

Without a Leg to Stand On: The Merger of Article III Standing and Merits in Environmental Cases

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I. INTRODUCTION

In *Massachusetts v. EPA*,¹ the United States Court of Appeals for the D.C. Circuit wrestled with determining whether petitioners, who had brought suit against the Environmental Protection Agency (EPA or “the Agency”) in an attempt to force the Agency to regulate carbon dioxide under the Clean Air Act,² had standing to bring the case.³ Citing a factual overlap between the merits of the case and the standing issue, the court ultimately affirmed the EPA’s decision not

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1. 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (2006).

2. 42 U.S.C. §§ 7401–7671 (2000). Petitioners brought suit citing § 7521(a)(1) of the Act, which states:

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicle[s] . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

Id. § 7521(a)(1).

3. The petitioners in the case were a group of state and city governments, together with a number of environmental organizations. *Massachusetts*, 415 F.3d at 53. The group had petitioned the EPA, asking that carbon dioxide be regulated as a pollutant within the meaning of the Clean Air Act. *Id.* The EPA Administrator concluded that carbon dioxide was not a pollutant, and thus the Agency lacked the authority to regulate the gas. *Id.* Furthermore, the EPA stated that, even if the Agency could regulate carbon dioxide, it would decline to do so. *Id.*; *see also* 68 Fed. Reg. 52,922 (Sept. 8, 2003) (notice by EPA explaining reasons for denying petition).

Petitioners sought review of this decision in federal appellate court pursuant to 42 U.S.C. § 7607(b)(1), which states: “A petition for review of action of the Administrator in promulgating . . . any standard under . . . § 7521 . . . may be filed only in the United States Court of Appeals for the District of Columbia.” 42 U.S.C. § 7607(b)(1) (2000).

to regulate carbon dioxide,⁴ though the process by which the court reached this conclusion was anything but clear-cut.

Massachusetts v. EPA thus raises a number of questions concerning the standing doctrine under Article III of the United States Constitution. With the Supreme Court having recently granted certiorari in the *Massachusetts* case,⁵ the Court now has an opportunity to clarify many of these issues surrounding Article III standing. This Note shall analyze the difficulties associated with the approach to standing used by the D.C. Circuit in *Massachusetts*, and discuss a possible resolution to the standing problem in the context of global environmental harm litigation.

Suits that concern or are brought on behalf of the environment often involve a confusing interplay between the facts of the given case and the science that surrounds those facts.⁶ In *Massachusetts*, the D.C. Circuit was faced with a factual dispute over global warming and the effects of certain greenhouse gases.⁷ In order to establish standing, petitioners had to show that they had a particular injury that was caused by global warming, that global warming could be attributed to the EPA's decision not to regulate carbon dioxide, and that forcing the EPA to regulate the gas would provide redress and alleviate the global warming problem.⁸ However, the merits of

4. *Massachusetts*, 415 F.3d at 58.

5. 126 S. Ct. 2960 (2006) (order granting certiorari).

6. See, e.g., *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 512 (4th Cir. 2003) (“[A] failure to show environmental impact is not dispositive of the question whether there has been injury to the plaintiff sufficient to support standing.”); *Miss. River Revival, Inc. v. City of Minneapolis*, 319 F.3d 1013, 1016 (8th Cir. 2003) (discussing the law of environmental suit standing as it relates to mootness).

7. *Massachusetts*, 415 F.3d at 56–57. The petitioners asserted that a build-up of certain gases in the Earth's atmosphere—carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons (collectively referred to as greenhouse gases)—has led to a rise in global temperatures. Final Brief for the Petitioners in Consolidated Cases at 5–6, *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (No. 03-1361). Furthermore, the petitioners asserted that emissions from motor vehicles and power plants in the United States had contributed to global warming and the greenhouse effect, causing “a host of harmful effects to the public health and welfare of the United States.” Final Brief for the Petitioners in Consolidated Cases, *supra*, at 6.

The Agency responded by citing a report prepared by the National Research Council for the National Academy of Sciences, which concluded in part that “a causal linkage” between greenhouse gases and global warming could not be “unequivocally established.” *Massachusetts*, 415 F.3d at 57 (quoting COMM. ON THE SCI. OF CLIMATE CHANGE, NAT'L RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 17 (2001)).

8. See *Massachusetts*, 415 F.3d at 54. The EPA argued in its brief that the petitioners had

the case, which involved an inquiry into whether the EPA had the discretion to decide that carbon dioxide was not a pollutant (and consequently that it should not be regulated), required a factual determination of these very same issues. Thus, the D.C. Circuit court chose to assume *arguendo* that the petitioners had standing to bring their suit, and ultimately found in favor of the respondent EPA.⁹

On its face, this decision, though not favorable to the environmentalists in its outcome, may seem at least an attempt by the court to hear the petitioners on the merits rather than dismiss the case outright for lack of standing. However, as binding precedent in the D.C. Circuit, *Massachusetts* has the potential to vastly enhance the burden on environmental groups who seek to challenge EPA actions. As this Note shall demonstrate, even where the distinction between standing and merits may seem “exceedingly artificial,” a bright line division between the two is essential.¹⁰ However, the precise notion of what establishes a party’s standing in environmental suits is ambiguous. Where courts are faced with an overlap between standing and merits, alternative methods of assessing a petitioner’s standing can and should be used.

Part II of this Note provides historical background on the evolution of the standing doctrine—first discussing the notion of standing generally, then looking at environmental suit standing, and finally examining the issue of standing as it relates to global environmental issue litigation. Part III applies current thinking about

not “adequately demonstrated” two of these standing elements: that the alleged injuries were “caused by EPA’s decision not to regulate emissions of greenhouse gases from mobile sources”; and that the petitioners’ injuries could be “redressed by a decision in their favor.” *Id.* at 54 (citation omitted).

