Michigan Law Review

Volume 87 | Issue 3

1988

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Recommended Citation

Heidi L. Feldman, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733 (1988).

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NOTES

Divided We Fall: Associational Standing and Collective Interest

To invoke the jurisdiction of the federal courts, an individual plaintiff must have suffered a legally cognizable injury.¹ In the case of a plaintiff that is an association, rather than a single individual, current doctrine defines a legally cognizable injury in two ways. Standing will be accorded to an association if (1) some or all of the association's members have suffered individual injury, or (2) the association, likened to a single person, has suffered an injury comparable to one to which an individual could be vulnerable.² Each of these approaches reduces the interest the association seeks to protect to an interest that can be construed individualistically, or atomistically.³ Such a conception interprets both interests and persons in a particular way. First, legally cognizable interests are located within and defined with reference to individual persons. Second, these persons — whether they be actual single human agents or other entities fictionalized as such — are regarded as irrevocably distinct from one another, the bearers of private, competing concerns.⁴

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1. *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 107, 111, 124-29, 145-47 (2d ed. 1988).

2. For a full discussion of current associational standing doctrine, see *infra* Part I.

3. The terms "atomistic" and "atomistically" refer to a conception of persons and their interests that portrays persons as isolated "atoms." On this view, persons are like isolated particles, perhaps able to co-exist successfully if external conditions permit, but never able to achieve any unity or solidarity. See C. TAYLOR, *Atomism*, in 2 *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 187 (1985).

4. In well-known standing cases of the 1960s and 1970s, courts relying on this model denied standing to the individual plaintiffs who sued as citizens because their injuries were not distinct from the harm suffered by other citizens. See *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208 (1974) (citizen alleged violation of the incompatibility clause because some members of Congress also held positions in military reserves); *United States v. Richardson*, 418 U.S. 166 (1974) (taxpayer alleged violation of article I because the public budget of the CIA was not itemized, an omission of "statement and accounting"). The taxpayer and citizen plaintiffs in these cases argued that as individuals whom the law regards as taxpayers or citizens, they possessed specific interests that the government injured. The Supreme Court, however, found it rather easy to reject this line of reasoning because the Court has traditionally viewed the judiciary as the arbiter of disputes between the claims of private individual persons. See *Richardson*, 418 U.S. at 174-75, 179 (recommending that the legislature provide the forum for taxpayers and citizens to argue their concerns against the government).

The sort of argument underlying *Schlesinger* and *Richardson* assumes that the property of having suffered a distinct injury supposedly separates a litigant from the rest of the populace, and concludes that without a distinct injury a prospective litigant may not invoke the jurisdiction of a federal court. See generally J. VINING, *LEGAL IDENTITY* 145 (1978) (explaining the rationale behind equating injury and unique identity). Working from the premise that a personal injury distinguishes a litigant from the general population, it follows that a citizen or taxpayer cannot invoke standing based on a claim staked on taxpayer or citizen identity. In fact, asserting the

Unfortunately for plaintiff-associations, many interests adopted by associations do not fit this atomistic model. For example, interests in a clean environment or an ongoing system of unemployment benefits express social or public concerns that do not reduce easily to the interest of any one person.⁵ Despite the acknowledged importance of such concerns,⁶ current standing doctrine denies them judicial protection. Associations often seek to redress injuries to interests that can only be understood nonatomistically, yet current associational standing retains an allegiance to the individualistic model of interest. This prevents courts from redressing an injury to any interest best modelled as a collective one. Often, such interests take shape just because a group of people form an association to share a joint concern. Alone, no one member embodies the interest at stake, but in banding together all of the members create a vehicle that does possess a distinct, potentially vulnerable interest. The association serves as such a vehicle not because it is like any single individual — no single individual bears the association's interest — but specifically because it is *unlike* an individual.⁷

Although courts acknowledge the existence and advantages of association, the lack of a coherently articulated conception of collective interest prevents realization of the benefits of association within the legal system. The tension in the judicial system between acknowledging these benefits and sticking to an atomistic model of interest manifests itself in inconsistent grants of associational standing. Even when faced with interests that the Supreme Court has articulated as legitimate for associations to represent, some courts have relied on the atomistic model of interest to deny associational standing.⁸ In the end, current doctrine weakens the ability of associations to litigate ef-

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interest of a taxpayer or citizen presupposes that the rest of the populace shares the interest in question. Since all other adults are taxpayers and/or citizens, a claim based on these identities serves only to demarcate the taxpayers or citizenry from the government, not from one another. Thus, this sort of argument would deny standing to taxpayer-plaintiffs and to citizen-plaintiffs.

This argument, however, contains an odd feature. The government itself does not seem to be the sort of atomistic individual the Court required the plaintiffs in these cases to be. "The government" includes people who are citizens and taxpayers, but enjoys a legal identity of its own. By accepting the government as a litigant, courts already acknowledge a potential plaintiff whose injuries do not demarcate it as a single, isolated agent, comparable to a single human being. The government itself provides a paradigm of an entity that cannot be construed atomistically.

5. For discussion of the inapplicability of the atomistic interpretation to such interests, see *infra* Part I and notes 69-77 and accompanying text.

6. See, e.g., *UAW v. Brock*, 477 U.S. 274, 290 (1986); Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 721 (1987) (recognizing the impact associational standing has upon the availability of protection for certain public interests); see also *Sierra Club v. Morton*, 405 U.S. 727, 741-55 (1972) (Douglas, J., dissenting); 405 U.S. at 755-60 (Blackmun, J., dissenting), *infra* note 20.

7. See *infra* Part II.A.

8. See *infra* Part I.B; see also *National Maritime Union v. Commander, Military Sealift Command*, 824 F.2d 1228 (D.C. Cir. 1987); *Associated Gen. Contractors v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979).

factively by forcing them to filter their claims through the traditional, atomistic model of interest. Some legitimate associational claims, however, cannot survive this process. Real collective interests worthy of judicial protection fall by the wayside for want of a framework to accommodate them.

This Note asserts that associations merit standing when they seek to litigate collective interests they reasonably claim as theirs. Part I of this Note examines the state of judicial doctrine on associational standing, and illustrates how current doctrine hampers associations by refusing to recognize, and thus protect, interests that fit naturally with those the Supreme Court has regarded as associational. Part II reworks the concept of associational standing by formalizing collective interest and arguing for the association as the appropriate legal representative of such interest. Finally, Part III addresses the separation of powers concerns raised by a reworked concept of associational standing, and concludes that the suggested concept contributes to the uniqueness of the judiciary's role rather than encroaching on the legislature's domain.

I. THE CURRENT STATE OF ASSOCIATIONAL STANDING⁹

A. *Supreme Court Doctrine*

The Supreme Court has recently embraced the concept of associational standing.¹⁰ In *UAW v. Brock*,¹¹ the Court stated:

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9. Federal courts award standing to associations on two grounds, as organizations in their own rights ("organizational standing") and as representatives of members' interests ("representational standing"). See *supra* note 4. Recent developments have concerned representational associational standing, the type reconsidered in this Note. This Note does not address organizational associational standing because such standing does not concern collective interests.

Representational standing offers the possibility of recognizing that although associations may be composed of individuals with their own legal identities as members, and may have legally individual identities themselves, they are the bearers of interests that are irreducibly collective. See *infra* Part II.A. Organizational standing treats the association as a single individual and recognizes that it can suffer harms structurally equivalent to those suffered by any legal individual. Associational interests of this sort do not require the rearticulation suggested here because they fit comfortably within the traditional atomistic view of interest. There are instances, however, where it seems a court will force an association's claim into the organizational category to sidestep the issue of the collective interest. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982).

In *Havens*, a residential counseling association objected to the racial steering practices of an apartment complex. The association sought standing on both organizational and representational grounds. Without reaching the latter contention, the Court granted the former, stating that it would "conduct the same inquiry as in the case of an individual," 455 U.S. at 378, and concluding that the actions of the complex could drain the organization's resources and impair its ability to advise apartment-seekers effectively. 455 U.S. at 379. Given the recent and regular confusion about when to grant individuals standing, the efficacy of likening associational standing to individual standing seems doubtful. See *Schlesinger*, 418 U.S. at 208; *Richardson*, 418 U.S. at 166; *Flast v. Cohen*, 392 U.S. 83, 83 (1968).

10. See *UAW v. Brock*, 477 U.S. 274 (1986).

11. 477 U.S. 274 (1986).

