



Injury in Fact, Then and Now (and Never Again): Summers v. Earth Island Institute and the Need for Change in Environmental Standing Law

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INJURY IN FACT, THEN AND NOW (AND NEVER AGAIN): *SUMMERS V. EARTH ISLAND INSTITUTE* AND
THE NEED FOR CHANGE IN ENVIRONMENTAL STANDING LAW*

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16 Mo. Env. L. & Pol. Rev ___***

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Abstract

This article has 3 goals: to describe the origins and development of environmental standing law, to present theoretical objections to the requirement that environmental plaintiffs

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demonstrate an “injury in fact” as it is currently understood, and to use the Court’s recent decision in *Summers v. Earth Island Institute* to ground those theoretical objections in an actual case, and demonstrate the inadequacies of modern environmental standing doctrine. The article concludes that modern standing doctrine has no rational basis in constitutional analysis or even reasoned jurisprudence, but rather stems from a series of decisions exhibiting confused and obscure reasoning. Further, from a normative perspective, there is no reason to believe that the Constitution, either structurally via the doctrine of separation of powers or directly via Article III, requires plaintiffs to demonstrate “injury in fact.” Finally, the Court’s decision in *Summers* upholding the injury in fact requirement demonstrates several important truths: the Court’s efforts to liberalize standing doctrine in several recent cases were insufficiently aggressive to accomplish a permanent shift, and the injury in fact doctrine has real negative implications both for the intellectual integrity of environmental standing law and for the environment itself.

Introduction

Questions of standing-- who has it, what it means, why it exists-- have vexed environmental law scholars, practitioners, and plaintiffs since the inception of statutory environmental litigation almost fifty years ago. The doctrine has become one of the most prominent features of modern environmental law, forcing environmental plaintiffs to jump through what are often impossibly high hoops just to get into court, regardless of the validity of their claims on the merits. Standing jurisprudence in the context of environmental cases has been the subject of extensive controversy among legal scholars, with conservative thinkers typically supporting a high bar for standing and more progressive thinkers favoring greater access to courts. Standing law has shifted back and forth between these two poles several times

over the course of the Supreme Court's dealings with it. In one of its most recent major standing decisions, *Massachusetts v. EPA*,¹ the Court came down on what is generally thought to be the liberal side of the debate, significantly broadening its application of the three-part test for standing farther than it ever had before. In its most recent decision, *Summers v. Earth Island Institute*,² the Court reverted to a more conservative approach that relies on the stringent requirement of injury in fact.

In this article, I will argue that this approach is unjustified from a constitutional perspective, and that the Court needs to do more than it did in *MA v. EPA* to remedy the problems with standing doctrine. While the Court's opinion in *MA v. EPA* did represent a victory for advocates of liberal environmental standing law, the Court's opinion did nothing to rectify any of the fundamental problems that make conservative standing doctrine so anathema to the ideals of environmental protection in the first place, and thereby set the stage for the environmental loss in *Summers*. In acquiescing to using the basic test for standing set out by Justice Scalia in *Lujan v. Defenders of Wildlife*³ in 1992, even while significantly liberalizing it, the Court in *MA v. EPA* gave that "Scalian standing"⁴ test further precedential weight and thereby gave strength to a doctrine of standing that is deeply problematic for the goals of national environmental protection, as is demonstrated by the outcome of *Summers* and its potential environmental consequences.

¹ 549 U.S. 497 (2007).

² No. 07-463, slip op. (U.S. Mar. 3, 2009).

³ 504 U.S. 553 (1992).

⁴ Jamie Pleune, *Is Scalian Standing the Next Lochner-ess Monster?*, 38 *Envtl. L.* 273 (2008). See also John Echeverria, Jon T. Zeidler, *Barely Standing: The Erosion of Citizen "Standing" to Sue and Enforce Environmental Law*, Georgetown University Environmental Policy Project (June 1999), available at http://www.law.georgetown.edu/gelpi/research_archive/standing/BarelyStanding.pdf (referring to Justice Scalia "single-handedly transform[ing] the law of citizen standing in environmental cases").

Part I will trace the historical development of standing law, arguing that its roots, while purportedly constitutional, are in fact largely prudential in nature and have very tenuous ties to the Article III “case or controversy” requirement. Those roots are based largely in judicial fabrication with minimal constitutional basis, and reflect outdated modes of jurisprudence that are incompatible with a collective effort to save the environment from exploitation and destruction. Part II will set out constitutional arguments against Scalian standing. These arguments demonstrate the theoretical and practical inadequacy of that doctrine, which is fundamentally at odds with the best means that America has come up with to address the collective action problems that plague the pursuit of environmental protection: citizen enforcement of environmental laws and regulations. Part III will discuss the *Summers* case and its consequences in detail, and argue that it demonstrates why the Courts’ liberal standing cases should not be considered anything more than pyrrhic victories for proponents of broader access to the courts for citizens and environmental groups. I will argue that in order to achieve a doctrine of standing that is both intellectually and practically viable, the Court will need to go back to the drawing board, abandoning Scalian standing entirely as a failed experiment with potentially devastating environmental results.

Part I: The Origins and History of Standing Law

In 1992, Justice Antonin Scalia definitively articulated modern standing doctrine when he denied standing to the plaintiffs in *Lujan v. Defenders of Wildlife*,⁵ examined in more detail below. In so doing, he explained that “[o]ver the years, our cases have established that the

⁵ 504 U.S. 553 (1992).

irreducible constitutional minimum of standing contains three elements.”⁶ In order to achieve standing, a plaintiff must have (1) “suffered an ‘injury in fact.’”⁷ This means “an invasion of a legally protected interest” which itself has two fundamental components-- the injury must be both “concrete and particularized” and “actual or imminent, not ‘conjectural or hypothetical.’”⁸ In addition, (2) “there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court.’”⁹ Lastly, (3) “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable opinion.’”¹⁰ In this part I will trace back these elements of standing (with an emphasis on injury in fact) to their inceptions in case law, as well as explore their constitutional underpinnings (or lack thereof) and prudential justifications. I will then follow those ideas through the early environmental cases, *Defenders of Wildlife*, and subsequent developments, all with the hope of demonstrating the confusion and inconsistency that has surrounded the doctrine and exhibited its lack of genuine constitutional origin.¹¹

A. Injury In Fact

⁶ *Id.* at 560.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 561.

¹¹ See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 299 (2008) (arguing that “historical practice . . . does not justify inserting the injury-in-fact requirement into Article III”).

What makes Scalia's decision in *Defenders of Wildlife* particularly notable is the fact that the plaintiffs were suing under the citizen suit provision of the Endangered Species Act,¹² which expressly authorized citizens to sue to enforce that Act's provisions. By insisting that plaintiffs did not have standing to sue despite this Congressionally created cause of action, Scalia ostensibly declared the citizen suit provision unconstitutional unless plaintiffs could prove an "injury in fact."¹³ As indicated above, the origins of this doctrine are somewhat hazy, and have no basis in the plain text of the Constitution. While the injury in fact test is purportedly based in Article III of the Constitution, that Article states only that "[t]he judicial power shall extend to all cases . . . [and] controversies"¹⁴ The story of how this vague phrase became the root of the "injury in fact" requirement is deeply confused.

Scholarship and jurisprudence on standing have identified two strains of standing doctrine, which have come together in puzzling ways to yield the injury in fact test. Today, "constitutional standing" is that premised on the "constitutional minima" cited in *Defenders of Wildlife*, which are purportedly required by Article III. "Prudential standing," by contrast, focuses on whether a plaintiff has a cause of action under a relevant statute; today, that test is known as the "zone of interests test," because it inquires whether the plaintiff is within the zone of interests contemplated by the statute.¹⁵ Both tests have undergone significant evolution over the course of the twentieth century. It is difficult to say which strain of reasoning is responsible for the idea of injury in fact; while today it is claimed under the constitutional heading, its first

¹² 16 U.S.C. §1540(g) (1973).

¹³ *Defenders of Wildlife*, 504 U.S. at 576-578. See also William W. Buzbee, *Standing and the Statutory Universe*, 11 Duke Env'tl. L. & Pol'y F. 247, 253 (2001). An alternative way to view his outlook is to suggest that Congress would not have intended to abrogate the constitutional injury requirement, and that therefore citizen suit provisions are not intended to confer standing on people who do not have an injury in fact.

¹⁴ U.S. Const. art. 3, §2.

¹⁵ See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

appearance in case law, as seen below, actually came in the context of an opinion discussing prudential standing requirements.¹⁶

1. Constitutional Standing

Different scholars have placed the emergence of the constitutional strand of standing law at different points in time, most no earlier than the 1920s.¹⁷ As early as 1831, however, the Court was struggling with issues of justiciability and separation of powers, stating that when resolution of a case “would seem to depend for relief upon the exercise of political power,” it “appropriately devolv[es] upon the executive, and not the judicial department of the government. This court can grant relief so far, only, as the rights of persons or property are drawn in question, and have been infringed.”¹⁸ It is clear from reasoning like this that the history of requiring a plaintiff to be injured in some way is firmly rooted in constitutional thinking, and this requirement is both sensible and justified based on separation of powers principles. It is the further development of the injury doctrine, and the restriction of what qualifies as a “right” to be “infringed,” that starts to become more problematic.

The 1923 case of *Frothingham v. Mellon* exemplifies the more specific move of limiting standing based specifically on the jurisdictional grant of Article III.¹⁹ In that case, the Supreme Court held that it could not assume jurisdiction over a suit in which an individual taxpayer sought to sue the government for what she argued was unconstitutional misuse of her tax dollars.

¹⁶ See *id.*; *Barlow v. Collins*, 397 U.S. 159 (1970). See also Cass Sunstein, *What’s Standing After Lujan*, 91 Mich. L. Rev. 163, 169 (1992).

¹⁷ See *id.* at 180; see also Timothy C. Hodits, *The Fatal Flaw of Standing: A Proposal for an Article I Tribunal for Environmental Claims*, 84 Wash. U. L. Rev. 1907, 1910 (2006) (asserting that a majority of commentators find no jurisprudence relevant to modern standing law before 1920 and collecting articles).

¹⁸ *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831) (Thompson, J. dissenting).

¹⁹ 262 U.S. 447 (1923).

Citing concerns about separation of powers similar to those seen in the earlier cases, the Court stated,

[w]e have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.²⁰

To assume jurisdiction without the presence of an individual stake, the Court said, “would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.”²¹ Here one can see the injury requirement, while still apparently based in separation of powers concerns, implicitly tied into the jurisdictional grant of Article III via the phrase “judicial controversy.” The Court’s move here is to say that any assumption of jurisdiction that would infringe upon the other branches of government is by definition not a judicial controversy within the meaning of Article III. While this move begs the question somewhat, its doing so is largely harmless given the legitimacy of the underlying rationale.

To this point there has been nothing unreasonable in the development of an injury requirement-- the Court has consistently sought to limit its own authority to cases it deems justiciable without straying into the realm of policy-making. While its logically questionable invocation of Article III is somewhat superfluous, the constitutional foundation for its decisions is still strong; this is because separation of powers principles embodied in the general structure of the Constitution provide a strong rationale for the Court’s desire to avoid taking on fundamentally political issues. In one element of its opinion in *Frothingham*, however, the Court took a step that eviscerated plaintiffs’ ability to get into court, and it did so without providing any

²⁰ *Id.* at 488.

²¹ *Id.* at 489.

cogent constitutional justification. That step was to say that Frothingham’s injury, by virtue of being “shared with millions of others,” was insufficient “for an appeal to the preventive powers of a court of equity.”²² In justifying this conclusion, the Court noted:

The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.²³

The Court therefore held that plaintiffs’ injuries, even if legitimate, become non-justiciable simply by virtue of being shared with many others; its only explicit normative basis for doing so, moreover, was the “attendant inconveniences” that would result from holding otherwise.²⁴ Note that the stated justification for what would ultimately become the particularization requirement in *Scalian* standing is little other than convenience (and not any explicit constitutional concern).

²² *Id.* at 487.

