branch has priority according to the political mandate of its members and according to "how far into the social order its central constitutional responsibilities allow it to reach." R. UNGER, FALSE NECESSITY, *supra* note 194, at 456. The importance to the public of the policy issues over which an institution has jurisdiction would, thus, determine the power of that institution. Another goal may be the promotion of socialist ideals. *See* Tushnet, *Dilemmas*, *supra* note 110, at 424.

CLS, thus, contrasts the received legal order with a vision of natural justice. *See* Eskridge & Frickey, *supra* note 22, at 724; *see also supra* note 117. CLS evolved out of the spirit of the early twentieth century Realist school of jurisprudence, which exposed rules as positive, contingent and unjustified. *See* Schlegal, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 405–07 (1984). CLS's criticisms carry the powerful sting of observations of inequities and breakdowns in the American system of law and government during the 1960s. These observations relate particularly to civil rights, the Vietnam War and corruption in government. Eskridge & Frickey, *supra* note 22, at 713.

CLS should encounter major problems in gaining popular acceptance for such massive destabilization. Stephen Presser's and Jamil Zainaldin's questioning of the Realist movement is applicable here. They ask: "Could one expect a republic to be governed by laws that are inherently uncertain? Is it too much to expect a populace, or even most lawyers, to accept a legal world in which there is no one, no thing, or no idea permanently at the helm?" S. PRESSER & J. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS 771 (2nd ed. 1989). While Professor Unger answers these questions through his vision of a hierarchical governmental structure, the authoritarian specter that hierarchical government raises poses problems of its own. Professor Unger also protests that the "extreme and almost paradoxical voluntarism" required by Critical Legal Studies is not so farfetched, because its aims are in accordance with the best of liberal democratic goals inherent in western democracy. Unger, *Critical Legal Studies*, *supra* note 18, at 586.

These problems are reducible to a common objection to all theories of natural law: claims by any individual or small group to have discovered true morality are suspect. Professor Arthur Leff asks: "*who* ultimately gets to play the role of ultimately unquestionable evaluator, a role played in supernaturally based systems by God? Who among us . . . *ought* to be able to declare 'law' that *ought* to be obeyed?" Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1233 (1979) (emphasis in original).

[197] *Are Lawyers Really Necessary? Barrister Interview with Duncan Kennedy*, 14 BARRISTER 10, 12 (Fall 1977) [hereinafter *Interview*].

valves to allow only so much injustice."[198] Professor Unger offers a similar deconstruction of equal protection.

Professor Unger argues that underlying the equal protection doctrine is an individualistic view that, in most cases, "individuals can escape confinement to a disadvantaged group" without governmental assistance.[199] In the few instances where "collective inferiority" is deep enough, however, there is insufficient access to the political process to remedy oppression.[200] In these instances, equal protection prevents the government from using membership in a group as a legal category to reinforce disadvantages.[201]

Professor Unger maintains that this "underlying view" is an inaccurate portrayal of society. He argues that rigidity of class structures, misrepresentation in politics and bias prevent the political system from fulfilling its proper corrective function.[202] The instances of severe collective disadvantage, moreover, are far more widespread than perceived by the "underlying view."[203] If the judiciary were to address all of these instances, it would become embroiled in the "censorial superpolitics" of restructuring society.[204]

Professor Unger would replace the equal protection system with a system of "destabilization rights," or claims against governmental institutions to remove those institutions from "transformative conflicts."[205] In dealing with collective disadvantage, these destabilization rights would pertain to all categorizations made according to membership in groups.[206] They would operate either by invalidating laws or by "disrupt[ing] power orders in particular institutions or localized areas of social practice."[207]

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[198] Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* 22 HARV. C.R.-C.L. L. REV. 301, 303–04 (1987). Some find this attack on the legitimacy of rights disconcerting. Minority groups, in particular, claim that informal systems of order, such as the ones "Crits" tend to propose, often encourage racism and are inappropriate to minority needs. *See generally* Delgado, *supra*; Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Note, *The Schism Between Minorities and the Critical Legal Studies Movement: Requiem for a Heavyweight?*, *supra* at 137.

