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The Constitution and Reconstitution of the Standing Doctrine Comment.

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COMMENTS

THE CONSTITUTION AND RECONSTITUTION OF THE STANDING DOCTRINE

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I. INTRODUCTION

"Generalizations about standing to sue," Justice Douglas once wrote, "are largely worthless as such."[1] Justice Douglas showed great insight when he made this remark nearly forty years ago, as standing has become "the most amazing, complex, intricate web of minutiae imaginable."[2] Federal courts use the preliminary inquiries of standing, mootness, ripeness, and political question as guidelines to ensure that claims presented satisfy the "cases" or "controversies" requirement under Article III, Section 2 of the United States Constitution.[3] Satisfying these requirements is

1. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970).

2. Colloquia, *Group Discussion on the Supreme Court's Recent Administrative Jurisprudence*, 7 ADMIN. L.J. AM. U. 287, 288 (1993) (referring to recent Supreme Court developments in the area of standing).

3. *See* Flast v. Cohen, 392 U.S. 83, 94 (1968) (observing that "[a]s is so often the situation in constitutional adjudication, those two words ['cases' and 'controversies'] have an iceberg quality, containing beneath their surface simplicity[,] submerged complexities which go to the very heart of our constitutional form of government"). In *Flast*, the Court quoted Professor Paul A. Freund's statement for the proposition that "[s]tanding has been called one of 'the most amorphous (concepts) in the entire domain of public law.'" *See id.*

a prerequisite for every claimant.[4] Since its inception during the New Deal era, the purpose of the standing doctrine has changed.[5]

With the rise of the administrative state in the late 1930s and 40s, the Supreme Court developed a conservative doctrine of standing to protect New Deal legislation from court-based attacks by businesses seeking to preserve their economic interests.[6] Later, during the 1960s and 70s, as individual constitutional rights expanded, standing rules were liberalized.[7] This expansion allowed litigants to challenge the actions and deci-

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at 99 & n.18 (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess., 465, 498 (1966) (statement of Prof. Paul A. Freund)); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 109-110 (2d ed. 1988) (noting that the Court's standing doctrine as a whole "is one of the most criticized aspects of constitutional law"); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 820 (Kermit L. Hall et al. eds., 1992) (stating that "[b]oth the prudential and the injury in fact requirements have been widely criticized").

The standing doctrine identifies "*who* may bring claims" alleging that a government action has violated the Constitution. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 48, 819 (Kermit L. Hall et al. eds., 1992) (explaining that the justiciability doctrines of standing, mootness, ripeness, and political question have been developed by courts to define their proper role and to ensure judicial power is limited to "cases" and "controversies" contemplated by Article III). Mootness and ripeness determine *when* claims may be brought. *See id.* The political question doctrine identifies *what* claims may be presented to courts for resolution. *See id.*; *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 88 (3d ed. 1996) (pointing out that access doctrines, as inferences from Article III, Section 2, serve the policy of judicial restraint by ensuring that courts exercise their power only within a limited constitutional context).

4. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 458 (Kermit L. Hall et al. eds., 1992) (explaining that federal courts will dismiss cases when litigants do not satisfy requirements for standing, mootness, and ripeness). Jurisdictional limits also prohibit courts from adjudicating questions that fall within the purview of the other political branches. *See id.* at 461.

5. *See* Allen v. Wright, 468 U.S. 737, 752 (1984) (declaring that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers"); *Flast*, 392 U.S. at 100-01 (stating that whether a person is the proper party to maintain an action does not, in itself, raise a separation of powers problem; rather, 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").

6. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1437 (1988) (explaining that "courts favorably disposed toward the New Deal reformation developed doctrines of standing, ripeness, and reviewability largely to insulate agency decisions from judicial intervention"); *see also* Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939) (denying the right of public utilities to challenge the Tennessee Valley Authority Act); Alabama Power Co. v. Ickes, 302 U.S. 464, 480, 484-85 (1938) (holding that a private utility has no right to immunity from competition by a municipal utility).

7. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1441-42 (1988) (stating that, in the 1960s, courts interpreted statutes to allow television viewers, housing discrimination victims, and people who use the environment to

sions of administrative agencies more easily.[8] Beginning in the early 1980s, however, three Republican administrations, each with a conservative political agenda, appointed a total of five new justices to the Supreme Court.[9] As the Court's composition shifted, the purpose and role of the standing doctrine was redefined.[10] Although traditionally regarded as a judicially designed aggregate of prudential principles that were used to complement what the Court perceived to be legislative goals, standing is now considered to be rooted in the text and structure of the constitu-

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sue based on the view that these individuals were seeking protection of their statutory interests); *see also* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-88 (1973) (acknowledging that although anyone who breathes the air could claim the same harm alleged by SCRAP, standing should not be denied simply because a large number of people suffer the same injury); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 932-37 (2d Cir. 1968) (finding that the alleged victims of housing discrimination had standing under the Housing Acts of 1949 and 1954); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966) (holding that television viewers had standing under the Federal Communications Act to challenge the renewal of a broadcast license); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 615-17 (2d Cir. 1965) (ruling that users of the environment have standing under the Federal Power Act to protect their interests from Federal Power Commission activities).

8. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1441-42 (1988) (observing that statutes were interpreted broadly in the 1960s to allow litigants bringing non-traditional claims easier access to courts).

9. *See* Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 109 (1996) (noting that three Republican administrations in the 1980s, failing to persuade Congress to curtail environmental protection, appointed "a very large number of conservative thinkers to the federal judiciary"). According to Professor Richard Lazarus, these appointments proved fruitful in recent years by effectuating the "creation of constitutional barriers to standing that make it very difficult to enforce congressional commands." *Id.* Justice Sandra Day O'Connor was the first conservative appointee, appointed to the Supreme Court in 1981 by President Ronald Reagan. *See* THE SUPREME COURT JUSTICES 509 (Clare Cushman ed., 2d ed. 1995). Chief Justice Rehnquist became Chief Justice in 1986. *See id.* at 500. President Reagan also appointed Justice Antonin Scalia in 1986. *See id.* at 513. In 1987, President Reagan appointed Justice Anthony M. Kennedy to the Court. *See id.* at 519. President George Bush appointed Justice David H. Souter in 1990. *See id.* at 525. In 1991, President Bush selected Justice Clarence Thomas to replace the seat vacated by Justice Thurgood Marshall. *See id.* at 529.

10. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 48 (Kermit L. Hall et al. eds., 1992) (observing that the justiciability doctrines, their interpretations, and their applications have evolved throughout American judicial history). During his tenure on the Court, Chief Justice Warren diluted the standing, mootness, and political question doctrines to decide important political questions discounted by the other governmental entities. *See id.* In contrast, the Burger and Rehnquist Courts have imposed stringent requirements on standing. *See id.* The scope of judicial power, thus, varies with "the prevailing conception of what constitutes a justiciable case or controversy under Article III." *Id.*

tion.[11] Far from facilitating legislative goals, the modern Court believes that restraints on the right to bring suit are essential to maintain a separation of powers, and to ensure that federal courts remain within their constitutionally assigned limits.[12]

Under the present doctrine, a litigant demonstrates standing to sue only if he meets the "case-or-controversy" requirement of Article III.[13] To meet that requirement, a plaintiff must show (1) that he has suffered an "injury in fact," which means a concrete and particularized personal injury[14] that is imminent and not speculative, conjectural, or hypothetical;[15] (2) that the injury is fairly traceable to the defendant's conduct and is not due to some third party not before the court;[16] and (3) that the

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11. *See* Robert J. Pushaw, Jr., *Justiciability and Separations of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 455 (1996) (explaining that "[t]he modern court has treated all justiciability doctrines as constitutional"). Professor Pushaw considers the Court's justiciability doctrines as constitutional as follows: first, the text of Article III limits "judicial power" to "cases" and "controversies;" second, the structure of the Constitution preserves the separation of powers by avoiding judicial interference with the other political branches. *See id.* Professor Pushaw also states that in fashioning a different justiciability scheme that addressed radical changes brought on by the New Deal, neither Justice Frankfurter nor his colleagues on the Court acknowledged that they were exercising judicial discretion. *See id.* at 459. For example, "[i]nstead of following Brandeis' prudential approach, Frankfurter persuaded the Court to characterize justiciability as required by the Constitution's text, history, and political theory." *See id.*

12. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992) (arguing that the separation of powers depends upon a common understanding of the respective roles of each of the branches); Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (stating that the standing doctrine sets apart the types of "cases" and "controversies" referred to in Article III); Allen v. Wright, 468 U.S. 737, 752 (1984) (declaring that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers"); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471-76 (1982) (describing the "case or controversy" requirement as defining the parameters of the Judicial Branch within the concept of the separation of powers); Warth v. Seldin, 422 U.S. 490, 498 (1975) (explaining that the justicability doctrines are "founded in concern about the proper—and properly limited—role of the Courts in a democratic society"); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 88 (3d ed. 1996) (explaining that courts are allowed to rule "only in the context of a constitutional case").

13. *See Lujan*, 504 U.S. at 560 (stating that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III").

14. *See Warth*, 422 U.S. at 508 (holding that a plaintiff must allege specific, concrete facts showing that the challenged action personally harms him); Sierra Club v. Morton, 405 U.S. 727 n.16 (1972) (recounting the observation by Alexis de Tocqueville that judicial review remedies a particular, concrete injury).

15. *See Whitmore*, 495 U.S. at 155 (citing City of L.A. v. Lyons, 461 U.S. 95, 109 (1983), which required the plaintiff to demonstrate a "live and active claim").

16. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976) (stating that the "case or controversy" limit of Article III requires federal courts to redress only those injuries that are traceable to the defendant's action and to refrain from addressing those that result from the actions of an absent party).

injury is likely to be redressed by a court's favorable judgment.[17] If a plaintiff satisfies these requirements, but the suit challenges the government's conduct under a statute such as the Administrative Procedure Act (APA)[18] that does not specifically grant standing, the plaintiff must also fulfill other "prudential" restrictions.[19]

Prudential concerns "arise from a perceived institutional need for judicial self-restraint rather than from the Constitution itself."[20] For instance, such cases may involve a plaintiff who asserts rights on behalf of another, one whose claim expresses generalized public grievances, or one who raises an issue not specifically covered by law but which is deemed to fall within the "zone of interests" protected by a statute.[21] Known as "prudential" restrictions, these judicially self-imposed limits are not invoked when Congress passes a law that clearly grants standing to a plaintiff or a class of plaintiffs to protect specific interests.[22] Regardless, even when a statute confers a right on individuals to bring suit to protect a legal inter-

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17. *See id.* at 38 (stating that "when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision").

18. 5 U.S.C. § 702 (1988). The Administrative Procedure Act (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." *Id.* Typically, suits are brought pursuant to the APA in order to nullify an administrative action. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1481 n.31 (1988).

19. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 820 (Kermit L. Hall et al. eds., 1992) (explaining that prudential limits are designed to prevent judicial intervention in certain situations where political processes are better suited to resolving the dispute).

20. Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1066 (1994) (quoting David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 46); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 108 (2d ed. 1988) (stating that prudential principles allow courts to avoid deciding questions where no individual right would be redressed); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 252 (1988) (explaining that when a court refuses to grant prudential standing, it essentially "refuses to infer a cause of action from existing legal materials").

21. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474-75 (1982) (explaining that a court may deny standing if the litigant presents issues which affect the public at large and are better addressed in the representative branches, if a claim seeks to vindicate the rights of others, or if a claim is not within the "zone of interests" to be protected by a statute).

22. *See* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) (noting that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute").

est, every plaintiff must still meet the Article III requirements of injury, cause, and redressability.[23]

Statutorily prescribed standing is rarely an issue when the law in question specifies the class of individuals and the types of injuries the statute is designed to protect.[24] Since the 1960s and 70s, however, Congress has passed numerous environmental statutes containing "citizen suit" provisions.[25] These provisions purport to confer standing on "any person" alleging violations of these statutes without the requisite Article III showings of personal injury, cause, and redressability.[26] Increasing use of these provisions to challenge government actions has exposed an inherent conflict between Congress' power to confer jurisdiction on federal courts

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23. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (reiterating the essential standing components). In *Defenders*, the Court stated:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" . . . . Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. (citations omitted).

24. *See id.* at 580 (Kennedy, J., concurring). In Kennedy's opinion, the Court:

> [M]ust be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition . . . . 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 . . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Id.

25. Statutes containing such provisions include: Toxic Substances Control Act of 1976, 15 U.S.C. § 2619 (1994); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (1994); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1994); Clean Water Act of 1976, 33 U.S.C. § 1365 (1994); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(1) (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994); Noise Control Act of 1972, 42 U.S.C. § 4911 (1994); Energy Policy and Conservation Act, 42 U.S.C. § 6305 (1994); Solid Waste Disposal Act of 1976, 42 U.S.C. § 6972 (1994); Clean Air Act of 1955, 42 U.S.C. § 7604 (1994 & Supp. 1990); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435 (1994); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9659 (1994); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11046(a)(1) (1994); Outer Continental Shelf Lands Act of 1978, 43 U.S.C. § 1349 (1994); Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 2014 (1994).

26. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 1077 (2d ed. 1996) (explaining, that in 1970, Congress began including citizen suit provisions in "all the major environmental statutes it adopted"). With the exception of the Federal Insecticide, Fungicide, and Rodenticide Act, virtually all major environmental statutes authorize a citizen suit provision. *See id.*

and the Supreme Court's power to deny jurisdiction over claims that do not qualify under the Article III criteria.[27]

In three opinions authored by Justice Scalia during the 1990s, the Supreme Court has used the citizen suit provisions contained in environmental laws as a backdrop to reshape the scope of Article III standing requirements.[28] Despite the "any person" language contained in the statutes, the Court has consistently applied a narrow interpretation of the standing criteria in citizen suit claims, requiring plaintiffs to show specifically how violations of these statutes injured them personally.[29] Today, the Court's revised approach to standing effectively prohibits the federal judiciary from recognizing "any person's" right to enforce environmental laws under citizen suit provisions—or indeed, under any other statutory provision—unless a plaintiff can demonstrate concrete or imminent personal harm.[30] Without declaring these statutes unconstitutional, the Court's application of the Article III criteria effectively preempts Congress' power to legislate broad grants of standing, and raises serious con-

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27. *Cf. Defenders*, 504 U.S. at 573 (rejecting the view that the Endangered Species Act's citizen suit provision can confer upon "any person" the right to enforce the statute). The Court emphasized that Congress cannot create an individual right of action by using citizen suit provisions because statutory grants of standing cannot automatically satisfy the requirements of Article III. *See id.* at 575-78.

28. *See* Bennett v. Spear, 117 S. Ct. 1154, 1164, 1168-69 (1997) (holding that the petitioners asserting economic injury met the requirements for standing under both the Article III and "zone of interests" tests); *Defenders*, 504 U.S. at 577-78 (finding that plaintiffs lacked standing to bring action because they did not assert sufficient imminent injury); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 899-900 (1990) (finding allegations of land use "in the vicinity" of proposed activity insufficient to establish standing).

29. *See Defenders*, 504 U.S. at 564 (holding that the intent to revisit an area where plaintiffs had observed endangered species was "simply not enough" to establish injury). The Court continued, stating that "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.*; *see National Wildlife Fed'n*, 497 U.S. at 889 (stating that "Rule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract or territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action").

30. *See Defenders*, 504 U.S. at 573-74 (discussing problems with current standing doctrine interpretations). In *Defenders*, the Court stated:

> We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Id.

cerns regarding the future viability of citizen suit statutes as a means of enforcing agency regulations.[31]

This Comment examines the Supreme Court's transformation of the standing doctrine from a judicial invention designed to facilitate legislative goals into a constitutionally mandated separation of powers tool—a tool that displaces Congress' ability to confer statutory jurisdiction on federal courts. Part II reviews the origin of the standing doctrine and its historical role in promoting policy goals advanced by the legislative and executive branches. Part III explores the concept of the citizen suit as a means of enforcing agency regulations and discusses the standing and separation of powers issues raised by such statutes. Part IV then analyzes the three environmental standing decisions written by Justice Scalia since 1990 and also explains how the Court's standing doctrine limits judicial review of citizen suit claims. These decisions are instructive, not only for predicting the future direction of the Court's standing doctrine, but also as an indicator of how the Court might resolve a constitutional challenge to citizen suit statutes. Part V proposes statutory amendments that may preclude a constitutional challenge and recommends that Congress properly fund government enforcement of environmental laws to reduce the need for citizen suit litigation. The remedies proposed with regard to environmental regulation also apply in other arenas where standing to enforce laws or regulations may be ambiguous. Additionally, this Comment argues that, because of the inherent difficulties surrounding a constitutional amendment to override the Court's interpretation of Article III, Congress needs to take action to craft more effective citizen suit statutes.

II. THE CONSTITUTION OF STANDING

A. *The Standing Doctrine As Recent History*

Much of the scholarship addressing standing criticizes its pedigree as a questionable, judge-made legal fiction—essentially, a judicial invention without foundation in the text or history of the Constitution.[32] Indeed,

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31. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 233 (1988) (claiming that the Article III limitations on congressional grants of standing "limit the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) (stating that Article III appears to forbid Congress from granting standing to "citizens"); Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 109 (1996) (explaining that the Court has created a number of constitutional hurdles to standing, thus complicating the enforcement of congressional commands).

32. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 100 (3d ed. 1996) (noting that standing limits were created principally by justices allied with the New Deal or progressive movement); Colloquia, *Group Discussion on the Supreme Court's Recent Adminis-*

the bare language of Article III extending judicial power to "cases" and "controversies" provides little constitutional guidance as to the standards and policies that limit access to judicial review.[33] This lack of textual guidance led the Court, as early as 1803 in *Marbury v. Madison*,[34] to justify the constitutional case or controversy parameters using structural arguments.[35] For example, if the Constitution separates and limits the powers

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trative Jurisprudence, 7 ADMIN. L.J. AM. U. 287, 288 (1993) (critiquing the Court's use of "case" or "controversy" requirements in the past two decades as jurisprudence that is "all judge-made"); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) (explaining that the Supreme Court decision in *Defenders* was without basis in the history or context of Article III); *see also* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 819 (Kermit L. Hall et al. eds., 1992) (stating that the origin of the standing doctrine is "unclear").

33. *See* Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 256 (observing that the Constitution did not attempt to define legislative, executive, or judicial powers); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1150 (1993) (stating that "the Framers gave almost no indication of what the [Article III case or controversy requirement] meant"); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168-69 (1992) (arguing that Article III contains no reference to standing, personal stake, or "injury in fact" and that "[i]f we are to impose additional standing requirements, we must do so on the basis not of text but of history"). James Madison observed in the *Federalist* that "[e]xperience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the Legislative, Executive and Judiciary." THE FEDERALIST NO. 37, at 235 (James Madison) (Jacob E. Cooke ed., 1961).

34. 5 U.S. (1 Cranch) 137 (1803).

35. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178-80 (1803) (arguing that because the Constitution is superior to acts of the Legislature and judicial power extends to cases arising under the Constitution, law that is repugnant to the Constitution cannot create justiciable cases or confer jurisdiction on the Court); *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 448-49 (1996) (explaining that Chief Justice Marshall's decision in *Marbury* captured the Federalist's separation of powers theory, but ignored the doctrine requiring the Court to construe statutes in a way that avoided constitutional questions). However, ignoring the fact that Marshall's decision actually claimed for the Court a power superior to that of the Legislature, "the modern Court has cited *Marbury* as exemplifying the judicial restraint embodied in the justiciability doctrines." *Id.*

The concept of justiciability for the Framers "did not embrace notions of standing as we think about them today." Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1395 (1988). At that time, the legal question was required to "assume such a form that the judicial power is capable of acting on it." *Id.* (quoting Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738, 819 (1824)). This concept was expressed by what Steven Winter terms the "syllogism of the forms," which he describes as follows: "[Judicial] power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case . . . ." *Id.* In an elaborate structural argument citing numerous cases that define judicial power based on case or controversy requirements, then-Justice Rehnquist's opinion in *Valley Forge Christian College v. Americans United for Separation of Church and*

of each branch of government,[36] and judicial limits are defined by the "cases and controversies" language of Article III,[37] then the justiciability doctrines provide standards for what constitutes a "case or controversy."[38] Under this structural argument, the standing, mootness, ripeness, and political question requirements are all inherent derivatives of Article III.[39]

Critics of the Article III requirements attack such logic by arguing that "[t]here is no evidence of constitutional limits on the power to grant standing."[40] Specifically, critics contend that the dramatic shifts in underlying doctrinal standards during differing eras, as well as arbitrary decisions to apply one doctrine versus another, evidences the judiciary's discretionary policy preferences rather than Article III limits.[41] On the

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State concludes that Article III standing requirements are "a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471-76 (1982).

36. *See* United States v. Harris, 106 U.S. 629, 635 (1882) (stating "the United States government is one of delegated, limited, and enumerated powers").

37. *See* U.S. CONST. art. III, § 2 (extending judicial power to cases in law and equity that arise under the Constitution, statutes and treaties, and to controversies in which the United States is a party or that involve disputes between a state and another party).

38. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (stating that the doctrine of standing serves "to identify those disputes which are appropriately resolved through the judicial process" (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990))).

39. *See id.* (reasoning that "[t]hough some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III").

40. Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 171 (1992); *see* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224 (1988) (indicating that standing limitations are relatively recent creations).

41. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 48 (Kermit L. Hall et al. eds., 1992) (contrasting the Warren Court's liberal interpretation of the standing doctrine with the Berger and Rehnquist Courts' conservative application); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170-97 (1992) (discussing the five stages of standing law and the political policies influencing their development). Professor Sunstein explains that in the second stage of standing law, developed by Justices Brandeis and Frankfurter, "[t]heir goal was to insulate progressive and New Deal legislation from frequent judicial attack." *Id.* at 179. In the third stage, Congress passed the Administrative Procedure Act to allow people "to have causes of action, and hence standing, even if their interests were not entitled to consideration by the relevant agency." *Id.* at 182. During the 1960s and 70s, the fourth stage of standing law, courts were influenced by literature suggesting that agencies were susceptible to pressure from regulated industry, and courts allowed many people affected by government actions to file suit to bring agencies into conformity with law. *See id.* at 183. The idea that these "regulatory beneficiaries" should have the same access to judicial review as the regulated community "seemed to stem from partisan considerations or judicial hostility to regulatory programs enacted by Congress; it did not appear to have any better

other hand, proponents of standing emphasize the doctrine's purpose—to preserve separation of powers and preclude an overreaching "government by judiciary" offensive to the constitutional structure.[42] Advocates also argue that the standing doctrine promotes these goals by ensuring that courts decide only those disputes that meet the Article III case or controversy criteria.[43]

In the scheme of constitutional history, the standing doctrine is a relatively recent development.[44] Prior to 1939, when the Court first began

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pedigree." *Id.* at 184. The fifth stage of standing law, the contemporary stage, reflects a judicial reluctance to supervise agency inaction based upon separation of powers concerns. *See id.* at 196.