²³ *Id.*

²⁴ The Court appears to have made the erroneous assumption that any harm shared by a large number of people is fundamentally political by nature and therefore should not be justiciable. This assumption, and the resultant particularization requirement, pose an obvious practical and ethical problem, elucidated by Justice Stewart in his opinion for the Court in the *SCRAP* case (discussed later in this Part, *see infra* notes 64-69 and accompanying text): “To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.” *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). Justice Souter expressed a similar concern in a memo to Justice Scalia regarding the draft majority opinion in *Defenders of Wildlife*: “Despite ambiguous dicta in some of our cases, I doubt anyone would have standing to sue on the basis of a concrete injury that everyone else has suffered; Congress might, for instance, grant everyone standing to challenge government action that would rip open the ozone layer and expose all Americans to unhealthy doses of radiation. Yet the repeated references to a particularity requirement . . . draw that conclusion into doubt.” Memorandum from Justice David Souter to Justice Antonin Scalia (May 28, 1992) (on file with author). *See also* Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law’s Growing Shadow*, 2007 Sup. Ct. Rev. 111, 129 (2007) (describing standing as “the notion that litigants should only have access to court when the harm they assert is neither too small nor too large, but rather ‘just right’--a kind of ‘Goldilocks’ theory of standing”).

In *Doremus v. Board of Education*,²⁵ decided in 1952, the Court applied this idea again, once again denying a taxpayer standing to sue. Quoting the companion case to *Frothingham*, the Court said,

Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'²⁶

This statement does not necessarily mirror the strict principle from *Frothingham* that injury is insufficient if shared; indeed, the statement here read literally does not necessarily preclude the possibility that a *direct* injury shared among many people would be sufficient to get into court. However, the Court again seems to use some questionable logic in its holding, implying that the injury at issue in the case is determined to be insufficiently direct simply by virtue of its being shared. This implies that broadly shared injuries are a death knell for plaintiffs' hopes of getting into court. Further underscoring this point, the Court that same year, in *Adler v. Board of Education*,²⁷ denied standing to eight plaintiffs who sought to enjoin a waste of taxpayer funds under a New York statute. It argued the following in regard to plaintiffs' argument that the statute gave them standing to sue:

New York is free to determine how the views of its courts on matters of constitutionality are to be invoked. But its action cannot of course confer jurisdiction on this Court, limited as that is by the settled construction of Article III of the Constitution. We cannot entertain, as we again recognize this very day, a constitutional claim at the instance of one whose interest has no material significance and is undifferentiated from the mass of his fellow citizens.²⁸

²⁵ 342 U.S. 429 (1952).

²⁶ *Id.* at 435.

²⁷ 342 U.S. 485 (1952).

²⁸ *Id.* at 501.

Again, the court here commits the logical fallacy of assuming that a claim that is undifferentiated is not materially significant. Moreover, the Court offers Article III as the basis for the proposition that shared injuries are not justiciable. However, the only citation the Court offers for the above statement is to *Doremus*, which in turn (as seen above) relies for its conclusions on the reasoning in *Frothingham*, which was based not on Article III but on the avoidance of “inconvenience.” Therefore the Article III basis for the particularization requirement seems to have been pulled largely out of thin air.

The Court continued to invoke Article III as a justification for the injury requirement outside the context of particularization as well, though the underlying justification shifted over time away from the separation of powers concerns that initially legitimated the doctrine.²⁹ In 1962, the Court couched the question of injury in the following terms: “Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?”³⁰ The idea seems to be that only by asserting an injury can a plaintiff assure the proper function of the adversary process. By 1968, this “concrete adverseness” justification had worked its way into constitutional discourse: “in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”³¹ In terms of providing an Article III justification for the injury requirement, this line of reasoning begs the question just as the separation of powers reasoning did-- rather than reasoning from the text as to what Article III

²⁹ See Hessick, *supra* note 12, at 299-300.

³⁰ *Baker v. Carr*, 369 U.S. 186, 203 (1962).

³¹ *Flast v. Cohen*, 392 U.S. 83, 99-101 (1968).

requires, the Court made its own judgment about how courts should properly function and read that judgment back into Article III.

While constitutional standing continued to develop on its own terms, it ran head on into prudential standing in 1970 with the Court’s decision in *Association of Data Processing Service Organizations, Inc. v. Camp*.³² Before investigating the progression of the constitutional injury requirement after that point, it makes sense to briefly canvas the development of the injury requirement in the prudential standing context.

2. Prudential Standing

While courts have been citing prudential concerns since the early days of the republic³³ (indeed, much of the reasoning in the early cases cited above might be more aptly characterized as prudential than constitutional), the development of prudential standing as relevant to the purposes of this Part can be traced to the progressive period and the New Deal.³⁴ It is important to note explicitly that in many instances, the line between prudential and constitutional reasoning is not always clear, especially in the early twentieth century cases.³⁵ The two are almost more readily distinguished by the context in which they arise than by the reasoning they utilize. The

³² 397 U.S. 150 (1970).

³³ See, e.g., *Owings v. Norwood’s Lessee*, 5 Cranch 344 (1809); *Henderson v. State of Tennessee*, 51 U.S. 311 (1850); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1851) (Daniel, J. dissenting); *Georgia v. Stanton*, 73 U.S. 50 (1868); *Tyler v. Judges of Court of Registration*, 179 U.S. 405 (1900); *Hendrick v. State of Maryland*, 235 U.S. 610 (1915).

³⁴ See Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 *Notre Dame L. Rev.* 875, 890-91 (2008); Sunstein, *supra* note 12, at 179.

³⁵ For example, Justice Brandeis at one point noted, “The Court has frequently called attention to the ‘great gravity and delicacy’ of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions.” *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-46 (1936) (Brandeis, J. concurring). While he made no explicit reference to Article III, he did utilize the specific phrase “cases and controversies,” rendering the reasoning at least implicitly constitutional. A similar phenomenon occurred in *Frothingham* with the phrase “judicial controversy.” See *supra* notes 20-21 and accompanying text.

prudential standing test is entirely statutory today, which is no coincidence given its origins in the period comprising the rise of the regulatory state.

Most scholars agree that modern prudential standing requirements arose as a result of progressive Justices' efforts to protect progressive and New Deal legislation from attack by industry.³⁶ The Justices primarily responsible were Brandeis and Frankfurter.³⁷ Between them they created what is referred to as the "legal right" test for standing, wherein to establish standing, litigants had to show that a legal right, conferred upon them by statutory or common law, had been infringed.³⁸ This served their ultimate purpose of protecting regulatory action because competitors could not satisfy this test, not having any legal rights at stake; only those directly subject to agency action could have their legal rights injured. In 1930, in a case about railroad rate regulation, a railroad company sought to challenge the validity of an ICC finding of undue prejudice. Justice Brandeis, denying standing, said the company did not have

the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order In the case at bar, the appellants have no independent right which is violated by the order to cease and desist.³⁹

Similarly, in *Tennessee Electric Power Co. v. Tennessee Valley Authority*,⁴⁰ the Court summarized the doctrine as follows:

The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,-one of property, one arising

³⁶ See Sunstein, *supra* note 12, at 179; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1458 (1988).

³⁷ *Id.* at 1374.

³⁸ RONALD A. CASS, COLIN S. DIVER & JACK M. BEERMAN, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 270 (5th ed. 2006).

³⁹ *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 255 (1930).

⁴⁰ 306 U.S. 118 (1939).

out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.⁴¹

The legal rights test was not grounded explicitly on constitutional principles, reflecting its motivating factors. Instead, as the Court's language demonstrates, it was largely based in the relevant statutory language, as well as the common law requirement that plaintiffs have some legal cause of action.⁴² Both of these sources, as well as the explicit language of the test, made it clear that Congress had the capacity to create judicially cognizable injury by legislation.⁴³ On a very broad scale, this is what Congress did when it passed the Administrative Procedure Act⁴⁴ (APA) in 1946, which made its own provision for judicial review of agency action.

Section 702 of the APA provides that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."⁴⁵ Lower courts interpreted APA judicial review to allow both objects and beneficiaries of agency action to get into court, in keeping with prior case law such as *Sanders Brothers*.⁴⁶ This was an expansion of the legal right test to the extent that it understood people who stood to benefit from regulation as having legal rights, as opposed to merely non-legal interests, at stake. The Supreme Court's first treatment of the legal right test in this era, however, took an unpredictable turn, and introduced for the first time the concept of "injury in fact."

⁴¹ *Id.* at 119.

⁴² See Sunstein, *supra* note 12, at 180-81; CASS ET AL., *supra* note 38 at 271.

⁴³ See *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (confirming that Congress could grant standing to competitors to challenge licensing awards); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940) (noting that injury alone cannot create a cognizable "source of legal rights in the absence of constitutional legislation recognizing it as such"). See also CASS ET AL., *supra* note 38, at 271.

⁴⁴ Administrative Procedure Act, 5 U.S.C. §§ 701-711 (1946).

⁴⁵ 5 U.S.C. § 702.

⁴⁶ See Sunstein, *supra* note 12, at 183, n. 97 (collecting cases).

3. Collision Point

The term “injury in fact” first appeared in the companion cases of *Data Processing* and *Barlow v. Collins*⁴⁷ in 1970. The term made its debut amidst reasoning drawing on both constitutional and prudential principles, presented such that it is unclear from which category (and to which category) it applies. The following close reading of *Data Processing* aims not necessarily to advocate one particular understanding of the opinion, but rather to demonstrate the extent to which its reasoning is confused, especially with regard to the distinction between constitutional and prudential standing requirements.

Data Processing considered the question of whether the data processors’ organization, as a competitor, had standing to challenge the Comptroller of the Currency’s ruling that allowed banks to perform data processing services for their customers. Beginning his discussion with the mysterious assertion that “generalizations about standing to sue are largely worthless as such,” Justice Douglas proceeded to discuss both the constitutional and prudential elements of standing doctrine.⁴⁸ He introduced the constitutional issue by explaining that

the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to ‘cases’ and ‘controversies.’ As we recently stated in *Flast v. Cohen* [citation omitted], ‘(I)n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.’⁴⁹

Note that separation of powers concerns appear to have dropped out of the picture entirely, replaced by the more abstract concern with sufficient adversarial context. Using this concept as his “Article III starting point,” Douglas proceeded to distinguish the *Flast* taxpayer suit context

⁴⁷ 397 U.S. 159 (1970).

⁴⁸ *Data Processing*, 397 U.S. at 151.

⁴⁹ *Id.* at 151-152.

from the competitor suit at issue.⁵⁰ He did so by introducing the concept of injury in fact, noting that “[t]he first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”⁵¹ Clearly a competitor whose business will be reduced has suffered an injury in fact of the economic variety, whereas, Douglas implicitly presumed, a taxpayer does not have a constitutionally cognizable injury in fact at all. This second conclusion has little to support it, given that the taxpayer clearly is experiencing *some* sort of injury that has driven him to court in the first place. In truth, Douglas offered no explanation for his conception of injury in fact at all.

To determine what is actually doing the work of distinguishing the taxpayer here, one would have to determine what Douglas meant by “injury in fact,” and what categories thereof he meant to encompass in the phrase “economic or otherwise.” Unfortunately, he offered little to work with in this regard. His next step was to object to the Court of Appeals’ approach to the case, explaining that the lower court “viewed the matter differently.”⁵² It is unclear whether “the matter” refers to the case in its entirety, the injury in fact requirement, or the specific injury determination in this case. The Court of Appeals had applied the legal right test and denied standing on that ground. Douglas brushed off this approach, stating that “the ‘legal interest’ test goes to the merits.”⁵³ He then offered his own approach to standing, without explaining whether he was expounding on the injury in fact requirement or discussing a new requirement altogether.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* This is a puzzling assertion; the legal interest test had been understood as a determination of standing to this point. The assertion that it “goes to the merits” is, while not an unreasonable view of the doctrine, not in keeping with how it had been applied to date. *See, e.g.,* The Chicago Junction Case, 264 U.S. 258 (1924) (finding that plaintiffs’ potential monetary loss was a sufficient legal interest to allow them to bring suit and not discussing that loss on the merits).

The question of standing is different. It concerns, apart from the ‘case’ or ‘controversy’ test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person ‘aggrieved by agency action within the meaning of a relevant statute.’⁵⁴

Douglas here introduced what has become the mainstay of modern *prudential* standing-- the zone of interests test. As noted above, however, it is unclear if he intended to refine the method of determining *whether* an injury in fact had occurred, or if he meant to create a new test distinct from the injury in fact requirement. It is also unclear whether Douglas intended to establish a prudential or a constitutional test. He stated only that the zone of interests test is separate from the cases and controversies requirement. This leaves some question as to whether the zone of interests test is somehow constitutional in nature without being directly linked to the case and controversy requirement. There are several ways to read the opinion that yield different answers to these questions.