[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all."¹²

Despite this wholehearted endorsement of associational standing and recognition of its potentially unique role, the Court in *Brock* continued to rely on a set of criteria for representational standing¹³ that defeated the purposes of the doctrine the Court espoused. Although the *Brock* Court was able to frame that case in terms of these criteria, the Court's development of the criteria in previous cases and application in subsequent appellate decisions reveals the tension between the Supreme Court's acknowledgement of the legitimacy of associational interests and the current criteria courts use to decide representational standing. In *Hunt v. Washington Apple Advertising Commission*,¹⁴ the Supreme Court itemized the criteria for representational standing¹⁵ using a three-pronged test. According to *Hunt*, an association has standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."¹⁶ This test reflects the tension implicit in the Court's attempt to formulate representational standing so as to vindicate members' associational interests while still retaining a tie to the atomistic model of interest. By building individual standing into the first criterion for representational standing, the Court undercut the idea that members of an association share interests that would not exist but for the possibility of association — or collectivity — itself.¹⁷

The test articulated in *Hunt* encapsulates requirements for representational standing that the Supreme Court had already imposed prior to *Hunt*. Two of these earlier cases illustrate the anomalous results produced by the logic of a criterion requiring individual standing before awarding representational standing. In *Sierra Club v. Morton*,¹⁸ the Supreme Court denied a long-established environmental protection association representational standing because the associa-

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12. 477 U.S. at 290 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951)).

13. For a discussion of representational standing, see *supra* note 9.

14. 432 U.S. 333 (1977).

15. These criteria were originally suggested in *Warth v. Seldin*, 422 U.S. 490, 502, 511 (1975).

16. 432 U.S. at 343.

17. See *infra* notes 36-38 and accompanying text.

18. 405 U.S. 727 (1972).

tion failed to show that any particular member would be individually harmed by recreational development of federal parkland. The Sierra Club refused to send a token member through the parkland, thus laying the groundwork for a claim of individual deprivation of the park's natural beauty, precisely because the Club wanted to argue for preservation of the area as a shared natural resource.¹⁹ The dissenting justices recognized the disingenuousness of demanding that environmental cases be litigated on the basis of *ad hoc* individualistic claims, particularly in the face of legitimate associational interests.²⁰ The deceptiveness of the individual standing requirement as a test of legitimate interest becomes overwhelmingly apparent in the reasoning of a later environmental case, *United States v. Students Challenging Regulatory Agency Procedure* ("SCRAP").²¹ There, the Court awarded representational standing to a newly formed association of five law students, who sued a federal agency for granting a fee increase to railroads. The students claimed that the rate increase threatened each of their individual interests by (1) increasing the costs of inexpensive bottled and packaged goods, because the added shipping costs for transporting used bottles and packaging to recycling centers would be passed along to them as consumers; and (2) interfering with their use of natural resources in a given area for recreational and aesthetic purposes.²² In fact, the case concerned the environmental impact of effectively raising the cost of recycling, but because SCRAP willingly translated their claim into atomistic terms, the Court granted standing to an "environmental association" far less established than the Sierra Club²³ to vindicate an environmental injury far less obvious than the one threatened in the *Sierra Club* case.

Although the association-plaintiffs in both *Sierra Club* and *SCRAP* reacted differently to the necessity of satisfying the individual standing requirement, these associations did have the option of protecting a collective interest by creating a sufficiently related individual interest. In this manner, protecting the "dummy" individual interest would suffice to protect the underlying collective concern. Additionally, both the Sierra Club and SCRAP could create the requisite individual injury at little cost to the associations themselves. In other cases, however, the very collectiveness of the injury precludes the use of this ploy because it will be in no single individual's interest to risk playing the tester's

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19. 405 U.S. at 735-36.

20. 405 U.S. at 741-45 (Douglas, J., dissenting); 405 U.S. at 755-58 (Blackmun, J., dissenting). Justice Blackmun asked, "Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?" 405 U.S. at 755-56.

21. 412 U.S. 669 (1973).

22. 412 U.S. at 678.

23. 412 U.S. at 685. The age and history of an association seem to be good indicators of the association's commitment to the interest it seeks to litigate. See *infra* text accompanying note 87.

role, particularly if it involves more than sending a member for a stroll through the park.²⁴

Aside from its susceptibility to reliance on token individual plaintiffs, the first *Hunt* criterion creates another type of confusion for associational standing doctrine. The doctrine of individual standing suffers from a controversy over just how personal an injury must be to qualify the plaintiff for standing. By assimilating the requirements for associational standing into the requirements for individual standing, plaintiff-associations become mired in the same controversy.²⁵

The Court's decision in *Allen v. Wright*²⁶ illustrates this problem. In *Allen*, the plaintiffs sought to state a representational claim according to *Hunt*'s terms, arguing that an individual among them would have standing. The Court rejected this argument, maintaining that no member's injury demarcated him sufficiently from the population the plaintiffs sought to represent.²⁷ The Court's denial rested on grounds similar to those specified in *United States v. Richardson*²⁸ and *Schlesinger v. Reservists Committee To Stop the War*:²⁹ no member's injury was sufficiently personal to qualify him as a unique litigant. The group of black parents seeking standing in *Allen* claimed that IRS standards for tax-exemption were too lax and allowed discriminatory private schools to claim tax exemption. According to the Court, this claim could not be maintained by any individual parent, because even if the regulations made it more difficult for blacks as a group to obtain equal public education for their children, the regulations in and of themselves did not make any single parent's search for equal education more arduous.³⁰ A meaningful concept of representational standing,

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24. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975). In *Warth*, the Supreme Court introduced the individual injury requirement in denying standing to, among others, an association of firms engaged in residential construction. This association claimed injury by the exclusive zoning practices of a town planning board, but the Court refused to recognize the injury because the association could not produce a member who had sought a low-income housing building permit from the board and been denied. 422 U.S. at 516. No firm, however, would attempt to acquire a permit because of the large investment necessary in making a presentation to the board. Yet the zoning board's practices clearly indicated denial of any permit for low-income housing. The members of the association had a shared, collective interest in changing the town's zoning practices, but no single firm had an interest in being the token: the collective nature of the injury effectively thwarted any individual response by removing individual incentive to challenge the zoning practices.

25. See *supra* note 9.

26. 468 U.S. 737 (1984).

27. 468 U.S. at 755-56.

28. 418 U.S. 166 (1974); see *supra* note 4.

29. 418 U.S. 208 (1974); see *supra* note 4.

30. 468 U.S. at 756-57. Writing for a divided Court, Justice O'Connor asserted: "Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of value interests of concerned bystanders.'" 468 U.S. at 756 (quoting *United States v. SCRAP*, 412 U.S. at 687). In his dissent, Justice Brennan made the point that the black parents seeking standing were more than "concerned bystanders" and had, in fact, suffered a "distinct" and "palpable" injury. 468 U.S. at 770, 773 (Brennan, J., dissenting).

Justice O'Connor failed to recognize that judicial formulation of societal values pervades the

however, would recognize that the black parents *as a group* had a legitimate representational interest in government behavior that increased the segregation of schools, whether or not any single member could have brought suit against the government. Such a group might possess, and choose to represent, an interest not reducible to, or captured by, an individual atomistic interest.³¹

The first *Hunt* criterion is not the only one to sneak atomism into the foundation of representational standing. The third criterion, the test of whether the claim or relief requires individual participation in the lawsuit,³² can also work to defeat an associational claim of interest. This test can always reintroduce atomism by requiring individual members to testify if their atomistic interests diverge from the collective interest.³³ However, possible diversity of members' interests at an atomistic level does not negate the possibility of an associational commitment to the protection of one another's interests. In this sense, people can share interests they would not regard themselves as having were it not for their relation to other people — as when a gameplayer reports his own inadvertent cheating because he shares an interest with his opposite number: the integrity of the game. Either player could "testify" to this interest. In fact, to understand fully the integrity of the game is to recognize this. But the third criterion of the *Hunt* test eliminates recognition of this type of mutual interest or testimony and would, in effect, only recognize the harm to the cheated player. If we take membership seriously as a phenomenon, the collective interest belongs both to the association and to each member *insofar as she is part of the association*.

The hurdles raised by the three-pronged test prevent associations from doing exactly what the Supreme Court identified as an important function in *UAW v. Brock*:³⁴ to vindicate the members' shared interest through litigation.³⁵ The *Brock* Court granted standing to the UAW

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concept of injury sufficient to merit standing: deciding that a particular type of harm and type of victim qualifies for standing indicates a value considered worthy of protection by societal mechanisms. This idea of the judiciary's role differs radically from that which explains courts as the mechanisms that replace combat in the case of interpersonal disputes. See J. VINING, *supra* note 4, at 145. Professor Vining maintains that courts develop and articulate what we value. If Professor Vining is correct, refusal to characterize associational standing as distinct from individual standing diminishes collective values, just as refusal to recognize certain interests as sufficiently personalized constitutes a rejection of the values asserted by that interest holder.

31. See *infra* Part II.A.

32. See *supra* text accompanying note 16.

33. In *Harris v. MacRae*, 448 U.S. 297 (1980), an association of women sought to challenge the Hyde Amendment, which limits the use of Medicaid to fund abortions, as a violation of the free exercise clause of the first amendment. The association claimed that some of its members had a religious interest in being able to obtain abortions. The Court countered that because not all members had this interest, the association's claim required individual participation. 448 U.S. at 321.

34. 477 U.S. 274 (1986).