42. *See* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1277 (1989) (observing that whether or not standing is an appropriate doctrinal means of limiting federal jurisdiction, the Court believes that broadly worded statutes present too great an opportunity for "politically unaccountable federal judges to substitute their policy preferences for those of politically accountable institutions"); Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983) (arguing that a disregard of the standing doctrine "will inevitably produce—as it has in the past few decades—an over judicialization of the process of self-governance").

43. *See* Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers,* 17 SUFFOLK U. L. REV. 881, 894 (1983) (asserting that "the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority"); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1806-08 (1993) (explaining that just as Congress cannot delegate the authority to individuals to regulate work place safety, it also cannot confer upon private citizens standing to enforce statutes through citizen suit provisions); Charles S. Abell, Note, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 VA. L. REV. 1957, 1979-86 (1995) (arguing that the citizen suit provision of the Clean Water Act does not allow plaintiffs to meet the Article III standing requirements, and therefore, does not present the type of case or controversy the judiciary is constitutionally permitted to hear).

44. *See* William A. Fletcher, *The Structure of Standing,* 98 YALE L.J. 221, 224 (1988) (reporting that "current standing law is a relatively recent creation"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III,* 91 MICH. L. REV. 163, 169 (1992) (stating that "standing as a distinct body of constitutional law is an extraordinarily recent phenomenon"); Jonathan Poisner, Comment, *Environmental Values and Judicial Review After* Lujan*: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335, 338 (1991) (noting that prior to this century, when deciding whether to hear certain claims, courts did not address standing as a distinct issue).

The term "standing" was first used in a concurring opinion by Justice Frankfurter in 1939. *See* Coleman v. Miller, 307 U.S. 433, 464-68 (1939) (Frankfurter, J., concurring) (discussing the standing of Kansas legislators to challenge political procedures used to ratify the Child Labor Amendment). *But see* Mississippi & Mo. R.R. v. Ward, 67 U.S. 485, 491 (1862) (denying the defendant's argument that, absent joinder of the co-owners, plaintiff did not "stand" in a valid position to bring suit). Prior to a formal standing doctrine, courts determined a plaintiff's right to sue by reference to the common law, to statute, or to the

developing a distinct law of standing, the right to bring suit was tied closely to a narrow group of well-recognized common-law injuries arising from tort, breach of contract, or violation of property rights.[45] In this regard, lower courts viewed their role primarily as one of resolving disputes that were brought on these bases.[46] Accordingly, plaintiffs who brought suit under any of these recognized theories were required to prove for standing purposes that the defendant breached a duty that caused the plaintiff to suffer either personal or economic damages.[47] Because statutorily created rights did not result in traditional common-law injuries to property or liberty interests, courts did not historically accord those rights a high regard.[48] This paradigm, recognized by courts prior to

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Constitution. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224 (1988) (stating that "[i]n the late nineteenth and early twentieth centuries, a plaintiff's right to bring suit was determined by reference to a particular common law, statutory, or constitutional right, or sometimes to a mixture of statutory or constitutional prohibitions and common law remedial principles"). Litigants were also required to have a personal interest at stake. *See* Tyler v. Judges of the Court of Registration, 179 U.S. 405, 407 (1900) (refusing to hear the case because the plaintiff did not allege "an interest in the litigation which has suffered, or may suffer, by the decision of the state court in favor of the validity of the statute"); *see also Ward*, 67 U.S. at 492 (holding that a plaintiff acting as a "public prosecutor" could maintain the suit without joining his co-owners so long as he showed current and continuing damage to himself). In the famous case of *Frothingham v. Mellon*, the Court articulated the rule barring generalized grievances, refusing to hear a suit brought by a taxpayer who suffered in an "indefinite way in common with people generally." Frothingham v. Mellon, 262 U.S. 447, 488 (1923). Without mentioning the term "standing," the Court held that the taxpayer's interest was "minute and indeterminable." *Id.* at 487.

45. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 724 (2d ed. 1996) (explaining that this approach was termed "the 'legal wrong' test of standing"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 181 (1992) (noting that as late as 1939, the Court held that to have standing, the plaintiff must have a "legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege" (quoting Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939))).

46. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988) (discussing the evolution of the standing doctrine which uses "common-law understandings to define the judicial role").

47. *See id.* (summarizing the question of standing at common law to be "whether A has violated a duty it owes to B"); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224 (1988) (explaining that the right to bring suit in the late nineteenth and early twentieth centuries was based on common-law, constitutional, or statutory remedial principles).

48. *Cf.* James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters—Is It Against Nature to Pay for a Taking?*, 27 LAND & WATER L. REV. 309, 322 (1992) (contending that debates regarding "the clash between environmental regulation and property rights" must be understood in light of "the intrinsic value of a system of government that protects property rights"). The Lockean view, favored by the Constitu-

the formal development of a standing doctrine, has been labeled the "private law" model.[49]

Two important political developments caused the standing doctrine first to emerge, then to shift dramatically. First, the rise of the administrative state during the New Deal era prompted the Court to develop, and later to modify, the private law model of standing.[50] The second political development, increased emphasis on individual rights and environmental values during the 1960s and 70s, persuaded the Court to abandon the private law model and to liberalize its concept of standing.[51] By the 1980s, however, Supreme Court decisions signaled the Court's retreat from a broad interpretation of the standing doctrine.[52]

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tion, holds that property rights are essentially a fundamental liberty on par with the freedoms of religion, speech, and due process. *See id.* at 323; *see also* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988) (explaining that in the early period of administrative regulation, judicial protection was unavailable unless a common-law right was at stake). Professor Sunstein explains that the basis of this view was the underlying notion of the social contract. *See id.* at 1435. This notion contends that citizens enter society with certain rights that the government cannot normally abridge. *See id.* In the state of nature, these rights consisted of liberty and the rights of private property. *See id.* If such an interest was not at stake, no authority existed for legal intervention. *See id.* Accordingly, "the interests of statutory beneficiaries were invisible as far as the courts were concerned." *Id.*

49. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 724 (2d ed. 1996) (noting that the legal wrong test has also been known as the "private law" model of standing); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988) (equating the private law with notions of common-law rights and interests).

50. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 225 (1988) (explaining that as the New Deal government expanded and began to regulate the private sector, individuals sought access to the courts to restrict the government's power).

51. *See id.* at 227-28 (describing federal litigation in the 1960s and 70s as increasingly involving attempts to enforce constitutional and public values by litigants who were not affected personally by the actions of which they complained); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 90 (1984) (stating that as society's values changed, the judiciary recognized environmental concerns as protectable interests).

52. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 759-60 (1984) (denying standing to a plaintiff who challenged the tax-exempt status of racially discriminatory schools); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 483 (1982) (holding that a general right to have the government act in accordance with the law is insufficient to confer jurisdiction on a federal court).

B. *The Private Law Model of Standing and the Rise of the Administrative State*

During the 1930s, the Great Depression created a legal crisis as well as an economic one.[53] Idealistic theories about laissez-faire capitalism, which had bolstered the nation's pro-business attitude since the late nineteenth century, collapsed suddenly in 1929.[54] President Franklin D. Roosevelt believed government intervention was necessary to save the nation's economy.[55] Roosevelt's views, however, were contrary to the jurisprudence at the turn of the century, which upheld individual liberty to contract and forbade government interference in the marketplace.[56]

Roosevelt's innovative response to the nation's declining economy challenged the historical relationships between politics and law, as well as the degree of government involvement in the social and economic order.[57] Previously, courts protected business interests from government regulation and held that government restrictions on rates and profits

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53. *See* KERMIT L. HALL, THE MAGIC MIRROR 271 (1989) (observing that the Great Depression of the 1930s was "as much a legal as an economic crisis").

54. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 392 (Kermit L. Hall et al. eds., 1992) (documenting the challenges faced by the Court during the Depression).

55. *See* KERMIT L. HALL, THE MAGIC MIRROR 272 (1989) (stating that the Roosevelt administration believed that government was responsible for the national economy and the well-being of individual citizens); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 584 (Kermit L. Hall et al. eds., 1992) (reporting that Roosevelt was confident that constitutional power existed to pass emergency legislation and establish regulatory agencies).

56. *See* KERMIT L. HALL, THE MAGIC MIRROR 241-42 (1989) (discussing how *Lochner v. New York*, 198 U.S. 45 (1905), symbolized the Court's determination to second-guess legislation that regulated working conditions); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 388 (Kermit L. Hall et al. eds., 1992) (noting that the Court accepted the view that certain provisions of the Constitution "incorporated the moral and economic principle of laissez-faire and that government could not interfere with the free market's distribution of economic wealth and power"); Monica Reimer, *Competitive Injury As a Basis for Standing in Endangered Species Act Cases*, 9 TUL. ENVTL. L.J. 109, 114 (1995) (reporting that the common law traditionally favors free competition).

57. *See* KERMIT L. HALL, THE MAGIC MIRROR 271 (1989) (noting that government intervention in the social and economic order and the relationship between politics and the law were two historical problems that reemerged during the Depression); *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 456-57 (1996) (stating that "[t]he New Deal challenged the fundamental constitutional idea of a limited federal government divided into three branches exercising enumerated powers"). According to Kermit Hall, "[e]xperimentation was the hallmark of Franklin Roosevelt's New Deal." KERMIT L. HALL, THE MAGIC MIRROR 273 (1989).

were "confiscations" of private property in violation of due process.[58] Roosevelt's New Deal aimed to replace this laissez-faire system with extensive regulation of the marketplace.[59] He experimented with various approaches, and if one failed, he proposed another.[60] During the first one hundred days of the Roosevelt administration, which has been called "one of the most creative and active periods in [legislative] history,"[61] Congress passed extensive measures creating numerous regulatory agencies.[62]

The Supreme Court's conservative bloc[63] was alarmed by Roosevelt's pragmatic approach to the economic crisis.[64] In 1935, the Court began to strike down Roosevelt's legislative initiatives, thereby obstructing the administration's efforts to cope with the economic crisis.[65] New Deal reformers, frustrated by judicial hostility toward administrative regulation,[66] decried the Court's excessive protection of private property rights.[67] In response, Roosevelt announced his "court-packing plan,"

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58. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 387 (Kermit L. Hall et al. eds., 1992) (describing the Court's treatment of property rights during the nineteenth century).

59. *See id.* at 393 (describing the extensive innovative measures proposed by Roosevelt to address the nation's economic crisis).

60. *See id.* (explaining Roosevelt's philosophy regarding the action necessary to alleviate the national economic downturn).

61. KERMIT L. HALL, THE MAGIC MIRROR 272 (1989).

62. *See id.* at 272-73 (naming the Home Owners Loan Corporation, the Federal Deposit Insurance Corporation, the Civilian Conservation Corps, and the Tennessee Valley Authority as among the federal regulatory agencies created in the early days of Roosevelt's administration).

63. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 584 (Kermit L. Hall et al. eds., 1992) (listing Justices Willis Van Devanter, Pierce Butler, James C. McReynolds, and George Sutherland as the conservative bloc of the Court). In reference to *Revelation* 6:2-8, the conservative bloc has been called the "Four Horsemen." *See id.*

64. *See id.* (stating that the conservative bloc disagreed with Roosevelt's pragmatic approach to handling the national economic crisis).

65. *See id.* (reporting that Justice Owen Roberts and Chief Justice Charles Evans Hughes joined the "Four Horsemen" in *Schecter v. United States,* 295 U.S. 495 (1935), *United States v. Butler,* 297 U.S. 1 (1936), and *Carter v. Carter Coal,* 298 U.S. 238 (1936)). The decision in *Schecter* voided the National Industrial Recovery Act, and *Butler* voided the Agricultural Adjustment Act of 1933. *See id. Carter Coal* cited the Court's discredited decision in *United States v. E.C. Knight Co.,* 156 U.S. 1 (1895), to invalidate an exercise of Congress' power under the Commerce Clause. *See id.*

66. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1438 (1988) (noting that the New Deal attack on Lochner-era jurisprudence was a reaction by those who believed judicial supervision of administrative regulation was, to a large degree, anachronistic).

67. *See id.* at 1437 (stating that the New Deal's attack on legalism and the judiciary was prompted by advocates who favored administrative regulation). Professor Sunstein

which not only changed the face and direction of the Supreme Court, but also would shape the Court's initial approach to standing.[68]

Roosevelt's plan hastened the retirement of seven Supreme Court justices.[69] Justice Felix Frankfurter, one of President Roosevelt's new appointees who was amenable to New Deal reformation, subsequently led the Court in developing the standing doctrine. Justice Frankfurter's goal was to structure a doctrine that would minimize judicial intrusion into the regulatory process.[70]

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observes that "[i]n the view of the New Deal reformers, the common law was inadequate as such because it was excessively protective of property rights, insufficiently protective of the disadvantaged, and ill-adapted to economic welfare in an integrated national economy." *Id.*

68. *See* RICHARD B. MORRIS, ENCYCLOPEDIA OF AMERICAN HISTORY 356 (1961) (reporting that the Court's continued invalidation of social and economic legislation led to Roosevelt's "court-packing plan"). On February 5, 1937, Roosevelt submitted a plan to reorganize the federal judiciary. *See id.* The proposal included: (1) increasing the membership of the Court from 9 to 15 if judges declined to retire upon reaching age 70; (2) adding a total of no more than 50 judges to all levels of federal courts; (3) sending appeals of constitutional issues from lower courts directly to the Supreme Court; (4) implementing a requirement that government attorneys be allowed to argue the case prior to a lower court issuing any injunction against an act of Congress if a question of constitutionality was involved; and (5) assigning district judges to more congested areas to expedite court business. *See id.* The plan sparked bitter controversy and debate and drew criticism that Roosevelt was attempting to corrupt the Constitution and "pack" the Supreme Court. *See id.*

69. *See id.* at 357 (noting that Roosevelt was able to fill seven vacancies on the Court within the four years following the court-packing plan). The justices appointed by President Roosevelt were Hugo Black (1937), Stanley Reed (1938), Felix Frankfurter (1939), William O. Douglas (1939), Frank Murphy (1940), Robert H. Jackson (1941), and James F. Byrnes (1941). *See id.*

70. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 396 (1996) (asserting that based on slender historical evidence, Justice Frankfurter "almost singlehandedly developed the modern justiciability doctrines during the middle of this century"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179 (1992) (explaining that in an attempt to counter an aggressive Supreme Court of the period, Justices Brandeis and Frankfurter became the principal architects of the standing doctrine); *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring) (denying standing to plaintiffs to challenge an agency action that was not final); Coleman v. Miller, 307 U.S. 433, 464-68 (1939) (Frankfurter, J., concurring) (asserting that the Court's finding that litigants lacked standing was compelled by Article III's history and text); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341-45 (1936) (Brandeis, J. concurring) (refusing to grant standing to corporate stockholders challenging an agency's dealings with the corporation). Although a majority of the Court rejected the views of Justices Brandeis and Frankfurter, their opinions were important to the development of the standing doctrine. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1481 n.20 (1988). In fact, Frankfurter's opinions in *Coleman* and *McGrath* "have become the foundation of the modern justiciablity doc-

Early standing guidelines retained the restricted access policies of the earlier private law model, and served to protect government programs from unwarranted attack.[71] The Court began to recognize the distinctive expertise of administrative agencies to carry out government programs, and presumed that agencies were acting properly to protect the public's interests.[72] Unless plaintiffs had a "legal right,—one of property, one arising out of contract, one protected against tortuous invasion, or one founded on a statute which confers a privilege," the Court denied the cause of action.[73]

During the late 1930s and early 40s, agency expansion raised new questions of how to decide who could bring suit to challenge governmental regulation.[74] Regulatory agencies' activities were, after all, aimed toward providing benefits to a public that had a vested interest in receiving proper service.[75] In two cases, for example, the Court broadly interpreted the Federal Communications Commission Act to grant standing to protect the interests of radio listeners.[76] In other cases where the statute

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trines." Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 463 (1996).

71. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 180 (1992) (characterizing the Brandeis-Frankfurter guidelines as "broadly compatible with preexisting law").

72. *See, e.g.*, Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (deferring to the agency's interpretation of its regulations); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944) (affirming the National Labor Relations Board's determination of who is an "employee" within the meaning of the National Labor Relations Act).

73. Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939). By the late 1930s, businesses could no longer expect the courts to rule in their favor by finding that government regulation constituted a "taking" of their private property. *See* KERMIT L. HALL, THE MAGIC MIRROR 291-92 (1989) (stating that the dramatic change in the Court in 1937 "dethroned substantive due process and freedom to contract, enhanced legislative and administrative intervention into society and diminished the sanctity of property and contract rights"); *cf. Bowles,* 325 U.S. at 414 (holding that the ultimate standard for judicial construction of an ambiguous agency regulation was "the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation").

74. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 225 (1988) (stating that "[a]mong the difficult questions posed by the enormous growth of administrative agencies in the 1930s, one of the most prominent was how to determine who could sue to enforce the legal duties of an agency" (citation omitted)).

75. *Cf.* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 184 (1992) (explaining that the legal injury test was expanded to allow standing to those who were meant to benefit by regulatory action). According to Professor Sunstein, the idea that the objects of regulation should have access to judicial review, but beneficiaries should not, "seemed positively perverse." *Id.*

76. *See* Scripps-Howard Radio v. FCC, 316 U.S. 4, 14 (1942) (stating that the purpose of the Communications Act of 1934 was not to create new private rights, but rather "to protect the public interest in communications"); FCC v. Sanders Bros. Radio Station, 309

did not explicitly confer a cause of action, the Court compared the claim to traditional common-law rights of contract, property, or tort and found no standing.[77] Gradually, the concept of standing was expanded beyond the private law model to allow statutory standing and common-law rights of action to co-exist informally as equal avenues of access to judicial review.[78] In 1946, concurrent with the rise of the administrative state, Congress codified this co-equal standing doctrine in the Administrative Procedure Act.[79]

C. *The Civil Rights Era and the Liberalization of Standing*

As time passed, the Supreme Court's focus shifted from regulatory concerns to civil rights issues.[80] The flag-salute cases, the Japanese-American internment during the early years of World War II, and the desegregation cases decided by the Warren Court in the mid-1950s launched the judicial battle for civil rights.[81] The focus on expanding con-

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U.S. 470, 475 (1940) (asserting that "it is not the purpose of the Act to protect a licensee against competition but to protect the public"). Currently, "any . . . person . . . aggrieved or whose interests are adversely affected by any order of the Commission" has standing to appeal a decision by the Commission. 47 U.S.C. § 402(b)(6) (1994).

77. *See Tennessee Elec. Power Co.*, 306 U.S. at 137-38 (denying standing of private utilities to challenge the Tennessee Valley Authority Act unless the legal right is founded on a statute or is based on property, contract, or tortuous invasion); Alabama Power Co. v. Ickes, 302 U.S. 464, 480, 484-85 (1938) (holding that a private utility has no right to challenge federal loans to a municipal competitor because there is no right to immunity from competition).

78. *See* Jonathan Poisner, Comment, *Environmental Values and Judicial Review After* Lujan*: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335, 339 (1991) (stating that the private law model unraveled as Congress enacted statutes benefiting the public and the Supreme Court began recognizing standing based solely on violations of such statutes).

79. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 243 (1946) (codified as amended at 5 U.S.C. § 702 (1994)) (stating that "[a]ny person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof"). The reference to legal wrong meant "harm to common-law, statutory, and constitutional interests;" the "adversely affected or aggrieved" clause was designed to allow courts to recognize statutory standing if the law the plaintiff claimed was violated protected his interests. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1440-41 (1988).

80. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 394 (Kermit L. Hall et al. eds., 1992) (observing that economic matters played a less important role on the Supreme Court's agenda following the court-packing fight). Although economic cases are still heard, the Court has adopted a considerable deference to Congress, invalidating regulations only if no rational basis can be offered to explain Congress' policy. *See id.*

81. *See id.* at 395 (observing that the flag-salute cases and Japanese internment cases "arose in the context of a nation at war"). Although the desegregation cases were not

stitutional rights intensified during the 1960s and 70s,[82] as ideological values shifted with the Vietnam War, the civil rights movement, and Watergate.[83] Consequently, the public and the courts no longer presumed, as they had in the post-New Deal era, that government agencies were acting properly to protect the public's interests.

The nation's courts, predominantly activist during this period,[84] framed many issues at a high level of generality to find new fundamental rights hidden in the Constitution.[85] These emerging rights protected individu-

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decided until 1954, "the judicial battle for civil rights began to pick up steam in the postwar years." *Id.* During the seven-year tenure of Chief Justice Vinson, from 1946-53, Justices Black, Douglas, and Murphy articulated their belief that the Court had a responsibility to address equal protection violations. *See id.* The landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954), "nourished the sense of rights consciousness that had begun in the World War I era and, as important, demonstrated the possibilities of social change through litigation." KERMIT L. HALL, THE MAGIC MIRROR 287 (1989).

82. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 227 (1988) (stating that "federal litigation in the 1960s and 70s increasingly involved attempts to establish and enforce public, often constitutional, values"); *cf.* A YEAR IN THE LIFE OF THE SUPREME COURT 156 (Rodney A. Smolla ed., 1995) (observing that "the Warren Court in the 1960s began a steady expansion of the rights of criminal suspects and defendants under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments").

83. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 485 (3d ed. 1996) (noting the controversy and public distrust of the presidency after the Vietnam war). The assassinations of Robert F. Kennedy, John F. Kennedy, and Martin Luther King, Jr. in the 1960s, as well as the resignation in 1974 of President Richard M. Nixon, led to the nation's disillusionment and an "atmosphere of impatience with previously ignored . . . issues." KERMIT L. HALL, THE MAGIC MIRROR 287 (1989).

84. *See* Donna F. Coltharp, *Writing in the Margins: Brennan, Marshall, and the Inherent Weaknesses of Liberal Judicial Decision-Making*, 29 ST. MARY'S L.J. 1, 6 (1997) (stating that "the Court is rarely comprised of a majority of judicial activists as it was at the end of the Warren-Court era"); *see also* Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 819 (observing that during the 1960s and 70s, "administrative discretion was constrained by activist judicial review, which was based on whatever legislative intent courts could discern in the vague statutes"); Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 107-08 (1996) (discussing the judicial activism in environmental law during the 1960s and 70s). Coltharp explained that judicial activists rely less on text and history as interpretive tools, choosing instead to employ "abstract principles, natural law theory, or community consensus." Donna F. Coltharp, *Writing in the Margins: Brennan, Marshall, and the Inherent Weaknesses of Liberal Judicial Decision-Making*, 29 ST. MARY'S L.J. 1, 7 (1997).

85. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 950-51 (3d ed. 1996) (discussing the right to privacy as an unenumerated right elaborated by the Supreme Court under the theory of implied rights of liberty guaranteed by the Fourteenth Amendment). Perhaps the most familiar examples of the right to privacy are found in the famous line of cases that followed *Griswold v. Connecticut*, which held that the right to use contraceptives is a fundamental right that "emanates" from the "penumbra" of specific guarantees expressed in the Bill of Rights. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). By re-

als, rather than the marketplace, from unwarranted government intrusion.[86] During this era, courts also adopted liberal interpretations of statutes to expand the concept of standing.[87]

In 1968, in an unprecedented move, the Supreme Court granted standing, on establishment clause grounds, to a taxpayer who challenged federal expenditures to parochial schools.[88] In *Flast v. Cohen*,[89] the Court noted that the primary question of standing was "related only to whether

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framing issues such as the right to use contraceptives or to seek an abortion as a more abstract, general right to personal autonomy over one's childbearing decisions, specific conduct was redefined as a broader fundamental right to privacy. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (stating that "the right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 962 (3d ed. 1996) (noting that "[d]efenders of *Roe* . . . argue that, taken together, the *Meyer/Pierce/Griswold/Eisenstadt* line of cases delineates a sphere of interests—which the Court now groups and denominates 'privacy'—implicit in the 'liberty' protected by the [F]ourteenth [A]mendment"). The Court previously declared that individuals have certain other fundamental rights that demand respect. *See* Aptheker v. Secretary of State, 378 U.S. 500, 505, 517 (1964) (holding that the freedom to travel, like the freedom of speech and association, is constitutionally protected); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stressing that procreation is a fundamental right closely akin to the fundamental right of marriage); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (declaring that parents and guardians possess the right to direct their children's education, for holding otherwise would be contrary to the guarantees of the Constitution); Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (asserting that the Constitution protects and upholds the right to teach one's children a foreign language).

86. *See, e.g., Griswold*, 381 U.S. at 484 (protecting an individual's right to use contraceptives); *Roe*, 410 U.S. at 153 (guarding from state intrusion a woman's right to an abortion).

87. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 725 (2d ed. 1996) (observing that "[i]n the 1960s, lower courts pushed standing doctrine to the limits of Section 702, largely under the influence of citizen and environmental groups—the presumed beneficiaries of many of the statutes Congress had enacted—who were dissatisfied with agency interpretations and actions"); *see also* Hardin v. Kentucky, 390 U.S. 1, 6 (1968) (holding that "when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision"); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 932-37 (2d Cir. 1968) (holding that alleged victims of housing discrimination had standing under the Housing Acts of 1949 and 1954); Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966) (granting standing to television viewers under the Federal Communications Act to contest the renewal of a broadcast license); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 615-17 (2d Cir. 1965) (granting standing under the Federal Power Act to protect the interests of plaintiffs who use the environment). *But see* Baker v. Carr, 369 U.S. 186, 204 (1962) (requiring that plaintiffs have a personal stake in the suit to ensure adversity).

88. *See* Flast v. Cohen, 392 U.S. 83, 102-03 (1968) (holding that a taxpayer may challenge the constitutionality of a federal taxing or spending program if there is a logical connection between the taxpayer's status and the claim). Justice Scalia observed that "[n]ever before had an improper expenditure of federal funds been held to 'injure' a federal taxpayer in such fashion as to confer standing to sue." Antonin Scalia, *The Doctrine of*

the dispute sought to be adjudicated will be presented in an adversary context."[90] The idea that the controversy be in such a context, like other standards set at a high level of generality, was broad enough to allow nearly every dispute to be classified as "adverse." As a result of this decision, the purpose of the standing doctrine shifted from protecting agencies, to allowing plaintiffs much broader access to the courts to challenge government decisions.[91]

Soon thereafter, in 1970, the Supreme Court issued a decision that proved to be the turning point in the development of the standing doctrine.[92] Originally intended as a means to facilitate plaintiffs' ability to sue the government, the Court's decision in *Association of Data Processing Service Organizations v. Camp*,[93] ironically, produced an unintended effect.[94] Rather than enhancing access to federal courts, *Data Processing*

Standing As an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881, 891 (1983).

89. 392 U.S. 83 (1968). *Flast* held that the Establishment Clause limits the taxing and spending power conferred to Congress and that when such specific limits are identified, a taxpayer will have a "clear stake" in ensuring that those limits are not breached. *See Flast*, 392 U.S. at 105-06.

90. *Flast*, 392 U.S. at 101. Professor Tribe observes that in *Flast*, the Warren Court opined that standing was premised on the principle of ensuring adverseness, rather than upon concerns with potential separation of powers issues. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 108-09 (2d ed. 1988); *see also Flast*, 392 U.S. at 100-01 (stating that when separation of powers issues arise, they come from the substantive issues the plaintiffs seek to adjudicate).

91. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 184 (1992) (stating that courts "built on the 'legal wrong' idea to grant standing to many individuals and groups intended to be benefited by statutory enactments").

92. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) (asserting that "[m]ore damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 185 (1992) (noting that *Data Processing* "provides the basic underpinnings for the modern law of standing").

93. 397 U.S. 150 (1970).

94. *See* Brian J. Gatchel, *Informational and Procedural Standing After* Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L. 75, 81 (1995) (stating that "what began as a relatively simple test progressively lost its simplicity upon re-articulation"); Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 889-90 (1983) (criticizing *Data Processing* and *Barlow v. Collins*, 397 U.S. 164, 165 (1970), because both misinterpreted the Administrative Procedure Act and produced the "weird" effect of actually denying, rather than granting, standing under certain regulations); *see also* Miriam S. Wolok, Note, *Standing for Environmental Groups: Procedural Injury As Injury-In-Fact*, 32 NAT. RESOURCES J. 163, 168 (1992) (noting that the subsequent divergence of the injury in fact and zone of interests test "has [had] important ramifications for environmental litigants").

provided the architecture for what have become the most restrictive requirements in the doctrine's history.

1. *Association of Data Processing Service Organizations v. Camp* and the "Injury in Fact" Requirement

The petitioners in *Data Processing* were in the business of selling computer services to business customers.[95] Relying on language in the Bank Services Corporation Act, which they argued prohibited banks from engaging in other activities, the petitioners challenged a Comptroller of the Currency ruling that allowed banks to provide data processing to customers.[96] The case was dismissed by the lower courts for lack of standing.[97]

In reversing the lower courts on the standing issue, the Supreme Court reasoned that "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action," and that "[t]he whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend."[98] In order to facilitate the trend, the Court set aside the question of whether the plaintiff had a "legal interest," asserting that "[t]he 'legal interest' test goes to the merits."[99] According to the Court, "[t]he question of standing [was] different."[100]

Through this holding, the Court severed the question of standing from the merits by creating, although unintentionally, a two-part test. The opinion set forth a new threshold, requiring the plaintiffs to allege an "injury in fact"[101] and to demonstrate that "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."[102] Because Justice Douglas, the author of the majority opinion, intended to enlarge the class of those eligible to challenge an agency's action, the logical conclusion is that the two parts of the test were to be applied in tandem; that is, the question of standing would turn on "whether there was an injury in fact that was 'arguably within the zone' of interests protected by the statut[e]."[103] The use of the word "arguably"

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95. *See* Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 151 (1970).

96. *See id.* at 155 (quoting the Bank Service Corporation Act of 1962, which provides that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks").

97. *See id.* at 151.

98. *Id.* at 154.

99. *Id.* at 153.

100. *Id.*

101. *See id.* at 152.

102. *Id.* at 153.

103. Cass R. Sunstein, *Standing and the Privatization of Public Law,* 88 COLUM. L. REV. 1432, 1445 (1988).

further revealed Justice Douglas' intention that the Court should broadly interpret the types of interests a given statute was designed to protect.[104] Moreover, the injury in fact requirement was intended to be less exacting, requiring only a brief examination of the statute for evidence of a specific legal interest.[105] Although the Court often has fluctuated between requiring general and specific evidence of injury as a standing prerequisite, *Data Processing* first articulated the "injury in fact" requirement.[106]

In applying its new test, the Court in *Data Processing* acknowledged that the statutes in question did not protect a specifically identifiable group.[107] Nonetheless, the Court concluded that the petitioners, as economic competitors, alleged government violation of protected interests. The Court held that plaintiffs were clearly "within that class of 'aggrieved' persons who, under s[ection] 702, are entitled to judicial review of 'agency action.'"[108]

The Supreme Court failed to explain how it could determine that the petitioners had standing to bring suit without knowing whether the Bank Service Corporation Act or the National Bank Act recognized a competitor's economic injuries as a legal interest.[109] The plaintiff's ability to establish a legal injury, which is always the first element of any claim whether labeled as a standing issue or a question on the merits,[110] is pred-

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104. *See* Sanford A. Church, Note, *A Defense of the "Zone of Interests" Standing Test*, 1983 DUKE L.J. 447, 452 (observing that the use of the word "arguably" both liberalized standing requirements, and created a threshold test that shifted the focus away from a detailed examination of the merits).

105. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1445 (1988) (noting that the injury in fact requirement was designed to be lenient and require "only a brief examination of the statute" in question).

106. *See Data Processing*, 397 U.S. at 152 (establishing as the threshold question, "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise"); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 230 (1988) (stating that "[t]he idea that a plaintiff must suffer some kind of injury before a federal court can provide relief was, of course, already at large in the Supreme Court's cases").

107. *See Data Processing*, 397 U.S. at 157 (stating that the Acts "do not in terms protect a specified group").

108. *Id.*

109. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 258 (1988) (explaining that focusing on the injury requirement, the Court after *Data Processing* assumed that "proof of injury [was] sufficient to establish standing without regard to the substantive statute whose protection was invoked, and that injury [could] be defined independently of the substantive statute").

110. *See id.* at 236 (noting that Professor Stewart and Judge Breyer explained that in the context of statutorily granted standing, "[w]hen a plaintiff seeks standing on the basis that an interest is protected by statute, the question whether that interest is legally protected for standing purposes is the same as the question whether plaintiff (assuming his factual allegations are true) has a claim on the merits" (citation omitted)).

icated on the threshold issue regarding a court's jurisdiction, namely, whether a plaintiff has a legal right to enforce a legal duty.[111] The Court nonetheless remanded the jurisdictional issue,[112] confounding its previous standing conclusion that the petitioners had a legal right to bring the claim. The Court's determination was based on the subjective assessment of whether the plaintiffs' interests were *in fact* injured, and not upon the Court's interpretation of a statutory right.[113] This type of "reverse" analysis was similar to that conducted by Chief Justice Marshall in *Marbury v. Madison*, where the Court first found an "injury," only to conclude later that the case must be dismissed for lack of jurisdiction.[114]

Applying the injury in fact test as dictated in *Data Processing* allows courts to determine, prematurely, and before consulting the statute upon which the claim is based, whether the plaintiff is entitled to sue. A problem with the test is that it can not be applied in such a non-normative way because what constitutes an injury is not a factual question, but a legal one.[115] Despite this shortcoming, the legacy of *Data Processing* is clear;

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111. *See id.* at 229 (asserting that "[t]he essence of a true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty?").

112. *See Data Processing*, 397 U.S. at 158 (remanding the case for a hearing on the merits and a determination whether either of the Acts confers a legal interest upon the plaintiffs).

113. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1447 (1988) (supporting the criticism of *Data Processing* as a decision that promoted the idea that injury in fact can be determined in the abstract, without reference to what the law provides); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231-33 (1988) (demonstrating through various examples how the concept of injury, if not based on a substantive statute that defines a legal right, cannot be applied in a non-normative way).

114. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175-80 (1803) (holding that a law repugnant to the Constitution is void and cannot confer jurisdiction on the courts beyond the limits of Article III). Chief Justice Marshall analyzed the issue in the following manner: "1. Has the applicant a right to the commission he demands? 2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? 3. If they do afford him a remedy, is it a mandamus issuing from this court?" *Id.* at 154.

115. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 232 (1988) (arguing that injuries may be real, but unless the law provides for a cause of action, such injuries cannot be recognized by the legal system); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1447 (1988) (emphasizing that whether an injury exists cannot be determined abstractly and without reference to what the law provides); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1379-80 (1988) (observing that whether one has suffered an injury of any type is a matter of purely legal construct, depending on one's assessment of a litigant's interests). Professor Fletcher states that without reference to a normative structure, it is impossible to determine, as a factual matter, whether someone has suffered an injury. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231 (1988). For example, if someone loses sleep worrying about welfare cutbacks, the loss of sleep is

since the decision, the Court has consistently reinterpreted the judicially created injury in fact test as a preliminary jurisdictional requirement ingrained in the "constitutional core" of the Article III conceptual scheme.[116]

2. "Injury in Fact" in the Abstract: The Aftermath of *Data Processing*

The injury in fact test led to much confusion regarding who had the right to sue.[117] For example, using the injury in fact test outlined in *Data Processing*, the Supreme Court applied the injury in fact test to two factually similar environmental standing cases and reached opposite results.[118]

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not recognized as a legal injury. *See id.* at 232. If, however, the same individual loses sleep because a neighbor's dog barks all night, the law protects the individual with a cause of action for nuisance. *See id.* In the homeless example, the determination that the plaintiff suffered no injury in fact "was based on some normative judgment about what ought to constitute a judicially cognizable injury in the particular context, not whether an actual injury occurred." *Id.*

116. *See* William A. Fletcher, *The Structure of* Standing, 98 YALE L.J. 221, 230 (1988) (noting that "[i]t has become part of the received wisdom since *Data Processing* that a plaintiff must show 'injury in fact' in order for an Article III federal court to hear the dispute"). Professor Fletcher also states that "[e]ven the *Data Processing* dissenters, who rejected the 'arguably within the zone of interests' part of the test, agreed that 'injury in fact' was a constitutional requirement." *Id.*

117. *See id.* at 256 (explaining that the difficulty in determining standing under the APA is partly the fault of the Supreme Court "which has been anything but clear in explaining the interrelation of the APA and 'relevant' substantive statutes, often to the point of failing to mention the statutory provisions on which standing is premised"); Jonathan Poisner, Comment, *Environmental Values and Judicial Review After* Lujan*: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335, 341 (1991) (observing that *Data Processing* left many questions unanswered, and "[t]he Court made virtually no effort to define the injury in fact required for standing"); *see also* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186 (1992) (stating that in *Data Processing*, "[t]he Court's opinion was opaque on the connection between injury in fact and Article III").

The "zone of interest" test, in particular, created much confusion. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 22.02-11, at 347 (Supp. 1982) (noting inconsistencies in the Court's application of the test and commenting that "a criterion for determining when it is the law is completely absent"); Sanford A. Church, *A Defense of the "Zone of Interests" Standing Test*, 1983 DUKE L.J. 447, 452-55 (discussing court confusion about how and when to apply the test); Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1142-43 (1994) (observing the Court's "muddling" of prudential standing guidelines and the potential damage caused by such confusion).

118. *Compare* United States v. Students Challenging Regulatory Agency Proceedings (SCRAP), 412 U.S. 669, 685 (1973) (recognizing injury to a group of students using lands in the vicinity for recreational purposes), *with* Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (denying standing to environmentalists for failure to allege an actual injury).

In *Sierra Club v. Morton*,[119] a 1972 decision, an environmental protection organization sought to enforce laws regulating the use of National Forest and National Park lands.[120] The Court denied standing, concluding that because the organization failed to allege that any of its members actually would be injured, the club had no direct stake in the outcome.[121]

The following year, the Supreme Court decided *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*.[122] In *SCRAP*, George Washington Law School students challenged an Interstate Commerce Commission railroad rate increase.[123] The group alleged that the increase ultimately would create more litter in the Washington, D.C., area where the students hiked, fished, and backpacked.[124] The group's members claimed that they "breathe[d] the air" and used the rivers, forests, mountains, and streams, as well as other natural resources, in the area.[125]

Acknowledging the attenuated causation between rate increases and more litter, the Court nonetheless ruled that the widespread injury was sufficient to grant standing, even if only some persons were in fact injured.[126] The Court distinguished *Sierra Club* by stating that the Sierra Club failed to allege a specific injury, whereas the *SCRAP* plaintiffs alleged an "illegal action of the Commission [that] would directly harm them in their use of the natural resources of the Washington Metropolitan Area."[127] Although the Court has never overruled *SCRAP*, the decision is "a high-water mark for environmental standing,"[128] one that Justice Scalia said, "has never since been emulated by this Court."[129]

As in *Data Processing*, both *Sierra Club* and *SCRAP* focused on whether an injury in fact was alleged, without determining whether the

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119. 405 U.S. 727 (1972).

120. *See Sierra Club*, 405 U.S. at 730 (noting that the plaintiffs sought a declaratory judgment in order to enforce federal statutes and regulations governing the preservation of national parks and forests).

121. *See id.* at 740.

122. *See SCRAP*, 412 U.S. at 689-90 (holding that proof of the plaintiffs' allegations "would place them squarely among those persons injured in fact by the commissioner's action").

123. *See id.* at 675-76 (protesting a surcharge that plaintiffs alleged would result in environmental harm).

124. *See id.* at 678 (alleging that members used the forests, streams, mountains, rivers and other natural resources in the vicinity of the Washington area for hiking, camping, sightseeing, fishing, and other recreational purposes).

125. *Id.*

126. *See id.* at 687 (stating that "standing is not to be denied simply because many people suffer the same injury").

127. *Id.* at 687.

128. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 725 (2d ed. 1996).

129. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990).

underlying statutes provided the respective plaintiffs the right to sue.[130] Had the Court instead analyzed the relevant statutes to determine if the plaintiffs' interests were protected, the Court could have explained the opposite outcomes based on the different legal interests created by each statute.[131] The Court chose, however, merely to apply the injury in fact test, thereby creating two factually similar yet contradictory precedents.[132] Consequently, subsequent court rulings would always be in conflict with one of these decisions.[133]

3. Cause and Redressability

By 1976, the Supreme Court developed the remaining two elements of the Article III case or controversy requirements: cause and redressability.[134] As corollaries to the injury in fact requirement, these two components require that the alleged injury be "fairly traceable" to the

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130. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 260-61 (1988) (observing that the Court failed to examine the underlying statutes in *Sierra Club* and *SCRAP*).

131. *See id.* at 261 (arguing that the Court could have justified the apparently contradictory holdings in *Sierra Club* and *SCRAP* based on the respective statutes involved in each case). The *Sierra Club* plaintiffs brought suit under the APA and several statutes regulating the use of lands in National Parks and National Forests. *See id.* at 260. The plaintiffs in *SCRAP* sued under the National Environmental Policy Act (NEPA). *See id.* at 261. The purpose of the statutes in *Sierra Club* was to protect national parks against overuse. *See id.* Therefore, the Court could have concluded that absent an allegation of actual use by one of its members, the statutes should not be interpreted to confer standing to *Sierra Club*. *See id.* Likewise, the Court could have decided in *SCRAP* that the language of NEPA, requiring an environmental impact statement, should be read broadly to allow standing to environmental plaintiffs. *See id.*

132. *Compare SCRAP*, 412 U.S. at 678 (claiming that increased litter and pollution of natural resources in the Washington metropolitan area adversely affected recreational activities), *with Sierra Club*, 405 U.S. at 734 (alleging injury to the scenery and wildlife in Segovia National Park).

133. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 261 (1988) (contending that the different purposes and language of the underlying statutes provide a valid basis upon which to find standing in both cases and, therefore, implying that any subsequent ruling would conflict with one of the decisions).

134. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41-42 (1976) (requiring that an injury be "fairly traceable" to the defendant's conduct and imposing a burden on plaintiffs to show that an injury is likely to be redressed by a favorable decision); *cf.* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 480 (1996) (stating that "[u]nlike injury, the 'causation' and 'redressability' requirements have little historical pedigree"). Professor Pushaw considers ironic the fact that the Court's refusal to redress certain injuries on these issues violates a Federalist principle that "the violation of every legal right must have a judicial remedy." *Id.*

defendant's conduct rather than to the actions of a third party.[135] In addition, a favorable decision must be likely to remedy the plaintiff's injury.[136]

As with the injury in fact requirement, the cause and redressability components make sense conceptually: if the defendant did not cause the plaintiff's injury, or a judgment is not likely to achieve the result the plaintiff seeks, a judicial remedy would not change the plaintiff's situation, and "exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art[icle] III limitation."[137] Critics make an identical argument regarding the analysis of these elements as that made for the "injury in fact" component.[138] Essentially, if cause and redressability are analyzed without reference to the statute on which the claim is based, the reasons for granting or denying standing turn upon a court's assessment of the plaintiff's ability to prove his or her claim on the merits.[139] Two decisions from the mid-1970s exemplify this point.[140]

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135. *See, e.g.*, *Simon*, 426 U.S. at 42-43 (holding as "purely speculative whether the denials of service specified in the complaint *fairly can be traced* to [IRS regulations'] 'encouragement' or instead result from decisions made by hospitals without regard to the tax implications" (emphasis added)); Warth v. Seldin, 422 U.S. 490, 505 (1975) (stating that a plaintiff must "establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm").

136. *See Simon*, 426 U.S. at 38 (requiring plaintiffs to show that a court's favorable decision is likely to redress the injury).

137. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-18, at 130 (2d ed. 1988) (quoting *Simon*, 426 U.S. at 38). Professor Tribe observes that, on its face, the causation requirement seems reasonable because if no such requirement existed, a court's judgment would not change the plaintiff's situation "at all." *See id.*

138. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM L. REV. 1432, 1464 (1988) (claiming that "the causation requirements, as sometimes applied, threaten to make standing issues turn on considerable discovery, factfinding, and, worst of all, judicial speculation on the precise effects of regulatory initiatives"); Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1071 n.44 (stating that the causation requirement "does no more than restate the personal stake requirement, for without such a causal relationship, it is unclear that a remedy will benefit the plaintiff; therefore he has no [incentive to bring] the case" (quoting Mark v. Tushnet, *The Sociology of Article III, A Response to Professor Brilmeyer*, 93 HARV. L. REV. 1698, 1707 (1980))).

139. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-18, at 130 (2d ed. 1988) (quoting Dean Prosser's observation that "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such welter of confusion" than the issue of causation). Professor Tribe argues that the causation requirement is highly manipulable, and that the Supreme Court's isolation of it as an independent element of the injury in fact inquiry risks the possibility that:

> In the guise of causality analysis, federal courts will engage in an unprincipled effort to screen from their dockets claims which they substantively disfavor. Indeed, the causation requirement has come under increasing attack from commentators for being what

a. *Warth v. Seldin*

In *Warth v. Seldin*,[141] four classes of plaintiffs challenged a Penfield, New York, zoning ordinance that excluded low and moderate income housing.[142] The Court denied standing to all four classes because each failed to establish a nexus between the ordinance and the individuals' respective circumstances.[143] In the Court's opinion, the plaintiffs could not show a "substantial probability" that, absent the zoning, they would be able to afford housing in Penfield.[144] Justice Brennan, writing the principal dissenting opinion, argued *inter alia* that the extreme specificity demanded of the plaintiffs—to show a "substantial," as opposed to a "reasonable" probability that the ordinance injured the plaintiffs—was unprecedented.[145]

The proper standing question in *Warth* should have been whether the Equal Protection Clause, the basis of the claim, conferred a legal right on the plaintiffs to challenge the zoning ordinance.[146] Rather than examine this threshold issue, however, the majority concluded that none of the plaintiffs could show that the ordinance caused them any harm.[147] The Court's articulation of the holding as a failure to prove the causation ele-

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Justice Brennan has termed "no more than a poor disguise for the Court's view of the merits of the underlying claims."