Given the subsequent reference to APA judicial review, it is possible that Douglas meant the zone of interests requirement strictly as an interpretation thereof. However, it is equally possible that Douglas was merely referencing the APA as support for his reading of a constitutional standing requirement. This possibility is supported by the fact that Douglas introduced the zone of interests test as part of his repudiation of the appellate court’s method of defining injury, which he initially discussed in the context of injury in fact. The third possibility is that he meant the zone of interests test to be the newest iteration of prudential standing. However, this interpretation is complicated by the fact that Douglas’ next move in the opinion was to invoke prudential standing as a separate category:

⁵⁴ *Data Processing*, 397 U.S. at 154.

Apart from Article III jurisdictional questions, problems of standing, as resolved by this Court for its own governance, have involved a ‘rule of self-restraint.’ . . . Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise.⁵⁵

Douglas’ transition here-- “apart from Article III jurisdictional questions”-- suggests that everything discussed prior to this point had been an Article III jurisdictional question. If that is the case, then the zone of interests test as well as the injury in fact test (if they are in fact different) are both Article III tests. Douglas offered constitutional justifications for neither.

The purpose of the above analysis is to show that drawing any sort of doctrinal conclusion from *Data Processing* is at best a questionable proposition. Given the lack of explanation, justification, and clarity in the opinion, its critical status in the development of standing law is unfortunate and undesirable. However, *Data Processing* has been taken to create two new and separate tests for standing-- a constitutional inquiry into “injury in fact,” and a prudential inquiry into the zone of interests contemplated by the statute at issue. This interpretation has become mainstream despite the fact that a new constitutional injury requirement emerged from the rejection of an old prudential requirement, not to mention that this new injury requirement made what was once a purely legal inquiry into a purely factual one with no explanation or justification whatsoever.⁵⁶

What did Douglas mean by “injury in fact, economic or otherwise?” It is impossible to tell from the opinion, but the general idea seems to have been to expand the concept of injury beyond the simple violation of a statutory or common law right. Under the new test, any harm to one’s interests is sufficient injury for the purposes of getting into court as long as those interests fall

⁵⁵ *Id.*

⁵⁶ See Jonathan Poisner, *Environmental Values and Judicial Review after Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 Ecology L. Q. 335, 340-41 (1991).

within the zone of interests protected or regulated by the relevant statute.⁵⁷ What is unclear is how broadly the test was meant to open the courthouse doors. Douglas did note that certain non-traditionally legal interests would qualify, stating that such interests might reflect ‘aesthetic, conservational, and recreational’ as well as economic values.”⁵⁸ Other categories of interests remain ambiguous-- Is a purely emotional injury an injury in fact? What about a moral outrage? Can purportedly illegal action comprise an injury in fact without concrete damage to one’s concrete interests? *Data Processing* does not make these issues clear, and the Court has interpreted the requirement variably in subsequent opinions.

4. Moving Forward After Data Processors

In 1972, the Court in *Sierra Club v. Morton*⁵⁹ began the process of fleshing out the holding in *Data Processing*. The case considered the question of whether the Sierra Club had standing to sue as an organization to prevent the development of the Mineral King valley. The Court restated its holding from *Data Processing*, explaining that in that case,

we held more broadly that persons had standing to obtain judicial review of federal agency action under §10 of the APA where they had alleged that the challenged action had caused them ‘injury in fact,’ and where the alleged injury was to an interest ‘arguably within the zone of interests to be protected or regulated’ by the statutes that the agencies were claimed to have violated.⁶⁰

The Court added, in a footnote, “In deciding this case we do not reach any questions concerning the meaning of the ‘zone of interests’ test or its possible application to the facts here

⁵⁷ The “zone of interests” concept, somewhat ironically, has been interpreted loosely by the same Justices who support narrow standing requirements. *See generally* *Bennett v. Spear*, 520 U.S. 154 (1997).

⁵⁸ *Data Processing*, 397 U.S. at 154.

⁵⁹ 405 U.S. 727 (1972).

⁶⁰ *Id.* at 733.

presented.”⁶¹ Interestingly, the Court couched the injury in fact and zone of interest tests both solely in terms of the APA, forsaking any discussion of a constitutional injury requirement. The Court concluded that the alleged injury in fact was insufficient, not because it was aesthetic/conservational/recreational in nature, but rather because the Sierra Club had alleged an injury to the concerns of the organization rather than a concrete injury to itself or its members. In so doing, the Court stated that

the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.⁶²

Sierra Club is usually viewed as a victory for environmental advocates, despite the denial of standing in the specific circumstances, because it affirmed the idea that broadly shared environmental interests were appropriate subjects for judicial review (and ultimately allowed plaintiffs to amend their complaint).⁶³ However, in the course of its holding, the Court actually significantly narrowed the potential meaning of the injury in fact test from where it had been left after *Data Processing*. The Court noted that the Sierra Club’s longstanding interest in the preservation of the Sierra Nevada Mountains was not enough to render the destruction of that wilderness an injury in fact to the organization.

The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's

⁶¹ *Id.* at 733 n.5.

⁶² *Id.* at 734-735.

⁶³ See, e.g., Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 Fla. St. U. L. Rev. 433, 466 (2008) (“The decision was deemed to be something of a victory for the environmental movement because of the recipe laid out in the opinion for meeting standing requirements....”); Emily Longfellow, *Friends of the Earth v. Laidlaw Environmental Services: A New Look at Environmental Standing*, 24 *Environ. L. & Pol’y. J.* 3, 17 (2000) (“While the Court followed its standing doctrine in requiring the plaintiff to be among those injured, the decision was a victory for environmental plaintiffs because the Court recognized that an injury can involve harm to aesthetic and environmental values, not only economic values.”).

depredations. But if a ‘special interest’ in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide ‘special interest’ organization however small or short-lived. And if any group with a bona fide ‘special interest’ could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.⁶⁴

It is difficult to understand why the threatened injury to a “special interest” should not qualify as an injury in fact, whether for groups or for individual citizens. That conservational interests were specifically included as cognizable interests in *Data Processing* makes this even more puzzling.

What the Court seems to be doing here is limiting injury in fact to those injuries that affect concrete or tangible interests-- the number of dollars one possesses, the ability to physically hike in aesthetically pristine area, the possibility of viewing an endangered specimen. While this is nowhere explicitly stated, the rationale for this move is presumably to read “in fact” as doing no work unless it refers to some element of the concrete world. The negative consequences and implications of this view will be discussed later on. For the purposes of this section, it is sufficient to note that it is equally if not more plausible to read “in fact” as meaning simply “in truth;” that is, the person must experience genuine negative effects from the purported injury, but not necessarily in concrete terms. Under this reading, the Sierra Club or any other individual with an interest in conservation would be injured in fact by the threatened destruction of the Mineral King valley. The Court chose to reject this reading, but once again, in what has become a familiar pattern, declined to explain why.⁶⁵ Despite this narrowing of the scope of the injury in fact test, however, the Court’s continued emphasis on the connection between the APA and the

⁶⁴ *Sierra Club*, 405 U.S. at 739-40.

⁶⁵ The only underlying justification we see in the entire opinion is a reference back to the necessity for adversity and “personal stake” with citations to *Baker v. Carr* and *Flast v. Cohen*, neither of which does the work of justifying the Court’s narrow reading of injury in fact.

injury in fact test was potentially good news for environmental plaintiffs, insofar as it had the potential to limit the application of that test to cases brought under the APA.

The next major environmental standing decision from the Supreme Court came in 1973, in the case of *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.⁶⁶ SCRAP sued under the APA to challenge an ICC rate ruling that would increase shipping costs, and thereby render the shipping of recycled materials prohibitively costly, which would in turn injure the environment. Despite the attenuated and broad nature of these claimed injuries, the Court found that the plaintiffs had standing. It brushed off the contention that the injury complained of could be shared by any number of people, saying that “[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.”⁶⁷ Further explaining that “pleadings must be something more than an ingenious academic exercise in the conceivable,”⁶⁸ the Court nevertheless held that “we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected.”⁶⁹ As in *Sierra Club*, the key factor was therefore the plaintiff/appellees’ factual use of the specific natural resources that would purportedly suffer due to higher rail rates.

The injury in fact test in this opinion, however, was also explicitly tied to the APA: “‘Injury in fact’ reflects the statutory requirement that a person be ‘adversely affected’ or ‘aggrieved,’ and it serves to distinguish a person with a direct stake in the outcome of a

⁶⁶ 412 U.S. 669 (1973).

⁶⁷ *Id.* at 688.

⁶⁸ *Id.*

⁶⁹ *Id.* at 689.

litigation-- even though small-- from a person with a mere interest in the problem.”⁷⁰

Interestingly, any constitutional basis for the injury in fact test seems to have fallen by the wayside-- neither Article III specifically nor the constitution in general is mentioned once in the entire standing section of the opinion. The Court thereby left unclear to what extent the injury in fact test applied to suits brought under statutes other than the APA, of which there was to be a great proliferation over the next several years thanks to new environmental legislation including citizen suit provisions. This shift in the statutory landscape perhaps explains why the Court did not address the question of environmental standing again for nearly twenty years.

In 1990, the Court decided *Lujan v. National Wildlife Federation*.⁷¹ This was another suit brought under the APA, by conservation groups seeking to enjoin the Bureau of Land Management from engaging in its “land withdrawal review program,” which would have opened up certain public lands for mining and other private uses. Justice Scalia, writing for the Court, found that the program in general was too broad to constitute “agency action” within the meaning of §702, and therefore was unreviewable. The Court also upheld the District Court’s finding that the plaintiffs had not alleged sufficiently specific “injury in fact” because they claimed only that they used lands “in the vicinity” of the lands at issue in the case. This is a significant narrowing from the injury in fact test in *SCRAP*, where the injury was not only significantly more attenuated but also much more general. The Court in *National Wildlife Federation* expected the plaintiffs to identify and experience the exact acreage at risk in order for damage to that land to constitute an injury in fact. Scalia noted that “[t]he *SCRAP* opinion, whose expansive expression of what would suffice for §702 review under its particular facts has never since been emulated by this Court, is of no relevance here, since it involved not a Rule 56

⁷⁰ *Id.* at 690 n.14.

⁷¹ 497 U.S. 871 (1990).

motion for summary judgment but a Rule 12(b) motion to dismiss on the pleadings.”⁷² Scalia here made explicit his crusade to narrow the injury in fact test and foreshadowed what was to come.

In 1992, the Court decided *Lujan v. Defenders of Wildlife*,⁷³ in which Scalia laid out his three part test for standing.⁷⁴ Before analyzing his approach to injury in fact in this case, however, I will more briefly investigate the origins of the causation and redressability prongs in order to discuss Scalia’s approach as a whole.

B. Causation and Redressability

Causation and redressability are really more elements of injury in fact than they are separate requirements of Scalia’s standing test. These elements were formalized in two cases from the early seventies: *Linda R.S. v. Richard D.*⁷⁵ and *Warth v. Seldin*.⁷⁶ *Linda R.S.* concerned the mother of an illegitimate child who sought to enjoin a prosecutor from utilizing discretion to avoid prosecuting recalcitrant fathers of illegitimate children. The Court held that she did not have standing to sue, finding that she had “failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention.”⁷⁷ The Court further explained, referencing the companion case to *Frothingham*, that “the bare existence of an abstract injury meets only the first half of the standing requirement. ‘The party who invokes

⁷² *Id.* at 889.

⁷³ 504 U.S. 555 (1992).

⁷⁴ See *supra* notes 6-11 and accompanying text.

⁷⁵ 410 U.S. 614 (1973).

⁷⁶ 422 U.S. 490 (1975). See Francisco Benzoni, *Environmental Standing: Who Determines the Value of Other Life?*, 18 Duke Env’tl. L. & Pol’y F. 347, 356 (2008).

⁷⁷ *Linda R.S.*, 410 U.S. at 617-18.