35. "[T]he doctrine of associational standing recognizes that the primary reason people join

in order for the union to protest a Department of Labor regulation that resulted in the denial of supplementary unemployment benefits to displaced union members. The Secretary of Labor's attack on the union's representational standing was twofold: he argued that the union failed each of the *Hunt* criteria³⁶ and that the test — and with it, representational standing altogether — should be rejected as duplicative of the test for class actions.³⁷ The Court, however, responded by affirming the separate advantages of associational standing and applying the *Hunt* criteria as loosely as possible in an effort to have them encompass injury to a nonatomistic interest.³⁸

This emphasis on the identifiably collective outlook and purposes of association derives from an older set of pre-*Hunt* cases. These cases indicate a closer identity between organizational and representational standing. In *Joint Anti-Fascist Refugee Committee v. McGrath*,³⁹ the Court awarded organizational standing, but in a dissent urging representational standing, Justice Jackson recognized members' own acknowledgement of a shared interest in joining an association: "[P]eople pool their capital, their interests, or their activities under a

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an organization is often to create an effective vehicle for vindicating interests that they share with others." 477 U.S. at 290.

36. 477 U.S. at 282-88. The Secretary of Labor contended that because the union was not seeking actual unemployment benefits but was instead asserting the unlawfulness of the regulation, it could not demonstrate the possibility of individual standing. 477 U.S. at 283-84. This type of argument parallels that used successfully against the plaintiffs in *Allen v. Wright*, 468 U.S. 737 (1984), see *supra* note 30 and accompanying text. However, the *Brock* Court rejected this argument because union members potentially affected by the regulations had a "live interest" in the litigation, 477 U.S. at 284, and "a direct challenge" by the union was "not only proper, but appropriate." 477 U.S. at 286. The Court easily found grounds for union standing on the second *Hunt* criterion, germaneness of the organization's purpose to the lawsuit, because the union's constitution stated among its purposes an effort to work for legislation implementing an effective system of federal unemployment insurance. 477 U.S. 286-87.

The Secretary contended that the union's claim required the individual participation of members whose finances would be variously injured because of the Department's regulations. But since the union's claim did not concern particular benefits owed to any member, the Court dismissed this argument. 477 U.S. 287-88.

37. 477 U.S. at 288. Significantly, the Court recognized the prior collective organization of an established association, as opposed to the contingent nature of the aggregation of class action plaintiffs:

The Secretary's presentation, however, fails to recognize the special features, advantageous both to the individuals represented and to the judicial system as a whole, that distinguish suits by associations on behalf of their members from class actions. While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital.

477 U.S. at 289. The Court's comments distinguish between a truly collective entity and an *ad hoc* union, despite the emphasis on the atomistic benefits of association for members, rather than an emphasis on the possibility that *only* associations represent genuinely common claims.

Not only are class actions different from collective claims, but class action lawsuits are declining as well, see Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. Times, Jan. 8, 1988, at B7, col. 3, and hence seem an impractical substitute for associational representation.

38. See *supra* notes 36 & 37.

39. 341 U.S. 123 (1951).

name and form that will identify collective interests . . . .”⁴⁰ In *Brock*, the Court subsequently capitalized on Justice Jackson’s point in its endorsement of association.⁴¹ And in *NAACP v. Alabama*,⁴² the Court granted representational standing to the NAACP when it sought to assert the privacy rights of its members, calling the association “the medium through which its individual members seek to make more effective the expression of their own views.”⁴³

Tension is thus evident between these earlier hints at the concept of interest underlying association — interests the Court continues to recognize — and the Court’s latest articulation of the requirements for representational standing. The individualistic requirements of the *Hunt* test require a conception of association that does not jibe with an idea of association as a medium that blends individual interests into an independent shared interest — as the *NAACP v. Alabama* Court suggested. Similarly, the *Hunt* concept does not support the claim that an association more effectively vindicates shared interests because associational and shared interests mutually constitute one another — as Justice Jackson implied. Part II of this Note demonstrates structural reasons for the inconsistency between the two views of association and collective interest. The remainder of this section reveals the confusion this tension has created at the appellate level.

B. Representational Standing in the Appellate Courts

Each of the *Hunt* criteria has been interpreted differently by the different courts of appeals, and the decision in *Brock* seems to have done little to inspire convergence. The difference between the First Circuit and the D.C. Circuit regarding the requirement of individual standing, the first prong of the *Hunt* test, reveals the tremendous ambiguity created by this criterion. In a case tailor-made for satisfying the *Hunt* criteria, *Camel Hair and Cashmere Institute, Inc. v. Associated Dry Goods Corp.*,⁴⁴ the First Circuit relied on *Brock*’s “strong endorsement”⁴⁵ in granting representational standing to a five-member association of cashmere merchant firms. In *Camel Hair*, the association sued a manufacturer for overstating the amount of cashmere in its products. Because any one of the firms could have sought injunctive relief against the manufacturer in the interest of preserving the reputation of cashmere, the court held that the association met the first of the *Hunt* requirements.⁴⁶

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40. 341 U.S. at 187. See also *supra* note 12 and accompanying text.

41. 477 U.S. at 290.

42. 357 U.S. 449 (1958).

43. 357 U.S. at 459.

44. 799 F.2d 6 (1st Cir. 1986).

45. 799 F.2d at 11.

46. 799 F.2d at 12.

But in *National Maritime Union v. Commander, Military Sealift Command*⁴⁷ — a case more complicated than *Camel Hair*, yet concerning a union interest arguably similar to that in *Brock* — the D.C. Circuit maintained that the association had run afoul of the first requirement of the *Hunt* test. The court denied standing to unions seeking to ensure that the government adhered to regulations governing wage determinations when awarding jobs to private contractors. While recognizing that the government's irregular procedure might have reduced the overall number of positions available, the court nonetheless held that the union could not show a causal connection between the procedure and the loss of employment by any particular member.⁴⁸ Thus, the court refused to grant standing on the basis relied upon in *Brock*: that the union had the right to protect a shared interest (in this case, maintenance of job positions) not easily framed in atomistic terms.

Despite the difference in result between *Camel Hair*⁴⁹ and *National Maritime Union*,⁵⁰ both courts of appeals cast their decisions according to the aggregative concept of association exemplified in the *Hunt* decision.⁵¹ The courts decided these cases according to the ease with which the interests of the associations could be reduced to individual interests, with the First Circuit applying a liberal construction of *Hunt*, and the D.C. Circuit a stringent one. Such latitude for discretion defeats the practical realization of the *Brock* Court's endorsement of associational standing for the sake of collective action: "[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. 'The only practical judicial policy . . . is to permit the association . . . to vindicate the interests of all.'"⁵²

Because the second prong of *Hunt* ascertains whether the association's interest is germane to its overall purpose, organizations typically meet this test easily by reference to their organizational constitutions or their statements of purpose in bringing suit.⁵³ More troublesome

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47. 824 F.2d 1228 (D.C. Cir. 1987).

48. 824 F.2d at 1235-36, 1240.

49. 799 F.2d at 6.

50. 824 F.2d at 1228.

51. An "aggregative" concept of association perceives the association's interests as the sum of its members' pre-associational individual interests, rather than as interests that would not exist but for the associational relationships members share with one another. See generally *supra* text accompanying note 17; *infra* Part II.A.

52. *UAW v. Brock*, 477 U.S. 274, 290 (1986) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., concurring)).

53. *Hunt v. Washington Apple Advertising Commn.*, 432 U.S. 333, 344-45 (1977) (since Commission functioned as a trade association, protection of commercial interest germane to respondent's purpose); see also *Brock*, 477 U.S. at 286 (the Court cited UAW's constitution as support for its claim that protection of unemployment benefits was germane to the union's pur-

for the courts, however, has been deciding whether diversity among the interests of members overrides statements of associational purpose, thus preventing an association from satisfying the third *Hunt* requirement. This prong of the *Hunt* test rules out representational standing when a case would require individual participation or proof of the relevant interests.⁵⁴ In cases where members are diverse or not similarly situated against the defendant, the Eighth Circuit has denied standing even in the face of an admittedly legitimate associational interest.⁵⁵ The D.C. Circuit, on the other hand, has taken *Brock* as the definitive statement on representational standing and has refused to regard diversity among member interests as a bar to standing when a legitimate collective claim is asserted.⁵⁶ The Sixth and Tenth Circuits have also applied the third *Hunt* criterion liberally. Like the D.C. Circuit, these courts relied on the rationale that member diversity should be discounted since members expect to incur some costs in the course of associating.⁵⁷

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pose); *Camel Hair*, 799 F.2d at 11 ("As harm to the reputation of cashmere is precisely the kind of harm the plaintiff corporation was designed to prevent, the requirement that the suit be germane to the association's purposes is clearly met here."). But see *Minnesota Pub. Interest Research Group v. Selective Serv. Sys.*, 557 F. Supp. 925, 934 (D. Minn. 1983), *vacated on other grounds*, 747 F.2d 1204 (8th Cir. 1984) (second prong not satisfied because the association was, by name, a "public interest" group; therefore, its purposes were automatically too broad to underpin any specific interest).

54. See *Hunt*, 432 U.S. at 343; see also *Harris v. McRae*, 448 U.S. 297, 320-21 (1979).

55. See *Terre Du Lac Assn. v. Terre Du Lac, Inc.*, 772 F.2d 467, 471 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (residents' association sought injunctive relief against community owner for failure to provide promised facilities (i.e., country club, sewer system) but because monetary damages possibly at stake, individualized proof required); *Associated Gen. Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 691 (8th Cir. 1979) (plaintiff-association sought to make an antitrust claim but due to differences between member firms individual participation required).