The appellate judges were in sharp disagreement as to whether the petitioners had met this burden. Judge Sentelle, in his concurring opinion, concluded that the petitioners had not demonstrated sufficient injury to satisfy standing. *Massachusetts*, 415 F.3d at 59 (Sentelle, J., concurring). Meanwhile, Judge Tatel, in his dissenting opinion, concluded that at least one petitioner had satisfied the standing requirement, namely, the state of Massachusetts. *Id.* at 64–65 (Tatel, J., dissenting) (concluding that rising sea levels “would lead to serious loss of and damage to Massachusetts’s coastal property”).

9. *Massachusetts*, 415 F.3d at 56 (majority opinion). This was the approach laid out in the plurality opinion, written by Judge Randolph, though there was no majority that signed on to this method. Each of the three judges on the panel wrote their own opinion and resolved the standing issue differently. *See supra* note 8.

10. *Massachusetts*, 415 F.3d at 56 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 97 n.2 (1998)).

the standing doctrine to the problem of overlap between standing and merits in suits that concern global environmental issues, and concludes that the current standing doctrine is ill-equipped to address such cases. Part IV then proposes a number of solutions to the problem of a standing and merits overlap, first looking at solutions which may be purely practical and non-judicial, and then looking to possible solutions from within the judiciary. Part V concludes with a summary of the emerging problem of the overlap between standing and merits, and discusses what this problem might mean for the future of global environmental cases.

II. HISTORY

A. Standing Doctrine Generally

Since the formation of the United States federal judiciary, courts' power to decide cases and controversies has been limited by Article III of the Constitution.¹¹ The factors which distinguish a case or controversy as appropriate for judicial review, however, have never been explicitly established.¹² At a minimum, federal courts are, by definition, limited by certain jurisdictional elements that must be set forth in each case.¹³ Among these jurisdictional elements is the idea of standing—the plaintiff's or petitioner's authority to bring the suit.¹⁴ Though this basic concept is easy to define, standing “has been

11. See U.S. CONST. art. III, § 2 (limiting federal courts' jurisdiction to specific classes of cases and controversies); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding that, under Article III, Section 2, the Supreme Court had no authority to issue a writ of mandamus to the Secretary of State because original jurisdiction in the case was not conferred by the Constitution).

12. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (noting that the requirement that a plaintiff have standing to sue in court is a function of the separation of powers, which “depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts”).

13. “The requirement that jurisdiction be established as a threshold matter ‘springs from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (quoting *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)) (alteration in original).

14. See *Lujan*, 504 U.S. at 560 (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

described as one of the more confusing areas of the law,”¹⁵ and the evolution of the standing doctrine demonstrates as much.

The early common law required that a litigant have a defined “legal interest” in order to show standing.¹⁶ This standard has been referred to as “restrictive and often circular.”¹⁷ Over time, the standing requirement evolved into a more workable “injury in fact” test.¹⁸ The Supreme Court later amended this standard, codifying the test into three distinct elements.¹⁹ The first element, the “injury in fact,” requires that the plaintiff demonstrate an injury which is (1) concrete and particularized,²⁰ affecting the plaintiff in a “personal and individual way,”²¹ and (2) actual or imminent, rather than conjectural

15. William Funk, *Standing in the Supreme Court and Circuits: October Term 1997*, 51 ADMIN. L. REV. 343, 352 (1999) (citing KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT 428-29 (3d ed. 1972)); *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982) (“We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency . . .”).

16. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150-52 (1951) (Frankfurter, J., concurring) (finding that the federal courts’ power to hear a case is limited to those controversies which are “justiciable,” and that the “controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests”); *see also* JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 20-33 (1978) (discussing the history of the legal interest theory of standing).

17. Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U.L. REV. 301, 306 (2002); *see also id.* at n.10 (“A litigant ordinarily has standing to challenge governmental action of the sort that, if taken by a private person, would create a right of action cognizable by the courts.” (quoting *McGrath*, 341 U.S. at 151-52 (Frankfurter, J., concurring))).

18. *See* Ass’n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152-53 (1970) (holding that the petitioners had established injury in fact and rejecting the lower court’s requirement that the petitioners demonstrate a legal interest).

19. *See, e.g.,* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (holding that the standing requirement of Article III mandates that, in addition to demonstrating injury, the plaintiff must show that the court has the power to provide redress); Warth v. Seldin, 422 U.S. 490, 498 (1975) (similarly holding); *see also* Nichol, *supra* note 17, at 307-08 for a discussion of the evolution of the injury in fact requirement for standing.

20. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Justice Scalia foreshadowed his requirement in *Lujan* for injury to be “particularized and concrete” while sitting as a circuit court judge in *Center for Auto Safety v. National Highway Traffic Safety Administration*, 793 F.2d 1322, 1342 (D.C. Cir. 1986).

At least one commentator has noted the paradox associated with requiring a plaintiff to show particularized, concrete injury in cases in which courts resort to abstract, formalist reasoning to decide issues while ignoring the concrete injury that plaintiffs were required to demonstrate. *See* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 811 (2004) (citing the decision in *Clinton v. City of New York*, 524 U.S. 417 (1998), as such an example).