(judicial) power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of (a statute's) enforcement.”⁷⁸ While the idea of injury being traceable to a party or action is in some sense implicit in the concept of a case or controversy, this was the first case to make that requirement explicit and central to its denial of standing.⁷⁹

The Court in *Linda R.S.* also made a point about redressability, demonstrating that at least to some extent it is the flip side of causation. Redressability as a concept inquires, “if the court rules in your favor, will the injury be redressed?” Of course, the definition of “redress” will be an important sticking point in terms of what the doctrine requires.⁸⁰ In this case, the Court seemed to interpret the concept narrowly, holding that if

appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the ‘direct’ relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case.⁸¹

Redressability was found lacking here because there was no way to know whether a court ruling would actually attenuate the injury at stake (because of inherent uncertainties in the prosecution process, etc). This ruling can be squared with *SCRAP* insofar as there, at least, the fundamental cause of the injury (the rate increase) would be removed by the Court’s ruling in *SCRAP*’s favor, whereas here a court ruling will affect the fundamental cause of the injury (recalcitrant father) only indirectly. Whether this distinction is a reasonable one is less clear-- presumably a court

⁷⁸ *Id.* at 618 (quoting *Massachusetts v. Mellon*, 262 U.S. 447 (1923)).

⁷⁹ It is fascinating that this holding came from the same term as *SCRAP*, where the injury seems so attenuated as to defy the concept of direct nexus.

⁸⁰ Compare *Defenders of Wildlife*, 504 U.S. at 568-71 (plurality opinion) with *Massachusetts v. EPA*, 549 U.S. 497, 525-27 (2007).

⁸¹ *Linda R.S.*, 410 U.S. at 618.

ruling will at least *help* resolve the plaintiff's injury in *Linda R.S.*, and it is unclear where the Court means to draw the line in its redressability analysis.⁸²

Warth concerned a group of plaintiffs who sought to challenge a town's zoning ordinance on the grounds that it prevented people of low and moderate income from living in the town. Ruling that the plaintiffs did not have standing, the Court cited *Linda R.S.* in explaining the concepts of causation and redressability as follows:

But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.⁸³

This seems to suggest a “substantial probability” test for the causation and redressability questions, meaning that the plaintiff's injury would be substantially likely not to exist absent the challenged behavior, and that a court ruling in the plaintiff's favor would be substantially likely to remedy the injury. Of course substantial likelihood is a flexible concept, so this test does little to determine what injuries will qualify as sufficiently caused and redressable. At other points in the opinion, the language is more exacting, stating that “to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm” is a “minimum requirement of Article III.”⁸⁴ The Court's holding was actually fairly narrow, however: “We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm

⁸² This problem would later result in the major disagreement between the majority and Chief Justice Roberts' dissent in *MA v. EPA*. See *infra* notes 128-32 and accompanying text.

⁸³ *Warth*, 422 U.S. at 504.

⁸⁴ *Id.* at 505.

him, and that he personally would benefit in a tangible way from the court's intervention.”⁸⁵ The Court’s choice of words reveals the extent to which the causation and redressability requirements are somewhat empty of substance, given that they leave open the possibility that a partial redress (“benefit in a tangible way,” rather than “would have his injury entirely abated”) will suffice-- thereby creating a line-drawing problem just like that in *Linda R.S.*

C. Scalian Standing

This was the status of standing when Scalia wrote *Lujan v. Defenders of Wildlife*-- vague and unspecific, certain that justiciability required some sort of injury and associated personal stake, but unclear as to exactly what qualified as injury under what circumstances. Scalia’s opinion treated this uncertainty as if it did not exist, carefully crafting a standing test that, while appearing to be generously supported by precedent, does not do justice to the subtleties of the jurisprudence involved.⁸⁶

Defenders of Wildlife involved a suit by the conservation group Defenders of Wildlife against the Secretary of the Interior, seeking to challenge his interpretation of a provision of the Endangered Species Act.⁸⁷ That provision, §7(a)(2), requires every federal agency to ensure via consultation with the Secretary of the Interior that its activity does not jeopardize the continued existence of any endangered species. While the Interior Department originally interpreted §7 to be international in scope, it shifted its position in a regulation promulgated in 1986 to interpret the provision “to require consultation only for actions taken in the United States or on the high

⁸⁵ *Id.* at 508.

⁸⁶ Scalia had earlier elucidated much of his thinking on standing in a Suffolk Law Review article, much of the reasoning from which appeared in *Defenders of Wildlife*. See *infra* notes 145-55 and accompanying text.

⁸⁷ 16 U.S.C. § 1536(a)(2) (1973).

seas.”⁸⁸ This decision allowed for the unregulated progress of certain development projects overseas that threatened the habitats of several endangered species.

Plaintiffs sought to establish standing based on the affidavits of two members who had traveled to Egypt and Sri Lanka to see the Nile crocodile and the Asian elephant and leopard, respectively. Both claimed that they had a strong interest in seeing the endangered animals again, and that the habitat destruction attending the development projects would inhibit their ability to do so. The Court found the affidavits inadequate to establish standing because the members did not have specific travel plans for returning, and therefore their injury was deemed insufficiently “actual or imminent” to provide for standing.

In delivering the Court’s opinion, Justice Scalia provided a good deal of argument and justification in support of his understanding of the injury in fact doctrine and the history of standing in general. Acknowledging that the Constitution does not define the terms “judicial Power,” “Cases,” and “Controversies,”⁸⁹ Scalia nonetheless argued, by way of the Federalist Papers, that the judicial power is constitutionally bounded by “landmarks still less uncertain”⁹⁰ than those that confine the powers of the legislative and executive branches. He then spelled out the three-part test for standing cited earlier, requiring injury in fact (which in turn must be concrete and particularized, and actual and imminent (not conjectural or hypothetical)), causation, and redressability.⁹¹ He cited several cases for each of these propositions, most prominently *Warth v. Seldin* and several other cases from the 1980s that followed its general lead in requiring more and more specific factual injuries or threats thereof. Among these was

⁸⁸ *Defenders of Wildlife*, 504 U.S. at 559.

⁸⁹ U.S. Const. art. 3, § 2.

⁹⁰ *Defenders of Wildlife*, 504 U.S. at 560 (quoting *The Federalist* No. 48, p.256 (Carey and McClellan, eds. 1990)).

⁹¹ *See supra* notes 6-11 and accompanying text.

City of Los Angeles v. Lyons,⁹² where the Court had held that a man who had been held in an illegal chokehold by a police officer in the past did not have standing to sue to enjoin the use of the chokehold because, despite having been concretely injured by it already, he could not “establish a real and immediate threat that he would *again* be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.”⁹³

In applying his test to the plaintiffs, Scalia made several moves that served to make the standing inquiry even more challenging for plaintiffs than it had already become. One was to make explicit what had been hinted at in prior cases,⁹⁴ namely that “when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.”⁹⁵ This more or less creates a presumption against standing for regulatory and statutory beneficiaries by assuming that they will be unlikely to be able to show the appropriate degree of traceable injury. Scalia also made a much more significant and problematic argument in *Defenders of Wildlife*, which was to reject the concept of procedural injury as a valid source of standing.

Scalia rejected the approach of the Court of Appeals in *Defenders of Wildlife*, which had been to grant plaintiffs standing based on the idea that the government’s failure to follow the procedural requirements of the Endangered Species Act itself constituted an injury in fact. As Scalia put it, “the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental ‘right’ to

⁹² 461 U.S. 95 (1983).

⁹³ *Id.* at 105 (emphasis added).

⁹⁴ *See, e.g.*, *Allen v. Wright*, 468 U.S. 737 (1984); *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. East Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976).

⁹⁵ *Defenders of Wildlife*, 504 U.S. at 562.

have the Executive observe the procedures required by law. We reject this view.”⁹⁶ Scalia hastened to explain that he did not intend to say that no citizen could enforce her procedural rights under a given statute; instead, the ability to enforce those rights required that a plaintiff have a concrete interest at stake that the rights were supposedly protecting.⁹⁷ He offered as examples that dedicated whale watchers could exercise their procedural rights in Court when their ability to see whales was threatened by whale harvesting,⁹⁸ or that a citizen could sue to enforce procedural requirements under the National Environmental Policy Act when a federal facility was being constructed next door to them.⁹⁹ Scalia’s basic point was that Congress could not eliminate the injury-in-fact requirement with citizen suit provisions.¹⁰⁰

Scalia defended his view with several arguments, calling on both constitutional principles and case law for support. Constitutionally he relied on the doctrine of separation of powers, as the Court did in its early standing cases. However, Scalia’s reasoning was slightly different from that employed in the late nineteenth and early twentieth centuries. Those cases expressed reluctance to adjudicate abstract claims because the resolution of general policy issues was considered the domain of the political branches; Scalia’s concern was more specific. He first reiterated the more general separation of powers concern that motivated the earlier cases, saying that “[v]indicating the *public* interest (including the public interest in Government observance of

⁹⁶ *Id.* at 573.

⁹⁷ *Id.* at 573 n.8.

⁹⁸ *Id.* (citing *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 230-31 (1986)).

⁹⁹ *Id.* at 572.

¹⁰⁰ Whether or not this meant that citizen suit provisions were in fact unconstitutional as written in the ESA and other statutes was unclear after *Defenders of Wildlife* was decided. Scalia certainly seemed to suggest that “all persons” could not be understood as allowing suits by individuals without injuries in fact without violating Article III. However, this could be taken to mean that he construed citizen suit provisions to accommodate this understanding and that they were therefore constitutional within that constraint.

the Constitution and laws) is the function of Congress and the Chief Executive.”¹⁰¹ However, he then went on to state that “[t]o permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed,’ Art. II, § 3.”¹⁰² Scalia’s major concern, then, seems to be that the citizen suit provision without an injury in fact requirement will allow the courts to overpower the executive in the scheme of checks and balances by refusing to allow the executive the appropriate discretion to not enforce the laws.

In terms of case law, Scalia drew particularly on the line of jurisprudence used in *Frothingham v. Mellon*, in which the Court characterized “generalized grievances” as nonjusticiable. As seen above, the reasoning underlying that determination at the time was largely prudential, rather than constitutional, concerned as it was with the large numbers of claimants who would supposedly overwhelm the courts.¹⁰³ Scalia’s use of this strand of case law to support his constitutional argument is therefore unconvincing. He also drew on more recent cases, however, to support his proposition. These included *Schlesinger v. Reservists Committee to Stop the War*¹⁰⁴ and *Allen v. Wright*.¹⁰⁵ Both reiterated the point that “the generalized interest of all citizens in constitutional governance...is an abstract injury,” and therefore cannot serve as a basis for standing.¹⁰⁶

Both of these cases, however, as well as others that Scalia cited, had to do with citizens

¹⁰¹ *Defenders of Wildlife*, 504 U.S. at 576.

¹⁰² *Id.*

¹⁰³ See *supra* notes 22-24 and accompanying text.

¹⁰⁴ 418 U.S. 208 (1974).

¹⁰⁵ 468 U.S. 737 (1984).

¹⁰⁶ *Schlesinger*, 418 U.S. at 217. The Court made a similar point in *O’Shea v. Littleton*, 418 U.S. 488, 494 (1974)(“Abstract injury is not enough.”).

challenging the constitutionality of government action, not a lack of compliance with statutory regimes. Scalia acknowledged this distinction in his opinion, but brushed it off as inconsequential:

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than of the political branches.¹⁰⁷

The assertion that the Article III inquiry should not turn on the source of the right at issue is itself problematic from a separation of powers perspective, and therefore undercuts the rationale that supposedly underlies the injury in fact requirement in the first place. It suggests that Congress should not have the power to utilize a private attorneys general model when it deems that model to be necessary and proper. This argument, as well as Scalia’s constitutional justification for injury in fact generally, will be addressed in more detail in Part II.¹⁰⁸

Scalia also drew a plurality of the Court to his argument that the plaintiffs’ injuries were insufficiently redressable. He argued that the agencies responsible for funding the overseas projects would not necessarily be bound by any judgment the Secretary of the Interior might make upon consultation, and therefore requiring the consultation to occur might not remedy the injury.¹⁰⁹ Further, even were the agencies to be bound by a judgment, the small percentage of funding they provided to the projects meant that any Court remedy would not necessarily do

¹⁰⁷ *Defenders of Wildlife*, 504 U.S. at 576.

¹⁰⁸ See *infra* notes 135-62 and accompanying text.