[199] Unger, *Critical Legal Studies*, *supra* note 18, at 606.

[200] *Id. See also* United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).

[201] Unger, *Critical Legal Studies*, *supra* note 18, at 606.

[202] *Id.* at 607–08.

[203] *See id.* at 608.

[204] *See id.* at 608–09.

[205] *Id.* at 612.

[206] Unger, *Critical Legal Studies*, *supra* note 18, at 612.

[207] *Id.* at 613.

This institutional disruption of power is an extension of the structural injunctions of the type at issue in *Allen*.[208] Professor Unger sees the judiciary as poorly suited to engage in this type of massive restructuring of society.[209] He argues that incremental reform in the current system of rights will not bring about this massive restructuring.[210]

Professor Unger, nonetheless, qualifies this dismal portrayal by writing that his vision may have exemplary value for critiquing and shaping the development of the actual equal protection doctrine.[211] Some type of device similar to the structural injunction figures prominently in Professor Unger's reconstructed society. In his scheme of hierarchy, transformation and destabilization, Professor Unger analogizes large-scale structural injunctive relief to giving priority to "the organization of government and of conflict over governmental power" in order to "provide a suitable institutional setting for every major kind of practical or imaginative activity of transformation."[212]

C. *Deconstructing Standing*

Professor Unger's willingness to proceed with a development of the law based on his vision of reconstructed society, despite some trepidation over the institutional capacities of the judiciary, suggests that Critical Legal Studies scholars would oppose the use of separation of powers considerations in the standing doctrine.[213] In light of the American tradition of judicial oversight and of the fact that

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[208] *Id.* at 614.

[209] *See id.* at 608–09.

[210] Professor Unger notes that his system of destabilization rights presupposes "far-reaching changes in the institutional organization of the state and society," and he argues that "piecemeal and partial doctrinal moves" will not accomplish these changes. *Id.* at 614.

[211] Professor Unger writes: "this seemingly daring scheme might . . . serve to guide the criticism and development of counterpart bodies of rule, principle, and conception in existing bodies of law." *Id.* CLS anticipates some of its difficulties by presenting itself as a movement to change consciousness. *Cf. Interview*, *supra* note 197, at 16 (Duncan Kennedy responding to how he would restructure law firms to eliminate their institutional injustices). Pursuing this tactic may facilitate a greater range of directions in which the legal system might grow. *See id.* at 37 (Professor Kennedy emphasizing the importance of raising consciousness). Professor Tushnet argues that jurisprudential theories only matter insofar as they help "define[] the limits of . . . political discussion[]," which he contends are the limits within which judges operate. Tushnet, *Does Constitutional Theory Matter?*, 65 TEX. L. REV. 777, 786–87 (1987).

[212] Unger, *Critical Legal Studies*, *supra* note 18, at 592–93.

[213] Tushnet, *The New Law of Standing*, *supra* note 16, at 694.

the powers of government are not truly separate in practice, it is questionable that separation of powers concerns should play a decisive role in the issue of standing.[214] In this vein, Professor Mark Tushnet asks why the law of standing should assume that judicial inquiry may offend coordinate branches of government when the political question doctrine initially should prevent the judiciary from invading inappropriate realms.[215]

Professor Tushnet's point addresses the question of what purpose the standing doctrine should serve. Standing is a formality—an arbitrary tool for identifying those activities over which a court may or may not have jurisdiction.[216] Judges can apply such formalities as standards—searching for the reason behind the doctrine as the *sine qua non* for jurisdiction—or as general rules—searching for conformity to arbitrary qualifications as the *sine qua non* for jurisdiction.[217] A choice between either method is an inherently political choice between two competing world-views.[218] Standing, perhaps like all legal formalities, determines the ability to assert rights against governmental power. Consequently, courts should look for the reason behind the standing doctrine rather than for conformity to qualifications in order to further the CLS goal of destabilizing institutional structures.