56. See *National Maritime Union v. Commander, Military Sealift Command*, 824 F.2d 1228, 1233 (D.C. Cir. 1987). "[T]he [Supreme] Court appeared to deal with the problem of conflicting interests by saying that associational standing was too valuable to jettison and offering possible safeguards for members whose interests were adverse to the litigating position taken by the association." In *National Maritime*, the D.C. Circuit also gave its own rationale for rejecting member diversity as a bar to representational standing: because internal conflicts are endemic to associations, members expect to incur certain costs to their own interests upon joining. Courts can entertain injured members' challenges to the association's internal procedures for determining which interests to litigate — but so long as these procedures were predetermined and followed, the court will uphold standing. 824 F.2d at 1233-34. Compare *National Maritime*, 824 F.2d at 1228, with *Telecommunications Research of Action Center v. Allnet Communication*, 806 F.2d 1093 (D.C. Cir. 1986) (representational standing denied because damages sought; individual member participation necessary to determine division of these).

57. See, e.g., *Gillis v. United States Dept. of Health & Human Servs.*, 759 F.2d 565, 572-73 (6th Cir. 1985) (defendant's assertion of conflict arising from diversity of members was "speculative and indirect"; such conflict is the association's concern, not the court's). The court explained:

Virtually any relief involving the expenditure of money that benefits some but not all of an organization's members potentially means that that money will be unavailable to or in part exacted from the remainder of the membership. By joining an organization dedicated to a particular goal in the public interest, members indicate a willingness to make certain sacrifices productive of that goal. Carried to its logical extreme, evaluation of representational standing in terms of the adverseness of remote interests of discrete members would seriously

These discrepancies between and within the courts of appeals indicate the difficulties of applying representational standing doctrine without a clear understanding of the sort of interests uniquely suited to associational representation. Courts need a concept of a collective interest that lends itself to consistent grants of associational standing and prevents standing from becoming a tool for predisposing of cases on the merits.⁵⁸ A reformed test would obviate the need for artificially produced token injuries to individuals⁵⁹ and would avoid the reduction of associational claims to individual claims.⁶⁰ A concept of collective interest that alleviates these discrepancies would justify the distinctive characterization of associational standing developed in *Brock*.

II. FROM REPRESENTATIONAL TO COLLECTIVE STANDING

In discussing and awarding representational standing, the courts have recognized that members of associations possess shared resources,⁶¹ shared problems,⁶² and shared self-understandings.⁶³ Yet current doctrine denies associations a legal identity that would truly afford an opportunity to litigate common problems using common resources. To effectuate the virtues of associational standing, courts need a framework that will inform the recognition of such virtues by articulating a definition of what it means for resources, problems, and

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undermine the ability of individuals through organizations to achieve public interest objectives through the legal system.

759 F.2d at 572-73. See also *NCAA v. Califano*, 622 F.2d 1382, 1391-92 (10th Cir. 1980) (diversity of member interests is a reality of association and a cost members accept; where its members have conflicting interests, an association must demonstrate to court fairness of procedure in decision to litigate).

58. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); see also Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); *supra* notes 26-31 and accompanying text.

59. See, e.g., *United States v. Students Challenging Regulatory Agency Procedure ("SCRAP")*, 412 U.S. 669 (1973); see also *supra* text accompanying notes 19-24.

60. Any grant of representational standing decided on the basis of the *Hunt* test does this by recognizing associational standing only insofar as individual standing would have been granted. See *supra* text accompanying notes 17 & 33.

61. See *Brock*, 477 U.S. at 289 (unlike class action plaintiffs, an associational plaintiff "can draw upon a pre-existing reservoir of expertise and capital"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., dissenting) (in associations "people pool their capital, their interests, or their activities under a name and form that will identify collective interests").

62. See *Brock*, 477 U.S. at 290 ("the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others"); *Baker v. Carr*, 369 U.S. 186, 207 (1961) (association of voters sought "relief in order to protect or vindicate an interest of their own, and of those similarly situated") (emphasis added).

63. See *Brock*, 477 U.S. at 290 ("The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests."); *National Maritime Union v. Commander, Military Sealift Command*, 824 F.2d 1228, 1233-34 (D.C. Cir. 1987) (because members of associations have thrown in their lots together, they expect and accept certain costs to individual self-interest).

self-understandings to be “shared” or “common.” This framework should yield a concept of collective standing that succeeds in capturing those legitimate associational interests that representational standing cannot. Subsection A of this Part identifies the structure of a collective good, and the type of interest to which such a structure gives rise. The existence of such a structure and its attendant interests provides the ground for collective standing. Subsection B explicates the reasons for awarding collective standing to associations rather than individuals.

A. *The Interest of a Collectivity*

In its purest form, a collectivity provides an identity distinct from that of its individual members, an identity that makes sense only in the context of the members’ relationship to one another and to other actors in the social world. The collectivity then can further interests that atomistic agents, acting in isolation, cannot. Collectivities can thus be understood both in terms of these interests and in terms of their structure and function in contemporary society. This subsection focuses on the formal character of a collective interest and indicates the collectivity’s alignment with the protection of such an interest. One familiar example of a collectivity is the labor union: once organized, workers share in an identity separate from and irreducible to their identities as isolated employees. In fact, the union identity diverges from the individual identities. An effort to form an illegal union — say in an industry in which unionization is prohibited — illustrates this. Imagine that an upstart union calls a strike to pressure the employer into recognizing the union and negotiating higher wage rates. During the course of the job action strikers will not be paid — and if the action fails, participating workers will not be rehired. Striking, therefore, poses some risk to participants. For the strike to be effective, the owner’s business must be hobbled. Achieving this effect, however, does not require that absolutely every employee refuse to work, only a number sufficient to cripple operations. Thus, the optimal strategy for each isolated employee is to report to work (remaining on payroll and ensuring her job post-strike) while betting that enough workers dedicated to unionization will strike successfully (harming the owner’s interests enough to gain recognition of the union in return for resuming work).⁶⁴ Of course, if each employee realizes this strategy, the union’s

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64. This situation presents a classic free-rider problem. Free-rider problems arise when a good can be provided at no cost to any individual who fails to contribute so long as most or all of the other agents do contribute. One common illustration is that of a lawn that a group wishes to keep untrammelled. A single person taking a short-cut across the lawn will not wear a path in the grass, but if everybody takes the shortcut, soon there will be only dirt. If each single person assumes she can cross with impunity (say, when nobody else is looking), everybody will end up crossing, defeating attainment of the desired public good: an untrammelled lawn. For further examples and a discussion of the difficulties in coordinating collective action, see R. LEMPET &

effort to organize and strike will disintegrate, precisely because its interest cannot be reduced to those of isolated employees.⁶⁵

In more formal terms, the relations between workers themselves, and between workers and the collective goal, serve to defeat the attempt to unionize. This structure is known as a Prisoner's Dilemma. The Prisoner's Dilemma appears in a number of forms, including the following.

Two prisoners are known to be guilty of a very serious crime, but there is not enough evidence to convict them. There is, however, sufficient evidence to convict them of a minor crime. The District Attorney . . . separates the two and tells each that [he] will be given the option to confess if [he wishes] to. If both of them do confess, they will be convicted of the major crime on each other's evidence, but in view of the good behavior shown in squealing, the District Attorney will ask for a penalty of ten years each rather than the full penalty of twenty years. If neither confesses, each will be convicted only of the minor crime and get two years. If one confesses and the other does not, then the one who does confess will go free and the other will go to prison for twenty years.

Each prisoner sees that it is definitely in his interest to confess no matter what the other does. If the other confesses, then by confessing himself this prisoner reduces his own sentence from twenty years to ten. If the other does not confess, then by confessing he himself goes free rather than getting a two-year sentence. So each prisoner feels that no matter what the other does it is always better for him to confess. So both of them do confess guided by rational self-interest, and each goes to prison for ten years.⁶⁶

J. SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 309-16 (1986); R. BORK, THE ANTITRUST PARADOX 430-31, 435 (1978).

65. See generally C. OFFE, *Interest Diversity and Trade Union Unity*, in DISORGANIZED CAPITALISM 151 (1985). Offe argues that contemporary West German unions confront an increasing diversity of member interests due to the differences in socioeconomic status of workers. He argues that unions can maintain solidarity only by strengthening their identities through addressing issues beyond wage rates, including qualitative concerns with both workplace and politics. See *id.* at 164-69. This amounts to a broadening of the range of issues considered collective. Perhaps the widening scope of issues associational plaintiffs seek to litigate reflects a similar trend. To ensure protection of collective goods, some have suggested that courts grant standing to entities more alien to the law than associations. See, e.g., C. STONE, *SHOULD TREES HAVE STANDING?* (1974) (arguing that the best way to protect interests in the environment would be to confer "rights" on natural entities and allow for their direct representation).