¹⁰⁹ *Defenders of Wildlife*, 504 U.S. at 569.

anything to prevent the projects from moving forward and injuring the plaintiffs.¹¹⁰

Justice Kennedy wrote a concurrence in *Defenders of Wildlife* expressing his own views on the intersection of standing and Congressional creation of causes of action. He stated that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view.”¹¹¹ He thought Congress had not done this with the Endangered Species Act, because its citizen suit provision did not establish outright that violations of the law per force injured the “any person” that the provision entitled to bring suit.¹¹² He then said that the Article III case and controversy requirement constituted the “outer limit” to Congress’ power to confer rights of action, and that this requirement prevented Congress from establishing “citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws” because “the party bringing suit must show that the action injures him in a concrete and personal way.”¹¹³

D. The War Over Standing

The Court’s position on standing has varied in the time between *Defenders of Wildlife* and its most recent decision in *Summers*, and the cases reflect a sharp division between those Justices who would expand standing and those who would narrow it. Critically, the Court’s decisions since *Defenders of Wildlife*, whether ruling for or against environmental plaintiffs, have all worked within the general rubric of injury in fact, specifically the three-part test that Scalia laid out in his opinion for the majority in that case. This has meant that even when the liberal bloc on

¹¹⁰ *Id.* at 571.

¹¹¹ *Id.* at 580 (Kennedy, J. concurring).

¹¹² *Id.*

¹¹³ *Id.* at 580-581.

the Court has managed to build a coalition to liberalize standing requirements, victory has come at the price of giving further precedential weight to the injury in fact test. The consequences of this loyalty to the Scalian approach can be seen in *Summers*, and will be explored in more detail in Part III.

The Court's next major environmental standing decision after *Defenders of Wildlife* came in *Steel Co. v. Citizens for a Better Environment*¹¹⁴ in 1998. In that case, plaintiffs lived near a steel plant and sued for that plant's past violations of the Emergency Planning and Community Right-to-Know Act (EPCRA).¹¹⁵ The injury claimed was a purely informational one; it was uncontested that the defendant had not met its reporting requirements under the statute, and plaintiffs argued that the deprivation of that information was itself an injury in fact. Justice Scalia, writing for the majority, said that it was unclear whether an informational injury would be adequate to meet the injury in fact standard.¹¹⁶ He went on to state that the Court would not address the question, however, because the plaintiffs failed to establish redressability and therefore clearly failed the standing test on that ground. The plaintiffs had requested a number of different remedies from the Court, all of which Scalia found would not redress their injury because of its basis in past actions.¹¹⁷ In the course of his analysis, he explained that

although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.¹¹⁸

¹¹⁴ 523 U.S. 83 (1998).

¹¹⁵ 42 U.S.C. §§ 11001-11050 (1986).

¹¹⁶ This question would later be decided in plaintiffs' favor in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), over the dissent of Justices Scalia, Thomas and O'Connor.

¹¹⁷ *Steel Co.*, 523 U.S. at 102-10 (finding that each of five proposed remedies did not redress the injury; in the case of injunctive relief, "[b]ecause respondent alleges only past infractions of EPCRA, and not a continuing violation or the likelihood of a future violation, injunctive relief will not redress its injury").

¹¹⁸ *Id.* at 107.

While overtly a point about redressability, this is a backhanded commentary on the injury requirement itself. It reiterates what Scalia implied in *Defenders of Wildlife* in his rejection of procedural injury¹¹⁹-- the presumed injury that would be remedied by “psychic satisfaction” is psychic dissatisfaction, and if psychic satisfaction is not a remedy for a cognizable Article III injury, then “psychic [dis]satisfaction” cannot constitute a valid injury in fact. While *Steel Co.* more generally stood for the proposition that it would be very difficult to establish standing to sue for wholly past infractions,¹²⁰ this point about psychic injury is particularly interesting because of its relevance to the Court’s next major decision.

In 2000, the Court decided *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*¹²¹ This was a case brought under the citizen suit provision of the Clean Water Act, wherein plaintiffs complained of repeated NPDES permit violations by defendant Laidlaw. Friends of the Earth offered member affidavits from individuals who lived near the facility and were concerned about the potential effects of Laidlaw’s pollution on their river activities, such as swimming, fishing and camping. While they had no proof that the river or surrounding environment had actually been damaged, their concern led them to curtail these activities. Justice Ginsburg wrote for the majority that “[t]he relevant showing for purposes of Article III standing...is not injury to the environment but injury to the plaintiff.”¹²² In the circumstances of this case, the consequences of this statement were that the plaintiffs had a valid injury in fact by virtue of their discontinuation of outdoor activities, even though that discontinuation was based purely on their concern for the river’s cleanliness, rather than on any actual environmental damage (which was

¹¹⁹ See *Defenders of Wildlife*, 504 U.S. at 572-78.

¹²⁰ See Michael J. Wray, *Still Standing? Citizen Suits, Justice Scalia’s New Theory of Standing and the Decision in Steel Co. v. Citizens for a Better Environment*, 8 S.C. Envtl. L. J. 207 (2000).

¹²¹ 528 U.S. 167 (2000).

¹²² *Id.* at 181.

minimal).¹²³ While this holding did not go so far as to overrule Justice Scalia’s holding in *Steel Co.* about “psychic injury,” since the injury itself is still the inability to engage in activity, the idea that injury could be based purely on concern rather than actual environmental damage was a significant liberalization of standing law. The Court also found that the plaintiffs had standing to seek civil penalties as a remedy, despite *Steel Co.*, given the ongoing nature of the violations and the potential deterrent value of penalties.¹²⁴ Justice Scalia (joined by Justice Thomas) dissented from both holdings, as well as a third about mootness. He objected to the Court’s finding of injury in fact without any actual injury to the environment, and thought the plaintiffs failed on redressability because they sought only civil penalties, which would not necessarily deter further violations. This last point raised serious constitutional concerns for Scalia regarding the capacity for courts and private litigants to invade the constitutional realm of the Executive branch.¹²⁵ Justice Kennedy wrote a short concurrence also expressing some hesitation about those constitutional concerns, but stating that this was not the correct case in which to address them given that the questions presented did not present the issues squarely.¹²⁶

The trend of liberalizing standing continued with the Court’s next major standing decision, *Massachusetts v. EPA*.¹²⁷ This case was somewhat unique among the Court’s standing decisions because of its intense political salience; it concerned the question of EPA’s statutory authority to regulate greenhouse gases under the Clean Air Act, and dealt directly with the harms resultant from global warming. With regard to standing, the question was whether the state of

¹²³ *Id.* at 184.

¹²⁴ *Id.* at 186-87.

¹²⁵ *Id.* at 209-10 (Scalia, J. dissenting).

¹²⁶ *Id.* at 197 (Kennedy, J. concurring).

¹²⁷ 549 U.S. 497 (2007).

Massachusetts could establish injury in fact, causation, and redressability based on the loss of coastal land caused by global warming and concomitant rising sea levels. A five-Justice majority found that Massachusetts had standing, based on two different theories. First, relying on a 1907 case called *State of Georgia v. Tennessee Copper Co.*,¹²⁸ Justice Stevens wrote for the majority that states, because of their status as “quasi-sovereign” entities, deserved “special solicitude” in the context of standing analysis.¹²⁹ He then proceeded to engage in the usual three part test for standing. The injury in fact, argued the majority, was the loss of coastal land that Massachusetts would suffer as a result of global warming. Because sea levels had already risen ten to twenty centimeters at the time of the lawsuit, the harm qualified as imminent.¹³⁰ Further, the Court said, the fact that “these climate-change risks are ‘widely shared’ does not minimize Massachusetts’ interest in the outcome of this litigation.”¹³¹ As to causation, the Court stated that while EPA’s failure to regulate greenhouse gases was not the sole cause of global warming, it was nevertheless a significant factor contributing to Massachusetts’ injury and therefore satisfied the causation requirement.¹³² The Court used similar reasoning for redressability, arguing that while EPA’s regulation of greenhouse gases would not fully remedy global warming, it would “slow or reduce” the process.¹³³

Chief Justice Roberts wrote a dissent on standing, which was joined by Justices Scalia, Thomas, and Alito (Justice Scalia wrote a separate dissent on the merits for the same four Justices). Roberts rejected Stevens’ reading of *Tennessee Copper*, arguing that the case dealt solely with remedies rather than standing, and therefore rejecting outright the concept that states

¹²⁸ 206 U.S. 230 (1907).

¹²⁹ *MA v. EPA*, 549 U.S. at 520.

¹³⁰ *Id.* at 522-23.

¹³¹ *Id.* at 522. The Court cited *FEC v. Akins* for this proposition; the same idea surfaced in *Sierra Club*.

¹³² *Id.* at 523-25.

¹³³ *Id.* at 525.

should have any special solicitude in standing analysis.¹³⁴ He then confronted the Court's findings on each of the three elements of standing. He argued that the injuries associated with global warming were by the nature of the phenomenon insufficiently particularized and imminent.¹³⁵ Causation was also problematic, argued the dissent, because the complexities and global nature of climate change precluded EPA from being considered the cause of coastal land loss.¹³⁶ Further, for these same reasons, EPA regulating greenhouse gases would not remedy that injury, because global warming would continue (due to the unpredictable acts of third parties) despite being potentially abated by a court order.¹³⁷

The majority opinion in *MA v. EPA* gave heart to environmental plaintiffs by seeming to seriously relax the causation and redressability requirements, or as Chief Justice Roberts put it in dissent, allowing plaintiffs to “sue over any little bit.”¹³⁸ The opinion also treated the injury in fact requirement somewhat more leniently than the Court had in the past, especially in terms of imminence and particularization. Between *Laidlaw* and *MA v. EPA*, the Court seemed to be establishing a trend towards liberalizing standing. It is worth highlighting, however, that despite the liberal justices' victories in these two cases, they maintained the basic framework of “injury in fact.” As will be argued in more detail later on, this concession to the conservative view of standing law is a fatal flaw in any effort to truly change that law for the benefit of environmental plaintiffs and the environment itself. It also allows the Court more latitude to revert to conservative standing principles, which is in fact what happened in *Summers* (discussed in Part III).

¹³⁴ *Id.* at 537.

¹³⁵ *Id.* at 540-43.

¹³⁶ *Id.* at 543-45.

¹³⁷ *Id.* at 545-46.

¹³⁸ *Id.* at 547.

Part II: Normative Arguments

I have attempted to show in Part I that the origins of the injury in fact test are obscure at best, and justified only marginally, if at all, by reasoned constitutional argument. Later proponents of the test have offered constitutional justifications for it, briefly sketched in Part I, which I will address in more detail and rebut in this Part before turning to the Court's most recent standing decision in *Summers*.

It is important to establish at the outset of any constitutional discussion that standing itself is not fundamentally contestable as a constitutional concept. The basic separation of powers ideal that runs throughout the Constitution precludes the Court from serving as a general policy maker. Plaintiffs should clearly not be able to petition courts for new environmental protection policy. Further, it is incontestable that, in order for the case and controversy requirement to do any work, courts' jurisdictions must be limited such that they do not tread on the ground of the political branches. However, when the legislature has established policy in statutes, and especially when those statutes contain citizen suit provisions, citizens should be able to vindicate their rights under those statutes in court. The requirement that they demonstrate injury in fact, at least as the Court understands it, is not constitutionally defensible.

Proponents of the injury in fact doctrine offer several major constitutional justifications, two of which Scalia spelled out in *Defenders of Wildlife*. He argued first that allowing courts to adjudicate claims when plaintiffs did not suffer an injury in fact amounted to allowing courts to vindicate the public interest, which he said was the exclusive function of the political branches. Scalia's particular concern, however, was with the public interest in the government's

observation of laws and constitutional constraints. He objected to courts taking jurisdiction over such complaints because, according to his view, they co-opt the executive function of enforcing the law in doing so.¹³⁹

Simply because the plaintiff is not injured in any concrete, tangible manner does not mean that vindicating her rights under a relevant statute will cause the court to tread on the constitutional territory of another branch of government. The requirement that the plaintiff have a concrete interest at stake, rather than an abstract interest in environmental preservation or in the government following the law, is not inherent in Article III. Rather, it is a vestige of the private law model in which the injury in fact model's origins lie.¹⁴⁰ From a perspective unbiased by that historical trend, there is nothing innately unconstitutional about a court rendering judgment based on abstract harm.