Id. (citation omitted); *see* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1464 (1988) (claiming that the current application of causation requirements to the standing doctrine threatens to make the process increasingly speculative and uncertain).

140. *See Simon*, 426 U.S. at 42-46 (holding that a change in IRS regulations might not remedy the plaintiff's injury); *Warth*, 422 U.S. at 508-10 (finding that a zoning ordinance did not cause any of the plaintiffs' circumstances).

141. 422 U.S. 490 (1975).

142. *See Warth*, 422 U.S. at 493-94.

143. *See id.* at 518 (holding that none of the petitioners met the threshold standing requirement).

144. *See id.* at 504 (stating that petitioners must allege facts from which the Court could reasonably infer that a substantial probability existed that those individuals would have the ability to buy or lease in Penfield).

145. *See id.* at 520 (Brennan, J., dissenting) (stating that the Court has created numerous hurdles, "some constructed here for the first time," that deny standing to "almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional").

146. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 275-76 (1988) (arguing that the Court should have determined whether the Equal Protection Clause authorizes plaintiffs to challenge an exclusionary zoning practice).

147. *See Warth*, 422 U.S. at 518 (denying standing to all plaintiffs for failure to show the zoning ordinance caused their injuries). The plaintiffs included low-income individuals seeking affordable housing, taxpayers in a neighboring city who were forced to assume the burden for extra construction of low-income housing, a civic action group who claimed they were harmed by the exclusion of low-income citizens from their town, and two other

ment of the Article III requirements, rather than as a failure to prove the essential element of intentional discrimination, encourages the view that causation, like injury in fact, is an autonomous component of standing.[148] Furthermore, the Court's holding promotes the perception that the remedy, rather than the plaintiff's cause of action, forms the basis for jurisdiction and that the causation element is "no more than a poor disguise for the Court's view of the merits of the underlying claims."[149]

b. *Simon v. Eastern Kentucky Welfare Rights Organization*

The following year, in the case of *Simon v. Eastern Kentucky Welfare Rights Organization*,[150] the Court determined that the indigent plaintiffs lacked standing to challenge IRS regulations.[151] According to the Court, the claimants could not possibly prove that the IRS rules, which changed the requirements for tax-exempt status, caused hospitals to reduce the amount of care to the poor, nor could they prove that the requested remedy—a court's order to strike the rules—would cause the hospital to restore the amount of care to previous levels.[152] Under the old IRS rules, the hospital might have foregone the tax break and reduced the amount of care anyway; therefore, the Court reasoned, it is "purely speculative whether the denials of service specified in the complaint fairly can be traced to [the tax benefit] or instead result from decisions made by the hospitals without regard to the tax implications."[153] Consequently, the court could not be certain that granting the requested remedy would en-

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entities, including real estate developers, who claimed they would have built affordable housing in Penfield absent the restrictive ordinance. *See id.* at 494-95.

148. *Cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-18, at 131 (2d ed. 1988) (arguing that "an autonomous causation requirement need not be a desirable part of injury in fact doctrine"); Jonathan Poisner, Comment, *Environmental Values and Judicial Review After* Lujan*: Two Critiques of the Separation of Powers Theory of Standing,* 18 ECOLOGY L.Q. 335, 395-96 (1991) (observing that injury and causation determinations are highly manipulable, therefore allowing courts considerable discretion over which values will be legally enforced).

149. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-18, at 130 (2d ed. 1988) (quoting Allen v. Wright, 468 U.S. 737, 782 (1984) (Brennan, J., dissenting)); *see* Stanley E. Rice, Note, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in* Lujan v. Defenders of Wildlife, 38 ST. LOUIS U. L.J. 199, 203 (1993) (reporting "[t]hat the Court has been accused of allowing its view of the merits to dictate its conclusions regarding standing, despite the fact that standing decisions should theoretically never involve an evaluation of underlying substantive issues").

150. 426 U.S. 26 (1976).

151. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 28 (1976).

152. *See id.* at 43 (determining as inconclusive whether a judgment in the plaintiffs' favor would result in the desired services because the hospital could choose to forgo favorable tax treatment in favor of increasing services).

153. *Id.* at 42-43.

sure the plaintiffs' relief. Had the Court first considered the fundamental issue of whether the underlying statute allowed the plaintiff to bring suit, the Court could have denied standing based on the enduring principle that the tax code does not grant individuals the right to challenge another's tax status.[154]

The standards established in *Warth* and *Simon* illustrate that when standing is based on the independent components of cause or redressability rather than upon a statute, parties suffering non-traditional injuries must prove, to a virtual certainty, the causal link between the action challenged and the claimed injury, regardless of whether a statute or a constitutional clause provides a legal basis for the claim.[155] Further, by structuring the jurisdictional inquiry to encompass the cause and redressability components, the Court has created alternate elements and standards for assessing the reviewability of a plaintiff's allegations and has heightened the ambiguity between standing and the merits of the claim.[156]

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154. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 262 (1988) (explaining that, although the Court did not justify its result on this basis, "it is a deep-rooted principle of tax law that, absent exceptional circumstances, the tax code does not grant the right to individuals to challenge the tax status of others").

155. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-18, at 134 n.29 (2d ed. 1988) (noting that although the majority in *Warth* did not require that the plaintiffs challenging the zoning have a current contractual interest in the project, the holding essentially did so by treating allegations of prior unsuccessful efforts to locate housing as insufficient). Professor Tribe states that "Justice Brennan's dissent properly noted that the Court had never 'required such unachievable specificity in standing cases in the past.'" *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 528 (1975) (Brennan, J., dissenting)); *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1144-45 (1993) (observing that within the past fifteen years, "[t]he Court has tightly cabined injury, employed causation to reject apparent congressional policies, and interpreted redressability to demand near certainty in remedial success" (footnotes omitted)).

156. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 243 (1988) (alleging that the considerable variation in the application of the causation and redressability requirements illustrates "the essential lawlessness of the Court's approach to standing"); *see also* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1275-76 (1989) (claiming that "the Court frequently uses standing as a pretext for refusing to address the merits of a case when the real reason for the Court's reluctance is unrelated to the issue of who can challenge an action"); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1459 (1988) (claiming that the causation requirements have recreated the unpredictability *Data Processing* sought to eliminate, and "are being used to do work that has little to do with causation"); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1373 n.14 (1988) (speculating that "most academics and practicing lawyers at least share the suspicion that standing law is nothing more than a manipulation by the court to decide cases while not appearing to decide their merits").

D. *The 1980s Shift to Conservatism: Standing As a Separation of Powers Policy*

When the Court decided *Warth* and *Simon* in the mid-1970s, federal courts interpreted environmental laws and regulations broadly.[157] The courts viewed environmental laws as quasi-constitutional in nature, and believed, therefore, that courts had a significant role to play in protecting future generations.[158] Consequently, courts subjected agency actions to a "hard look"[159] and, at times, amplified the plain meaning of a statute in order to issue an injunction without applying equitable criteria.[160] The Supreme Court's decision halting construction of the Tellico Dam due to the endangered snail darter in *Tennessee Valley Authority v. Hill*[161] is perhaps the best example.[162] As a result of this ideology, lower courts concluded that, unless a plaintiff asserted an interest in protecting the

157. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 106 (2d ed. 1996) (stating that the "rapid growth of environmental legislation in the 1970s was accompanied by a parallel opening up of the courts to judicial review of agency decisions that affected the environment"); Stanley E. Rice, Note, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in* Lujan v. Defenders of Wildlife, 38 ST. LOUIS U. L.J. 199, 208 (1993) (reporting that increased access to federal courts resulted from broadened standing requirements).

158. *See* Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 107-08 (1996) (stating that courts were extremely active in environmental protection in the 1960s and 70s and explicitly announced a "partnership with Congress" to ensure such concerns would not become "lost or misdirected in the vast hallways of the federal bureaucracy").

159. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 186 (2d ed. 1996) (explaining that the "hard look" doctrine "counseled agencies to examine carefully the factors made relevant by statute prior to taking action"); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 819 (noting that activist judicial review constrained administrative discretion during the 1960s and 70s).

160. *See* Sierra Club v. Ruckelshaus, 344 F. Supp. 253, 256 (D.D.C. 1972) (going beyond Environmental Protection Agency (EPA) regulations to require states to implement programs to prevent deterioration of air quality), *aff'd by an equally divided court*, 412 U.S. 541 (1973). This decision eventually resulted in the birth of the EPA's Prevent Significant Deterioration (PSD) program. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 804 (2d ed. 1996).

161. 437 U.S. 153 (1978).

162. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978) (holding that the Endangered Species Act required conservation of endangered species regardless of cost); James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters—Is It Against Nature to Pay for a Taking?*, 27 LAND & WATER L. REV. 309, 321 (1992) (explaining that the Endangered Species Act was used in a manner whereby "no balancing of economic losses against the value of the snail darter was permitted").

environment as a motive for bringing suit, the environmental law did not protect his injured economic interests.[163]

During the 1980s and early 90s, three successive Republican administrations attempted to curtail environmental protection programs, but despite their efforts, were unsuccessful in overcoming public opposition.[164] To further their agenda, Presidents Reagan and Bush appointed a number of conservative federal judges, including Supreme Court Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas.[165] As Roosevelt's appointment of new justices in the New Deal era altered the Supreme Court's ideology, the change in

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163. *See* Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 283 (D.C. Cir. 1988) (holding that indirect economic beneficiaries could be granted standing only if there was either "some explicit evidence of an intent to benefit such firms, or some reason to believe that such firms would be unusually suitable champions of Congress' ultimate goals"); Pacific Northwest Generating Coop. v. Brown, 822 F. Supp. 1479, 1504 (D. Or. 1993) (holding that because their economic interests were not aligned with those of the salmon, plaintiffs could not be granted standing to bring their claims), *aff'd*, 25 F.3d 1443 (1994). This type of judicial activism was denounced by the new Republican Attorney General, William French Smith, soon after his appointment in 1981. *See* Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 108 (1996) (citation omitted).

164. *See* Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 109 (1996) (reporting the "concerted effort" in the 1980s to reform environmental protection laws); *see also* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 773 (2d ed. 1996) (noting the "Reagan administration's ideological opposition to [environmental] regulation"). Percival observed that the Reagan administration requested relief from a settlement agreement that required the EPA to develop new standards for sixty-five toxic pollutants under the Clean Water Act. *See id.* at 919-21. After this effort failed, the EPA published relatively weak standards. *See id.* at 921. Subsequently, government enforcement of environmental regulations declined dramatically. *See id.* at 1078. Reagan's unsuccessful attempt to veto the 1987 Clean Water Act amendments was accompanied by a message describing them as "the ultimate whip hand for Federal regulators." *Id.* at 974.

165. *See* Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 109 (1996) (discussing with other panel members that Republican presidents, having failed to convince Congress to reform environmental laws, turned to appointed judges in an attempt to promote a more conservative agenda in the environmental area); *see also* THE SUPREME COURT JUSTICES 509 (Clare Cushman ed., 2d ed. 1995) (stating that at the time of her appointment in 1981, Justice O'Connor was considered to be very conservative). In her first term, Justice O'Connor voted with Justice Rehnquist on twenty-seven decisions, prompting *Time* magazine to label her Justice Rehnquist's "Arizona twin." *See id.* During the first five terms, O'Connor often aligned with the Court's conservative faction. *See id.* Justice Scalia is "often said to be the most consistently conservative justice." *Id.* at 515. Kennedy's reputation is also as a conservative jurist. *See id.* at 519. Although Justice Souter has emerged as the leader of the centrist coalition, he was considered to be a "conservative, hard-working bachelor" when he was appointed in 1990. *See id.* at 525. Justice Thomas supports a limited role for the Court and a narrow view of constitutional guarantees. *See id.* at 530.

the Court's composition during the 1980s likewise generated a new philosophy regarding the purpose and limits of judicial review.[166] Unlike the Roosevelt era Supreme Court, however, which sought to protect government programs from attacks by business interests, the modern Supreme Court has developed a standing doctrine that guards agencies from citizen-plaintiffs.[167]

In 1984, before all but one of the above-named justices were confirmed, the Supreme Court decided *Allen v. Wright*.[168] *Allen* significantly changed the Court's rhetoric concerning the purpose of the standing doc-

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166. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 113-14 (2d ed. 1996) (noting that the judiciary has become less sympathetic to environmental concerns in recent years and has imposed more restrictive standing requirements); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 462 (Kermit L. Hall et al. eds., 1992) (stating that similar to the New Deal era, alterations in the composition of the Court resulted in important doctrinal shifts); *see also* Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 845 (stating that "[i]n the last ten years, the Court has redefined the nature of judicial review of agency decisions by replacing the earlier judicial activism of the federal courts with judicial restraint"). Hall observes that, "[t]he difference in the last two decades is that the Court's majority has not limited itself to a revision of substantive constitutional law . . . . [T]he recent anti-activist majority has undertaken a major program to restrict the federal courts' jurisdiction." THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 462-63 (Kermit L. Hall et al. eds., 1992). Professor Percival has also noted:

> In several cases, major environmental regulations have been voided by courts insisting that agencies provide greater and more specific evidentiary support for regulation. These decisions represent a move toward the kind of principles of individualized causation required in private law, which public law is designed to supplant by authorizing precautionary regulation.

ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 113-14 (2d ed. 1996).

167. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (holding that the plaintiffs' affidavits did not show how damage to endangered species would produce "imminent" injury to their interests), *and* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 887 (1990) (ruling that plaintiffs failed to show specific injury because there was no evidence they used the particular tract of land involved in the complaint), *with* Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939) (refusing to recognize a right to freedom from competition), *and* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341-45 (1936) (Brandeis, J., concurring) (denying standing to corporate stockholders to challenge the agency's dealing with the corporation); *see also* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing As a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1193 (1993) (observing that in a high number of statutory standing cases reviewed by federal courts, "no prospective plaintiff could meet the extraordinary burden of proof required").

168. *See generally* Allen v. Wright, 468 U.S. 737 (1984) (concluding that the line of causation from IRS' regulations to the segregation of public schools was not "fairly traceable to the IRS' conduct). Justice O'Connor delivered the opinion of the Court. *See id.* at 739.

trine. For the first time, the separation of powers doctrine was specifically articulated as part of the standing formula.[169]

Relying on *Simon*, the *Allen* Court denied standing to parents of African-American public school students who alleged that tax-exempt status was granted to schools that discriminate on the basis of race.[170] Finding that the causal link between IRS rules and public school segregation was too attenuated,[171] the Court held that allowing such a claim would pave the way for suits challenging "not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations."[172] The Court declared these types of claims "rarely if ever appropriate for federal-court adjudication,"[173] as the "'federal court . . . is not the proper forum to press' general complaints about the way in which government goes about its business."[174]

The Court's refusal in *Allen* to allow a general attack on agency programs echoed conservative post-New Deal policies limiting court-based challenges to government decisions.[175] The *Allen* decision also changed the fundamental purpose of the standing doctrine. The *Flast* standard of ensuring the adverseness of the parties was no longer the primary function of standing; instead, preserving the separation of powers would become key to the Court's transformation of the standing doctrine into the constitutional gatekeeper of federal court jurisdiction.[176]

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169. *See id.* at 759 (explaining that "[t]he idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury 'fairly can be traced to the challenged action' of the IRS" (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976))).

170. *See id.* at 766 (holding that the complaint seeks "nationwide relief and does not challenge particular identified unlawful IRS actions").

171. *See id.* at 757. The majority indicated that in order to satisfy standing the parents needed to make three showings: (1) that enough private schools in the area received exemptions to make "an appreciable difference in public school integration;" (2) that a significant enough number of those schools would change their policies if threatened with losing the tax-exempt status; and (3) that a significant number of parents would transfer their children to public schools if the exemptions were withdrawn. *See id.* at 758. Since the plaintiffs made none of these allegations, standing was denied. *See id.* In his dissent, Justice Stevens advocated a common sense rule that "when a subsidy makes a given activity more or less expensive, injury can be fairly traced to the subsidy for purposes of standing analysis because of the resulting increase or decrease in the ability to engage in the activity." *Id.* at 786 (Stevens, J., dissenting).

172. *Id.* at 759.

173. *Id.* at 760.

174. *Id.* (quoting City of L.A. v. Lyons, 461 U.S. 95, 111 (1983)).

175. *Cf.* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 820 (Kermit L. Hall et al. eds., 1992) (using *Allen* as an example of a case that revived the problem of confusing standing with the merits).

176. *See Allen*, 468 U.S. at 752 (declaring for the first time that "standing is built on a single basic idea—the idea of separation of powers").

The *Allen* decision did not foretell how specific the injury in fact requirement would become, nor how narrowly the Court would taper the standing doctrine. Following *Allen*, the injury in fact and separation of powers concepts began to merge.[177] The unification of these two doctrines, restricting Article III courts to hearing individualized disputes rather than generalized grievances,[178] has had a profound impact on claims brought under citizen suit statutes. This impact has been most evident in the area of environmental law, where Congress has attempted to provide an enforcement mechanism—the citizen suit provision. Unfortunately, in structuring the broad grants of standing that authorize any citizen to bring suit to force an agency, a corporate entity, or an individual to comply with the law, Congress inadvertently created a catalyst for the Court's reconstitution of the standing doctrine.[179] Before these changes are addressed, however, a discussion of the citizen-suit concept is necessary to explain the role these provisions played in the Court's reformation of the standing doctrine.

III. The Concept of the Citizen Suit

Citizen suit provisions are statutory clauses that grant a class of individuals a private right of action to enforce a law. Individuals and groups bringing suit under these provisions usually have suffered no personal injury in fact.[180] Rather than bringing suit as victims to redress a personal wrong, litigants in a citizen suit act as "private attorneys general" to enforce the law on behalf of the public at large.[181]

Within the context of American legal history, the modern citizen suit provision has been compared to the mandamus, qui tam, and informer's

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177. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573, 578 (1992) (holding that the respondents lacked standing because the injury in fact requirement could not be satisfied by Congress' conferral of Article III jurisdiction through the use of citizen suit statutes), *with* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 895, 898 (1990) (holding that the respondents' affidavits were insufficient to confer standing because they were untimely and devoid of specificity).

178. *See Defenders*, 504 U.S. at 573-74 (describing generalized grievances as those that seek relief that no more directly benefit the plaintiffs than the public at large); Warth v. Seldin, 422 U.S. 490, 499 (1975) (defining a generalized grievance as harm that is "shared in substantially equal measure by all or a large class of citizens").

179. *See generally* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992) (analyzing the Court's revision of the standing doctrine as a result of citizen suit statutes).

180. *See* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339, 340 (1990) (claiming that individuals bringing suit under citizen statutes have sustained no injury, or only minimal injury in fact).

181. *See id.* (explaining the "private attorney general" concept).

actions.[182] Unlike the qui tam and informers' actions, however, citizen suit statutes do not provide for collection of a bounty; instead, the litigant enforces the law for the public benefit.[183] Since the 1970s, Congress has relied increasingly on private law enforcement to attain public objectives in the areas of consumer protection, prevention of procurement fraud, and to curb insider trading.[184] The primary field for Congress' expansion of private enforcement, however, has been environmental law.[185] In this area, Congress has considered citizen suit provisions to be an efficient policy instrument, and a democratic, participatory mechanism that affords "concerned citizens" a means to redress environmental pollution.[186]

A. *Factors Leading to the Creation of the Citizen Suit Provision*

Congress entrusts agencies with implementing a massive number of rigid, highly centralized, and draconian regulatory requirements, usually within unrealistic deadlines.[187] These agencies often cannot perform all their legally required tasks, because Congress does not provide them adequate resources.[188] Nonetheless, when environmental laws were passed, elected representatives wanted to claim credit for aggressive regulation

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182. *See* Cass R. Sunstein, *What's Standing after* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 172-75 (1992) (explaining that the mandamus action compels the executive branch to perform its duty as required by law, while the qui tam and informers' actions allow successful plaintiffs a bounty for bringing suit). Professor Sunstein argues that the legal history of these actions refutes the argument that claimants must demonstrate a personal injury in order to have standing to enforce a law. *Id.* at 176-77. *But see* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 343-44 (1990) (claiming that it is misleading to compare citizen suit statutes to bounty hunter and informer actions, because the latter, unlike the former, are based on government priorities that are carefully selected and executed).

183. *See* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 341 (1990) (arguing that the theory behind citizen suit provisions is to prompt altruistic enforcement of environmental laws, not to create incentives for personal rewards). Greve argues that despite the theory, "private environmental law enforcement is an outgrowth of interest group politics [and] an off-budget entitlement program for the environmental movement"). *Id.* at 341.

184. *See id.* at 339-40 (describing Congress' employment of citizen suit provisions as a means of using private law enforcement to obtain public objectives).

185. *See id.* at 340 (claiming that "the prime field for the expansion of private enforcement has been environmental law").

186. *Id.*

187. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizens Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 222 (1992) (explaining why the citizen suit provision is, at best, "a band-aid superimposed on a system that can meet with only mixed success").

188. *See id.* (arguing that "[t]he citizen suit is part of a complex system in which Congress delegates difficult or even impossible tasks, appropriates inadequate resources, imposes firm and sometimes unrealistic deadlines, and enlists courts and citizens in order to produce compliance" (footnotes omitted)).

and enforcement.[189] Congress saw three major roadblocks to its ability to bring about greater administrative compliance with environmental laws: the cost to the regulated community of implementing standards that were virtually impossible to meet; the lack of agency oversight by any of the three branches of government; and the fear of "agency capture."

1. Public Concern for Enforcement of Environmental Laws

With the first Earth Day celebration in 1970,[190] environmental protection became an enormously popular political issue.[191] Prompted by the nationwide demand for environmental improvement at any cost,[192] the Environmental Protection Agency (EPA) was established by Executive Order in 1970,[193] and within a six-year period, Congress passed nearly all environmental laws overwhelmingly.[194] These new environmental stat-

189. *See id.* at 221-22 (observing that the citizen suit system may be explained in terms of the pragmatic self-interest of our elected representatives).

190. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 102 (2d ed. 1996).