21. *Lujan*, 504 U.S. at 560 n.1.

or hypothetical.²² Second, the plaintiff must establish a “causal connection between the injury and the conduct complained of.”²³ Finally, the injury must be one which is likely to be redressed by a favorable outcome.²⁴

Unfortunately for litigants, the application of this standing test has turned out to be “radically unsatisfying” in its consistency.²⁵ Some cases have used a very high standard to establish standing,²⁶ making for a “powerful barrier to federal court review.”²⁷ At the same time, others have had a much more relaxed threshold for standing,²⁸ likening the requirement to that of notice pleading, and requiring that standing merely “be something more than an ingenious academic exercise in the conceivable.”²⁹ Such contradictions have led some commentators to call for sweeping revisions to the standing doctrine.³⁰

22. *Id.* at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)); *see also Whitmore*, 495 U.S. at 155 (“[The] injury . . . must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is distinct and palpable.” (citations omitted)); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

23. *Lujan*, 504 U.S. at 560 (citing *Simon*, 426 U.S. at 41–42).

24. *Id.* at 561.

25. Nichol, *supra* note 17, at 304.

26. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (“[S]tanding cannot be ‘inferred argumentatively from averments in the pleadings,’ but rather ‘must affirmatively appear in the record.’” (citations omitted)); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544–49 (1986) (holding that a school board member who was sued in his official capacity had no standing to appeal as an individual parent when the board itself declined to appeal); *Warth v. Seldin*, 422 U.S. 490, 504 (1975) (“Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents’ [conduct], there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.”).

27. Nichol, *supra* note 17, at 309 (quoting ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 71 (1997)).

28. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 183–88 (2000) (holding that environmental groups had standing to seek an injunction against a polluter for violation of the Clean Water Act, even though penalties would be paid to the government and specific injury to the environment was questionable); *Holly Sugar Corp. v. Goshen County Coop. Beet Growers Ass'n*, 725 F.2d 564, 568 (10th Cir. 1984) (“When deciding the issue of standing, a court must accept as true all of the material allegations of the complaint and must view the complaint in the manner most favorable to the complaining party.”).

29. 13A CHARLES ALLEN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3531.15 (2d ed. 1984) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973)).

30. *See, e.g., Nichol, supra* note 17; David M. Roberts, *Fact Pleading, Notice Pleading*,

These three elements—*injury in fact*, *causation*, and *redressability*—are undeniably the plaintiff’s burden to establish,³¹ though it is often unclear how much a plaintiff must show to meet this burden. A lax standing requirement may lead to a rushed and ill-considered decision, while a heightened requirement can probe excessively into the merits of a case prior to trial.³² As an added confusion, the legal standard for a plaintiff’s standing may shift according to the posture of a particular case. At the pleading stage, courts have historically found broad, general allegations to be sufficient to establish standing.³³ However, under different circumstances, where an opposing party has filed a summary judgment motion based on the plaintiff’s lack of standing, “the plaintiff can no longer rest on ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts,’” consistent with the Federal Rules of Civil Procedure to prove standing.³⁴ Lastly, “at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.”³⁵ This confusing rule of law seems to indicate that a defendant can manipulate the plaintiff’s burden to show standing merely by choosing the best tactical stage at which to attack the opposing party’s standing.³⁶ Commentators have thus noted that the summary judgment procedure is generally

and Standing, 65 CORNELL L. REV. 390 (1980); Joshua Schwartz, Note, *Limiting Steel Co.: Recapturing a Broader “Arising Under” Jurisdictional Question*, 104 COLUM. L. REV. 2255 (2004).

31. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Warth*, 422 U.S. at 508.

32. WRIGHT ET AL., *supra* note 29, § 3531.15.

33. *Lujan*, 504 U.S. at 561 (“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889 (1990) (alteration in original))).

34. *Lujan*, 504 U.S. at 561 (quoting FED. R. CIV. P. 56(e)) (citations omitted). “When a motion for summary judgment is made . . . the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e); *see also* *Massachusetts v. EPA*, 415 F.3d 50, 55 (D.C. Cir. 2005) (“[A] petitioner challenging agency action has the same burden of production as a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing by affidavit or other evidence.” (citations omitted)).

35. *Lujan*, 504 U.S. at 561 (citations omitted).

36. WRIGHT ET AL., *supra* note 29, § 3531.15.

“inappropriate as a means for deciding jurisdictional issues,” and thus should not be used to address arguments concerning standing.³⁷

B. Standing in the Environmental Context

In the context of environmental suits (particularly those brought by private citizen groups) the issue of standing has proved especially contentious.³⁸ The nature of the harm involved and the type of redress often sought in environmental litigation has left some commentators concluding that it is “difficult and probably fruitless” to apply the strict rules of standing in environmental cases.³⁹ On the other hand, insofar as the standing doctrine implicates issues regarding federalism,⁴⁰ other commentators have expressed concern that the use of litigation to achieve environmental policy goals has produced “results that are mixed, or at least controversial.”⁴¹

Early environmental law decisions reflected a willingness on the part of courts to apply a loose interpretation of the standing doctrine.⁴² In decisions such as *Sierra Club v. Morton*⁴³ and

37. *Id.*

38. See Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENVTL. L. 359, 371-74 (2004). Congressional authorization of environmental citizen suits has met with mixed criticism. Proponents have argued that citizen suits hold government agencies accountable for performing their required duties. *Id.* at 372. Critics have countered by saying that citizen suits undermine government enforcement, and often end in settlements that benefit environmental interest groups at the public's expense. *Id.* at 373-74.

39. WRIGHT ET AL., *supra* note 29, § 3531.15.

40. See Michael S. Greve, *Friends of the Earth, Foes of Federalism*, 12 DUKE ENVTL. L. & POL'Y F. 167, 168 (2001) (“[S]tanding and federalism are in fact quite closely connected.”).

41. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 294 (2005). Even Justice Scalia has seemingly expressed contradictory views on the propriety of environmental suits, noting with disdain “the judiciary's long love affair with environmental litigation.” Steve France, “*What's It to You?*”: *Scalia's 'Rude Question' May Help to Clear the Air in His Campaign to Curb Citizen Environmental Suits*, 85 A.B.A. J., Oct. 1999, at 36, 36 (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 884 (1983)). He later commented that the environment is “a matter in which it is common to think all persons have an interest.” *Bennett v. Spear*, 520 U.S. 154, 165 (1997).

42. See *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971) (courts may require government agencies to comply with the National Environmental Protection Act); *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097 (D.C. Cir. 1970) (noting that a private citizens group with a “demonstrated interest in protecting

Association of Data Processing Service Organizations v. Camp,⁴⁴ the Court allowed plaintiffs to allege injury in broad, general terms, not specifically limited to economic injury. Plaintiffs claiming an infringement of natural, aesthetic interests were deemed by the Court to have met their burdens to show injury in fact.⁴⁵ This rule of law was subsequently adopted and applied by the lower courts.⁴⁶

The trend toward liberalization of the standing doctrine was reversed, however, beginning with the two *Lujan* decisions, *Lujan v. National Wildlife Federation*⁴⁷ (*Lujan I*) and *Lujan v. Defenders of Wildlife*⁴⁸ (*Lujan II*). In *Lujan I*, an environmental citizens' group challenged the Secretary of the Interior's reclassification of certain public lands, claiming that the reclassification was an ill-considered decision that would lead to mining, thereby harming the environment.⁴⁹ Though members of the citizen group had filed

the environment from pesticide pollution" had a "necessary stake" in the controversy to challenge the Secretary of Agriculture's failure to regulate use of one type of pesticide).

In an article he wrote while serving as a circuit court judge, Justice Scalia noted that the *Calvert Cliffs* decision "began the judiciary's long love affair with environmental litigation." Scalia, *supra* note 41, at 884.

43. 405 U.S. 727 (1972). A citizens group, challenging construction of a ski resort near Sequoia National Park, claimed the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." *Id.* at 734 (citation omitted). Though the Court found that such aesthetic concerns and harm to environmental well-being could support a claim for injury in fact, the Court ultimately dismissed the plaintiffs' claims because the plaintiffs themselves were not "among the injured." *Id.* at 735.

44. 397 U.S. 150 (1970). The Court noted that the injury in fact burden could be met through proof of non-economic injuries, and a plaintiff may sue under a statute if the case falls within the "zone of interests" of the statute. *Id.* at 153.

45. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). The Court affirmed the plaintiff's standing claim of "economic, recreational and aesthetic harm" as a result of the defendant's conduct. *Id.* at 678. The Court noted that SCRAP members filed affidavits saying they "use[d] the forests, rivers, streams, mountains, and other natural resources . . . for camping, hiking, fishing, sightseeing, and other recreational and aesthetic purposes." *Id.* at 678 (citation omitted).

46. See *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608 (2d Cir. 1965); *Crowther v. Seaborg*, 312 F. Supp. 1205 (D. Colo. 1970).

47. 497 U.S. 871 (1990).

48. 504 U.S. 555 (1992).

49. *Lujan I*, 497 U.S. at 879. The petitioners argued, among other things, that the Secretary of the Interior, in reclassifying the lands, had violated the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1785 (2000), by "failing to consider multiple uses for the disputed lands, focusing inordinately on such uses as mineral exploitation and development; and failing to provide public notice of decisions." *Lujan I*, 497 U.S. at 879 (citations omitted).

affidavits claiming personal injury due to the reclassification,⁵⁰ and those affidavits were held by the circuit court to be sufficient to survive a motion to dismiss,⁵¹ a majority of the Supreme Court ultimately found the affidavits insufficient to withstand the opposing party's summary judgment motion, as injury had not been adequately alleged.⁵² Justice Blackmun, in dissent, criticized the majority's holding, saying the question was "not whether [the plaintiff group] ha[d] *proved* that it ha[d] standing to bring this action, but simply whether the materials before the District Court established that there [was] a genuine issue for trial."⁵³

Two years later, a similar approach on the part of the Court resulted in a narrowing of environmental suit standing in *Lujan II*. Justice Scalia, writing for the majority, held that the petitioners, who were challenging the Secretary of the Interior's interpretation of a

50. *Lujan I*, 497 U.S. at 886. The Court reprinted one such affidavit, alleging purely aesthetic injury:

My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

Id.

51. *Id.* at 880.

52. *Id.* at 889. The Supreme Court, like the district court, noted that the affidavits contained "only a bare allegation of injury," and that statements showing a petitioner uses "unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur" were insufficient. *Id.* at 887, 889.

One commentator, analyzing the implications of the *Lujan I* decision, noted that the opinion signaled a growing hostility on the part of the Court toward environmental litigation: "Environmental groups now must show injury in fact with greater specificity than the federal courts previously required. Current judicial restraint has altered the focus of standing requirements, has led to uncertainty, and has posed new challenges for future environmental litigants." Sarah A. Robichaud, *Lujan v. National Wildlife Federation: The Supreme Court Tightens the Reins on Standing for Environmental Groups*, 40 CATH. U. L. REV. 443, 444 (1991) (citations omitted).

The narrow, focused approach to an individual group's standing used by the Court in *Lujan I* arguably has the effect of thwarting environmentalists' attempts to achieve "across-the-board protection of our Nation's wildlife." *Id.* at 471 (quoting *Lujan I*, 497 U.S. at 894).