The easiest case for which to argue this point is that wherein Congress has explicitly provided for citizen suits in a piece of legislation. Almost every major environmental statute has a citizen suit provision that allows citizens to bring suit against violators or the administering agency.¹⁴¹ For these laws, Congress has made the legislative judgment that the agency alone has insufficient resources to ensure proper enforcement of the law, and has enlisted the public to serve as private attorneys general.¹⁴² Under these circumstances, there is little reason to worry about separation of powers in the context of courts serving as policy-making institutions-- the

¹³⁹ See *supra* notes 94-106 and accompanying text.

¹⁴⁰ See Percival, *supra* note 24, at 158 (rooting conservative standing doctrine in “the traditional paradigm of private law litigation”).

¹⁴¹ See Cassandra Stubbs, *Is the Environmental Citizen Suit Dead? An Examination of the Erosion of Standards of Justiciability for Environmental Citizen Suits*, 26 N.Y.U. Rev. L. & Soc. Change 77, 77 n.3 (2001) (collecting statutes).

¹⁴² The concept behind this term can be traced to *FCC v. Sanders Brothers*, *supra* note 43. The term itself originated with the case of *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943), and was most famously employed in *Data Processing*, 397 U.S. at 153.

policy underlying the suit has already been properly and democratically instituted by the political branches; the court is serving only to uphold and enforce the law as written.¹⁴³ However, this point serves to highlight Justice Scalia's alternative separation of powers grievance regarding lax standing requirements-- namely that without an injury in fact requirement, the courts serve not just as policy-makers, but as enforcers of the law, and thereby tread unconstitutionally on the traditional and constitutional function of the executive branch.¹⁴⁴

This objection, while facially compelling, is a shallow one. It assumes that the Constitution's grant of powers to each branch of government is exclusive.¹⁴⁵ While it may have been realistic to interpret the Constitution this way at one point, the rise of the administrative state has rendered such a reading obsolete. Administrative agencies, technically a part of the executive branch, exercise both legislative and judicial powers, in addition to executive ones. While this fact has been the subject of constitutional controversies, these have almost entirely been resolved in favor of agency authority.¹⁴⁶ This establishes that branches of government exercising powers supposedly designated to other branches is not in and of itself constitutionally problematic. Courts can therefore serve as enforcers of the law without offending Article II, and

¹⁴³ See generally Buzbee, *supra* note 13; David N. Cassuto, *The Law of Words: Standing, Environment and Other Contested Terms*, 28 Harv. Envtl. L. Rev. 79 (2004) (arguing that standing should be determined by reference to statutory language).

¹⁴⁴ See *Defenders of Wildlife*, 504 U.S. at 577; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 883 (1983).

¹⁴⁵ See Scalia, *supra* note 140, at 881 ("The principle of separation of powers was set forth in the Constitution of the Commonwealth of Massachusetts well before it found its way into the federal document...: 'the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them.'").

¹⁴⁶ The doctrine of non-delegation, while it enjoyed a brief hey-day in 1935 (see *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)), has since been definitively repudiated (see *Mistretta v. U.S.*, 488 U.S. 361 (1989); *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001)). Administrative agencies, technically a part of the executive branch, therefore constitutionally wield legislative power all the time. The same is true of judicial power. See *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). This demonstrates that separation of powers is by no means absolute in the modern administrative state.

indeed they have.¹⁴⁷

Justice Scalia's more specific concern, however, seems to be with executive discretion--namely that it is not within courts' purview to take on an enforcement function because it will interfere with the executive branch's inherent discretion to only enforce certain laws in certain cases. Scalia's first major writing on standing came in a 1983 article in the *Suffolk Law Review*, in which he elucidated an argument about standing and separation of powers that is strongly reflected later on in his Supreme Court opinions. In that article, he made reference to a famous passage by Judge Skelly Wright wherein Wright envisioned a hand for courts in the enforcement process: "Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."¹⁴⁸ Scalia acknowledged this as an indication of the role courts had come to play in "assur[ing] the regularity of executive action,"¹⁴⁹ but rejected that role from a normative standpoint. He said in response:

Does what I have said mean that, so long as no minority interests are affected, 'important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?' Of *course* it does -- and a good thing, too. Where no particular harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere.¹⁵⁰

Scalia's argument here is in part a substantive critique of environmental laws; he offers no procedural or institutional explanation for why a lack of harm to minorities and individuals should mean that laws should be "lost or misdirected," so we are left to assume that his

¹⁴⁷ See Sunstein, *supra* note 12, at 173-79 (offering several examples from early American history, such as *qui tam* and informers' actions).

¹⁴⁸ *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

¹⁴⁹ Scalia, *supra* note 140, at 884.

¹⁵⁰ *Id.* at 897.

complaint about such laws is their content, the loss or misdirection of which would be “a good thing, too.” However, he offers minimal constitutional explanation for why the executive branch should have such broad discretion to ignore democratically enacted laws.¹⁵¹

From a separation of powers perspective, it makes little sense that the Executive branch should have that sort of discretion. It makes intuitive sense for the legislature to have complete discretion over whether to enact laws; that same intuition does not hold for the executive branch and enforcing those laws once enacted. The Executive’s constitutional role, and duty, is to enforce democratically enacted programs.¹⁵² Justice Scalia believes that the electoral process will provide sufficient remedy for executive recalcitrance in this duty.¹⁵³ However, this is not the usual approach to constitutional impropriety-- when the President or Congress takes unconstitutional action, it is not generally assumed that the public will take care of the problem through the electoral process; the Court strikes the action down.¹⁵⁴ Scalia offers no explanation for why inaction should be treated any differently than action for constitutional review purposes,

¹⁵¹ See Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. Rev. 1505, 1533 (2008) (“A cynic might say that Justice Scalia had rewritten the clause to require the president to ‘take care that the law be *fitfully* executed.’”). Scalia generally ignores the problem of underenforcement as one that can be addressed by the political process (see *infra* note 148 and accompanying text); however, there is little justification for having such intense concern about potential overenforcement and no concern about what would seem to be the parallel problem of underenforcement.

¹⁵² The fact that prosecutorial discretion is so well entrenched in the criminal context should not carry over to the administrative context. This is primarily because courts are only prevented from forcing the executive branch to enforce laws constituting or administered by agencies when agency action is left to agency discretion by the organic statute. See Administrative Procedure Act, 5 U.S.C. §702(a)(2) (1946); Heckler v. Chaney, 470 U.S. 821 (1985). This is directly opposed to the criminal context, wherein prosecutorial discretion is judicially protected and not dependent on statutory language.

¹⁵³ Scalia, *supra* note 140, at 896 (“There is surely no reason to believe that an alleged government default of such general impact would not receive fair consideration in the normal political process.”). Accord Jonathan H. Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers After Massachusetts and Hein*, 20 Regent U. L. Rev. 175, 195 (2008) (“Less-than-complete enforcement of environmental statutes may be the result of majority preferences. If not, there is at least a potential opportunity for political redress.”).

¹⁵⁴ See, e.g., Marbury v. Madison, 5 U.S. 137 (1803); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952); U.S. v. Lopez, 514 U.S. 549 (1995).

especially when that inaction (failure to enforce) can have the very significant impact of rendering Congress impotent.¹⁵⁵

Scalia's main justification for why courts should not be in the business of enforcement generally, without a concrete injury at stake, is that courts exist fundamentally for the purpose of protecting minorities rather than majorities, and "there is no reason to believe they will be any good at [the latter]."¹⁵⁶ While it is true that courts' fundamental purpose is antimajoritarian in some sense, insofar as they have the capacity and duty to protect individuals against majority infringements on their rights, this fact does not actually make for a strong argument in favor of Scalia's approach. The basic point of his argument is that courts do not have the policy sophistication of the elected branches and cannot effectively determine in the abstract when certain laws should be enforced based on the interests of the majority (and therefore should act to enforce them only when the rights of injured individuals are at stake).¹⁵⁷ But policy sophistication is irrelevant in light of what courts actually do when faced with suits by statutory beneficiaries alleging statutory violations. From a practical standpoint, the actions of the court in the case of a suit seeking enforcement of an environmental statute will be the same whether the regulatory beneficiary has a concrete injury at stake or not. Regardless of whether it is Joe the Hiker or Bob the Concerned Citizen or the Sierra Club who requests an injunction requiring the Forest Service to follow the appropriate procedures under the ARA, the court's reasoning *on the merits* will be the same.¹⁵⁸ It will determine what the law requires and whether the agency's

¹⁵⁵ See Hodits, *supra* note 17, at 1932-33.

¹⁵⁶ Scalia, *supra* note 140, at 896.

¹⁵⁷ *Id.*

¹⁵⁸ Standing is, after all, only a threshold inquiry. Even under the current system, once the plaintiff in a case like *Summers* has established the appropriate injury, her argument on the merits need not have anything to do with that injury, and can invoke the public interest generally. This happens in many if not most environmental cases; for a specific and recent example, see *Winter v. Natural Resources Defense*

interpretation of that law was reasonable or not.¹⁵⁹

Given that a court's reasoning on the merits will be the same regardless of whether the plaintiff has an injury at stake or not, it is unreasonable to use this factor to allow some beneficiaries into court but not others. Indeed, Scalia's antimajoritarian argument would make more sense if he were committed to limiting standing *only* to regulated parties. In that case the courts truly would be serving only as countermajoritarian defenders of minority rights, rather than protecting minorities and *some* members of the majority (when a concrete interest of theirs happens to be at stake). However, beneficiary standing has been well entrenched in case law since *Sanders Brothers* in 1940.¹⁶⁰ More importantly, it has also been codified in the Administrative Procedure Act.¹⁶¹

Even were this not the case, there is something perverse about understanding the massive and powerful corporate entities regulated under environmental statutes as "minorities" in need of protection by the courts.¹⁶² While these entities may be smaller in number than the majority who voted in favor of environmental protection, their influence in the regulatory and enforcement processes is disproportionately large, due to the financial resources at their disposal and their powerful lobbying capacity. In light of this fact it does not seem rational to fear for the interests of the numerical minority being subject to tyrannical oppression. Congress presumably sought to enlist citizens into the enforcement process via citizen suit provisions precisely because they feared inadequate enforcement in the face of agency capture and other disproportionate

Council, No. 07-1239, slip op. (U.S. Nov. 12, 2008), discussed in Part III. *See infra* notes 200-203 and accompanying text.

¹⁵⁹ *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

¹⁶⁰ *See supra* notes 43-45 and accompanying text.

¹⁶¹ 5 U.S.C. § 702 (1946).

¹⁶² *See generally* Pleune, *supra* note 5.

“minority” influence.¹⁶³

This brings us back to the basic question of the citizen suit provision and what role Congress should play in getting plaintiffs into court. I have argued broadly that the injury in fact requirement is unjustified from a separation of powers perspective and that the parade of separation-of-powers-horribles¹⁶⁴ that would result without such a requirement is overstated. My underlying point is that an environmental statute on point with a citizen suit provision should be enough to get *any* interested plaintiff into court, regardless of whether or not that plaintiff has a concrete interest at stake. This includes statutes that confer only procedural rights, such as the National Environmental Policy Act. As noted above in Part I, in his opinion for the majority in *Defenders of Wildlife*, Justice Scalia rejected the idea that Congress can override the basic standing requirements by legislation conferring procedural rights.¹⁶⁵ He does not believe that “procedural injury” should be a cognizable injury because he does not believe that the general public interest in having the government act in accordance with law is insufficiently concrete and particularized for standing purposes.¹⁶⁶

As noted above, however, all of the case law cited in *Defenders of Wildlife* in support of Scalia’s view on procedural injury had to do with citizens challenging government action that

¹⁶³ See Sunstein, *supra* note 12, at 219.

¹⁶⁴ The other type of horrible often cited, as noted earlier, is prudential-- namely that without an injury in fact requirement, citizens would bring frivolous suits that would be insufficiently adverse (as the majority in *Flast v. Cohen* feared) or too great in number (as the majority in *Frothingham* feared). These concerns, too, are overstated. While the environmental groups may be motivated by ideology rather than concrete injuries, this does not have negative implications for their capacity to properly argue their case. See Hessick, *supra* note 12, at 300 (“A litigant investing in such a suit is driven by principle, and the desire to vindicate that principle is likely to provide adequate motivation to litigate effectively.”). Further, the groups’ finite resources will insure against frivolity in their litigation decisions.