66. See Sen, *Behaviour and the Concept of Preference*, in RATIONAL CHOICE 60, 69 (J. Elster ed. 1986).

The problem, represented schematically, appears as follows:

		Player B	
		C	—C
Player A	C	-10 0 -10 -20	
	—C	-20 -2 0 -2	

In this diagram, Players *A* and *B* are the two prisoners. *C* stands for “confess”; —*C* stands for “don’t confess.” Player *A*’s resulting sentences are represented in the upper left corner of each box, Player *B*’s in the lower right.⁶⁷

The scenario demonstrates that it is strategically rational for each player to confess regardless of what the other does. But, if both confess, as the aggregation of individual rational choice would have it, they are worse off (ten-year sentences) than if neither did (two-year sentences). From the outside of the Prisoner’s Dilemma, we can see that if *A* and *B* both adopt the strategy that makes sense from each of their individual perspectives (“confess”), each will be worse off than if each chose not to confess. It might seem plausible to think both prisoners can also discern this before they actually choose a strategy. But, *even* if each *knows* the other will come to this realization, the Dilemma cannot be resolved; for, just at the moment *A* realizes that *B* perceives the problem, and thus the benefits of the strategy “don’t confess,” it becomes all the more individually rational for *A* to choose the strategy “confess,” and receive no sentence at all. The collective solution is highly unstable.

In the union example, each member occupies the place of one of the prisoners. Like the prisoners, the union members share a necessarily common problem: they cannot achieve the best outcome for the group if each aims toward the best outcome for himself. Both prisoners and workers require an escape from the disintegrative pattern into which they seem locked; they need access to a new conception of their relationship to one another, so that they may cooperatively address

67. *Id.*

their common concerns. A collectivity supplies the perspective from which to do this. By forming a union and regarding themselves as members, as well as employees, workers give themselves reason to participate in union activities and to trust that others will not free ride.⁶⁸ To understand membership from the collective perspective is to realize that it is incompatible with free riding.

Any effort to attain a common good, such as the workers' attempt to better conditions for the entire labor force, is vulnerable to collective action problems.⁶⁹ Other examples of common goods range from a well-played game to language itself — goods that cannot be known nor had alone.⁷⁰ More relevant, perhaps, to the legal context are so-called public goods.⁷¹ These include parks⁷² and a clean environment,⁷³ roads and sewers,⁷⁴ a governmental system of unemployment

68. See R. LEMPERT & J. SANDERS, *supra* note 64, at 321 n.28. Lempert and Sanders give a rather unsympathetic account of possible techniques unions may use to encourage workers to adopt a collective perspective. They suggest that "propaganda," "normative appeals," and "coercion" are particularly effective, and hence widely used, techniques.

69. The notion of a "common good" has been extended to phenomena not usually characterized as "goods." On this view, not only are certain goods necessarily shared or social — any action whatsoever is, in fact, social. As Nobel Prize-winning economist Kenneth Arrow states:

[A]ll significant actions involve joint participation of many individuals. Even the apparently simplest act of individual decision involves the participation of a whole society.

It is important to note that this observation tells us all non-trivial actions are essentially the property of society as a whole, not of individuals. It is quite customary to think of each individual as being able to undertake actions on his own . . . . Formally, a social action is then taken to be the resultant of all individual actions. In other words, any social action is thought of as being factored into a sequence of individual actions.

. . . [But] the particular factoring in any given context is itself the result of a social policy and therefore already the outcome of earlier and logically more primitive social values.

Arrow, *Values and Collective Decision-making*, in PHILOSOPHY AND ECONOMIC THEORY 110, 114 (1979). See also *infra* Part III.B for further discussion of Arrow's work.

70. A well-played game is a simple example of this sort of good. See *supra* text accompanying note 33; see also J. RAWLS, A THEORY OF JUSTICE (1971):

[T]he common desire of all the players [is] that there should be good play of the game. This shared end can be realized only if the game is played fairly according to the rules, if the sides are more or less evenly matched, and if the players all sense that they are playing well. But when this aim is attained, everyone takes pleasure and satisfaction in the very same thing. A good play of the game is, so to speak, a collective achievement requiring the cooperation of all.

Id. at 525-26; see also J. HABERMAS, *What Is Universal Pragmatics?*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY (1979) (detailing the mutual presuppositions necessary for linguistic communication); 1 J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 284-337 (1984) (interrelating the mutuality of language and the possibility of social cooperation); C. TAYLOR, *Interpretation and the Sciences of Man*, in 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 15 (1985) (arguing that social science must study intersubjective and common meanings to understand human life because language constitutes social reality).

Additionally, a collective itself is a collective good — it cannot be known or had alone.

71. Technically, "public goods" is an economic term used to describe those goods that cannot be provided for one person without providing them for everybody. In the legal context, disputes often arise when the provision of these goods depends upon the contributions of all those who will partake of them. See *infra* notes 73-77 and accompanying text.

72. See *Sierra Club v. Morton*, 405 U.S. 727 (1972).

73. See *United States v. Students Challenging Regulatory Agency Procedure* ("SCRAP"), 412 U.S. 669 (1973).

insurance,⁷⁵ and an integrated society.⁷⁶ Maintaining any of these goods requires the cooperation of everybody — or almost everybody — who partakes of them. And, as the cases demonstrate, people do form and join collectivities to achieve, sustain, and protect such goods.⁷⁷

As illustrated in this section, a collective interest differs in structure from an individual interest. It can be understood as an interest susceptible to free riding or to the collective self-defeat manifested in the outcome of a Prisoner's Dilemma. When collective organizations possess such interests, they may suffer a unique injury, either because a specifically collective interest or good is threatened, or because the collectivity itself is threatened.⁷⁸ The criterion for collective standing ought to be that the plaintiff-association seeks to protect an interest that is identifiably collective and therefore not equivalent to any atomistic interests.

B. Awarding Associations Collective Standing

Aside from serving identifiably collective interests, associations also manifest the distinct nature of a collectivity by virtue of their internal organization and their societal role. These characteristics differentiate the association from other legal actors, thereby demonstrating that it is worthy of standing to protect interests specific to the association. Because associations possess unique identities related to the protection of collective interests, and because isolated individuals are insufficiently related to such issues, courts should award and limit collective standing to associations.

When collectives seek to solve problems regarding shared goods, they face concerns pertinent exclusively to themselves, rather than to any single individual.⁷⁹ The collective possesses its own identity. This identity may grow from members' relationships to one another and the members' relationships to nonmembers, but it is distinct from members' individual identities and singular concerns.⁸⁰ Modern corporate

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74. See *Terre Du Lac Assn. v. Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

75. See *UAW v. Brock*, 477 U.S. 274 (1986).

76. See *Allen v. Wright*, 468 U.S. 737, 771 (1984) (Brennan, J., dissenting).

77. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984) (collective interest in integrated schools); *Hunt v. Washington Apple Advertising Commn.*, 432 U.S. 333 (1977) (collective interest in maintaining the reputation of Washington apples); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (collective interest in protecting wild land).

78. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 140-41 (1951) (an organization is harmed when defendant impairs its ability to attract and keep members).

79. As the union example demonstrates, these concerns may run counter to those of any particular individual, even if he belongs to the collective. See note 64 and accompanying text.

80. See R. LEMPERT & J. SANDERS, *supra* note 64, at 308-09. Lempert and Sanders discuss the rise of organizations in modern capitalist society, noting that "[some] organizations have a legal life that is distinct from their current membership. They exist apart from any individuals."

law recognizes this by defining a corporation as a legal person, apart from its directors, shareholders, and employees.⁸¹ Labor law also acknowledges distinctive collective identity by institutionalizing the status of unions.⁸² Ostensibly, the law in these areas has responded to the reality of contemporary social life: business and labor require definitively collective identities to pursue their goals.⁸³ The law has also noted that people associate to pursue noneconomic aims, recognizing the efficacy of collective action in these areas.⁸⁴

This recognition of the unique societal position associations occupy should be the basis for a correlatively significant legal role: regarding associations as the exclusive bearers of collective standing.⁸⁵

Id. at 308 (emphasis added); see also J. VINING, *supra* note 4, at 156-57 (1978) (explaining the concept of a legal identity that is distinct from individual human beings' identities). Contemporary systems theory generates a similar point:

If . . . a systems-theory approach is chosen, the very distinction between individualism and collectivism becomes questionable. Systems theory neither reduces collective action to individual action nor vice versa, but interprets both as different forms of social attribution of action . . . . [W]e would suggest that the *social reality of a legal person is a "collectivity": the socially binding self-description of an organized action system as a cyclical linkage of identity and action.*

G. Teubner, Enterprise Corporatism (unpublished manuscript) (on file with the *Michigan Law Review*). Such a collectivity need not be as legally formalized as a corporation or labor union. A private association, or even a more informal group may have the characteristics requisite to collectivity. See C. STONE, WHERE THE LAW ENDS 3-5 (1975) (portraying a jury "institutionally," or as a collectivity).