53. *Lujan I*, 497 U.S. at 903 (Blackmun, J., dissenting) (citation omitted). Additionally, Blackmun noted that the majority "fail[ed] to recognize . . . the principle that procedural rules should be construed pragmatically, so as to ensure the just and efficient resolution of legal disputes." *Id.* at 912.

provision of the Endangered Species Act,⁵⁴ had not shown adequate injury.⁵⁵ The petitioners claimed injury in fact through an inability to observe, at some future point in time, certain species of endangered animals in their natural habitat.⁵⁶ The majority emphasized a stringent requirement for injury in order to establish standing, and noted that “[w]here there is no actual harm . . . its imminence (though not its precise extent) must be established.”⁵⁷

In an effort to side-step what was becoming an increasingly convoluted and confusing area of law, a number of circuit courts began to forgo standing analysis by using an approach known as “hypothetical jurisdiction.”⁵⁸ Under this approach, a court could

54. 16 U.S.C. §§ 1531–1544 (2000). Petitioners brought suit claiming that the Secretary of the Interior had failed to comply with § 1533 and § 1536 of the Endangered Species Act, by refusing to require other government agencies to confer with the Secretary to ensure that other agencies’ actions would not endanger threatened species in foreign territories. *Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555, 558 (1992).

55. *Lujan II*, 504 U.S. at 562. Quoting the petitioners’ complaint, Justice Scalia wrote that the “claim to injury is that the lack of consultation [with the respective agencies] increase[s] the rate of extinction of endangered and threatened species.” *Id.* (citations omitted).

56. *Id.* at 564. The majority found it significant that the petitioners claimed only to return to the affected area at some point in the future, and did not say specifically when they would be returning. *Id.*

57. *Id.* at 565 n.2. The majority paid special attention to the requirement that the alleged harm be *imminent*, and took issue with the dissent’s claim that “a reasonable finder of fact could conclude . . . that [the affiants] will soon return to the project sites.” *Id.* at 591 (Blackmun, J., dissenting). In particular, the majority criticized the dissent’s use of the word “soon” which “stretch[ed] beyond the breaking point” and was incompatible with standing doctrine which required that injury be “certainly impending.” *Lujan II*, 504 U.S. at 565 n.2 (majority opinion) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). In his dissent, Justice Blackmun concluded that the majority’s opinion represented a “slash-and-burn expedition through the law of environmental standing.” *Id.* at 606 (Blackmun, J., dissenting).

For discussions of the potential impact of the *Lujan II* decision, see Lisa M. Bromberg, *Lujan v. Defenders of Wildlife: Where Does the Standing Issue Stand in Environmental Litigation?*, 16 AM. J. TRIAL ADVOC. 761 (1993); Tony Ed Monzingo, *I Think That I Shall Never See, Standing for a Tree: Or Has the Lujan v. Defenders of Wildlife Decision Spelled Doom for Extraterritorial Environmental Standing?*, 10 ARIZ. J. INT’L & COMP. L. 431 (1993).

58. The hypothetical jurisdiction approach was labeled as such in *United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996). The Ninth Circuit noted that in that case “the complex problem of jurisdiction presents the sole substantial disagreement” between the parties, and thus the court chose to assume without deciding the existence of subject matter jurisdiction, where the “difficulty of resolving [the jurisdictional question] is far greater than the difficulty of resolving [the merits . . .].” *Id.* (alterations in original).

For similar instances where hypothetical jurisdiction was used by the circuit courts, see *Smith v. Avino*, 91 F.3d 105, 108 (11th Cir. 1996) (“[I]t is permissible for the Court to bypass jurisdictional questions and decide the case on the merits when the jurisdictional issue is difficult [and] the law is not well-established . . .”). See also *Clow v. U.S. Dept. of Housing &*

hypothetically assume for the purposes of argument that a plaintiff had standing to bring suit. As long as the court ultimately ruled against the plaintiff on the merits, the standing issue could be held irrelevant and not worth considering.⁵⁹ While this practice may have drastically eased the burden on courts to wade through difficult issues of injury in fact, causation, and redressability, it was a practice that was abruptly put to an end with the Supreme Court's decision in *Steel Co. v. Citizens for a Better Environment*.⁶⁰

In *Steel Co.*, a citizen group brought suit against a manufacturing company for failing to file toxic and hazardous storage reports within a required time period, in violation of the Emergency Planning and Community Right to Know Act.⁶¹ Because the defendant company had filed the necessary reports by the time the suit was filed, the district court held that the citizen group lacked standing to maintain the suit.⁶² When the Seventh Circuit reversed this holding,⁶³ the defendants appealed. In reversing the circuit court decision, the

Urban Dev., 948 F.2d 614, 616 & 616 n.2 (9th Cir. 1991) (invoking the hypothetical jurisdiction approach, and criticizing the dissenting opinion for objecting to its use); *Cross-Sound Ferry Servs., Inc. v. Interstate Commerce Comm'n*, 934 F.2d 327, 333 (D.C. Cir. 1991) (use of hypothetical jurisdiction in the environmental context); *United States v. Parcel of Land*, 928 F.2d 1, 4 (1st Cir. 1991) (noting that hypothetical jurisdiction allowed the appellate court to avoid "hack[ing] [its] way through [a] jurisdictional bramble bush"); *Browning-Ferris Indus. v. Muszynski*, 889 F.2d 151, 154–55 (2d Cir. 1990) (again using hypothetical jurisdiction in the environmental context).

59. According to the Ninth Circuit in *SEC v. American Capital Investments, Inc.*, 98 F.3d 1133, 1139 (9th Cir. 1996), use of hypothetical jurisdiction requires four elements: "(1) the jurisdictional question must be difficult; (2) the decision on the merits must be clear; (3) the appeal must be resolved against the party asserting jurisdiction; and (4) undertaking a resolution on the merits . . . must not affect the outcome." *Id.* (citation omitted).