¹⁶⁵ See *supra* notes 94-98 and accompanying text.

¹⁶⁶ Justice Kennedy expressed a similar view in his concurrence.

was allegedly unconstitutional, not allegedly in violation of a statutory provision.¹⁶⁷ While he argued that “there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right,”¹⁶⁸ in truth the source of the right should not be insignificant. This is because, unlike statutes with citizen suit provisions, the Constitution does not provide for citizen enforcement of its own provisions. Instead, it relies for enforcement on the structural ideals of checks and balances and separation of powers, and more practically (at least after *Marbury v. Madison*), it relies on the Court to apply its strictures as against the other branches of government. Environmental statutes, by contrast, have citizen enforcement *built in*. The source of the asserted right *should* make a difference in terms of citizens’ ability to pursue that right in court, since one source of rights allows for citizen enforcement and the other does not. The string of cases denying citizen standing to challenge the constitutionality of government action should therefore not bear on the question of citizen standing to challenge the legality of government action under a particular statute that allows for citizen enforcement. While Justice Scalia argues that the citizen suit is unconstitutional insofar as it allows plaintiffs into court without a concrete injury (that is, based only on their interest in having the government act according to law), his arguments in favor of that constitutional understanding, as discussed above, are ill-founded.

When a statute does not have a citizen suit provision, the reasoning is less obvious but fundamentally no different. In such cases, the legislature has not explicitly provided for citizen enforcement, so plaintiffs hoping to prevent environmental damage on the basis of that statute must bring suit under the APA. Section 702 requires plaintiffs seeking review of agency action to be “adversely affected or aggrieved within the meaning of the relevant statute;” the question

¹⁶⁷ See *supra* notes 99-106 and accompanying text.

¹⁶⁸ *Defenders of Wildlife*, 504 U.S. at 576.

(from a normative perspective) is thus identical to that of any standing inquiry-- what harms to what interests should qualify as sufficient? Justice Douglas in *Data Processing* interpreted §702 to require injury in fact within the zone of interests contemplated by the statute, but as already discussed, this is normatively unjustified from a constitutional perspective.¹⁶⁹ Plaintiffs should have to show that they have interests at stake under the statute, but the types of harms that qualify for standing can be broader, constitutionally speaking, than those specific and concrete injuries that the Court has thus far espoused.

Part III: *Summers* and a Necessary Shift

The Court's most recent standing decision in *Summers v. Earth Island Institute*,¹⁷⁰ decided this March, can serve as a useful lens through which to view competing arguments about constitutional standing requirements, and ground them by viewing their factual consequences. The case had a lower profile than *Massachusetts v. EPA*, by virtue of dealing with the relatively mundane issue of timber sales rather than the politically charged issue of global warming. This fact may have played into the Court's conservative decision to limit standing in *Summers*; this possibility itself shows the necessity of a more dramatic shift in standing law than those undertaken in *Laidlaw* or *MA v. EPA*. Those cases liberalized the standing test while maintaining the underlying framework of injury in fact, allowing the Court further leeway to use that test to once again narrow the availability of standing. This outcome is unjustified by constitutional reasoning and goes against the ideals of environmental protection.

¹⁶⁹ See *supra* notes 149-55 and accompanying text.

¹⁷⁰ No. 07-463, slip op. (U.S. Mar. 3, 2009).

A. The Case

In *Summers*, Earth Island Institute and several other environmental groups sought to challenge a Forest Service regulation¹⁷¹ that exempted salvage-timber sales on certain small parcels from notice and comment procedures under the Forest Service Decision-Making and Appeals Reform Act.¹⁷² Suing under the general judicial review provision of the APA, the plaintiffs alleged this regulation to be “arbitrary, capricious, and not in accordance with law.”¹⁷³ Specifically, they challenged the regulation as applied to a salvage-timber sale in the Sequoia National Forest called the Burnt Ridge Project. An affidavit from a member of Earth Island Institute confirmed that he used the area frequently, had firm intentions and plans to do so again, and would be injured in his ability to view the local flora and fauna by the lack of opportunity to comment on the proposed sale. Standing on this ground was uncontested, but the Burnt Ridge dispute was settled; this left only the facial challenge to the regulations at issue in front of the court. The Supreme Court, in an opinion by Justice Scalia, reversed the two lower courts and held that the plaintiffs did not have standing to pursue that facial challenge. In so holding, Scalia wrote:

We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests. Such a holding would fly in the face of Article III’s injury-in-fact requirement.¹⁷⁴

The plaintiffs had tried to establish standing by various means, several of which relied on an affidavit from another member, Jim Bensman. That affidavit asserted that Bensman had a

¹⁷¹ 36 C.F.R. §§ 215.4(a), .12(f) (2003).

¹⁷² 16 U.S.C. §1612 note (1992).

¹⁷³ Petition for Writ of Certiorari at 3, *Summers v. Earth Island Institute*, 555 U.S. ____ (2009) (No. 07-463).

¹⁷⁴ *Summers*, slip op. at 6.

history of visiting National Forests in the past, and had been injured in the past by his inability to receive notice and comment on projects under the challenged regulation. Justice Scalia and the majority rejected this argument, stating that past injury was not sufficient to establish standing.¹⁷⁵

Earth Island also argued, however, that Bensman had a consistent and continuing interest in visiting National Forests, and that “the denial of ARA rights impairs those interests on a continuing basis.... Bensman's averments...demonstrate impairment of ‘concrete’ interests attributable to the Forest Service's procedures.”¹⁷⁶ The majority did not accept this argument, holding that the respondents had failed to allege specific injuries to specific tracts. The Court characterized this as “a failure to allege that any particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of Bensman’s to enjoy the National Forests.”¹⁷⁷ This failure was critical in terms of being able to establish injury in fact, held the majority, because

there may be a chance, but [it] is hardly a likelihood, that Bensman’s wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations Accepting an intention to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact.¹⁷⁸

The particularization requirement seems to have made a comeback here from its diminished status in *MA v. EPA*, where the generalized harm of coastal loss due to global warming was found sufficient to establish standing. Scalia underscored this point for the majority with the

¹⁷⁵ *Id.*

¹⁷⁶ Brief for Respondents at 42, *Summers v. Earth Island Institute*, 555 U.S. ____ (2009) (No. 07-463).

¹⁷⁷ *Summers*, slip op. at 7.

¹⁷⁸ *Id.* at 7. Earth Island had taken this fact to argue the opposite point, namely that naming tracts where plaintiffs would be injured in the future was “an obvious impossibility” and therefore the requirement was presumably unreasonable. Brief for Respondents, *supra* note 170, at 45.

statement that “generalized harm to the forest or the environment will not alone support standing.”¹⁷⁹ While Bensman did allege a specific desire to visit the Allegheny National Forest, Scalia reaffirmed the holding from *Defenders of Wildlife* that “some day intentions” will also not suffice to establish injury in fact.¹⁸⁰

Lastly, the plaintiffs tried to establish standing via procedural injury, arguing that their lack of access to notice and comment was itself an injury. They attempted primarily to distinguish their procedural injury from that rejected in *Defenders of Wildlife*: “There, the plaintiffs sought not to enforce procedural rights afforded *them*, but *internal* procedures requiring intra-governmental consultations; thus, they asserted only ‘an abstract, self-contained, noninstrumental “right” to have the Executive observe the procedures required by law.’”¹⁸¹ In this case, by contrast, Earth Island argued (quoting the *Defenders of Wildlife* concurrence in a clear attempt to appeal to Justice Kennedy) that the procedural rights created by the ARA “are aimed at protecting the commenters’ concrete interests in the use and enjoyment of the national forests, and do not violate the principle that Congress may not ‘confer rights of action . . . in the absence of any showing of concrete injury.’”¹⁸² Earth Island also drew on language from *MA v. EPA* to argue in favor of procedural injury, citing the proposition from that case that “[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly

¹⁷⁹ *Id.* at 5. The revival of the language of particularity is notable given that Scalia had been forced to tone down this element of his argument in *Defenders of Wildlife*. See *supra* note 24. See also Percival, *supra* note 24, at 11 (“In *Lujan v. Defenders of Wildlife*, Justices Kennedy and Souter refused for months to join Justice Scalia’s initial draft opinion because it sought to convert the prudential notion that courts should decline to hear generalized grievances into a constitutional one that would bar environmental plaintiffs from seeking redress for widely shared injuries.”).

¹⁸⁰ *Summers*, slip op. at 8.

¹⁸¹ Brief for Respondents, *supra* note 170, at 47 (quoting *Defenders*, 504 U.S. at 573).

¹⁸² *Id.* (quoting *Defenders*, 504 U.S. at 580-81 (Kennedy, J. concurring)).

harmed the litigant.”¹⁸³ Both arguments in favor of procedural injury were reasonable given the language of the statute at issue and the favorable treatment the Court gave procedural injury in *MA v. EPA*.

Just as he had in *Defenders of Wildlife*, however, Scalia rejected the procedural injury approach in the *Summers* majority opinion, stating that “deprivation of a procedural right without some concrete interest that is affected by the deprivation-- a procedural right *in vacuo*-- is insufficient to create Article III standing.”¹⁸⁴ In this statement he implicitly rejected Earth Island’s argument that its members’ interests in the National Forests could qualify as a concrete interest for purposes of procedural injury, but did not address that argument directly. He further specified that it made “no difference that the procedural right has been accorded by Congress;” while such a procedural right could “loosen the strictures of the redressability prong,” it could not get plaintiffs around injury in fact, “the hard floor of Article III jurisdiction that cannot be removed by statute.”¹⁸⁵ While Scalia’s statement about redressability is somewhat of a concession from his position in *Defenders of Wildlife* (which had garnered only a plurality), the basic rejection of procedural standing is a powerful reminder of Congress’ limited ability to get environmental plaintiffs into court.

Justice Kennedy, in addition to joining the majority, wrote a somewhat obscure concurrence on this point, reiterating his position from *Defenders of Wildlife* that, while procedural injury alone would not suffice to create standing, Congress has the ability to “provide redress for a concrete injury” and thereby create cases and controversies “where none existed

¹⁸³ *Id.* at 40 (quoting *MA v. EPA*, 549 U.S. at 518).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* Here Justice Scalia prominently cited Justice Kennedy’s concurrence from *Defenders of Wildlife* stating that “the public’s nonconcrete interest in the proper administration of the laws” would not create standing. *Id.*

before.”¹⁸⁶ He thought that this case did not present that circumstance, however, since he did not view the ARA as an attempt by Congress to “identify or confer some interest separate and apart from a procedural right.”¹⁸⁷ Presumably this means that if Congress had granted the public a specific right to the preservation of the National Forests from salvage-timber sales, Justice Kennedy would find standing; however, this raises the question of why Congress should be able to create a substantive right that is enforceable in court, but not a procedural one. It is also unclear why a procedural right should require a concrete interest at stake and a substantive right should not.

The dissent, authored by Justice Breyer and joined by Justices Ginsburg, Stevens and Souter, took issue with the majority’s treatment of organizational standing and the doctrinal consequences of *City of Los Angeles v. Lyons*.¹⁸⁸ The basic point of the dissent, adopting an argument by the plaintiffs in their brief, was that environmental organizations should be allowed to sue to enforce environmental laws when their membership has been injured in the past and is likely to be injured in the future.¹⁸⁹ Breyer argued that the upshot of *Lyons* was that when a plaintiff has been injured in the past, as in *Lyons*, she need only show a “*realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff.”¹⁹⁰ Given the groups’ large memberships and the Forest Service’s concession that it would likely pursue hundreds of salvage-timber sales and other actions without notice and comment procedures, Breyer considered it realistically likely that the organization’s membership would suffer injury, and would have granted standing on that ground. Scalia and the majority rejected this reasoning as

¹⁸⁶ *Id.* at 1 (Kennedy, J. concurring) (internal quotation marks omitted) (repaginated).

¹⁸⁷ *Id.*

¹⁸⁸ See *supra* note 90 and accompanying text.

¹⁸⁹ See Brief for Respondents, *supra* note 170, at 43; *Summers*, slip op. at 5 (Breyer, J. dissenting) (repaginated).

¹⁹⁰ *Id.* at 5.