81. See R. LEMPERT & J. SANDERS, *supra* note 64, at 318-20, 324-36. Joseph Vining makes a similar point, extending it beyond corporations, and stressing the strength of such legal identity. Professor Vining writes:

If the majority, even an overwhelming majority, of the individuals associated with an institution wish to define its interests and change its purposes to reflect another aspect of their concern, they may, depending upon the rules of the institution, be utterly unable to do so. . . . This is the orthodoxy of the law of organization. . . . The embarrassing facts of the large modern corporation or the multinational corporation — that control over its voice is secured and transferred quite without regard to its vast membership, and equity investment is treated as merely one among many of a number of sources of capital to be maintained to the degree necessary but no more — do not fit standard conceptual models, but do confirm the independent life of these institutions. . . . Corporate or associational existence is little different from the existence of the "person" who speaks without obvious institutional affiliation. . . . Each is the embodiment of a value or a set of values.

J. VINING, *supra* note 4, at 156-57 (emphasis added).

82. See R. LEMPERT & J. SANDERS, *supra* note 64, at 321-24, 339-47.

83. This is not to suggest that business and labor confront symmetrical collective action problems, nor that unions and corporations are structurally identical collectivities. See R. LEMPERT & J. SANDERS at 347 (union is "a legal structure that allows workers to organize against corporate power"); C. OFFE, *Two Logics of Collective Action*, in DISORGANIZED CAPITALISM 170, 175-206 (1985) (explaining that differences between the circumstances of workers and those of employers require that each group organize itself differently in order to achieve economic or political success); C. OFFE, *The Attribution of Public Status to Interest Groups*, in DISORGANIZED CAPITALISM 221, 248-53 (1985) (explaining the salient differences implying different statuses for various interest groups).

84. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., concurring); *UAW v. Brock*, 477 U.S. 274, 289 (1986).

85. Recognition of collective standing as the appropriate litigative stance for associations would replace the current division between organizational and representational standing. See *supra* note 9. This division rests on the assumption that some interests belong to an organization and others belong to its members. Insofar as the organization may be analogized to the model of

Courts can refine their selection of which associations to recognize as the representatives of particular collective interests according to an association's degree of formal organization⁸⁶ and demonstrated commitment to the claimed interest.⁸⁷ A stronger requirement along these lines might prevent the type of anomaly produced when the Supreme Court denied standing to the Sierra Club,⁸⁸ a long-established environmental protection group, and awarded it to SCRAP,⁸⁹ a group formed hastily to litigate a single environmental issue. To delineate collective standing, courts could require that the history of the association and its activities display an investment of resources, financial and otherwise, in the interest asserted.

Due to the nature of a collective good,⁹⁰ an injury to that good cannot damage a single individual's interest.⁹¹ Because a collective good consists in being shared among people, those individuals also

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the individual person, it may sue to protect its own interests. For an illustration of the ambiguities of organizational standing, compare *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) (housing counseling association awarded organizational standing because defendant's exclusion of minorities strained association's resources and hindered performance of its function), with *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987) (refugee counseling association denied standing to sue government for preventing refugees from entering the country, hence preventing counseling). Sometimes — if the *Hunt* criteria are satisfied — the association may sue to protect simultaneously all of its members' interests, still presenting these as essentially individual. Collective standing eliminates this dichotomy, urging that organizations litigate *only* interests that can be characterized as theirs, whether these be interests in maintaining the collectivity itself or in achieving collective aims. Removing the cleavage between organizational and representational standing accords with the Supreme Court's endorsement of association, because the split between organizational and representational standing undermines the mutual identification between members and their associations. Such a split institutionalizes the possibility of divergence between individual and associational interests, fostering such problems as the Prisoner's Dilemma and free-riding. See *supra* text accompanying note 66; see generally T. SCHELLING, *Strategic Analysis and Social Problems*, in *CHOICE AND CONSEQUENCE* 195, 207-12 (1984) (a survey of tactics that undermine collective action by driving a wedge between private and group interests). Under collective standing, associations do not partake of two legal identities. Rather, courts would recognize them as discrete legal entities with related and congruent interests.

86. See C. OFFE, *The Attribution of Public Status to Interest Groups*, in *DISORGANIZED CAPITALISM* 221, 237-42 (1985) (urging "public status" — legal identity — for those groups recognized and regulated by statute or electoral vote, receiving assistance from state resources, operating with a formal internal organization, and participating in political life); *National Maritime Union v. Commander, Military Sealift Command*, 824 F.2d 1228, 1232-34 (D.C. Cir. 1987) (an association merits standing despite diversity of member interests if it employs established internal procedures for deciding whether to bring suit).

87. In order to regard a particular interest as one held by the association in the way required for standing, courts already seek some proof of this commitment. See, e.g., *Hunt v. Washington Apple Advertising Commn.*, 432 U.S. 333, 343 (1977).

88. 405 U.S. 727 (1972).

89. *United States v. Students Challenging Regulatory Agency Procedures* ("SCRAP"), 412 U.S. 669 (1973). See *supra* text accompanying notes 18-24.

90. See *supra* Part II.A.

91. Cf. Doernberg, "We the People": *John Locke, Collective Constitutional Rights and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52 (1985). Doernberg treats as collective the interests at stake in taxpayer and citizen standing suits, and argues that an individual citizen deserves standing to redress injury to such interests. His view seems more prey to separation-of-powers concerns than does collective standing. See *infra* Part III.A.

share the harm of any impediment to its achievement. No single person can claim the injury as one to him alone.⁹² Since a personal connection to the injury claimed remains one of the general prerequisites to standing,⁹³ the fact that injuries to collective goods cannot damage any one individual's interest requires that a collectivity such as an association, rather than a single person, be the possessor of collective standing.⁹⁴

Notwithstanding the structural incongruity of assigning collective standing to single individuals, membership in an association may create a sufficient connection between a particular individual and a collective injury to justify a grant of collective standing to a single member. Although plausible, this alternative misconstrues the nature of participation in a collectivity. Amartya Sen draws a distinction juxtaposing two possible characterizations of the motives for membership:

[We] must distinguish between two separate concepts: (i) sympathy and (ii) commitment. The former corresponds to the case in which the concern for others directly affects one's own welfare. If the knowledge of torture of others makes you sick, it is a case of sympathy; if it does not make you feel personally worse off, but you think it is wrong and you are ready to do something to stop it, it is a case of commitment.⁹⁵

If people joined associations solely on the basis of sympathy, they would cooperate with one another in order to further their own individual interests.⁹⁶ In the case of a union, this would imply that the members all feel for one another. Each, therefore, behaves so as to better one another's lot because if others are better off, then, in turn, the participant himself will be better off. This puts a tremendous

92. Recall Rawls' example of ballplayers seeking a good play of the game, *supra* note 70 at 525-26. Cheating interferes with this collective good, which is possible only if all the players participate fairly and wholeheartedly. No one person could play a ballgame by herself, let alone achieve a good play of the game. Accordingly, no one person suffers alone when somebody cheats; rather, the play of the game, shared by all, suffers.

93. See generally *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974).

94. This argument resembles those espoused in cases where the Supreme Court denied standing to individual citizens claiming injury to general interests. The Court objected that such plaintiffs had not differentiated themselves sufficiently from the entire public. Thus, the Court reasoned, the plaintiffs could not define their injury in a manner that would ensure concrete presentation of the relevant issues. Mere concern for the principles at stake did not constitute an interest vulnerable to legally cognizable injury. See *Schlesinger*, 418 U.S. at 216-27; *Richardson*, 418 U.S. at 176-80. In these cases, the Court expressed further reservations regarding separation-of-powers problems raised by citizen standing. This Note addresses these reservations and maintains that collective standing is immune from them. See *infra* Part III.

95. Sen, *Rational Fools: A Critique of the Behavioural Foundations of Economic Theory*, in PHILOSOPHY AND ECONOMIC THEORY at 95 (1979). See also Simon, *From Substantive to Procedural Rationality*, in PHILOSOPHY AND ECONOMIC THEORY at 67-68 (1979) (distinction between substantive rationality in which an agent acts to achieve "given goals within the limits imposed by given conditions and constraints" and procedural rationality, which is "the outcome of appropriate deliberation"); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE at 182-83 (1982).

96. As the Supreme Court noted in *UAW v. Brock*, 477 U.S. 274, 289 (1986), this conception matches more nearly the nature of a class action suit.

weight on the empathy and altruism — *the sympathy* — of union members. If this seems farfetched in the union case, altruism and empathy appear to be even more unlikely motives for members of associations concerned, for example, with parks far from their homes. Even if members do have some sympathetic motivation for associating and participating in associational activities, free rider situations⁹⁷ demonstrate that even a sympathetic member will often choose not to participate if she realizes her contribution would be marginal.⁹⁸ Sympathy, it seems, fails to motivate the participation necessary for creating and protecting a common interest.

Rather, joining and participating in an association suggests that members are willing to “do something” — pay dues, strike, distribute pamphlets — about the association’s collective goals from motives other than the possibility of personal utility gains.⁹⁹ Rather, members display a commitment to the collective aims pursued by the association, and to the collectivity itself. They can be expected to understand the nature of such a commitment. Courts have understood this in granting representational standing to associations despite potential divergence of individual members’ interests from those of the association.¹⁰⁰ These decisions regard membership not as a personal connection to the injury sought to be redressed, but as an indication of the members’ own recognition of the aptness of a joint pursuit of a collective interest. Taking a cue from these cases, courts should rely on the members’ perceptible commitment as justification for granting collective standing to the association.