60. 523 U.S. 83 (1998). The Court declined to endorse the hypothetical jurisdiction approach and commented, "This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases." *Id.* at 94. This statement itself might have come as somewhat of a surprise, considering a number of the cases employing hypothetical jurisdiction cited Supreme Court authority endorsing its use.

61. *Id.* at 83. The Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001–11050 (2000), provides, in relevant part, "[A]ny person may commence a civil action on his own behalf against . . . [a]n owner or operator of a facility for failure . . . to [c]omplete and submit an inventory form under section 11022(a) of this title." *Id.* § 11046(a)(1)(A)(iii).

62. *Steel Co.*, 523 U.S. at 88.

63. *Id.*; see also *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1242 (7th Cir. 1996) (holding that the plaintiffs had standing to maintain their suit, and relying on Supreme Court precedent set in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987)).

Supreme Court saw an opportunity to reaffirm and strengthen the standing doctrine.⁶⁴ The majority insisted on a bright line rule that issues regarding standing be reviewed prior to any discussion of the merits.⁶⁵ As a jurisdictional issue, constitutional standing was held by the Court to be an essential element that must be resolved at the outset of a case. The hypothetical jurisdiction approach “carrie[d] the courts beyond the bounds of authorized judicial action and thus offend[ed] fundamental principles of separation of powers.”⁶⁶ Moreover, hypothetical jurisdiction, the Court noted, “produces nothing more than a hypothetical judgment.”⁶⁷

Writing the majority opinion in *Steel Co.*, Justice Scalia acknowledged in a footnote the potential problem of a standing and merits overlap that might blur the bright line mandate to resolve standing first.⁶⁸ However, Scalia insisted that this potential problem would only arise in the context of determining statutory, as opposed to constitutional, standing.⁶⁹ While Scalia noted that it might be “exceedingly artificial to draw a distinction” between statutory standing and a merits inquiry, he went on to say that “[t]he same cannot be said of the Article III requirement of remediable injury in fact, which (except with regard to entirely frivolous claims) has nothing to do with the text of the statute relied upon.”⁷⁰

64. The Court noted that its “insistence that proper jurisdiction appear begins at least as early as 1804,” and has been restated consistently “in the clearest fashion.” *Steel Co.*, 523 U.S. at 95. The Court added, “[T]wo centuries of jurisprudence affirm[] the necessity of determining jurisdiction before proceeding to the merits.” *Id.* at 98.

In reaffirming this characterization of the standing doctrine, the majority also took issue with Justice Stevens’s concurring opinion, which pointed out (as have a number of scholars), that the redressability prong of standing “is a judicial creation of the past 25 years.” *Id.* at 103 n.5 (quoting *id.* at 124 (Stevens, J., concurring)).

65. *Steel Co.*, 523 U.S. at 101–02 (majority opinion) (“For a court to pronounce upon the meaning or the constitutionality of a . . . law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.”).

66. *Id.* at 94.

67. *Id.* at 101.

68. *Id.* at 97 n.2.

69. *Id.*

70. *Id.* It was this footnote in particular that the D.C. Circuit relied upon in *Massachusetts v. EPA*, 415 F.3d 50, 56 (D.C. Cir. 2005). The D.C. court noted the “highly unusual circumstance,” in which the Article III standing issue was, contrary to the language in *Steel Co.*, no longer distinct from the merits of the case. *Id.*

Commentators were quick to weigh in on the implications and the prudence of the *Steel Co.* decision. While some heralded the decision as a strict enforcement of a rule mandated by federalism and the text of the Constitution,⁷¹ others were less enthusiastic, noting that the rule in *Steel Co.* led to confusing and inconsistent approaches to standing among the lower courts.⁷² Some standing issues previously left open were suddenly resolved to the detriment of citizen plaintiffs,⁷³ while the narrow exceptions carved out in *Steel Co.* were tortuously manipulated to achieve specific results in other cases.⁷⁴ Some commentators concluded that the jurisdictional rule in *Steel Co.* was largely motivated by political concerns, and ultimately wholly unnecessary.⁷⁵ The strict requirements set out for standing are,

71. See, e.g., Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 6 (2001) (“The Court’s repudiation of the practice was correct for several reasons . . .”); Joan Steinman, *After Steel Co.: “Hypothetical Jurisdiction” in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855, 939 (2001) (“The conclusion that *Steel Co.* should be read to preclude exercises of hypothetical jurisdiction in which a court of appeals assumes *arguendo* that the case before it satisfies Article III requirements is inescapable.”).

72. “Courts and parties would also save substantial time disposing of easy cases early, rather than bouncing them through the jurisdictional system developing standing doctrine. If . . . courts lack the power to decide any other issues when standing is in doubt, then policy reasons for reaching the merits are irrelevant.” Schwartz, *supra* note 30, at 2259; see also Funk, *supra* note 15, at 347 (“*Steel Co.* . . . reflect[s] the Court’s seemingly unrelenting hostility to citizen suits as an adjunct or supplement to government environmental enforcement . . .”).

73. See Comment, *Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. PA. L. REV. 712, 746 (1979) (arguing against hypothetical jurisdiction, and noting that, where the standing issue is purportedly reserved, it has in fact been decided in the affirmative, since “deciding the issue on the merits necessarily implies a decision that no [standing problem] exists”).

74. See, e.g., *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 203 (D.C. Cir. 2003) (Williams, J., dissenting) (making use of an exception to *Steel Co.* and noting that, where the merits issue has been previously resolved “in a companion case,” the standing issue need not be addressed); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (concluding that the statutory standing and merits issues had merged, and the constitutional standing issue could be resolved through factual inquiry); *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63–66 (D.C. Cir. 2000) (making a heavy factual inquiry into the standing issue to resolve standing prior to reviewing the facts to determine the merits); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 115–16 (4th Cir. 1999) (involving a lengthy analysis of the three standing requirements and ultimately concluding that the plaintiffs lacked standing).