191. *See id.* at 5 (noting that the country's politicians were both stirred and led by public opinion concerning environmental issues). The authors rely upon Theodore White's book on the 1972 presidential campaign, in which White observed that by 1970, "the environment[al] cause had swollen into the favorite sacred issue of all politicians, all TV networks, all goodwilled people of any party." *Id.* at 4 (quoting THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 45 (1973)).

192. *See id.* at 5 (observing that the breadth of concern for environmental protection did not diminish in the 1980s and 1990s despite extensive regulation). An annual public opinion poll conducted jointly by the *New York Times* and CBS found that "sizeable majorities" agreed that "protecting the environment is so important that requirements and standards cannot be made too high, and continuing environmental improvement must be made regardless of cost." *Id.*; *see* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 n.30 (1978) (halting construction of the Tellico Dam due to the endangered status of snail darters because the Endangered Species Act requires conservation of endangered species "at any cost"). *But see* James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters—Is It Against Nature to Pay for a Taking?*, 27 LAND & WATER L. REV. 309, 320 & n.61 (1992) (noting that 16 U.S.C. § 1533(b)(1)(a) prohibits, as a matter of law, the Fish and Wildlife Service from considering social or economic costs in the listing process).

193. *See* Reorg. Plan No. 3 of 1970, 3 C.F.R. at 199 (Comp. 1970), *reprinted in* 5 U.S.C. app. at 1551 (1994) (creating the Environmental Protection Agency); *see also* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 109 (2d ed. 1996) (stating that although the EPA is the federal agency primarily responsible for environmental protection, other regulatory agencies share this responsibility). For example, the Department of the Interior's Management of Public Lands is involved in a variety of environmental protection activities. *See id.* at 111. Also, the Department of Transportation regulates the Hazardous Materials Transportation Act, and the U.S. Army Corps of Engineers operates a permit program under the Clean Air Act. *See id.* In addition, the Department of Energy administers the National Energy Policy and Conservation Act. *See id.*

194. *See* ROBERT V. PERCIVAL ET AL. ENVIRONMENTAL REGULATION 5 (2d ed. 1996); *see also* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L.

utes were stringent, requiring immediate measures and new technologies to protect endangered species,[195] and to implement comprehensive controls on water and air pollution, hazardous wastes, and toxic substances.[196] The newly regulated community faced significant cost increases and slower economic growth.[197] Expecting that the regulated community might resist expensive compliance as long as possible,[198] Congress was concerned whether environmental statutes would be imple-

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REV. 339, 386 (1990) (stating that the Clean Water Act, the first environmental statute permitting private enforcement, "was passed in a great hurry and in a very emotional atmosphere").

195. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (1994). The Supreme Court noted, upon its first review of the Endangered Species Act (ESA), that "[a]s it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth.*, 437 U.S. at 180. *But see* Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419, 450 (1994) (suggesting that the ESA's breadth was not as broad as general pronouncements indicated).

196. *See* Toxic Substances Control Act, 15 U.S.C. §§ 2601-92 (1994) (providing guidelines for the control of Toxic substances); Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (1994) (mandating compliance with pollution control standards); Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994) (establishing requirements and time tables for the reduction of air pollution); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9659-75 (1988) (establishing strict liability for release of hazardous substances); *see also* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 106 (2d ed. 1996) (noting that environmental statutes "established the ground rules for environmental protection efforts by mandating that environmental impacts be considered explicitly by federal agencies, by prohibiting actions that jeopardize endangered species, and by requiring the establishment of the first comprehensive controls on air and water pollution, toxic substances, and hazardous waste").

197. *Cf.* David Broder, *Beyond Folk Songs and Flowers*, WASH. POST, Apr. 22, 1990, at B7 (suggesting that society has moved past "20 years of business warnings that environmental standards could be achieved only at a huge cost in jobs, in productivity and in competitiveness"), *reprinted in* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 11 (2d ed. 1996). A major criticism of environmental law and policy is that whatever gains have been accomplished have come at too high a cost, including private property rights, individual freedom, and economic growth. *See id.* at 10. At the direction of Congress, in 1990, the EPA studied the costs and benefits of the Clean Air Act and reported that compliance costs were estimated to be approximately $20 billion per year between 1973 and 1990. *See id.* at 821.

198. *See* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1621 (1995) (expressing the view that, without government oversight, private industry will procrastinate indefinitely before complying with environmental regulations, and agencies empowered with environmental protection are "far from diligent in that regard" (quoting Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1163-64 (D.N.J. 1988), *aff'd in part, rev'd in part*, 913 F.2d 64 (3d Cir. 1990))).

mented and vigorously enforced by the EPA.[199] Citizen suit provisions would provide Congress and the public a means to ensure that agencies enforced these laws against the regulated community.

2. The Government's Failure to Oversee the Administrative State

A second factor leading to the creation of citizen-suit provisions was Congress' concern about the structure and operation of the administrative state. After Roosevelt's reform initiatives in the New Deal era, Congress delegated to the administrative agencies under the executive branch much of its power to carry out new programs.[200] The administrative state quickly became a self-contained bureaucracy.[201] Unlike the separation of powers model dividing legislative, executive, and judicial powers among the three branches of government, regulatory agencies were empowered to perform all three functions: write, enforce, and rule on their own regulations.[202] As a result, administrative agencies enjoyed a high degree of

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199. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 109 *passim* (2d ed. 1996) (articulating the challenges brought on by the new regulations); Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 378 (1990) (noting the ambitious goals and standards of environmental statutes). Greve further notes that some of the environmental statutes mandated goals that were "unattainable even in theory." *Id.*

200. *See* BERNARD SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 35 (2d ed. 1962) (observing that, due to the national economic crisis in the 1930s, Congress could not act with the speed or flexibility necessary to meet the emergency, and that "[o]nly by wholesale delegations of legislative power to the Executive, it was said, could the demands of economic emergency be met"); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1245 (1989) (observing that Congress delegates the regulatory function to agencies because the agencies can regulate more effectively and because "legislators have limited expertise and limited foresight").

201. *See* BERNARD SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 17 (2d ed. 1962) (indicating that, during the New Deal era, a number of administrative agencies were created to carry out Congress' directives); *see also* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1241 (1989) (stating that "Congress is no longer the source of most government decisions. Most governmental decisionmaking occurs at the agency level"). Professor Schwartz notes that because independent commissions, such as the Federal Trade Commission, neither report to the President nor work for him, he can do little to compel their conformity to his policies. *See* BERNARD SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 20-21 (2d ed. 1962).

202. *See* BERNARD SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 28-29 (2d ed. 1962) (explaining that agencies are vested with authority traditionally exercised by the courts and Congress); *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 631 (1996) (arguing that Supreme Court cases permitting agencies both to write and construe their own regulations "unif[y] lawmaking and law exposition—a combination of powers decisively rejected by our constitutional structure").

independence and freedom from direct oversight or control by either the executive or the legislative branches.[203]

Likewise, judicial review of agency activities has been restricted to certain types of actions and decisions.[204] Courts normally accord great deference to agency decisions because of the judicial reluctance to interfere with executive branch programs and policies, and because controversies concerning administrative decisions often involve highly technical matters within the specialized expertise of the agency.[205] The resulting lack of close oversight or review by any of the three branches has likened the administrative state to a fourth branch of government, operating as an independent entity without the checks and balances created by the constitutional structure.[206] Therefore, citizen-suit provisions were viewed as a

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203. *See* BERNARD SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 21 (2d ed. 1962) (characterizing regulatory commissions as "miniature independent governments" (quoting REPORT OF THE PRESIDENT'S COMMITTEE IN ADMINISTRATIVE MANAGEMENT 33 (1937))); *see also* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1244 (1989) (stating that Congress delegates most major policy decisions to agencies rather than deciding them itself). Professor Pierce observed that "there is no direct principal-agent relationship between the people and any government agency." *Id.* at 1239. Unlike the president and Congress, who are accountable directly to the people, administrative agencies are accountable "to some combination of Congress, the president, and the judiciary, each of which is, in turn, accountable to the people." *Id.* at 1240.

204. *See* 5 U.S.C. § 701(a)(2) (1988) (precluding judicial review in cases where "agency action is committed to agency discretion by law"); *id.* § 704 (limiting judicial review to "final agency action"); *id.* § 706(2)(A) (authorizing the review of final agency actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see also* Heckler v. Chaney, 470 U.S. 821, 834-38 (1985) (concluding that the agency's decision was committed to its unreviewable discretion because there were no judicially enforceable standards that applied to the agency's decision not to take action). In *Heckler*, the Court further concluded that because judicially enforceable standards rarely govern agency decisions not to take action, a rebuttable presumption of unreviewability should be applied to all instances of agency inaction. *See id.* at 832-35.

205. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 669 (2d ed. 1996) (acknowledging the reluctance of courts to become involved in agency priority-setting and second-guessing agency decisions); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248-49 (1994) (observing that "the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUM. L. REV. 612, 628 (1996) (observing that "reviewing courts must enforce an agency's interpretation of its own regulation unless the agency view is entirely out of bounds").

206. *See* BERNARD SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 21 (2d ed. 1962) (characterizing the independent regulatory commissions as "a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers" (quoting REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 33 (1937))).

means by which citizens could oversee government agencies and hold them accountable for their activities.

3. The Problem of Agency Capture

Finally, the fear of "agency capture" heightened Congress' concern that EPA enforcement may not be sufficiently aggressive.[207] Congress surmised that by consistently interfacing with agency enforcement officials, representatives of the regulated community would create sympathy for their interests, perhaps gaining approval to circumvent or delay inconvenient and expensive compliance with environmental mandates.[208] Further, agency employees with highly specialized technical skills, who were intimately familiar with internal government procedures, would be targeted as prime candidates for jobs within these industries. As a result, agency employees would become less motivated to make decisions adversely affecting the regulated community's interests.[209] Citizen suit pro-

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207. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 181 (2d ed. 1996) (explaining that much of environmental law is a reaction against agency failure to respond to the public's environmental concerns). When Congress enacted these environmental laws, it apparently knew of the extensive literature implying that regulated industries tend to "capture" regulatory agencies. *See id.* Therefore, "[t]o resist this *agency capture* model of the process, action-forcing provisions such as citizen suits and provisions for judicial review were incorporated in the environmental statutes." *Id.* Furthermore, ambiguous regulations also provided opportunities for the regulated community to pressure agencies. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 680 (1996); *see also* Jonathan Poisner, Comment, *Environmental Values and Judicial Review After* Lujan*: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335, 374 (1991) (explaining that the "[c]apture theory argues that the close cooperation between regulators and the regulated leads agency officials to internalize the viewpoints of industry"). Poisner reports that the Bureau of Land Management and the Forest Service have been greatly influenced by the industries they normally regulate. *See id.* at 375.

208. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 182 (2d ed. 1996) (discussing Richard Stewart's interest representation model of the administrative process, which asserts that "agency decisions are in large part a product of input from competing private interest groups"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 676-78 (1996) (explaining that, since political funding and support comes disproportionately from organized interest groups with a substantial stake in agency policy, administrative agency decision making processes are susceptible to these influences). Coupled with judicial deference to agencies' interpretations of their own regulations, Professor Manning observes that such deference "leave[s] agencies vulnerable to political market failures by making it easier for agencies to use ambiguous or vague language to conceal regulatory outcomes that benefit small interest groups at the expense of the public at large." *Id.* at 676-77.

209. *See* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens*?, 54 MD. L. REV. 1552, 1653 (1995) (noting that some

visions were thus designed, in part, to answer this fear of "agency capture" and provide enforcement motivation.

Collectively, the inconvenience and expense of compliance, the lack of effective government oversight, and the possibility of "agency capture" created a perceived need for a mechanism to ensure agencies would remain accountable for enforcement of environmental statutes.[210] As indicated, Congress created such a mechanism by including citizen suit provisions in nearly all major environmental statutes, beginning with the Clean Air Act in 1970.[211]

B. *Citizen Suit Statutes As a Separation of Powers Issue*

Citizen suit provisions generally authorize "any person" to bring an action against "any person" who is in violation of the relevant statute.[212] The term "any person" is broad and encompasses private individuals, corporations, and government agencies.[213] The fundamental concept of the citizen suit is to permit the enlistment of anyone as a "private attorney general" to bring suit against either the government or a private violator, thereby augmenting government enforcement and safeguarding against agency inaction.[214]

During the 1970s, before the advent of a more conservative Supreme Court, citizen suit litigation played a major role in the enforcement of environmental laws.[215] Virtually all such suits were brought against the

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regulators are reluctant to enforce environmental regulations). According to Professor Hodas:

> Because government engineers tend to move on to industry positions during their careers, disincentives may exist for a state engineer to antagonize local industry or to earn a reputation for being unreasonable by refusing to tolerate small deviations from permit limitations. On a deeper level, government and industry engineers often share similar professional outlooks, which can blur the line separating the two sides and result in a mindset that perceives certain violations as too insignificant to enforce.

Id.

210. *Cf.* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 1077 (2d ed. 1996) (describing citizen suit statutes as an action-forcing device to ensure agency officials carry out their responsibilities).

211. *See id.* at 1077; Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 764 (1994) (stating that "Congress first established the citizen suit in the 1970 amendments to the Clean Air Act, in response to a perceived governmental failure to enforce the statute" (citations omitted)).

212. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 1077 (2d ed. 1996).

213. *See id.* (noting that "federal agencies and officials are among the 'persons' who may be sued for violating environmental regulations").

214. *See id.* (discussing the dual role of citizen suit statutes to supplement government enforcement efforts and ensure that the EPA implements environmental statutes).

215. *See id.* at 1078 (noting the role of such action-forcing litigation during the 1970s).

government to force agency action,[216] and the federal courts acquiesced by granting plaintiffs liberal access under these provisions.[217] Since the mid-1980s, however, the Court has narrowed the standing doctrine, citing the need to maintain a proper separation of powers between the three government branches.[218] In the particular context of environmental litigation, the citizen suit concept raised two significant separation of powers issues for the Court.

1. Threatened Expansion of Federal Court Jurisdiction

First, citizen suit provisions threaten to expand the jurisdiction of federal courts beyond the limits of Article III.[219] Under the Constitution, the traditional function of federal courts is to protect the rights of individuals against governmental or private encroachment[220] and to award judg-

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216. *See id.* (stating that, in the 1970s, suits against private parties for violating environmental regulations were rarely filed); *see also* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 351 (1990) (reporting that, prior to 1982, environmental organizations preferred to bring suit against the EPA rather than against private violators).

217. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 715 (2d ed. 1996) (noting that "one of the key developments in the early growth of environmental law was the opening up of the courts to citizens seeking review of agency actions"); *cf.* Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 90 (1984) (observing that, as values changed, "our society, and in turn, the judiciary, eventually recognized concern for the environment as a protectible interest").

218. *See, e.g.*, Bennett v. Spear, 117 S. Ct. 1154, 1161 (1997) (explaining that Article III and prudential limits are "founded in concern about the proper—and properly limited—role of the courts in a democratic society" (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (asserting that the doctrine of standing sets apart cases and controversies that define the limits of the judiciary under Article III); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 894 (1990) (claiming that it is the representative branches that have responsibility for overseeing agencies' activities); Allen v. Wright, 468 U.S. 737, 752 (1984) (stating that Article III standing is built on the single idea of separation of powers).

219. *See Defenders*, 504 U.S. at 573-74 (stating that the Court has held consistently that a plaintiff raising general grievances and seeking relief that will benefit him no more directly than others "does not state an Article III case or controversy"). The Court cited *Fairchild v. Hughes*, 258 U.S. 126, 129-30 (1922), which dismissed a suit challenging the ratification process of the Nineteenth Amendment. *See Defenders*, 504 U.S. at 574. In *Fairchild*, Justice Brandeis wrote:

> [This is] not a case within the meaning of . . . article 3 . . . . Plaintiff has [asserted] only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit . . . .

Fairchild, 258 U.S. at 129-30.

220. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (declaring that "[t]he province of the court is, solely, to decide on the rights of individuals"); *see also* Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17

ments that either restore victims to their former status or compensate them for the loss suffered.[221] The case or controversy paradigm that allows courts to perform this function is composed of adverse parties, each with a personal stake in the litigation and, at least one alleging a legal harm caused by the other.[222] Courts are well suited to resolve disputes of this nature. Conversely, they are neither authorized to resolve political issues of general interest to the public nor to compensate the entire citizenry for losses suffered equally by all.[223]

In the latter regard, citizen suit provisions represent a dramatic departure from the traditional litigation model. Such statutes grant standing without requiring the plaintiffs to allege harm or personal injury.[224] The statutory language typically confers standing upon anyone who alleges that a violator's actions harm the environment, and consequently, the

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SUFFOLK U. L. REV. 881, 894 (1983) (stating that the traditional role of the judiciary is to protect individuals and minorities from impositions of the majority); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1460 (1988) (stating that "[t]he distinctive judicial role is the protection of traditional or individual rights against governmental overreaching" (citation omitted)).

221. *Cf.* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (stating that "[i]n sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision"); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 431 (Kermit L. Hall et al. eds., 1992) (explaining that the Framers of the Constitution empowered federal courts to provide "all the remedies" developed in England's courts of equity).

222. *See* Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (explaining that the conventional reasoning has been that "[t]here is no case or controversy . . . when there are no adverse parties with personal interest in the matter" (citing Muskrat v. United States, 219 U.S. 346, 357 (1911); United States v. Ferreira, 54 U.S. (13 How.) 40, 46 (1851); Hayburn's Case, 2 U.S. (2 Dall.) 409, 409 (1792))); *see also* Baker v. Carr, 369 U.S. 186, 204 (1962) (requiring parties seeking relief to have such a personal stake in the outcome that "concrete adverseness" is ensured).

223. *See* Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 895-96 (1983) (asserting that courts are ill-suited to ensure, for example, strict enforcement of environmental laws, and further, that to the extent courts enforce legislative policies that the political process itself would not enforce, they are enforcing personal political prejudices); Jonathan Poisner, Comment, *Environmental Values and Judicial Review After* Lujan*: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335, 360 (1991) (noting that some theorists believe that standing prevents judicial interference in the political process).

224. *See Defenders*, 504 U.S. at 580 (Kennedy, J., concurring) (observing that although the Endangered Species Act appears to confer standing on "any person" to enforce the act, "it does not of its own force establish that there is an injury in 'any person' by virtue of any 'violation'").

public at large.[225] Issues that affect all citizens equally, however, are considered "generalized grievances," and are better suited to resolution by the representative branches through the political process.[226] To the extent Congress intends the judiciary to enforce claims by those who have not suffered injury, citizen suit statutes threaten to entangle the Court in political issues and impermissibly expand the federal courts' jurisdiction beyond the limits of Article III.[227]

2. Congress' Impermissible Delegation of Executive Branch Power

The second separation of powers issue posed by citizen suit provisions is a corollary of the first—whether Congress, through these provisions, impermissibly delegates the executive branch's law enforcement power under Article II of the Constitution,[228] which provides that law enforcement on behalf of the general public rests with the executive branch, not with the courts.[229] Transferring enforcement of environmental citizen

225. *See, e.g.*, 16 U.S.C. § 1540(g)(1)(A) (1995) (allowing any person "to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter" to enforce the statute); Fund for Animals Inc. v. Florida Game & Fresh Water Fish, 550 F. Supp. 1206, 1208 (S.D. Fla. 1982) (granting an environmental group standing to seek an injunction to prevent a planned deer hunt).

226. *See Defenders*, 504 U.S. at 576 (stating that "vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive" (emphasis omitted)).

227. *See id.* at 577 (stating that allowing Congress to convert public interests into individual rights would impermissibly allow the Court "to assume a position of authority over the governmental acts of another and co-equal department" (quoting Massachusetts v. Mellon, 262 U.S. 447, 489 (1923))). *But see* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1279 (1989) (arguing that, within the context of a democratically accountable administrative state, the Court should recognize the important differences between statutory and nonstatutory standing). Professor Pierce cites Judge Jerome Frank's view that allowing any "adversely affected or aggrieved" party to obtain judicial review of agency actions is "an important means of enforcing legislative policy decisions against agencies prone to capture by a faction." *Id.* at 1281-82.

228. *See Defenders*, 504 U.S. at 577 (explaining that because the public interest in agency compliance with laws is not an "individual right" allowing such issues to be adjudicated 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").

229. *See id.*; *see also* Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1806 (1993) (arguing that, consistent with the norm of a unitary executive, Congress cannot delegate to disinterested citizens the power to prosecute regulatory violations). The authors analogize the enforcement of citizen suit statutes to the enforcement of criminal laws. *See id.* at 1807. Furthermore, they claim that Congress should not have the authority to vest in private citizens the power to litigate cases on behalf of the public. *See id.*

suit statutes from the executive branch to the judicial branch therefore threatens to distort constitutionally assigned roles and upset the balance of governmental power.[230]

Although the Court has yet to confront the question of whether these perceived deficiencies are enough to render citizen suit statutes unconstitutional, the Court has suggested that such a finding is possible.[231] Remarkably, the Court's reconstruction of the standing doctrine as a mechanism specifically designed to maintain strict separation of powers[232] may actually allow the Court to avoid reaching this issue.

IV. The Reconstitution of Standing

With an eye toward preserving the traditional separation of powers inherent in the constitutional structure, Justice Scalia authored two Supreme Court decisions in the 1990s that had the dual effect of severely curtailing plaintiffs' standing to sue on behalf of the public interest and limiting judicial enforcement of environmental laws.[233] A third decision, also authored by Justice Scalia, reaffirmed the Court's traditional role of

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230. *See Defenders,* 504 U.S. at 577 (summarizing Stark v. Wickard, 321 U.S. 288 (1944), when discussing the powers of the three branches of government). According to the *Stark* Court:

> [E]mpowering administrative agencies . . . permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers . . . . This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents . . . . But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.

Stark, 321 U.S. at 309-10.

231. *See Defenders*, 504 U.S. at 576-77 (asserting that Congress has no authority to permit all citizens to sue the government, absent a showing of injury, nor to transfer from the President his "most important constitutional duty" to enforce the law).

232. *See, e.g.*, Bennett v. Spear, 117 S. Ct. 1154, 1161 (1997) (stating that Article III limits and prudential principles are "founded in concern about the proper—and properly limited—role of the courts in a democratic society" (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))); *Defenders*, 504 U.S. at 559-60 (asserting that the Constitution's central mechanism of separation of powers turns on a common understanding of the roles of the respective branches, and the standing doctrine defines the judiciary's role); Allen v. Wright, 468 U.S. 737, 752 (1984) (declaring that Article III standing is based upon the notion of separation of powers).