Professor Tushnet asserts that the Court has not looked for the reasons behind the standing doctrine, and he criticizes the standing doctrine as a set of amorphous rules that have enabled the Court to conceal decisions on the merits.[219] Professor Tushnet identifies

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[214] *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307 (1976).

[215] Tushnet, *The New Law of Standing*, *supra* note 16, at 694. Under the political question doctrine, courts tend to decline to rule on issues that "the Constitution . . . has committed . . . to . . . another . . . agency of government" and that would undermine judicial authority because of their political nature or on issues whose political nature would otherwise interfere with the functioning of the courts. L. TRIBE, ACL, *supra* note 3, at 96.

[216] *Cf.* Kennedy, *supra* note 18, at 1691–92 (defining formalities with regard to private law).

[217] *Cf. id.* at 1697–1701.

[218] *See id.* at 1702, 1705.

[219] Tushnet, *The New Law of Standing*, *supra* note 16, at 663; Tushnet, *The "Case or Controversy" Controversy—The Sociology of Art. III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1705 (1980) [hereinafter Tushnet, *"Case or Controversy"*]. "Crits," however, have no monopoly on examining legal doctrine cynically to determine what really motivates courts. Professor Tribe, for instance, reaches the same conclusion as Professor Tushnet about the Court's unprincipled approach to the standing doctrine. *See* L. TRIBE, CONSTITUTIONAL CHOICES, *supra* note 98, at 100.

the goal of "concrete adversity" as the purpose of standing and proposes stripping the standing doctrine of all its elements except for his version of causation.[220] This causation test would require "that the plaintiff have a personal stake in the action sufficient to ensure a concrete and adversarial presentation."[221] Often, auxiliary devices such as experts or amici curiae briefs can help satisfy this requirement.[222] In this view, separation of powers is extraneous to a causation analysis seeking to find the adverseness necessary to the proper application of the standing doctrine.[223]

D. Allen v. Wright *and Impediments to Institutional Restructuring*

The *Allen* Court used separation of powers to find causation too attenuated to allow standing where a group of plaintiffs asserted a right against an insulated governmental agency.[224] Allowing the plaintiffs to bring their claim, however, would have facilitated reorganization of government so as to conform better to democratic ideals through the resolution of conflict.[225] Separation of powers considerations and the Court's causation test are precisely the types of institutional biases and impediments to change that CLS aims to eliminate.[226] These biases and impediments contradict both the advances in desegregation since *Brown*[227] and the IRS Commissioner's attempt to adopt guidelines substantially similar to those requested by the *Allen* plaintiffs.[228]

Perhaps most important to the CLS school's efforts to transform the legal order is a clear elaboration of the issues.[229] This clarity is necessary to determine what structures of government are responsible for the injury and whether less biased decision-making

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[220] *See* Tushnet, "*Case or Controversy*," *supra* note 219, at 1706 (conditions necessary to create "concrete adversity" would supply the requisite causation for standing).

[221] *Id.*

[222] *Id.* at 1716. Note the similarity to New Legal Process theory. *See supra* notes 130–32 and accompanying text.

[223] Tushnet, *The New Law of Standing*, *supra* note 16, at 693–95. On the manipulability of the causation standard, see L. TRIBE, ACL, *supra* note 3, at 130.

[224] *See Allen*, 468 U.S. at 761.

[225] *Cf.* Unger, *Critical Legal Studies*, *supra* note 18, at 592.

[226] *See id.* at 590–92.

[227] *Hearings*, *supra* note 76, at 3–6 (statement of Jerome Kurtz).

[228] *Id.* at 5. Congress's prohibition of the IRS proposals, by contrast, is an effort to insulate an agency from transformative conflict and democratic forces. *Cf.* Unger, *Critical Legal Studies*, *supra* note 18, at 612.