75. See Maxwell L. Stearns, *From Lujan to Laidlaw: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL’Y F. 321, 322–23 (2001).

according to some, not mandated by the framers, and a quasi-jurisdictional approach to standing issues may in fact be preferable.⁷⁶

Given the almost decade-long trend of narrowing the environmental standing doctrine from *Lujan I* to *Steel Co.*, the Court's 2000 decision in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*⁷⁷ was, to say the least, unexpected. The decision in *Laidlaw* broke with a line of more restrictive environmental standing decisions⁷⁸ by holding that a citizen group had standing to bring a suit seeking civil penalties against a corporation discharging pollutants in violation of EPA regulations under the Clean Water Act,⁷⁹ even though the monetary penalties sought would be paid to the United States Treasury and not to the petitioners themselves,⁸⁰ and the district court found that the petitioners had failed to show any actual harm to the environment.⁸¹

Justice Ginsberg, writing for the majority in *Laidlaw*, found that the petitioners had adequately demonstrated injury in fact through their affidavits, which showed that Laidlaw's toxic waste discharges, together with the affiants' concerns about those discharges, directly affected those affiants' recreational, aesthetic, and economic interests.⁸² That the lower court ultimately found no actual harm to the environment was irrelevant, according to the majority, because "the relevant showing for purposes of Article III standing . . . is not

76. See generally Schwartz, *supra* note 30, at 2255–60.

77. 528 U.S. 167 (2000).

78. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (discussed *supra* notes 14–16 and accompanying text); *Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555 (1992) (discussed *supra* notes 54–60 and accompanying text).

79. 33 U.S.C. §§ 1251–1387 (2000). Laidlaw had been issued a National Pollutant Discharge Elimination System permit under § 1342 of the Act. *Laidlaw*, 528 U.S. at 174–76. Friends of the Earth brought suit against Laidlaw in an effort to force the company to comply with its permit, under § 1365(a), which provides for private citizen suits brought by "a person or persons having an interest which is or may be adversely affected." *Id.* at 173 (citing 33 U.S.C. § 1365(a) (2000); quoting 33 U.S.C. § 1365(g) (2000)).

80. See *Laidlaw*, 528 U.S. at 175 (citing 33 U.S.C. § 1365(a)).

81. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 956 F. Supp. 588, 600 (D.S.C. 1997) (finding "no adverse effect on the indigenous biological community in the North Tyger River downstream from Laidlaw's facility. . . . [And thus] no showing of any significant harm to the environment . . ."), *vacated and remanded* by 149 F.3d 303 (4th Cir. 1998), *rev'd and remanded*, 528 U.S. 167 (2000).

82. *Id.* at 183–84.

injury to the environment but injury to the plaintiff.”⁸³ Likewise, the Court found the civil penalties at issue in the case to be an adequate form of redress, because the penalties acted as a sufficient deterrent to keep *Laidlaw* from making unlawful discharges in the future.⁸⁴

Justice Scalia dissented “from all of this,”⁸⁵ and criticized the majority in *Laidlaw* for allowing mere “concerns” about the environment to fulfill the injury requirement for standing.⁸⁶ Absent any actual environmental harm, Scalia noted that the “vague, contradictory, and unsubstantiated allegations of ‘concern’” accepted by the majority as proof of standing turned the injury in fact requirement into a “sham.”⁸⁷

Not surprisingly, scholars have had much to say about the majority opinion in *Laidlaw*.⁸⁸ Some have considered the decision a

83. *Id.* at 181.

84. *Id.* at 187. The Court noted that “all civil penalties have some deterrent effect.” *Id.* at 185 (quoting *Hudson v. United States*, 522 U.S. 93, 102 (1997)). Additionally, the Court recognized:

[T]here may be a point at which the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing. The fact that this vanishing point is not easy to ascertain does not detract from the deterrent power of such penalties in the ordinary case.

Id. at 186.

85. *Id.* at 198 (Scalia, J., dissenting).

86. *Id.* at 199. To the majority’s claim that the “relevant showing . . . is not injury to the environment but injury to the plaintiff,” *id.* at 181 (majority opinion), Scalia responded:

This statement is correct, as far as it goes. We have certainly held that a demonstration of harm to the environment is not *enough* to satisfy the injury-in-fact requirement [H]owever, a lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs.

Id. at 199 (Scalia, J., dissenting).

87. *Id.* at 201.

88. See Stephen Lanza, Note, *The Liberalization of Article III Standing: The Supreme Court’s Ill-Considered Endorsement of Citizen Suits in Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 52 ADMIN. L. REV. 1447, 1450 (2000) (arguing that the *Laidlaw* decision, by granting private plaintiffs the right to sue in the absence of actual harm to the environment, “will foster increased citizen interference with government enforcement, thereby placing public policy in the hands of private citizens instead of in the hands of responsible public officials.”); see also Greve, *supra* note 40, at 169 (criticizing the Court’s “liberal wing” majority opinion, and noting “in contrast to the lofty pronouncements on ‘civic participation’ and ‘environmental values’ that characterized the standing decisions of the environmental era some three decades ago, Justice Ginsburg’s opinion is laconic, even pedantic, and makes no mention of principles or public purposes.” (citations omitted)). *But see* France, *supra* note 41, at 36. Writing prior to the decision in *Laidlaw*, France speaks of the importance of the decision,

blow to federalism: “In permitting Congress to define the boundaries of Article III standing, the *Laidlaw* Court sanctions an interest group bargain, rather than a public purpose.”⁸⁹

C. Standing in Litigation of Global Environmental Issues

The feud over environmental suit standing becomes that much more contentious when plaintiffs seek to litigate a global wrong, as opposed to one which is localized. Though the Supreme Court has yet to weigh in on the debate, various courts have offered interesting insight into how such problems might be resolved.