233. *See Defenders*, 504 U.S. at 568 (declaring that general challenges to agency programs are inappropriate for adjudication in federal courts); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 894 (1990) (denying standing to an environmental group seeking "across-the-board protection of our Nation's wildlife and the streams and forests that support it").

redressing personal, as opposed to public, injury and settled the future direction of the Court as to the standing doctrine.[234] All three decisions reflected Justice Scalia's long-held view that courts should adjudicate only the "cases" or "controversies" contemplated by the Framers—those that constitute an injury to an individual's personal interests.[235]

A. *An Old Philosophy Finds a New Purpose*

In 1983, Justice Scalia, then serving as a justice on the United States Court of Appeals for the District of Columbia,[236] published an essay entitled *The Doctrine of Standing As an Essential Element of the Separation of Powers.*[237] The thesis of the essay, as summarized in the title, maintained that the doctrine of standing was integral to the separation of powers principle "found only in the structure of the [Constitution]."[238] In Justice Scalia's opinion, the Framers empowered each branch of government with limited authority to resolve only certain types of disputes.[239] Accordingly, because the injury in fact pillar of the standing doctrine distinguished legal issues from political issues, the injury in fact aspect of standing would consistently keep the branches within their constitutionally defined roles.[240] In light of this theory, Justice Scalia criticized the evolution of standing and concluded that it was improperly expanded and misapplied in the context of broadly worded environmental statutes.[241] Justice Scalia's essay turned out to be prophetic with respect to the Court's future rulings regarding citizen suit provisions. His essay also served as a basis for his opinions in three cases that have substantially

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234. *See Bennett*, 117 S. Ct. at 1164 (granting standing to plaintiffs who suffered personal injury).

235. *See* Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1993) (explaining his belief and philosophy that only adverse parties with a personal interest in the matter should have standing).

236. *See* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995, at 512 (Clare Cushman ed., 2d ed. 1995) (reporting that "[i]n 1982 President Ronald Reagan appointed Scalia to the U.S. Court of Appeals for the District of Columbia Circuit").

237. 17 SUFFOLK U. L. REV. 881 (1983).

238. Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983).

239. *See id.* at 894 (describing the "functional relationship" between the three branches of government).

240. *See id.* at 895 (explaining why "concrete injury" is the "indispensable" element of standing that entitles a plaintiff to "some special protection from the democratic manner in which we ordinarily run our social-contractual affairs").

241. *See id.* at 894 (explaining that the standing doctrine restricts courts to their proper role of adjudicating *individual* rights and excludes them from prescribing the functions of the representative branches).

narrowed the criteria for the Court's standing doctrine: *Lujan v. National Wildlife Federation, Lujan v. Defenders of Wildlife,* and *Bennett v. Spear.*

B. Lujan v. National Wildlife Federation—*Standing As a Question of a Claim on the Merits*

To paraphrase Justice Scalia, the crux of the issue in *Lujan v. National Wildlife Federation*[242] was how "specific" must "specific facts" be?[243] The National Wildlife Federation (NWF) brought suit under the Administrative Procedures Act (APA), complaining that the Department of Interior intended to release land illegally into the public domain.[244] According to the NWF, this action would expose the land to mining activities and interfere with the NWF members' recreational and aesthetic enjoyment of the property.[245] The Department of Interior, however, claimed that the NWF had no standing under the APA to seek judicial review of the agency's actions and filed a motion for summary judgment.[246] In reviewing whether the court of appeals had properly reversed the district court's granting of summary judgment against NWF, the Court was required to determine whether "specific facts," consistent with the standard articulated in *Celotex Corporation v. Catrett*,[247] had been alleged.[248] Despite the fact that the statutes in question contained neither a citizen suit provision nor a specific grant of standing, the Court found that NWF's recreational and aesthetic enjoyment were within the "zone of interests" that the statutes were designed to protect.[249] Regardless of the zone of inter-

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242. 497 U.S. 871 (1990).

243. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990). In *National Wildlife Federation*, Justice Scalia wrote:

> At the margins there is some room for debate as to how "specific" must be the "specific facts" that Rule 56(e) requires in a particular case. But where the fact in question is the one put in issue by the § 702 challenge here—whether one of respondent's members has been, or is threatened to be, "adversely affected or aggrieved" by Government action—Rule 56(e) is assuredly not satisfied by [general] averments.

Id. at 889.

244. *See id.* at 879.

245. *See id.* at 879-86.

246. *See id.* at 881-82.

247. 477 U.S. 317 (1986).

248. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) (explaining that summary judgment may be granted if the moving party shows that there is no evidence to support the nonmoving party's case).

249. *See National Wildlife Fed'n*, 497 U.S. at 886 (affirming that the Federal Land and Policy Management Act of 1976 and the National Environmental Policy Act of 1969 protected recreational and aesthetic interests).

ests determination, the Court also held that the plaintiffs' allegations of injury were not specific enough to survive summary judgment.[250]

The plaintiffs' affidavits stated that they used lands "in the vicinity of" the areas to be opened by the Department of Interior.[251] The Court noted, however, that the tracts to be released by the Department of Interior comprised only 4,500 acres within a several-million acre area that had always been open to mining and leasing.[252] Hence, affidavits claiming use "in the vicinity of" the area were insufficient to establish that NWF members used the *specific* 4,500 acres in question.[253]

As a result, the Court refused to presume that the organization used the specific tract in question and ruled that NWF's reliance on the *SCRAP* Court's broad interpretation of standing was misplaced.[254] Further, the Court noted that the *SCRAP* holding was based on a Rule 12(b) motion to dismiss on the pleadings, which allows courts to presume the plaintiff's allegations are true—not a Rule 56 motion for summary judgment, which requires evidence of specific facts.[255] Ultimately, the Court held there was no genuine issue for trial.[256] Although one may debate whether NWF's statements were sufficient to withstand summary judgment, *National Wildlife Federation* illustrates that when challenging agency decisions based upon statutory causes of action, the Court requires plaintiffs to produce highly specific evidence of a personal injury in order to create a genuine issue for trial.[257]

National Wildlife Federation also stands for another proposition. In the case, the Supreme Court concluded that complaints regarding the overall administration of government agency programs were not "final agency actions" authorized for review under the APA.[258] Without characterizing the dispute as a separation of powers issue or calling the allegations a

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250. *See id.* at 889 (concluding that the plaintiffs did not set forth specific facts sufficient to survive summary judgment).

251. *See id.* at 886.

252. *See id.* at 887.

253. *See id.* at 889.

254. *See id.* The Court refused to assume NWF members were referring to the *specific* 4,500 acres the agency planned to release. *See id.* According to the Court, "[i]t will not do to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege." *Id.*

255. *See id.* at 889.

256. *See id.*

257. *See* Katherine B. Steuer & Robin L. Juni, *Court Access for Environmental Plaintiffs: Standing Doctrine in* Lujan v. National Wildlife Federation, 15 HARV. ENVTL. L. REV. 187, 200 (1991) (noting the "great specificity" required in *National Wildlife Federation* to survive a summary judgment motion).

258. *See National Wildlife Fed'n*, 497 U.S. at 890 (stating that complaints cannot be considered an "agency action" or a "final agency action").

political question, the Court wrote that "[r]espondent alleges that violation of the law is rampant within this program . . . . Perhaps so. But respondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."[259] By this pronouncement, Justice Scalia echoed his previously stated view that supervision of agency activities is the responsibility of the representative branches, and courts should adjudicate only individual rights.[260]

National Wildlife Federation stands in stark contrast to the Burger Court's standing analysis of the claims brought under the APA in *Data Processing*, *Sierra Club*, and *SCRAP*. Unlike these prior decisions, which first determined whether the plaintiffs had alleged an injury in fact, Justice Scalia's analysis in *National Wildlife Federation* initially decided whether the plaintiffs' interests were within the zone of interests the statutes were designed to protect, and then, whether sufficient injury had been shown.[261] Further, none of the prior decisions addressed whether the challenged actions constituted a "final agency action" that qualified for review under the APA.[262]

Justice Scalia's modification of the Court's standing analysis eventually would have two significant implications for claims brought under citizen suit statutes that sometimes must be adjudicated under the APA. First, *National Wildlife Federation* affirmed *Data Processing*'s broad interpretation of the types of claims that generally will be considered to be within a

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259. *Id.* at 891.

260. *See id.* at 894 (refusing to review as one action the plaintiffs' 1,250 alleged violations of the Department of the Interior's land withdrawal review program). According to Scalia:

> The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts.

Id. Scalia also stated that until Congress explicitly authorized the Court to correct administrative processes on a wholesale, rather than on a case-by-case basis, "more sweeping actions are for the other branches." *Id.*

261. *See National Wildlife Fed'n*, 497 U.S. at 886 (finding that recreation and aesthetic enjoyment were within the zone of interests of the Federal Land Policy Management Act and the National Environmental Policy Act before considering whether the respondents' interests were actually affected).

262. *See generally* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (containing no discussion regarding whether the alleged violations complained of constituted "final agency action" within the meaning of the APA); Sierra Club v. Morton, 405 U.S. 727 (1972) (conducting no inquiry concerning whether the alleged actions constituted a "final agency action"); Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970) (including no comment regarding whether the challenged violations composed a "final agency action").

statute's purpose.[263] Accordingly, the zone of interests test would not pose a significant barrier to claims representing a wide range of interests. Second, the higher degree of specificity demanded under *National Wildlife Federation* to establish both a sufficient showing of injury and to demonstrate that the claim challenges a specific agency action, was an important prelude to the standing issues the Court would later consider in the context of citizen suit statutes.

C. Lujan v. Defenders of Wildlife—*Citizen Suits and Judicial Restraint*

Two years after *National Wildlife Federation*, the Court again addressed standing within the context of environmental law.[264] In *Lujan v. Defenders of Wildlife*, the case was brought under the citizen suit provision of the Endangered Species Act.[265] As in *National Wildlife Federation*, *Defenders* was on appeal to the Supreme Court from a summary judgment.[266]

In *Defenders,* the plaintiffs sought to have the Secretary of Interior revise regulations that they believed erroneously interpreted the Endangered Species Act to apply only to domestic, rather than to foreign projects.[267] To determine whether a genuine issue was stated, the Court refined the "specific" injury requirement to include a temporal element—

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263. *See National Wildlife Fed'n*, 497 U.S. at 886 (finding recreational and aesthetic enjoyment to be interests covered by environmental statutes).

264. *See generally* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (dismissing claims brought by an environmental group under the Endangered Species Act for lack of standing).

265. *See id.* at 558 (explaining that under a 1978 interpretation of the Endangered Species Act, projects carried out or supervised by the government overseas required an assessment, or consultation, with the Secretary to ensure that endangered species would not be jeopardized by the project); *see also* 16 U.S.C. § 1536(a)(2) (1994) (mandating rules for federal agencies). The Act provided that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

Id. The Fish and Wildlife Service and the National Marine Fisheries Service promulgated the joint regulation on behalf of the Secretary of the Interior and the Secretary of Commerce. *Defenders*, 504 U.S. at 558. In 1983, the Secretary revised the regulation to require consultation only for domestic actions or those on the high seas; consultation for projects in foreign nations was no longer required. *See id.* at 558-59.

266. *See Defenders*, 504 U.S. at 559 (noting that, in the trial court, the Department of Interior moved for summary judgment on the merits).

267. *See id.* at 559 (noting that respondents were seeking an injunction to require the Secretary of Interior to write new regulations restoring a previous interpretation of the Endangered Species Act).

whether the plaintiffs alleged a sufficiently "imminent" injury to warrant standing.[268] The complaint's deficiencies spanned all three Article III factors and provided the Court an opportunity to expound on the purpose of the standing doctrine.[269] Following an exhaustive analysis of the Article III requirements, the Court held that the Endangered Species Act's citizen suit provision conferred no legal right on the plaintiffs to sue the government[270] and that Congress did not intend the Act to apply to overseas projects.[271] Resolving either of these issues initially, however, would have answered the threshold standing question based on statutory provisions and eliminated the need for the Article III analysis.

Significantly, the decision contained considerable dicta concerning Congress' lack of authority to confer broad grants of standing through citizen suit provisions.[272] As a result, *Defenders* was an extremely controversial decision that prompted commentators to criticize the Court's artificial use of Article III limits to overcome Congress' clear intent to confer standing on citizen plaintiffs.[273] Critics advanced an argument for legislative supremacy based on the notion that the Framers vested in Congress the power to make the laws on behalf of the People.[274] If Congress in-

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268. *See id.* at 564 (stating that the affidavits examined by the Court contained "no facts, however, showing how damage to the species will produce 'imminent' injury to Mses. Kelly and Skilbred").

269. *See id.* at 559-71 (evaluating the injury, cause, and redressability factors). Only four Justices agreed that "[t]he most obvious problem in the present case is redressability." *Id.* at 557, 568.

270. *See id.* at 577-78 (declaring that Congress cannot confer a statutory right that is not an individual right without violating the separation of powers doctrine).

271. *See id.* at 569-70 (explaining that the statute could not have been violated because it was not binding upon the party causing the injury).

272. *See id.* at 571-78 (discussing the concept and deficiencies of citizen suit provisions).

273. *See, e.g.*, Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142-43 (1993) (stating that *Defenders* "is difficult to square with the language and history of Article III, with the injury requirement itself, and with more modest visions of judicial power, and with time-honored notions of public law litigation"); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 483 (1996) (claiming that the Court's separation of powers justification in *Defenders* is "Orwellian" because "it engaged in activist constitutional interpretation to strike down an act of Congress approved by the President"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) (discussing why *Defenders* is a misinterpretation of the Constitution).

274. *See* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing As a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1199 (1993) (stating that "[i]n a constitutional democracy, politically accountable officers and institutions should have the dominant policymaking roles, subject only to judicially imposed limits that are firmly anchored in the Constitution"); Jonathan Poisner, Comment, *Environmental Values and Judicial Review After* Lujan: *Two Critiques of the Separation of Powers Theory of*

tended to grant standing to "any person" to enforce a statute, critics argued, then the Court should adjudicate claims brought by "any person" under citizen suit statutes.[275] As illustrated in *Defenders*, however, the Court did not share this view.

The *Defenders* opinion also identified three major themes that are likely to recur in future assessments of the Court's standing decisions: (1) the narrow application of the injury in fact requirement and its effect upon statutory causes of action; (2) the reality that the Article III requirements, though based upon what appear to be objective standards, do not necessarily lead to a greater degree of determinacy; and (3) the modern role of standing as a separation of powers mechanism the Court claims as the constitutional basis of judicial review over Congress' authority to create legal injuries.

1. The "Injury in Fact" Requirement

In *Defenders*, Justice Scalia acknowledged that although the Constitution does not define judicial power,[276] "the core component of standing [the injury in fact requirement] is an essential and unchanging part of the case-or-controversy requirement of Article III."[277] Like Justice Douglas' "penumbras" and "emanations" containing fundamental rights hidden in the Constitution,[278] Justice Scalia, in *Defenders*, transposed the injury in fact test, first articulated in 1970 by Justice Douglas in *Data Processing*, into an affirmative constitutional requirement of the standing analysis.

Standing, 18 ECOLOGY L.Q. 335, 398 (1991) (claiming that if the Court refuses to recognize certain injuries despite congressional intent, it has usurped an important legislative function).

275. *See* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing As a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1201 (1993) (arguing that because "Congress is a politically accountable institution," courts should enforce its policy preferences); Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns,* 142 U. PA. L. REV. 1063, 1106 (1994) (claiming that "[w]hile the Court supposedly denied standing for reasons related to the three-pronged Article III test, it really weighed concerns that should be independent of the constitutional analysis").

276. *See Defenders*, 504 U.S. at 559-60 (describing the respective roles of the three branches as structured by the Constitution, but noting that the Constitution "does not attempt to define those terms"). Without stating that the Constitution's Article III "case or controversy" language does not actually define the types of disputes appropriate for judicial review, Justice Scalia based the legitimacy of the standing doctrine on Madison's reference in *The Federalist No. 48*, to "landmarks" that describe the limits of judicial power. *See id.* at 560 (citing THE FEDERALIST NO. 48, at 256 (James Madison) (Carey & McClellan eds., 1990)). One of these landmarks, he asserts, is the doctrine of standing. *See id.*

277. *See id.* (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).

278. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (referring to fundamental rights implicit in the Constitution).

Moreover, *Defenders* was the first Supreme Court decision to state that Congress could not create a statute that would overcome the Court's standing requirements.[279] Despite the broad language of citizen suit provisions of the Endangered Species Act granting standing to "any person" to enforce the Act, litigants would be required to show specifically how their personal interests were, in fact, injured.[280]

To determine whether the plaintiffs demonstrated an "injury in fact," the *Defenders* Court examined the affidavits of the two Defenders members who claimed their interests were harmed.[281] The affidavits claimed that each of the plaintiffs traveled to Egypt in the previous six to ten years to observe endangered species in the vicinity of the Mahaweli project on the Nile River.[282] The plaintiffs intended to return to the area in the future and claimed that the project would reduce the number of endangered animals available for observation.[283] Neither of the plaintiffs had definite plans to return at a certain future time; in fact, an ongoing civil war in Sri Lanka precluded an immediate trip.[284]

Like the claim in *National Wildlife Federation* that land use "in the vicinity of" land scheduled for future use was insufficient to demonstrate specific injury, the *Defenders* Court ruled that the affidavits contained no facts showing how the Mahaweli project's damage to certain endangered species produced an "imminent" injury to the plaintiffs.[285] In the Court's opinion, neither past exposure to illegal activities, without a showing of continuing adverse effects, nor the plaintiffs' mere intent to return was sufficient to demonstrate a current case or controversy.[286] According to the Court, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[287]

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279. *See* Cass R. Sustein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 163, 163-65, 209 (1992) (discussing how *Defenders* was the "most important standing case since World War II" because it provided the novel holding that Congress cannot grant standing to citizens).

280. *See Defenders*, 504 U.S. at 561-62 (requiring litigants to show how they were directly affected).

281. *See id.* at 563 (stating that to survive a motion for summary judgment, respondents must show, in addition to their "'special interest' in th[e] subject," that they would be "'directly' affected" (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972))).

282. *See id.* at 563-64.

283. *See id.*

284. *See id.* at 564.

285. *See id.*

286. *See id.*

287. *Id.* In his dissent, however, Justice Blackmun argued that the Court confused the injury in fact standards with the summary judgment standards; for summary judgment, the

The Court also rejected the idea that the world is a contiguous ecosystem, where injury to one part harms the whole.[288] Equally unpersuasive was the argument that professionals who study or work with endangered animals are automatically harmed when the animals are destroyed.[289] The Court summed up the theme of the injury with the firm opinion that "[i]t cannot be that a person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world."[290] Justices Kennedy and Souter, although recognizing the stringency of the Court's holding in a concurring opinion, remarked that,

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specific facts only need to be sufficient to create a genuine issue of material fact. *See id.* at 590 (Blackmun, J., dissenting). In Blackman's view, the Court's requirement that the plaintiffs show evidence of specific plans to return in order to have a "sufficient" showing of "imminent" injury was a formalistic maneuver that went beyond the requirement to establish that a genuine issue exists for trial. *See id.* at 592 (Blackmun, J., dissenting). The dispute regarding the requirements needed to show an "imminent" injury was addressed during oral arguments. *See* Transcript of Oral Arguments, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (No. 90-1424), *reprinted in* Bradley J. Epstein, Note, *The Endangered Species Act Applies Extraterritorially*—Defenders of Wildlife v. Lujan, *911 F.2d 117 (8th Cir. 1990)*, 5 TRANSNAT'L LAW. 447, 490 (1992). The attorney representing Defenders of Wildlife complained that "the argument the Government makes about what kind of intention you need to go back to the site, in essence requires us to camp out at the site, in order to have standing." *Id.* at 527. One of the Justices replied, "Whereas you say a visit 10 years ago suffices." *Id.* at 528.

Justices Kennedy and Souter agreed with the requirement to show injury with great specificity. *See Defenders*, 504 U.S. at 579 (Kennedy, J., concurring). In defending the seemingly trivial requirement that the plaintiffs have a definite actual date upon which they plan to return to the project site, Justices Kennedy and Souter were unwilling to assume that the complainants were on the verge of suffering harm. *See id.* (Kennedy, J., concurring). Justices Kennedy and Souter cautioned, however, that as government programs change, the Court "must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition." *Id.* at 580 (Kennedy, J., concurring). According to the justices, when creating new causes of action:

> Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on "any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter," it does not of its own force establish that there is an injury in "any person" by virtue of any "violation."

Id. (Kennedy, J., concurring). Justices Kennedy and Souter agreed that it would exceed the Court's role and violate the separation of powers to recognize citizen suit statutes as conferring an individual right to vindicate the public interest. *See id.* at 580-81 (Kennedy, J., concurring).

288. *See Defenders*, 504 U.S. at 565-66 (rejecting the "novel" theories of standing offered by respondents, including the "ecosystem nexus" theory).

289. *See id.* at 566 (refusing to recognize the "animal nexus" and "vocational nexus" theories of standing).

290. *Id.* at 567 n.3.

"[w]hile it may seem trivial to require that [plaintiffs] acquire airline tickets to the project sites or announce a date certain upon which they will return . . . this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis."[291]

Although the outcome in *Defenders* is supportable based on other shortcomings regarding the merits of the plaintiffs' claim,[292] the application of the injury in fact requirement to the citizen suit claim in *Defenders* was as narrow as the holding relating to the APA in *National Wildlife Federation*. Together, the cases illustrate that, regardless of whether the cause of action is based on a citizen suit provision or the APA, injuries that are not rooted in common-law causes of action will be evaluated under the current Court's stringent injury in fact requirements; in this regard, such causes of action will be more difficult to establish.[293] Several members of the current Court, however, differ on what exactly constitutes a sufficient showing of injury.[294]

2. Applying the Article III Requirements

Significantly, in *Defenders* all members of the Court, even the dissenters, agreed that the Article III requirements are a constitutional prerequisite to standing.[295] Nonetheless, as evidence that the "unchanging core"

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291. *Id.* at 579 (Kennedy, J., concurring) (citations omitted).

292. *See id.* at 570 (inferring that no legal injury could have occurred based on the Court's finding that the regulation had not been violated). Additionally, because the decision to engage in the project was that of a foreign government, the Court could have refused to hear the claim on that basis. *See* Colloquia, *Group Discussion on the Supreme Court's Recent Administrative Jurisprudence*, 7 ADMIN. L.J. AM. U. 287, 295 (1993) (noting that matters relating to a foreign government's decision are addressed through the diplomatic process).

293. *See* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing As a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1191 (1993) (arguing that narrow definitions of injury, such as "actual or imminent," or "concrete and particularized," coupled with the extraordinarily demanding test[s] of causality and redressability, "are obviously designed to be impossible to satisfy"). Professor Pierce observes that, under *Defenders*, regulated firms often will be the only parties able to establish injury directly attributable to agency action. *See id.* at 1194. "For anyone else, the injury almost always will be characterized as 'generalized' or as the product of an indirect causal chain that is 'conjectural' or insufficiently precise and 'imminent' in its temporal dimension." *Id.* Under this view, the plaintiffs in *Data Processing* would also not have been able to prove a "concrete and particularized" injury. *See id.* at 1193.