[229] *See* Tushnet, "*Case or Controversy*," *supra* note 219, at 1726.

might yield a result closer in conformity to democratic principles.[230] Deciding a case based on a formality, thus, diverts attention away from the injury at stake.

Concealing decisions on the merits behind the rubric of standing likewise increases the difficulty of identifying the nature and scope of the rights at stake.[231] Professor Gene Nichol, a commentator on the standing doctrine, describes the *Allen* standing decision as equivalent to a decision on the merits because of the high standard of proof needed to prove such exact causation.[232] Given the development of the right to freedom from the incidents of government-sponsored discrimination,[233] the *Allen* plaintiffs would surely have the requisite "adversity" to pass Professor Tushnet's standing test.[234]

Another aspect of the *Allen* case that tends both to obscure the rights in question and to obstruct judicial redress lies in the nature of the challenged action. Analysis by tax experts suggests that tax benefits from exemptions or deductions promoting activities or interests are expenditures and that courts should treat these benefits like direct congressional spending programs.[235] The channeling of

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[230] *See generally* Unger, *Critical Legal Studies*, *supra* note 18, at 580.

[231] *See* Tushnet, *"Case or Controversy,"* *supra* note 219, at 1726.

[232] Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 640 n.27 (1985). Professor Nichol writes:

> A strict causation standard is particularly troublesome in cases where the causation issue closely approximates the claim on the merits . . . . The crucial question on the merits of the *Allen* claim was whether the government created a subsidy that in fact encouraged white students to leave the public schools. Under the majority's application of the traceability requirement, the connection between governmental action and the enrollment of white students in discriminatory private schools must be alleged in such a specific manner that there could be no speculation as to its truth. As a result, the plaintiffs were required to prove their case in the complaint without benefit of discovery or trial.

Id. (citations omitted).

Justice Brennan's dissent in *Allen* displays an awareness of how the Court's standing analysis hides decisions affecting substantive rights behind the smokescreen of formalities. Justice Brennan cites Professor Tushnet for the proposition that "the causation component of the Court's standing inquiry is no more than a poor disguise for the Court's view of the merits of the underlying claims." 468 U.S. at 782 & n.10 (Brennan, J., dissenting) (citing Tushnet, *The New Law of Standing*, *supra* note 16, at 663). Thus, Critical Legal Studies may be influencing at least some members of the judiciary to take a more critical perspective on the law.

[233] *See supra* note 6 (discussing cases construing standing doctrine liberally to allow plaintiffs to challenge governmental support of discriminatory institutions).

[234] *See* Tushnet, *"Case or Controversy,"* *supra* note 219, at 1706.

[235] *See supra* note 79.

governmental action through administrative agencies and bureaucracies effectively insulates that action and prevents analysis of that action in comparison to the ideals of a democratic system.[236] In *Allen*, the IRS could not even reform itself of its own will since Congress blocked the Commissioner's proposed guidelines.[237]

The CLS analysis shows how the Court may keep constitutional injuries from reaching judicial redress when institutional barriers harbor discrimination. Reading separation of powers concerns into causation analysis, as extra formalities to hurdle, diverts attention away from the substantive equal protection right at stake. Thus, although equal protection promotes an aura of fairness, in fact, equal protection failed to provide the *Allen* plaintiffs relief from a political system that reinforced private discrimination.[238]

V. Conclusion: The Relevance of Jurisprudence

Separation of powers questions determine a government's stability and its amenability to change. Separation of powers is central to a jurisprudential view that supports limiting the ability of courts to interfere with the aggregation of private preferences by the elected branches of government. Judge Easterbrook's explanation of *Allen* is compelling in light of the importance of separation of powers to the Law and Economics theory and may demonstrate an increasing concern of the Court that remedying collective disadvantage should not impinge upon the structures for aggregating and expressing individualistic choices.