“a hitherto unheard-of test for organizational standing.”¹⁹¹

B. Implications

The consequences of the outcome in *Summers*, where plaintiffs are not allowed standing based on procedural and abstract injuries, are unappealing from both constitutional and environmental perspectives. The Appeals Reform Act requires that the Forest Service “establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.”¹⁹² The Forest Service regulation eliminating notice and comment procedures for sales of small tracts is very arguably in violation of this statutory mandate. Society therefore has an interest in the regulation being investigated in court and potentially invalidated. The only way to accomplish this is for a plaintiff to challenge the regulation in court in the first place. Jim Bensman and other members of the plaintiff environmental groups, however, could not establish any imminent injury in fact to support standing for a facial challenge under the traditional test, since without a specific tract of land at issue, a concrete/factual injury would be impossible. The regulation could therefore remain in place indefinitely. Moreover, because the regulation cuts off notice and comment for these tracts, it limits potential plaintiffs’ ability to even realize when an illegal action is pending thereupon. Thus the odds that any given plaintiff’s “wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations”¹⁹³ must be multiplied by the equally small odds that said plaintiff will even be aware that the project is

¹⁹¹ *Id.* at 9 (majority opinion).

¹⁹² 16 U.S.C. § 1612 note (1992).

¹⁹³ *Summers*, slip op. at 7.

pending. The resultant probability of a plaintiff achieving standing under the rule of this case is therefore very small, which means that the regulation will go unchallenged for a longer time, allowing hundreds of tracts to be unlawfully sold without public participation.¹⁹⁴

This result is not ideal-- neither in terms of the rule of law nor in terms of the fate of the trees and organisms involved. The root cause of that result, namely the Court's failure to find standing in *Summers*, is unnecessary and unjustified. Several factors of this case render the constitutional arguments in favor of strict standing rules particularly inapt in context. Those arguments rely on separation of powers concerns and a narrow conception of the judicial role as a protector of minority rights. Recall that, in Justice Scalia's formulation, the separation of powers concerns were twofold. One concern was that without an injury in fact requirement, the courts would become policy makers. The second was that without injury in fact, courts would be acting as general discretionary enforcers of laws, which treads on the constitutional ground of the executive branch. As regards the first, the concern is unfounded in this case because the Appeals Reform Act clearly requires notice and comment proceedings to accompany Forest Service actions. In agreeing to adjudicate Earth Island's claim that the Forest Service's regulation is counter to that statutory mandate, the Court would not be making policy but merely enforcing it. As regards the concern that courts enforcing laws without a concrete injury at stake would intrude upon the executive's enforcement discretion, the argument just makes no sense in this context. This case does not present the situation where the executive branch is choosing not to enforce the law against a particular individual; instead, the executive branch is itself violating the

¹⁹⁴ *Id.* at 1 (Breyer, J. dissenting). See also Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. Rev. 931, 957 (1998) (“[I]n any facial challenge to a newly enacted rule, regulation, or statute, plaintiffs may have difficulty in demonstrating ‘imminent’ injury unless they can show a specific and harmful application of that rule, regulation, or statute. Thus environmental plaintiffs may have to wait to challenge new policies of general application until they have been implemented, with the possibility that real damage will already have occurred.”).

law (via the Forest Service's curtailment of notice and comment), and there is no constitutional reason why the executive should have the discretion to do so. While electoral accountability could resolve the problem, instead of the courts, that would yield potentially as many as four years of irreparable damages to the environment.¹⁹⁵ There is no reason to believe that the Framers would have endorsed such a counterintuitive result. Instead, separation of powers concerns seem to weigh in favor of allowing suit in this case, since continuing application of an executive branch regulation in violation of a congressional statute is counter to separation of powers principles. The courts should be able to exercise their judicial power to rectify such an imbalance.

With regard to judicial role, Justice Scalia's arguments about courts existing to protect only the rights of injured minorities are similarly inapposite in this case. The plaintiffs are regulatory beneficiaries, and are therefore members of the majority regardless of whether they have an injury in fact or not. The defendant here is an executive agency; the Forest Service, as a component of the government responsible for democratically enacting the law, is also part of the majority. As such the entire framework of the counter-majoritarian argument does not apply to this case and others like it: there is no minority party whose rights are being infringed. While one could argue that this is all the more reason for courts not to get involved, this argument would ignore the fact that this kind of suit, by regulatory beneficiaries against the government to compel enforcement, is commonplace, sensible, and most importantly enshrined in the

¹⁹⁵ See *supra* note 147 and accompanying text. It is also unrealistic to imagine that most voters would take into account the Forest Service's track record at following the ARA in voting for president. This factor renders the electoral accountability argument somewhat disingenuous; while proponents might argue that if voters don't care about the enforcement of a law then it *should* be ignored (as Scalia in fact argued in his law review article, see *supra* note 146 and accompanying text), this argument is counter to the constitutional design and insufficiently values the rule of law as such.

Administrative Procedure Act.¹⁹⁶

For another way to think about these broad arguments in context, consider the results of granting standing to Earth Island in this case. Specifically, consider the consequences of finding standing without any sort of injury in fact-- that is, not based on the dissent's conception of probabilistic injury in fact, but rather based purely on the group's interest in environmental protection and their procedural injury claim under the ARA. As argued in the abstract in the previous Part, the Court's reasoning on the merits would be absolutely no different under these circumstances than it would be if Jim Bensman were able to name a particular tract subject to a particular project alleged to be unlawful. The Court would ask whether Congress had spoken to the issue of notice and comment and, if not, whether the Forest Service's interpretation of the statutory provision was reasonable.¹⁹⁷ The presence or absence of an injury in fact has no impact on this inquiry whatsoever.

It makes little sense for the threshold injury of standing to be so divorced from the merits of the case.¹⁹⁸ It forces environmental protection groups to go through the charade of establishing injury to some relatively inconsequential interest, like that of a small number of members in hiking or bird watching, in order to become eligible to fight for the interests of the resources themselves. This result is conceptually indefensible, and persists only by virtue of the tradition requiring plaintiffs to show a concrete injury. Granting standing to Earth Island and other groups based on their interest in environmental protection (and absent an injury in fact) would thus have the advantage of being intellectually honest about what enforcement lawsuits

¹⁹⁶ See 5 U.S.C. § 702 (1946).

¹⁹⁷ See *Chevron*, 467 U.S. at 842-43.

¹⁹⁸ This phenomenon is a symptom of the fact that public standing law is a vestige of private and common law actions, where the plaintiff's injury would by definition be the subject of the suit. See generally Percival, *supra* note 24.

are actually about. The actual interests motivating lawsuits such as this one are not those of hikers to enjoy pristine wilderness, or of bird-watchers to catch a glimpse of a rare species. Instead, the Earth Island Institute, whose stated mission is “conserving, preserving, and restoring the ecosystems on which our civilization depends,”¹⁹⁹ presumably has the more high-minded goal of saving the actual resources at stake by forcing government and private actors to act in accordance with environmental law.

The point is clearer to see in cases where standing is granted and the parties are able to argue the merits. Take another case from this term as an example. In *Winter v. Natural Resources Defense Council*,²⁰⁰ an environmental group sued the Navy for failure to adequately meet its obligations under the National Environmental Policy Act²⁰¹ with regard to its use of active sonar in military exercises, which was alleged to be harmful to whales and other sea life off the coast of southern California. To establish standing, the group filed affidavits from several of its members stating that they were avid whale watchers and that injury or death to the whales in that region would injure their ability to see whales.²⁰² This was sufficient injury for standing purposes, but demonstrates the extent to which the standing inquiry distorts the actual values at stake in litigation such as this. Common sense suggests that it is unlikely that a major environmental organization would go to court just to protect the interests of a few people in *seeing* marine mammals; presumably, then, the interests of the whale watchers were not the primary focus of the litigation. Rather, the actual interests at stake from the plaintiffs’

¹⁹⁹ Earth Island Institute (About Us), <http://www.earthisland.org/index.php/aboutUs/> (last visited Apr. 7, 2009).

²⁰⁰ No. 07-1239, slip op. (U.S. Nov. 12, 2008).

²⁰¹ 42 U.S.C. §§ 4321-4347 (1970).

²⁰² See Brief for the Petitioners at 43, *Winter v. Natural Resources Defense Council*, 555 U.S. ____ (2008) (No. 07-1239).

perspective were those of the whales.²⁰³ The standing inquiry in this case and others like it merely distorts the nature of the underlying claim.

It could be objected that liberalizing standing doctrine by eliminating the injury in fact requirement would flood the courts with groups like Earth Island Institute, who are motivated purely by ideology.²⁰⁴ This concern is not particularly realistic, however, given that environmental groups, as well as individual plaintiffs, have limited resources. This will prompt them to litigate strategically, as they already do. Without an injury in fact requirement, however, they will target their efforts toward suits that will curb the most problematic violations of environmental law rather than toward suits where they could establish injury in fact. Further, even if there were an increase in suits by ideologically motivated litigants, this would not be a normatively undesirable result. It is critical to remember that all such suits, like *Summers*, allege violations of existing laws, and therefore ideological motivation is irrelevant-- suits will be limited by the provisions of democratically enacted laws like the ARA. Society has an inherent interest in proper enforcement of its laws,²⁰⁵ and thus allowing more plaintiffs to challenge

²⁰³ For another example of a similar distortion, see *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998), wherein plaintiff had to assert an “aesthetic” injury to his interest in seeing captive animals treated humanely, instead of being able to simply assert his emotional and ethical interest in seeing the animals treated humanely as lawfully required under the Animal Welfare Act.

²⁰⁴ See Farber, *supra* note 147 at 1542 (noting that the injury in fact test will tend to “limit litigation by plaintiffs who are ideologically motivated because it requires them to do more work prior to filing suit”). Further, an ideological motivation might not be the worst thing, even by conservative lights. One conservative commentator has criticized the concept of the citizen suit by arguing that it provides economic incentives for environmental groups to litigate, via attorneys’ fees, and that it is ultimately these economic incentives that motivate citizen suit litigation rather than environmental concerns. See Michael S. Greve, *The Private Enforcement of Environmental Law*, 69 Tul. L. Rev. 339 (1990). A narrow standing requirement forcing litigants to have a personal and concrete stake seems to theoretically support that sort of financially motivated litigation on the part of environmental groups. Broadening the standing requirement to allow ideological litigants would, by contrast, seem to better address Greve’s concern.

²⁰⁵ See Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 Duke Envtl. L. & Pol’y. F. 155, 161-163 (2001).

statutory violations is by no means an inherently undesirable outcome.²⁰⁶

Conclusion

While *Summers* does not drastically change the law of standing, it is notable that it did not cite *MA v. EPA* once, nor did it cite any part of *Laidlaw* that was not itself citing to *Defenders of Wildlife*.²⁰⁷ This demonstrates that any incremental gain that advocates of liberal standing doctrine make at the Supreme Court level are not necessarily secure, at least to the extent that they retain the basic structure of the injury in fact test. Especially in cases involving timber sales, wildlife and other mundane environmental issues without drastic human consequences at stake, the Justices are unlikely to perform the jurisprudential contortions that they used to find standing in *MA v. EPA*.²⁰⁸ To address the problems with standing law that I have attempted to elucidate in this paper, a more drastic shift in standing law is necessary. Such a shift, namely eliminating the injury in fact requirement, would serve both to protect natural resources and preserve the rule of law. Common sense, not to mention legal and environmental ethics, demand that citizens have some redress when government or private entities violate environmental laws, even in cases where there is little at stake except the fundamental rights of trees or water to exist unmolested and the abstract public interest in having government follow and enforce its own laws. The injury in fact requirement, no matter how attenuated, is incompatible with this end.

²⁰⁶ *But see* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 *Duke Env'tl. L. & Pol'y F.* 39, 61-63 (2001) (arguing that optimal enforcement is less than full enforcement).

²⁰⁷ The opinion cited to *Laidlaw* twice, both times for the basic standing test elucidated in *Defenders of Wildlife*.

²⁰⁸ *Laidlaw* is admittedly a notable exception. However, the result there can be explained by the make-up of the court, which was more amenable to liberal standing at the time, as well as the repeated and egregious violations of the law that were at issue in that particular case.

To properly do justice, the Court must abandon the doctrine as a failed experiment that is ill suited to the public and environmental law contexts. By doing so, the Court could better reconcile the requirements of standing with the realities and necessities of modern environmental law.