294. *Compare Defenders*, 504 U.S. at 564 (interpreting "imminent" injury to require litigants to be in close proximity to an activity), *with id.* at 583 (Stevens, J., concurring) (claiming that "imminence" should be based on the timing of the environmental harm), *and id.* at 591-92 (Blackmun, J., dissenting) (arguing that an affiant's claim that he intended to return to a site satisfies the "actual or imminent" standard).

295. *See id.* at 590 (Blackmun, J., dissenting) (citing Article III injury in fact requirements as ensuring the presence of a "case" or "controversy").

of Article III cannot be applied in a non-normative way, the Justices disagreed on the appropriate standard that should be used as the threshold level of injury for standing purposes.[296]

Taking a more liberal view of what constitutes an injury, Justice Stevens reasoned that, if a person studies or enjoys endangered animals, and the animals are destroyed, the "imminent" injury occurs when they are destroyed.[297] In his view, an imminent injury should be based on the timing of the environmental harm, not upon when the individuals plan to visit the area.[298] Applying this reasoning to the facts presented in *Defenders*, Justice Stevens found that "a reasonable finder of fact could conclude . . . [that the plaintiffs] will be injured."[299] Justice Stevens did not explain, however, how the finder of fact would have an opportunity to make such a finding when his extensive analysis of the Endangered Species Act revealed that the case should be dismissed because the statute "does not apply to activities in foreign countries."[300] Again, the analysis of injury in fact in the abstract causes Justice Stevens, as well as the Court to overlook the obvious: if the statute does not apply in foreign countries, there can be no legal injury; if there is no legal injury, then there can be no standing.

The dissent by Justices Blackmun and O'Connor expressed yet another basis for concluding that a reasonable finder of fact could classify the respondents' injury as "imminent." As professional observers of endangered animals who had previously visited the project sites, the respondents' assertions that they intended to return to the sites should have been sufficient to establish an imminent injury.[301] The dissenting justices, therefore, argued that respondents should have been required to show

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296. *See id.* at 564 (tying the finding of imminence of an injury to when litigants would return to the project site); *id.* at 583 (Stevens, J., concurring) (arguing that the "imminence" of an injury should be determined when the environmental harm occurs); *id.* at 591-92 (Blackmun, J., dissenting) (stating that an intention to return and observe endangered animals constitutes an "imminent" injury).

297. *See id.* at 583 (Stevens, J., concurring) (stating that individuals who intend to study endangered animals in the future are injured "as soon as the animals are destroyed"). Justice Stevens stated that when an action is taken that harms an endangered species or its habitat, "the 'imminence' of such an injury should be measured by the timing and likelihood of the threatened environmental harm." *Id.* (Stevens, J., concurring).

298. *See id.* at 582-83 (arguing that "imminence" should be measured by the timing of the environmental harm and not by the time between the present and when someone plans to revisit an area).

299. *Id.* at 584 (Stevens, J., concurring).

300. *See id.* at 585 (Stevens, J., concurring).

301. *See id.* at 592 (Blackmun, J., dissenting) (finding reasonable, in light of respondents' profession and past visits, that they were likely to return to the site).

only that the action they challenged injured them without having to show they were physically near the location of the injury.[302]

The opinions by Justices Scalia,[303] Stevens,[304] and Blackmun[305] on how an "imminent" injury should be defined and measured exemplify the criticism of the injury in fact test—that such standards cannot be applied in a non-normative manner.[306] Therefore, the question of whether any litigant is injured is not a question of fact, but depends upon the Court's judgment regarding the types of claims the judicial process should recognize.[307]

3. The Dual Role of Standing

The final section of the *Defenders* opinion explains why citizen suit provisions cannot overcome the Court's Article III standing requirements without upsetting the separation of powers balance.[308] Although the Court stopped short of declaring citizen suit provisions unconstitutional, Justice Scalia commented upon the "remarkable nature" of the court of appeals' finding that the Endangered Species Act's citizen suit provision granted standing to anyone who alleged a procedural violation of the statute.[309] Justice Scalia stated emphatically that Congress cannot confer "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[310] Hence, the *Defenders* Court

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302. *See id.* at 595 (Blackmun, J., dissenting) (arguing that the action that harmed the respondents was a valid basis for claiming injury).

303. *See id.* at 555.

304. *See id.* at 581 (Stevens, J., concurring).

305. *See id.* at 589-90 (Blackmun, J., dissenting).

306. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231, 233 (1988) (stating that the imposition of requirements or standards of injury in determining what causes of action to recognize requires courts to measure based on "reference to a normative structure;" for instance, an "injury in fact" requirement limits the power of a legislative body because it stifles the legislature from articulating and enforcing public values); *see also Defenders*, 504 U.S. at 564-65 n.2 (arguing that "imminence" of injury cannot be stretched to include "in this lifetime" but must be restricted to injuries that are "*certainly* impending"); *id.* at 582 (Stevens, J., concurring) (concluding that "imminence" of injuries should be measured by timing and likelihood of the threatened harm); *id.* at 606 (Blackmun, J., dissenting) (determining that courts must look at each case's particular facts in finding that an "injury" under Article III has occurred).

307. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 232 (1998) (claiming that legal injuries are based on value judgments regarding what ought to be considered a judicially cognizable injury).

308. *See Defenders*, 504 U.S. at 571-78 (discussing how citizen suit provisions purport to skew the responsibilities and roles between the three branches of government).

309. *See id.* at 572.

310. *Id.* at 573. The Court cited numerous prior cases that held that such disputes were actually "generalized grievances," rather than personal injuries, and therefore, inap-

viewed citizen suit provisions as impermissible attempts to shift the enforcement of environmental laws—which are otherwise an executive branch responsibility with political underpinnings—to the courts.[311]

Adding to this view, Justice Kennedy's concurring opinion observed that the citizen suit provision of the Endangered Species Act failed to meet the Court's "minimum requirement" that a statute "at least" identify the class of individuals and the type of interests Congress intended to protect.[312] If citizen suit statutes fail to at least identify the intended beneficiaries of the legislation, such provisions may violate the separation of powers doctrine by attempting to expand the Court's jurisdiction beyond

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propriate for resolution as Article III cases or controversies. *See id.* at 574; *see also*, Allen v. Wright, 468 U.S. 737, 766 (1984) (denying standing to plaintiffs who concluded that improper procedures were used to enforce agency regulations); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 489-90 (1982) (disallowing a suit filed by citizen-taxpayers who claimed that the donation of government-owned real estate to a religious college violated the Establishment Clause); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226-27 (1974) (dismissing a citizen-taxpayer suit alleging that Congressmen holding commissions in the military reserves violated the Incompatibility Clause); United States v. Richardson, 418 U.S. 166, 180 (1974) (refusing to recognize a taxpayer's individual right to force the government to disclose the Central Intelligence Agency's expenditures); *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (rejecting a suit contending that the appointment of Justice Black to the Supreme Court violated the Ineligibility Clause); Massachusetts v. Mellon, 262 U.S. 447, 480 (1923) (disallowing a taxpayer suit challenging the propriety of federal expenditures); Fairchild v. Hughes, 258 U.S. 126, 129-30 (1922) (dismissing a claim alleging that improper procedures were used to ratify the Nineteenth Amendment).

311. *See Defenders*, 504 U.S. at 577 (denying Congress' power to enact broad grants of standing to citizens who will help effectuate the enforcement of environmental laws). Scalia stated:

> To 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. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "virtually continuing monitors of the wisdom and soundness of Executive action."

Id. at 577 (citations omitted); *see also* RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 116 (1997) (concluding that Scalia's interpretation of the separate branches' powers kept the courts detached from interest groups' attempts to influence administration of agency regulations).

312. *See Defenders*, 504 U.S. at 580 (Kennedy, J., concurring) (indicating that "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit"). Justice Kennedy's views appear to align with those of Justice Scalia regarding Congress' need to draft precise statutes "so that the judiciary would rarely be invited to review the boundaries of administrative authority." RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 46 (1997).

the limits of Article III.[313] Article III standing requirements, therefore, provide a constitutional safeguard and ensure that federal courts hear only complaints regarding individual disputes and not disputes involving political issues properly resolved by Congress and the Executive.[314]

In essence, *Defenders* successfully reconstituted the standing doctrine into an essential separation of powers tool by using a structural argument similar to that used by Chief Justice Marshall in *Marbury v. Madison*.[315] First, by declaring that "injury in fact" was a constitutional minimum, and second, that Article III placed limits on Congress' ability to grant statutory standing, the Court used the injury in fact requirement to limit the power normally exercised by the legislative branch to create legal rights.[316] Plaintiffs bringing claims under broadly worded statutory provisions must then, as a constitutional requirement, meet the Article III injury in fact test, regardless of whether Congress intended to require such a showing.[317] Therefore, "[i]n significant part, a debate over what consti-

313. *See Defenders*, 504 U.S. at 580-81 (Kennedy, J., concurring) (claiming that entertaining citizen suits to vindicate a public interest would exceed the limits of the Court's jurisdiction).

314. *See id.* at 581 (Kennedy, J., concurring) (stating that the concrete injury requirement confines the judiciary to its proper, limited role in the constitutional framework).

315. *Compare Defenders*, 504 U.S. at 571-78 (manipulating the citizen suit doctrine to encompass general public interest injuries in order to establish standing that would transfer the power of Congress to the courts), *with* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-74 (1803) (arguing that if Congress had the ability to shift the powers between the Supreme Court and lower courts, then "the distribution of jurisdiction made in the Constitution is form without substance"). In *Defenders*, the Court denied respondents standing, reasoning that public interest grievances, without more, are redressed through Congress and the President, not the courts. *See Defenders*, 504 U.S. at 576. The post-*Defenders* standing doctrine is essentially the separation of powers tool that Justice Scalia envisioned in his 1983 essay. *See* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142 (1993) (labeling *Defenders* as "Justice Scalia's most important opinion in federal courts law" and predicting that the ruling "will mark a transformation in the law of standing").

316. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 233 (1988) (arguing that the Court's injury in fact requirement restricts Congress' power to create a cause of action); Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1067 (1994) (explaining that when a court classifies a limit as constitutional rather than prudential, Congress and future courts are precluded from considering whether countervailing concerns may outweigh prudential limits). The consequence, according to Gottlieb, is that "litigants who might otherwise satisfy both constitutional and prudential requirements are unnecessarily excluded from court." *Id.*; *see* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 236 (1992) (characterizing the concept of injury in fact as "a form of Lochner-style substantive due process").

317. *See Defenders*, 504 U.S. at 562 (establishing a higher standing barrier for litigants who assert an "injury aris[ing] from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*"); Kathleen C. Becker, Bennett v. Plenert*: Environ-*

tutes 'injury in fact' sufficient for Article III is thus a debate about separation of powers and the respective responsibilities of Congress and the Court."[318]

D. Bennett v. Spear—*The Reinstatement of the Private Law Model*

1. Citizen Suit Provisions and the "Zone of Interests" Test

Five years after the plurality decision in *Defenders*, a unanimous Court in *Bennett v. Spear*[319] granted standing to plaintiffs who alleged an injury to personal economic interests.[320] *Bennett* is an elegant integration, analysis, and culmination of the contemporary issues surrounding the Court's reconstitution of the standing doctrine. As the latest in a trilogy of decisions authored by Justice Scalia since 1990, *Bennett* finally provides a much needed blueprint of how to analyze claims brought under both a substantive statute and the APA.

Instead of claiming government under-enforcement of environmental laws, the plaintiffs sought relief from over-enforcement of the laws, alleging intrusion upon their property rights.[321] Harm to their interests was more closely aligned with the common-law injuries traditionally recognized by the private law model. The complaint, therefore, represented the paradigm of a court's role in protecting individuals from unwarranted government intrusion. Unlike the complaint in *National Wildlife Federation* brought under the APA[322] or the suit in *Defenders* that involved a challenge based exclusively upon the citizen suit provision of the Endan-

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mental Citizen Suits and the Zone of Interest Test, 26 ENVTL. L. 1071, 1085 (1996) (concluding that "[t]he language 'any person' only addresses who of those already having a cause of action may bring suit"); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing As a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1193 (1993) (observing that in statutory standing cases, "no prospective plaintiff could meet the extraordinary burden of proof required"); Stanley E. Rice, Note, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in* Lujan v. Defenders of Wildlife, 38 ST. LOUIS U. L.J. 199, 222-23 (1993) (noting that a heightened level of proof is needed to satisfy the current injury in fact test).

318. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 233 (1988).

319. 117 S. Ct. 1154 (1997).

320. *See* Bennett v. Spear, 117 S. Ct. 1154, 1160 (1997) (alleging injury to economic, as well as aesthetic, interests).

321. *See id.* at 1163 (noting that the claimed injury is a reduction in the quantity of irrigation water and that citizen suit provisions allow claims alleging both over- and under-enforcement of the statute).

322. *See* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 875 (1990) (stating that the claim was brought under the Administrative Procedure Act).

gered Species Act,[323] the plaintiffs in *Bennett* claimed standing based upon the provisions of both statutes.[324] As a result, the Court for the first time articulated the relative relationship between the Article III requirements and the zone of interests test and set forth clearly the proper analysis of claims brought under each.

In *Bennett*, two Oregon irrigation districts and two ranchers alleged that a Biological Opinion issued to the Bureau of Reclamation by the Interior Department's Fish and Wildlife Service would result in an illegal reduction of their water allotment.[325] The petitioners claimed that the Biological Opinion violated both the Endangered Species Act and the APA because it was not based on the requisite "best scientific or commercial evidence," and it failed to take into consideration the statutorily mandated "economic impact" of the determination.[326] Essentially, the petitioners argued that the Fish and Wildlife Service made a decision without providing any supporting evidence or following the proper procedure.[327] The petitioners argued that because the Bureau of Reclamation raised water levels in the Klamath Irrigation Project to comply with the opinion, they would receive less water and, therefore, were harmed by

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323. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-72 (1992) (finding that respondents had standing under the citizen suit provision because they alleged a "procedural harm").

324. *See Bennett*, 117 S. Ct. at 1159 (challenging the Interior Department's actions under the citizen suit provision of the Endangered Species Act and the Administrative Procedure Act).

325. *See id.* at 1159-60 (claiming violations of the Endangered Species Act (ESA) would result in reduced water allocation). Under the ESA, government agencies must notify the Fish and Wildlife Service (FWS) if a project or activity threatens an endangered species' critical habitat. *See id.* at 1159. FWS must issue a Biological Opinion evaluating whether the project jeopardizes the species, and if so, what modifications the agency must take in order to mitigate the threat. *See id.* In preparing the Biological Opinion, the ESA requires FWS to use the best scientific data available, and consider the economic impact of the opinion. *See id.* at 1168. If the agency agrees to implement the recommended actions, the Biological Opinion functions as a permit allowing the project to continue operating within the specified restrictions. *See id.* at 1165. If the agency does not comply with the Biological Opinion and proceeds with its proposed action, and the activity results in a prohibited "taking" of the endangered species, the agency and its employees risk substantial civil and criminal penalties. *See id.*

326. *See id.* at 1159-60, 1168 (alleging that no scientific evidence is available that shows the endangerment of fish species and that the government's implicit determination of the critical habitat failed to consider the requisite economic impact of such a decision).

327. *See id.* at 1160 (relating petitioners' repeated assertions that the Biological Opinion was "arbitrary, capricious, an abuse of discretion . . . [and] not in accordance with law").

the agency's opinion.[328] The district court dismissed the complaint for lack of standing at the pleading stage and concluded that the non-environmentalist petitioners' economic interests fell outside the zone of interests protected by the Endangered Species Act.[329] The court of appeals affirmed, holding that "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA."[330]

On appeal to the Supreme Court, the petitioners raised two questions: first, whether the zone of interests test was applicable to claims brought under the Endangered Species Act's citizen suit provision; and second, whether the petitioners' economic interests entitled them to standing under that test.[331] Significantly, the government did not attempt to defend the court of appeals' reasoning; instead, the government advanced three arguments: (1) petitioners did not meet the Article III standing requirements; (2) the citizen suit provision did not authorize the petitioners' claims; and (3) the Biological Opinion was not a final agency action and, therefore, could not be reviewed under the APA.[332]

Noting that the APA authorizes suit only when there is no judicial remedy available under other statutes, the Court looked first to the Endangered Species Act.[333] Once again, however, the Court analyzed the injury, cause, and redressability elements of Article III in the abstract before establishing whether the Endangered Species Act authorized petitioners to bring suit on their claims.[334] The Court's analysis began with a familiar discussion of the purpose of Article III standing requirements and emphasized that prudential limits, such as the zone of interests test, also ensure the proper role of courts in the democratic process.[335] Unlike their constitutional counterparts, however, prudential principles can be displaced by Congress through statutory provisions; as a result, the Court

328. *See id.* (alleging that the Fish and Wildlife Service's jeopardy determination did not employ the required data, and that imposition of minimum water levels "constituted an implicit determination of critical habitat").

329. *See id.*

330. *See id.*

331. *See id.*

332. *See id.*

333. *See id.* at 1160-61.

334. *See id.* at 1163-65 (analyzing the injury in fact, cause, and redressability factors of the Article III standing requirements before examining the provisions of the statute on which the claim is based).

335. *See id.* at 1161 (explaining that prudential limits, like their constitutional counterparts, were founded upon a concern for the proper role of courts in the democratic society).

concluded that the citizen suit portion of the Endangered Species Act was a provision capable of displacing prudential principles.[336]

Although the Court had previously applied the zone of interests test in cases that did not involve the APA,[337] the Court's holding in *Bennett*—that the Endangered Species Act's citizen suit provision displaces prudential considerations—essentially precludes future application of the zone of interests test within the context of environmental citizen suit claims. According to *Bennett*, lower courts must now turn to the specific provisions of the statute under which the claim is made and apply the Court's more stringent Article III requirements.[338]

Notwithstanding the demanding Article III standards, however, this change in *Bennett* should prove to be positive for citizen suit plaintiffs for two reasons. First, in light of the Court's Article III requirements, the zone of interests test appears to be a superfluous, *pro forma* requirement with little actual significance.[339] Its displacement within the context of citizen suit claims, therefore, could hardly be viewed as outcome-determinative. Second, and more importantly, its diminished use should have the more practical effect of preventing federal courts from invoking the zone of interests test improperly, as the court of appeals did in *Bennett*, to preclude claims by non-environmental plaintiffs who suffer more traditional harms to their personal and property interests.

2. Modifying the Citizen Suit Standard

In *Bennett*, Justice Scalia also discussed a noticeable modification of his earlier, strongly worded views on citizen suit statutes.[340] Previously, Jus-

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336. *See id.* at 1162 (citing the "remarkable breadth" of the statute's language as evidence that Congress intended to displace prudential standing considerations).

337. *See id.* at 1161 (noting that the Court has applied the "zone of interests" test outside the context of the APA in *Dennis v. Higgins*, 498 U.S. 439 (1991), and *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977)).

338. *See id.* at 1167 (stating that coverage under the zone of interests test is to be determined according to the specific provisions of a statute, not by its overall purpose).

339. *Compare Bennett*, 117 S. Ct. at 1163 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992), as listing the minimum requirements for Article III standing), *with id.* at 1161 (noting that a plaintiff's grievance must fall within the zones of interest that the statute or regulation is aimed at protecting). Thus, the judicially cognizable interest required under Article III appears to encompass the arguably protected interest required by the zone of interests test, rendering the zone of interests test unnecessary.

340. *Compare* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc., 484 U.S. 49, 71 (1987) (Scalia, J., concurring) (claiming that citizen suit statutes could not possibly confer standing to sue on all plaintiffs), *and Defenders*, 504 U.S. at 576 (denying emphatically that Congress has the authority to confer standing on all citizens to sue the government), *with Bennett*, 117 S. Ct. at 1162 (explaining the Court's willingness to accept the "any person" language of citizen suit provisions at face value).

tice Scalia insisted that "there cannot possibly be standing to sue"[341] under statutes that state "any person" may commence a suit against anyone who is "alleged to be in violation" of the statute.[342] Additionally, in *Defenders*, Justice Scalia also criticized "the invitation of Congress" to "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right'" through a statute that "permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue."[343]

Justice Scalia's language and tone in *Bennett* regarding citizen statutes was markedly different from these previous pronouncements. In *Bennett*, Justice Scalia continued to observe that the "any person" language of the citizen suit provision is "an authorization of remarkable breadth."[344] However, the Court's willingness now to accept the language at face value, he explained, was based on the common belief that all persons are interested in the environment, and upon the fact that the "obvious purpose" of the provision was to encourage enforcement by "private attorneys general."[345] Justice Scalia's reference to Congress' intent in passing the statute was noteworthy because the current Court has rarely relied upon legislative intent as an interpretive tool.[346]

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341. *Gwaltney*, 484 U.S. at 71 (Scalia, J., concurring).

342. *See* Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 887-88 (1983) (contending that a party cannot be "adversely affected or aggrieved . . . within the meaning of [a] statute" that does not use these or similar words); *see also Gwaltney*, 484 U.S. at 68 (Scalia, J., concurring) (arguing that the Court's conclusion that the plaintiff can never be called upon to prove the allegations that commenced the suit is unusual).

343. *Defenders*, 504 U.S. at 576-77.

344. *Bennett*, 117 S. Ct. at 1162.

345. *See id.*

346. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (stating that "[t]he greatest defect of legislative history is its illegitimacy"); Edwards v. Aguillard, 482 U.S. 578, 637-40 (1987) (Scalia, J., dissenting) (objecting to the use of tests that require judges to inquire into "subjective" legislative motives); *see also* RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 87-88 (1997) (discussing the reasons Justice Scalia believes it inappropriate to use legislative history as an interpretive tool); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1255 (1989) (observing that "Congress typically couples ambiguous statutory language with an unranked list of inconsistent purposes . . . [that] usually encompasses every constituency with an interest at stake in implementing the statute"). Judicial policy making sometimes results when courts are tempted to answer the question of how Congress *would* have resolved the issue with the question of how Congress *should* have resolved the issue. *See id.* The author cites numerous sources documenting Justices Kennedy's and Scalia's views that legislative history never should be considered in interpreting statutes. *See id.* at 1257 n.94 (criticizing the majority's reliance on legislative history to support a questionable decision)); Robert A. Katzman, *Summary of Proceedings* (discussing Justice Scalia's argument that using legisla-

Yet, the Court's relaxed tolerance in *Bennett* toward citizen suit provisions may be a result of the government's procedural violation that directly harmed the petitioners' common-law property interest.[347] In fact, for this reason, the citizen suit provision's broad grant of standing appeared to be unnecessary for this particular claim. The Court reiterated that, at the pleading stage, general allegations are presumed to be true,[348] therefore it dismissed the government's argument that the petitioners had not proven the Interior Department's actions would necessarily lead to a reduction in their personal water allocation. As a result, the Court easily found the requisite injury in fact in *Bennett*.[349]

3. Returning to the Private Law Model

The Court's analysis of the cause and redressability elements was also key to the standing decision in *Bennett*. The government argued that the petitioners did not have standing because the Biological Opinion issued by Fish and Wildlife Service was a recommendation only, and the Bureau of Reclamation had not yet made a "final agency decision."[350] Pointing out the risk of personal liability and possible criminal penalties that could be imposed on Reclamation officials who chose to disregard the Biological Opinion, the Court distinguished between proximate cause and "the

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tive history allows judges to manipulate it to any purpose), *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 162, 170-75 (R. Katzman ed. 1988).