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[236] *See* Unger, *Critical Legal Studies*, *supra* note 18, at 589.

[237] *See supra* note 78 and accompanying text. Congress's action may show that agencies are not insulated from oversight by the political branches. The IRS proposals, however, were in response to a transformative conflict regarding rights that exist as a response to the political system's failure to address collective disadvantage. *See* Unger, *Critical Legal Studies*, *supra* note 18, at 606; *see also* United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938). Therefore, under the CLS scheme, it would be improper for a political branch to strip an agency of its ability to respond to this type of conflict.

[238] The same House of Representatives that barred the IRS from reforming its procedures for revoking tax benefits for discriminatory schools also voted within twenty-four hours to ban the Justice Department from involvement in controversies surrounding school busing. Wash. Post, June 14, 1979, at A4, col. 1. The IRS proposals in response to *Allen* prompted 100,000 protest letters—the most complaints in its history. L.A. Times, Feb. 10, 1979, § I, at 1, col. 2. In response, the IRS modified these proposals. *Id.* After a protracted battle in Congress and in the courts, the IRS reversed its policy, deciding that violations of public policies such as discrimination would no longer serve as a basis for revoking tax benefits. *Legislation to Deny Tax Exemption to Racially Discriminatory Private Schools: Hearings on S. 2024 Before the Senate Finance Comm.*, 97th Cong., 2d Sess. 13 (1982).

Regardless of the merits of the Law and Economics theory's ordering of rights, Judge Easterbrook's substitution-at-the-margin theory demonstrates the difficulties of judicial regulation of agencies. This theory is also useful in showing the enormous entrenchment of institutionalized collective disadvantage in American society. Institutions such as the IRS, which provide tangible support to other discriminating institutions, are resistant to, if not immune from, change.

Critical Legal Studies, however, demonstrates that the nature of equal protection calls for some destabilization of the existing order. New Legal Process demonstrates that redress of constitutional injuries should not take a subordinate priority to efficiency. For now, structural injunctions of the type sought in *Allen* hold the most promise for redressing institutional violations of equal protection. The inability of the *Allen* plaintiffs to end the flow of tax benefits to discriminatory private schools, however, supports the CLS critique of rights that give the impression of justice, but really serve as smokescreens for society's refusal to address structural problems.

The New Legal Process focus on incorporating all relevant perspectives into legal decisions holds great promise for developing law that an increasingly diverse society may see as fair from its many diverse perspectives. CLS similarly focuses on the need for new perspectives in assessing the law by proposing criticism of legal rules based on democratic ideals instead of on the received legal order. As the involvement of diverse perspectives broadens and the judiciary's tendency to destabilize other branches of government grows, however, the Law and Economics school's criticisms of the judiciary's institutional capacities will grow increasingly relevant.

Despite the relevance of the Law and Economics institutional criticisms to the future growth of the judiciary, the past evolution of the right of minorities to freedom from government-sponsored discrimination and obstruction of desegregation demonstrates the New Legal Process dialogic theory in action. Historically, rights do evolve and take on new meaning. This explanation, however, may really be nothing more than what Critical Legal Studies condemns as "sanctification of the actual."[239] One reason for this condemnation may be the existence of cases such as *Allen*, where dialogue comes

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[239] Unger, *Critical Legal Studies*, *supra* note 18, at 571.

to an end. The rise of individualistic conservatism as the ideological acid test for judicial appointments[240] indicates that sanctifying the past evolution of rights may not prevent Law and Economics and like-minded theorists who gain judicial appointments from silencing dialogue over further development of those rights.

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[240] On the Reagan-Bush judicial ideology and its impact on the courts, see Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767, 767–69 (1987); *The Reagan Legacy*, Nat'l L.J., Apr. 18, 1988, at 12, col. 1; Strausser & Coyle, *How Much Influence Will Far Right Wield?*, Nat'l L.J., Nov. 21, 1988, at 3, col. 2.