C. *Applying a Doctrine of Collective Standing*

Regardless of one’s personal preference for or against collective action, the proposed reformulation of associational standing — collective standing — has two practical advantages over the *Hunt* model. First, collective standing accords with the theoretical justifications re-

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97. See *supra* note 64 and accompanying text.

98. As social philosopher Jon Elster explains:

[T]here can be no way of justifying the substantive assumption that all forms of altruism, solidarity and sacrifice really are ultra-subtle forms of self-interest, except by the trivializing gambit of arguing that people have concern for others because they want to avoid being distressed by their distress. And even this gambit . . . is open to the objection that rational distress-minimizers could often use more efficient means than helping others.

J. ELSTER, *SOUR GRAPES* 10 (1983).

99. This is not to deny that unionized workers receive personal utility gains because of unionization. When compared with the gains of free-riding (receiving union benefits without participating in membership activities), these gains do not, however, suffice to explain membership. A motive other than personal utility must be attributed to those members who do not free-ride in order to understand their behavior. See *supra* note 68 and accompanying text.

100. See *National Maritime Union v. Commander, Military Sealift Command*, 824 F.2d 1228, 1231-34 (D.C. Cir. 1987); *Gillis v. Department of Health & Human Servs.*, 759 F.2d 565, 572-73 (6th Cir. 1985); *NCAA v. Califano*, 622 F.2d 1382, 1391-92 (10th Cir. 1980); see also *supra* notes 56 and 57.

lied upon by the Supreme Court in granting standing to the UAW in *Brock*.¹⁰¹ Second, in applying a standing doctrine that resolves the tension between the individualistic model of interest and the endorsement of an association emphasizing collective concerns, courts can align their decisions on standing and eliminate the previous tendency toward inconsistency. For example, reference to collective standing could have enabled the Supreme Court to eliminate the incongruity between its decisions in *Sierra Club*¹⁰² and *SCRAP*.¹⁰³

The first advantage of the proposed reformulation of associational standing is its consistency with the Supreme Court's theoretical justification for associational standing set out in *Brock*. In *Brock*, the Court granted standing to the UAW in order for the union to protest a Department of Labor regulation that resulted in the denial of supplementary unemployment benefits to displaced union members.¹⁰⁴ As emphasized previously,¹⁰⁵ the Court justified its decision in terms of the unique nature of associational standing, which acknowledges that "the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others."¹⁰⁶ This Note has already argued that the *Hunt* test (basing associational standing on individual standing) defeats this justification for associational standing.¹⁰⁷ Collective standing, on the other hand, follows from the justification put forth in *Brock*. The *Brock* Court acknowledged that in forming associations, members identify exactly the sort of shared interests collective standing is premised upon.¹⁰⁸ The Court also realized that associations, having organized themselves so as to pool both economic and noneconomic resources, distinguish themselves as distinct legal actors, best suited to protecting the shared interests they serve.¹⁰⁹ If the Supreme Court had decided the question of the UAW's standing according to the collective model, these realizations would have supported the conclusion that the union was seeking to protect a common good (a system of unemployment insurance) that it was particularly suited to defend — because a workers' association exists and garners resources precisely to protect the well-being of workers understood as a group. This approach would have avoided the tensions engendered by forcing *Hunt*'s terms upon *Brock*.

In the same manner, the collective model would have allowed

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101. *UAW v. Brock*, 477 U.S. 274 (1986).

102. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

103. *United States v. Students Challenging Regulatory Agency Procedures* ("SCRAP"), 412 U.S. 669 (1973).

104. See *supra* notes 34-38 and accompanying text.

105. See *supra* notes 34-38 and accompanying text.

106. 477 U.S. at 290.

107. See *supra* Part I.

108. See *supra* Part II.A.

109. See *supra* Part II.B.

standing to the Sierra Club in *Sierra Club v. Morton*.¹¹⁰ There, the Court could have granted standing on the basis of its recognition that the Sierra Club sought to protect a shared interest in preserving public wild land; that a long-standing environmental association existed and developed means expressly to safeguard such an interest; and that this interest was not equivalent to any particular individual's interest in enjoying nature.¹¹¹ Conversely, in *SCRAP*,¹¹² the Supreme Court could have applied the collective model to reject the "dummy" interest, denying standing to a plaintiff who was awarded standing on the basis of the *Hunt* test.¹¹³ Alternatively, the Court could have granted standing to *SCRAP* by recognizing its true interest — protecting recycling as a means for reducing pollution — as a shared one, legitimately litigated by an association designed for this purpose. Either way, the Court could have decided *SCRAP* according to the principles the collective model would have imposed upon *Sierra Club*. The concept of collective standing resolves the incongruity and counterintuitiveness of the opposite results the Supreme Court actually reached in this pair of cases.

These examples of applying collective standing merely suggest ways in which a court could conceive of standing problems in terms of a collective model. Although in actual circumstances the issues of whether an interest is truly shared or whether a particular association is a legitimate protector of that interest will be subtle and complex, these issues are not undecidable. The association's background and prior activities provide guides to determining the answers.¹¹⁴ By awarding collective standing on the basis of criteria relevant to collectivity, courts will come closer to consistency both across cases and within doctrine — significant assets to the judicial process.

III. COLLECTIVE STANDING AND SEPARATION OF POWERS

Efforts to modify or expand the grounds for standing tend to provoke discussion about the role of the judiciary within the tripartite design of the United States government. This Part addresses the impact of collective standing on the role of the courts in a system requiring separation of the legislative and judicial functions. Subsection A argues that collective standing avoids an expansion of judicial policymaking power and, in fact, reserves the crux of this power to the legislature. Subsection B employs a brief illustration from social theory to demonstrate the need for collective standing within a democ-

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110. 405 U.S. 727 (1972).

111. See *supra* notes 18-20 and accompanying text.

112. 412 U.S. 669 (1973).

113. See *supra* notes 21-22 and accompanying text.

114. See *supra* text accompanying notes 86 and 87.

racy, and hence the appropriateness of judicial application of the doctrine.

A. *The Separation-of-Powers Objection and a Response*

Although this Note presents collective standing as a reformulation of the already existing doctrine of associational standing, critics might construe collective standing as an expansion of access to the courts. Conservatives in particular react negatively to any such expansion, and urge narrow grounds for standing as a means of protecting the separation of powers.¹¹⁵ This subsection denies that collective standing allows the judiciary to encroach on legislative prerogatives.

The main argument made by advocates of a circumscription of standing runs as follows. The judiciary serves the purpose of protecting individual — and minority — rights against the will of the majority,¹¹⁶ which holds sway in the legislature and the election of the executive. The courts, therefore, avoid settling disputes over value: that is the role of the “political” forums.¹¹⁷ If courts grant standing to entities seeking to do more than protect predetermined individual rights, they open themselves to becoming just another political arena, and a usurper of the legislative function.¹¹⁸ From this viewpoint, collective standing might be regarded as the doorway to determination of the value of collective action: a judicial fiat regarding an issue better suited to legislative deliberation. This objection, however, depends upon a disputable picture of the judiciary’s role and a misguided conflation of existing collective interests and the value of encouraging the development of potential ones.

The separation-of-powers objection portrays the courts as value-neutral guardians of presupposed, inherent individual interests.¹¹⁹ But in the course of resolving conflicts between individuals, the courts always decide what will *count* as a legally cognizable interest. And this conclusion necessarily includes a value judgment.¹²⁰ To maintain that the courts should only protect “individual interests” is already a judg-

115. See *Allen v. Wright*, 468 U.S. 737, 750-52 (1984) (O'Connor, J.); *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 803, 807 (D.C. Cir. 1987) (Bork, J.); Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

116. See Scalia, *supra* note 115, at 894; *Haitian Refugee Center*, 809 F.2d at 803.

117. Scalia, *supra* note 115, at 892; *Allen*, 468 U.S. at 752.

118. Scalia, *supra* note 115, at 881.

119. See *supra* text accompanying note 4.

120. J. VINING, *supra* note 4, at 145. Professor Vining elaborates:

That extra dimension to the securing of justice special to the role of a judge lies in the special place of courts in . . . defining public values. For in the very recognition of a “person” who is “harmed” courts formally cap the formulation of a value . . . confirm it in our language and our thought, and permit a full and continuous search for its realization to begin.

Id. at 171. See generally, Arrow, *supra* note 69, at 114-15 (legal identification of what qualifies as property illustrates value choice in judicial decision).

ment that will entail protection of some values at the expense of others. So it cannot be a decisive objection against collective standing that it clears the way for judicial value judgments — these already occur in practically every case.