347. *See Bennett*, 117 S. Ct. at 1160 (complaining that the use of water reservoirs for "recreational, aesthetic and commercial purposes, as well as for their primary sources of irrigation water" would be "irreparably damaged"); *cf. Defenders*, 504 U.S. at 572 (recognizing that the government's disregard of a procedural requirement, such as a hearing or an environmental impact statement, could result in a concrete injury sufficient to confer standing). The Court's elaboration on this concept using hypothetical examples in footnote seven of the *Defenders* opinion prompted a number of commentators to refer to the Court's relaxed standards for showing cause and redressability in such circumstances as "footnote seven standing." *See, e.g.*, Brian J. Gatchel, *Informational and Procedural Standing After* Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L. 75, 91 (1995) (entitling Part IV of his Comment "Footnote Seven Procedural Standing"); Lynnette McCloud, Comment, *A Hot Debate: Application of the Zone of Interest Test to the Endangered Species Act*, 4 MO. ENVTL. L & POL'Y REV. 38, 43 (1996) (reporting that the court recognized "footnote seven standing" in *Pacific Northwest Generating Co-op v. Brown*, 25 F.3d 1443 (9th Cir. 1994)); Robert W. Henry, Note, Bennett v. Plenert, *Or Who Loves the Suckers? A Question of Standing Under the Endangered Species Act*, 18 PUB. LAND & RESOURCES L. REV. 227, 235 (1997) (describing the type of plaintiff who would meet "footnote seven standing").

348. *See Bennett*, 117 S. Ct. at 1164 (distinguishing between a motion for summary judgment, requiring the plaintiff to set forth specific facts to survive the motion, and a motion to dismiss, requiring only general factual allegations).

349. *See id.* (finding that the complaint alleged the required injury in fact).

350. *See id.* (arguing that the Bureau of Reclamation retains ultimate authority regarding the disposition of the Biological Opinion).

very last step in the chain of causation."[351] According to the Court, if the Biological Opinion had a coercive effect, then the measures taken by Reclamation were nondiscretionary and the petitioners' injury was "fairly traceable" to the Opinion.[352] Furthermore, a withdrawal of the Opinion would not only release Reclamation's restriction on water levels, but it would also redress the petitioners' injury.[353]

Turning finally to the terms of the Endangered Species Act, the Court painstakingly analyzed the language of various sections of the Act; the Court then concluded that although a party who has been personally harmed may file a suit to compel the Secretary to perform an act mandated by the statute, the citizen suit provision cannot be interpreted to allow lawsuits for errors in administering the statute.[354] As such, the *Bennett* decision establishes that judicial review of an agency's activities under a citizen suit provision will be limited to (1) whether some other specific statutory provision entitles a plaintiff to compel an agency to perform a nondiscretionary duty, and (2) whether the plaintiff can demonstrate he was personally harmed by the non-performance of that duty. The Court's holding is likely to severely curtail claims brought against the government under citizen suit provisions, because the ruling establishes that the citizen suit provision is not an avenue for a private party to secure judicial review of an agency's implementation of the statute. As a result, coupled with the highly specific showings required by the Court's Article III requirements, only claims alleging common-law causes of action are likely to be sufficiently specific enough to win access to judicial review.

4. Final Agency Actions Under the APA

After determining that several of the claims were without remedy under the Endangered Species Act, the Court considered whether the remaining claims were reviewable under the APA.[355] As the Court had previously indicated, claims are reviewable under the APA if they fall within the zone of interests the statute in question was designed to protect. The Court, however, explained that the appropriate basis for determining whether a claim fell within the zone of interests was the

351. *Id.*

352. *See id.* at 1164-65.

353. *See id.* at 1165 (concluding that the Bureau would not impose the water level restrictions if the Biological Opinion were lifted).

354. *See id.* at 1166-67 (explaining that an interpretation of the statute that defined a "violation" to include any errors made by the Secretary would abrogate provisions of the APA).

355. *See id.* at 1167 (citing the APA's allowance for the review of claims, for which no other remedy is available in a court).

Endangered Species Act's specific provisions in question—not the citizen suit clause or the overall purpose of the statute.[356] The Court concluded that the section of the Act requiring the Fish and Wildlife Service to use the "best scientific and commercial data available" was intended to prevent economic injury and dislocation caused by "agency officials zealously but unintelligently pursuing their environmental objectives."[357] Therefore, the petitioners' economic injury was within the "zone of interests" the statute was designed to protect. Yet, the government argued that petitioners should not be granted standing because they were not challenging a "final agency action" as defined by the APA.[358] The Biological Opinion, the government argued, was a recommendation only, and Reclamation had not yet rendered an official decision whether to adopt it.[359] Ultimately, the Court concluded that the Biological Opinion was binding on Reclamation and caused the agency's raising of water levels, regardless of whether an official decision occurred.[360] As a result, the petitioners were granted standing, and the *Bennett* case was remanded for further action.[361]

V. Precluding a Constitutional Challenge to Citizen Suit Statutes

Given the Supreme Court's Article III requirements firmly established as a result of *Bennett*, *Defenders*, and *National Wildlife Federation*, future litigants must demonstrate that an agency's failure to perform a non-discretionary duty caused them harm, and resulted in specific injury to their personal interests.[362] If litigants fail to make this showing, the Court will

356. *See id.* at 1168 (stating that the "best scientific and commercial data" provision of the Endangered Species Act is intended "to prevent uneconomic (because erroneous) jeopardy determinations").

357. *Id.*

358. *See id.* (evaluating the government's argument that the Biological Opinion is not a final agency action within 5 U.S.C. § 704).

359. *See id.* (claiming the Biological Opinion does not conclusively determine the operation of the water project).

360. *See id.* at 1169 (explaining that the Secretary's action had direct legal consequences and, therefore, was final).

361. *See id.*

362. *See* Katherine B. Steuer & Robin L. Juni, *Court Access for Environmental Plaintiffs: Standing Doctrine in* Lujan v. National Wildlife Federation, 15 Harv. Envtl. L. Rev. 187, 200 (1991) (remarking upon the "great specificity" required in *National Wildlife Federation* to survive a summary judgment motion); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 226-27 (1992) (observing that the Court's renewed emphasis on the idea that harm must be imminent and not speculative likely will carry more weight in the future). Professor Sunstein remarks that "[b]efore [*Defenders*], requiring people to obtain a plane ticket or to make firm plans to visit the habitat of endangered species might well have been unnecessarily formalistic.

refuse to grant standing based solely on the citizen suit provision. Congress must now recognize the Court's declaration that citizen suit provisions fail to create Article III cases or controversies. If Congress fails to do so and continues to disagree with the Court's interpretation of the Article III requirements, then it will be left with the herculean task of amending the Constitution.[363] Because the representative process has enacted citizen suit statutes, which the Court has held cannot trump the Article III requirements, a constitutional amendment expanding the Court's jurisdiction and requiring the federal courts to entertain citizen suit claims is the only mechanism permitting Congress to overrule the Court.[364] Absent public pressure to initiate such an extreme measure, Congress is exceptionally unlikely, on this issue alone, to amend the Constitution to allow broadened citizen standing.

Accordingly, Congress should first amend citizen suit provisions in each of the established statutes to identify: (1) the class of individuals authorized to bring suit, and (2) the specific types of injuries to be protected.[365] For example, if Congress took action to remedy the citizen suit provisions with respect to environmental regulations, Congress might consider whom the legislation protects. If professionals who study or work with endangered animals are deemed to be in the class of plaintiffs

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Now such actions are apparently required." *Id.* Remarking on the *Defenders* decision, one panel member, discussing the Court's decisions during the 1991-92 term, argued that the decision indicated:

> [E]ven if you win on the first prong, you are going to lose on the second; and if you get by the second prong, you are going to lose on the third. There seem to be fifteen arrows in the quiver. Justice Scalia was saying, "even if you have the people who have been there, and they say 'I am going to make another trip,' you have to tie them down to precisely when they are going back. Even if there is a war, as one of the plaintiffs said, and 'it would be dangerous if I went to look at the African elephants right now,' that is no excuse."

Colloquia, *Group Discussion on the Supreme Court's Recent Administrative Jurisprudence*, 7 ADMIN. L.J. AM. U. 287, 291 (1993).

363. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 731 (Kermit L. Hall et al. eds., 1992) (explaining that the Court's interpretation of the Constitution can only be overcome by a constitutional amendment).

364. *See id.* (stating that "[w]hen the Supreme Court interprets the meaning of a provision in the Constitution, its decision can be overturned directly only by a constitutional amendment"); *cf.* THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating that the Constitution does not "authori[ze] the revisal of a judicial sentence, by legislative act").

365. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (advising that Congress must stipulate the class of individuals and the types of injuries it intends the statute to protect); Jonathan Poisner, Comment, *Environmental Values and Judicial Review After* Lujan*: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335, 402 (1991) (observing that "Congress could declare that certain activities constitute prima facie 'injury'").

with the types of interests Congress intends to protect under the Endangered Species Act, specifying such coverage in the statute would enable courts and citizens to determine more easily whether standing exists.[366] Although plaintiffs will continue to be required to pass through the Article III gauntlet, identifying and defining in the statute what actually constitutes a legal injury may lower the hurdle plaintiffs must surpass to establish their claims.[367]

In some environmental statutes, such as the Clean Water Act, private enforcement is made easier by access to regularly maintained records,[368] but the statute still does not provide the plaintiff the requisite "personal stake" in the controversy.[369] Therefore, Congress should consider creating statutory financial incentives similar to bounties or informer rewards to create the requisite "personal stake" in the outcome of government

366. *See* Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 794 (1994) (arguing that Congress' clarification of the scope of standing conferred by citizen suit statutes would simplify threshold standing determinations); *cf.* Harold J. Krent & Ethan G. Shenkman, *Of Citizens Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1808 (1993) (opining that "creating an injury in all those who have visited habitats to observe such species should pass constitutional muster"). *But see Defenders*, 504 U.S. at 564 (reiterating its specific rejection of the notion that past exposure to a harmful circumstance constitutes a present "case or controversy").

367. *Cf.* Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 799 (1994) (suggesting that a clarification of the grants of standing would allow courts to focus on the merits of the claim); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*:* *Standing As a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1183 (1993) (calling it "unlikely" that the Court would determine that a legislative finding of harm is "irrational"). Professor Pierce argues that it is a "commonsense notion that a biologist who has devoted a lifetime to study of the Asian leopard is injured when the last leopard meets its demise." *Id.*

368. *See* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 354 (1990) (explaining the regulatory framework of the Clean Water Act). Companies requiring permits to discharge polluted water must file a report with regional EPA offices. *See id.*

369. *See* 33 U.S.C. § 1365(a) (1994) (authorizing "any citizen" to bring a civil action against anyone "who is alleged to be in violation of . . . an effluent standard or limitation"). Unlike most other environmental laws, the Clean Water Act allows private citizens to sue to enforce the civil fines provision of the statute, as well as to seek injunctive relief against a violator. Michael S. Greve, *The Private Enforcement of Environmental Laws*, 65 TUL. L. REV. 339, 356 (1990). All fines are payable to the Treasury as a matter of law. *See id.* at 356-57. Although this rule is designed to encourage an altruistic citizen-enforcer to take action, violators usually settle with the enforcer who then converts Treasury fines into attorneys fees. *See id.* at 357-58. Unlike victims who have suffered a personal injury, private attorneys general typically have no basis on which to assess damages resulting from any given violation. *See id.* at 364.

enforcement efforts.[370] This idea, however, is not without controversy; several commentators have questioned the feasibility and appropriateness of this approach and argue that such incentives promote "enforcement cartels" by private organizations whose activities are not properly supervised by the government.[371] Others contend that cash incentives would easily cure the perceived standing defect, and that at a minimum, the bounty hunter model provides the private enforcer with a legal basis on which to prompt enforcement action.[372]

If enforcement of environmental statutes is inadequate, some evidence suggests that the executive branch and Congress, not the Court, carry the blame.[373] Since the early 1980s, Congress has inadequately funded the

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370. *See Defenders*, 504 U.S. at 573 (identifying Congress' creation of a cash bounty for victorious plaintiffs as "a concrete private interest in the outcome of a suit").

371. *Compare* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 385 (1990) (distinguishing between bounty hunter laws and citizen suit provisions, the latter of which, the author argues, have resulted in an environmental "enforcement cartel"), *with* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 173-77 (1992) (analogizing bounty hunter laws with citizen suit statutes). Greve argues that unlike bounty hunter laws that authorize citizen action but allow the government to retain control of those actions, citizen suit actions are harder to direct, and result in private citizens, rather than the government, selecting enforcement priorities. *See* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 342-51 (1990); *cf.* Charles S. Abell, Note, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 VA. L. REV. 1957, 1961 (1995) (claiming that unlike qui tam statutes that give plaintiffs a personal stake in the suit, citizen-suit plaintiffs can vindicate only the public interest).

372. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 232 (1992) (explaining how cash bounty provisions would provide citizens a personal stake in the outcome of litigation); *see also Defenders*, 504 U.S. at 572-73 (describing cash bounties for successful litigants as a "concrete private interest"). *But see* Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1821-22 (1993) (arguing that neither qui-tam mechanisms nor a system of bounties create an individual injury). The authors point out that under the False Claims Act and the bounty system, the injury is suffered by the government. *See id.* at 1821. According to Kent and Shenkman:

> Just as Congress cannot create an individuated injury merely by differentiating the class of those who can redress injuries suffered by the public as a whole, so it cannot create individuated injury by assigning the right to sue on behalf of the public to the highest bidder or to the first bounty hunter on the scene.

Id. at 1821-22 (citation omitted).

373. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 113 (2d ed. 1996) (stating that Congress is pursuing an agenda that includes "sweeping cutbacks" in environmental laws); Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. Rev. 339, 341-42 (1990) (arguing that Congressional support for private enforcement statutes reflects a failure to devise more efficient mechanisms and amounts to "an off-budget entitlement program for the environmental movement").

EPA's enforcement activities,[374] which has resulted in an increase in citizen suit litigation.[375] Justice Scalia has stated that the environment is an issue "in which it is common to think that all persons have an interest."[376] Yet, if Congress is unwilling to devote resources to environmental enforcement on behalf of the public,[377] and the public has raised no objection, then arguably neither Congress nor citizens should expect the Court to do for them what Congress and the representative process allows citizens to do for themselves.[378]

Although the impact of the Court's citizen suit jurisprudence is visible in the area of environmental law, other areas have not yet manifested signs of the Court's holdings. One question for the future is to what extreme the Court will be willing to insist on the Article III limits for statutes such as the Freedom of Information Act (FOIA), which grants citizens a legal right to non-exempt government information without having to show a need for the information.[379] For instance, if Congress can-

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374. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 112-13 (2d ed. 1996) (cataloging the repeated failures of Congress to reauthorize environmental laws and fund enforcement efforts); Michael S. Greve, *The Private Enforcement of Environmental Law,* 65 TUL. L. REV. 339, 382 (1990) (declaring that "Congress could remedy underenforcement by raising the fines available under environmental statutes, by increasing the EPA's enforcement budget, or by doing both").

375. *See* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?,* 54 MD. L. REV. 1552, 1609 (1995) (stating that citizen suit activity has been on the rise since the early 1980s and now accounts annually for almost five times the number of judicial actions brought by the federal government).

376. Bennett v. Spear, 117 S. Ct. 1154, 1162 (1997).

377. *See* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1661 (1995) (noting that the "EPA has limited civil enforcement resources, which are likely to decrease in the foreseeable future").

378. *See* Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 115 (1996) (observing that courts have probably gone as far as they are willing to go in curtailing statutory standing). As one commentator has stated:

> Every time the courts do so, they are telling Congress, "We will not go out and (pardon the expression) pimp for you and lean on the executive branch to do the things Congress itself is unwilling to do directly." Confronting Congress in this manner is a very hard thing to do, and courts don't really like to do it.

Id. Accordingly, relief from judicial mandates must come from Congress, requiring a change to the "entire system of environmental regulation." *Id.* at 116. *But see* Colloquia, *Group Discussion on the Supreme Court's Recent Administrative Jurisprudence*, 7 ADMIN. L.J. AM. U. 287, 294 (1993) (arguing the fallacy of lobbying Congress "when in fact, Congress already has passed the statute it wants").

379. *See* Colloquia, *Group Discussion on the Supreme Court's Recent Administrative Jurisprudence*, 7 ADMIN. L.J. AM. U. 287, 287-88 (1993) (quoting Peter Strauss, head of the

not create the requisite injury through statutory provisions, and the applicant cannot demonstrate a personal injury as a result of failing to receive the information, will the plaintiff still be denied standing under the FOIA?

Unless the Court reverses the order of analyzing the Article III elements before focusing on the statutory provision in question, the standing doctrine will remain a highly controversial constitutional issue. Congress, too, must act to ensure that the purpose and scope of its legislation is clearly defined in order to increase the future survivability of citizen suit litigation in the future. Congress should reevaluate whether citizen suit provisions are viable enforcement mechanisms[380] and use one or more of the above approaches to cure the perceived constitutional deficiencies identified by the Court.

VI. CONCLUSION

The idea that standing is a preliminary jurisdictional issue is, perhaps, one of the "generalizations about standing to sue" about which Justice

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ABA's Administrative Law Section, as stating that "all you have there is a right the Congress gave you to get the information from the government"). Because it does not require a showing of concrete injury, the Freedom of Information Act of 1967 (FOIA), like citizen suit statutes, "cannot constitutionally confer any right to get it, no matter what it says." *See id.* at 288. The FOIA allows anyone to demand government documents without explaining the reason for the request and to sue if the documents are withheld. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 821 (Kermit L. Hall et al. eds., 1992). This circumstance is difficult to reconcile with the restrictive interpretation of the injury in fact requirement. *See id.* According to Richard A. Brisbin, Jr., Justice Scalia already "has narrowly construed provisions of the Freedom of Information Act and has made it more difficult for private parties to obtain the information necessary to litigate policy choices by agencies." RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 111 (1997) (referencing United States Dep't of State v. Ray, 502 U.S. 164, 180-81, 550-51 (1991) (Scalia, J., concurring)). Brisbin reports that Justice Scalia has attempted to have the FOIA interpreted to allow persons to only inspect, not copy, presentence reports the Department of Justice has compiled. *See id.* at 112. The majority of the Court, however, rejected his inspection standard. *See id.* (referencing United States Dep't of Justice v. Julian, 486 U.S. 1, 15-23 (1988) (Scalia, J., dissenting)). Justice Scalia believed the majority's assessment of the FOIA "facilitat[ed] interest group and individual challenges to public policies in the courts." *Id.* Broadening exceptions to the FOIA would be an unwise policy in Justice Scalia's view. *See id.* However, Brisbin notes that these policy concerns sometimes have been offset by Justice Scalia's desire to narrowly construe the FOIA language, even if it means releasing the information, thus signaling to Congress the need to change the Act. *See id.* (referencing John Doe Agency v. John Doe Corp., 493 U.S. 146, 160-64 (1989) (Scalia, J., dissenting)).

380. *See* Stanley E. Rice, Note, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in* Lujan v. Defenders of Wildlife, 38 ST. LOUIS U. L.J. 199, 226 (1993) (stating that "[t]here is no point in having citizen suit provisions if no one can enforce them").

Douglas warned.[381] Like the post-New Deal private law model, the modern doctrine today is claimed to serve the larger purpose of precluding judicial review of issues properly decided by the representatives branches, and ensuring that the Court stays within its constitutionally-assigned limits.[382] Yet, the standing doctrine allows the Court, and not Congress, to define what constitutes a legal injury.[383] By approaching the standing analysis backward and defining a legal injury as one that meets the injury in fact test, rather than as one that is defined by statute, claims that do not conform to the private law model are less likely to be recognized as "injuries," and therefore, more easily weeded from the process of judicial review.[384]

Despite its manipulability, the current standing doctrine has the potential to become an ingenious mechanism to avoid declaring statutes unconstitutional. By simply refusing to grant standing based on the Article III requirements, the Court avoids deciding whether the statute itself is unconstitutional. In this way, the Court follows Chief Justice Marshall's example in *Marbury v. Madison* of limiting Congress' power while claiming to avoid interference with the other branches.[385] Therefore, with respect

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381. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (proposing that the idea that standing is a "preliminary jurisdictional requirement" be abandoned).

382. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577-78 (1992) (asserting that courts adjudicate only individual rights, which "do not mean public rights that have been legislatively pronounced to belong to . . . the public"), *with* Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939) (denying standing to sue the government because the plaintiff's right was not founded on "one of property, one arising out of contract, one protected against tortuous invasion, or one founded on a statute which confers a privilege").

383. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 233 (1988) (explaining that the injury in fact test "is a way for the Court to enlarge its powers at the expense of Congress").

384. *See id.* (claiming that the Court's placement of Article III limits on statutory standing allows the Court to enhance its powers and refuse to protect against the types of injuries the Court believes improper); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 192 (1992) (arguing that the resistance to the idea that Congress can create property rights in a certain state of affairs is based on "the notion that the common law exhausts Congress' power, and that the Constitution forbids it from intruding on that catalog or creating new legal rights").

385. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 479 (1996) (acknowledging that the Court recognized that its decision in *Marbury v. Madison* exerted ramifications far in excess of redressing Marbury's injury); *see also* L.H. LARUE, CONSTITUTIONAL LAW AS FICTION 54 (1995) (observing that the brilliance of Chief Justice Marshall's strategy of "[w]inning by losing" was that "he declared a broad power in order to avoid exercising power, and got away with it").

to the constitutional paradox raised by citizen suit claims, the Court may have found its own solution.

Even if Congress takes remedial action to improve citizen suit statutes, the struggle over standing will not end or become easier.[386] As the opinions of Justice Scalia and Justice Stevens in *Lujan v. Defenders of Wildlife* illustrated, even the extremely narrow Article III standards cannot always guarantee a higher level of determinacy regarding what constitutes an injury in fact. Because of the finality of the judiciary's voice, and the unlikelihood of constitutional amendment, the most effective response to the Court's construction of Article III standards will be to revise citizen suit statutes. Such action will restructure the citizen suit provision and reaffirm its important role in giving the injured citizen a voice against the administrative state.

386. *Cf.* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 290 (1988) (stating that "[t]he law of standing cannot be made easy").