We can, however, shift the emphasis of the original objection and attribute to it the following claim. Perhaps both the judiciary and the legislature make value judgments but they do so at different levels, employing distinct techniques. The legislature aptly decides questions of public policy and issues regulations accordingly; the courts decide cases of particular injury to interests and make judicial awards accordingly. The objection continues: collective interests are necessarily matters of policy and cannot be injured in a judicially cognizable sense. Therefore, any attempt, either by an individual or by an association, to vindicate collective interests through legal channels belongs to the legislative process rather than to the courts.

The response to this reformulated separation-of-powers objection is twofold. First, nothing in the nature of an interest mandates that it be lodged only in single individuals. In fact, courts already recognize interests other than those unique to individual persons, allowing corporations and associations to argue their claims, even at the expense of a particular individual's interest.¹²¹ Thus, the sheer collectivity of an interest should not relegate it exclusively to legislative consideration. Second, collective standing treats associational claims as ones of interest, not pure policy. Having an interest denotes a private, particular attachment to the matter at hand — an already defined attachment vulnerable to injury. Collective standing delineates collective interest so as to highlight these aspects. Asserting a policy preference, on the other hand, suggests a general push for governmental support of certain kinds of interests. Whereas judicial recognition of discrete collective interests would serve to protect those interests already formulated, claimed, and injured, legislative policies in favor of collective interests would promote their development in the first place.¹²² Collective standing requires only that courts address injury to formally established collective interests, not that the judiciary actively foster their development.

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121. J. VINING, *supra* note 4, at 156. "In view of who the person is that speaks in social discourse, the attribution of 'legal personality' to institutions — corporations, associations, partnerships, unions — should occasion no surprise . . ."

122. See C. OFFE, *Two Logics of Collective Action*, in *DISORGANIZED CAPITALISM* 170 (1985) (differences between capital and labor require different conditions for forming collective identity and engaging in associational practices); C. OFFE, *The Attribution of Public Status to Interest Groups*, in *DISORGANIZED CAPITALISM* 221, 237, 239-42 (1985) (suggesting mechanisms of state assistance for collective organization and arguing that the state must pursue different policies to further the organization of different types of interest groups). A more general discussion of collective interests beyond those involved in standing would include a focus on the generative dimension of such interests. In some cases, people do not know their shared interests until they conceive of themselves as a collectivity.

B. *A Coda: Collective Standing as a Practical Solution to Arrow's Impossibility Theorem*

Collective standing not only avoids intruding upon separation of powers, it reinforces the functional role of the judiciary in a democratic society. This section illustrates this point by suggesting that collective standing, a tool of the judiciary, presents a practical solution to a classic theoretical problem about voting. Research in social theory has shown that democracy, understood solely as a voting mechanism, cannot fully determine a society's preferences of possible environments.¹²³ In other words, democratic voting fails to isolate any one option as the unique social choice of the majority of voters. This failure results in the "indeterminacy" of voting. This characterization of voting as fundamentally ill-suited to reaching a definite, accurate outcome has alarming implications for democracies governed by legislatures, since legislatures rely on voting as a decisionmaking procedure. A decisionmaking procedure that fails to yield meaningful results offers little or no authoritative guidance. This section argues that operations of the judiciary, such as recognition of collective standing, prevent the indeterminacy of voting from paralyzing actual democratic government.

To redress the indeterminacy of voting, other mechanisms of choice must be used, and in actual democracies the nonlegislative branches of government serve this purpose. Because the judiciary does not utilize voting as its primary decisionmaking mechanism, its processes are not subject to the indeterminacy inherent in basic majority voting.¹²⁴ This subsection argues that by recognizing collectives and granting them standing, courts allow for the articulation of social options that cannot be adequately presented in a legislative forum. This articulation removes one of the constraints upon voting that social theoreticians have pinpointed as a cause of indeterminacy. Hence, the judiciary forestalls indeterminacy and facilitates legislative decisionmaking. Rather than encroach upon the legislative function, judicial grants of collective standing aid the operations of the legislature.

Economist Kenneth Arrow proved the indeterminacy of voting as a social choice mechanism.¹²⁵ Arrow's Impossibility Theorem demonstrated that no determinate social choice mechanism can be simultaneously aggregative,¹²⁶ Pareto-optimal,¹²⁷ independent of nonexistent or

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123. See *infra* notes 125-29 and accompanying text.

124. Although the justices and judges of the Supreme Court and the courts of appeals vote on their decisions, this voting procedure is unlike the one employed in the legislature. The decisions of these courts are expressed in written opinions, not simple tallies.

125. Arrow, *supra* note 69, at 121-25.

126. "Aggregative," in this context, means deriving a social ordering of preferences over states of the world from a collection of individual preferences of this sort. Arrow, *supra* note 69, at 120.

127. The "Pareto principle" requires that "[i]f alternative *x* is preferred to alternative *y* by

irrelevant alternatives,¹²⁸ and nondictatorial.¹²⁹ Arrow chose these conditions as appropriate constraints upon a voting procedure serving as social choice mechanism. But he also made a stronger claim, based on the condition of the independence of irrelevant alternatives: “[t]he condition of the independence of irrelevant alternatives implies that in a generalized sense all methods of social choice are of the type of voting.”¹³⁰ In effect, Arrow claimed that each of the conditions places a reasonable, important constraint on any social choice mechanism, and that requiring the independence of irrelevant alternatives commits any such mechanism to the form of voting. But, taken together, the conditions prevent any given voting mechanism from coming up with determinate social choices.¹³¹

Weakening any one of the conditions would resolve the troublesome indeterminacy. If, however, the condition of the independence of irrelevant alternatives is weakened, two things follow. First, the concept of open-ended possibility is reintroduced into social choice. Voters usually face a yes/no choice that seems to exhaust the social possibilities. Introducing previously nonexistent — and hence, irrelevant — options alleviates the tendency toward the *status quo* in “any historically given situation.”¹³² This rejuvenates the element of *choice* in social decisionmaking. For previously unconsidered possibilities to wend their way into the voting procedure, however, they must be articulated as concrete alternatives. Here the second result of weakening the independence of irrelevant alternatives comes into play: reasserting the force of outside alternatives requires ways of conceptualizing them for consideration. And, consequently, a niche is formed for a judiciary in the business of responding to social developments by protecting newly articulated interests. Associations and their interests, defined collectively, present a paradigmatic opportunity for this sort of activity. “[I]n the very recognition of a ‘person’ who is ‘harmed’

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every single individual according to his ordering, then the social ordering also ranks *x* above *y*.” Arrow, *supra* note 69, at 120.

128. “The social choice made from any environment depends only on the orderings of individuals with respect to the alternatives in that environment.” Arrow, *supra* note 69, at 120.

129. “There is no individual whose preferences are automatically society’s preferences independent of the preferences of all other individuals.” Arrow, *supra* note 69, at 121.

130. K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 27-28 (2d ed. 1963).

131. A simple example of the indeterminacy arises from violating the condition of the independence of irrelevant alternatives, as happens in rank-order voting:

[S]uppose that there are three voters and four candidates, *x*, *y*, *z*, and *w*. Let the weights for the first, second, third, and fourth choices be 4, 3, 2, and 1, respectively. Suppose that individuals 1 and 2 rank the candidates in the order *x*, *y*, *z*, and *w*, while individual 3 ranks them in the order *z*, *w*, *x*, and *y*. Under the given electoral system, *x* is chosen. Then, certainly, if *y* is deleted from the ranks of the candidates, the system applied to the remaining candidates should yield the same result, especially since, in this case, *y* is inferior to *x* according to the tastes of every individual; but, if *y* is in fact deleted, the indicated electoral system would yield a tie between *x* and *z*.

Arrow, *supra* note 130, at 27.

132. K. ARROW, *supra* note 130, at 119.

courts formally cap the formulation of a value . . . and *permit a full and continuous search for its realization to begin.*"¹³³

This is not to say that the legislature does not also deliberate and settle on new alternatives and values, which are then put to a vote. It is only to say that by incorporating new prospects into legal doctrine, courts make a unique contribution to the process. In choosing to protect collective interests, courts give them a chance to be chosen by the legislature as worthy of fostering. And by recognizing and articulating these interests, courts offer the legislature previously hidden alternatives. This eases one of the constraints upon legislative voting that would otherwise contribute to the problematic indeterminacy identified by social theory. By combining the legislative and judicial functions this indeterminacy can be avoided in practice.

IV. CONCLUSION

This Note makes a case for reformulating associational standing by concentrating on its intrinsically collective character, rather than treating it as a stepsister of traditional individual standing. The collective nature of certain interests dictates that they can only be borne by groups such as associations. These associations are thus the only legitimate protectors of these interests. The Supreme Court has recognized that, in forming and joining associations, individuals themselves conceive of their interests as shared amongst themselves — not reiterated from member to member.¹³⁴ A move to collective standing would shift the requirements for associational standing from criteria suited to individual interests held in isolation, to criteria relevant to shared interests held in common. Thus, collective standing should foster uniformity in grants of standing to associations and vindicate those virtues of association already recognized in judicial doctrine.

— Heidi Li Feldman

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133. J. VINING, *supra* note 4, at 171 (emphasis added).

134. *See* UAW v. Brock, 477 U.S. 274, 287-90 (1986). *See also supra* notes 34-43 and accompanying text.