One early case dealing with litigation of global environmental harm was *City of Los Angeles v. National Highway Traffic Safety Administration* (NHTSA).⁹⁰ In this case, petitioners sued to compel the NHTSA to prepare an Environmental Impact Statement (EIS) in conjunction with its Corporate Average Fuel Economy (CAFE) standards.⁹¹ The D.C. Circuit found that the petitioners had standing,

and notes “[a] High Court loss would decimate citizen enforcement of environmental statutes. . . . Defendants could drag out litigation, confident that last-minute compliance would spare them any risk of penalties and attorney fees.” *Id.* (quotation omitted); *see also* Stearns, *supra* note 75, at 327 (“As much as *Lujan* has been vilified, *Laidlaw* appears poised to be commended as a restoration of sound principles of standing.”).

89. Greve, *supra* note 40, at 172; *see also* Edgar B. Washburn & Christopher J. Carr, *Courts Go Too Far in Allowing Environmental Citizen Suits*, ANDREWS HAZARDOUS WASTE LITIG. REP., Aug. 31, 2001, at 16. In criticizing the Ninth Circuit’s decision in *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000), the authors noted: “[by] reject[ing] any requirement that a plaintiff have regular or continuous contact with the area or resource allegedly impacted by the defendant’s conduct[,] . . . the court extended *Laidlaw* so far that standing will almost never be an impediment to environmental citizen suits in the Ninth Circuit.” Washburn & Carr, *supra*, at 16.

90. 912 F.2d 478 (D.C. Cir. 1990) (per curiam), *overruled in part by* Fla. Audubon Soc’y v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996).

91. The petitioners challenged the NHTSA’s standards for fuel economy in cars for model years 1987, 1988, and 1989. *City of Los Angeles*, 912 F.2d at 482. They argued that the setting of the standards was, itself, the “federal action” which triggered the need for an EIS. *Id.* at 482–83. The petitioners sought to enforce section 102(2)(C) of the National Environmental Policy Act (NEPA), which requires that environmental impact be taken into consideration as part of any “major Federal action[] significantly affecting the quality of the human environment” National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (2000). The petitioners claimed that this language required that the NHTSA include global warming when considering environmental impact. *City of Los Angeles*, 912 F.2d at 482. The remedy sought by the petitioners was thus a procedural one, because NEPA does not allow parties to sue in order to compel a certain outcome or determination based on the EIS. *See* Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (per curiam) (noting NEPA does not mandate

based on their concerns that the new emission standards would contribute to global warming.⁹² While the lax approach to standing used by the majority was later overruled by a subsequent D.C. Circuit case,⁹³ the holding in *City of Los Angeles* demonstrated that at least one court was willing to embrace an argument that global warming could form the basis for legal injury. Significantly, the majority noted that “no one . . . appears to dispute the serious and imminent threat to our environment posed by a continuation of global warming[.]”⁹⁴ and further noted that “[n]o one disputes the causal link between carbon dioxide and global warming.”⁹⁵

Though some judges might agree with such a statement, it is clear that not all federal judges believe that the problem of global warming ought to be litigated in federal courts. In *Connecticut v. American Electric Power*,⁹⁶ a group of state attorneys general⁹⁷ acting *parens patriae*⁹⁸ attempted to sue a collection of power plants on the East

particular results, but simply prescribes the necessary process).

92. *City of Los Angeles*, 912 F.2d at 482. Under a conventional standing analysis, the link between petitioners and the injury in fact seemed highly attenuated: petitioners claimed that the failure to prepare an EIS created the risk that fossil fuel combustion would increase, thereby creating the risk of increased global warming, thereby creating a risk of a rise in sea levels which would damage shorelines and agriculture, thereby harming petitioners. *Id.* at 483–84 (Ginsburg, J., dissenting in part).

However, the majority ultimately found standing because, under the petitioners’ procedural cause of action, the court determined that the petitioners only needed to show that the alleged injury be “fairly traceable” to the proposed action. *Id.* at 495 (Wald, C.J., dissenting in part) (citing *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978)).

93. The rule of law in *City of Los Angeles* was overruled by *Florida Audubon Society v. Bentsen*, which, following the rule in *Lujan*, required plaintiffs in NEPA cases to show a “distinct risk to a particularized interest of the plaintiff.” 94 F.3d 658, 664 (D.C. Cir. 1996) (citing *Lujan II*, 504 U.S. 555, 572–73 (1992)).

94. *City of Los Angeles*, 912 F.2d at 493–94.

95. *Id.* at 495.

96. 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

97. State attorneys general from the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin, along with New York City and a number of citizen groups, joined together as plaintiffs in the cause of action. *Id.* at 267.

98. “Parent of his or her country. The state regarded as a sovereign.” BLACK’S LAW DICTIONARY 1144 (8th ed. 2004). The term “is a judicial construct that does not lend itself to a simple or exact definition,” but has been described as referring to the state’s assertion of “quasi-sovereign” interests. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex. rel. Barez*, 458 U.S. 592, 601 (1982). Though it is not entirely clear what standing requirements exist in such instances, “[a] quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant,” and must “survive the standing requirements of Art[icle] III.” *Id.* at 602.

Coast in a common law tort-based nuisance action for contributing to global warming.⁹⁹ Although some commentators have enthusiastically endorsed this approach and indicated that such claims could be theoretically likened to the cigarette and tobacco mass-tort class actions,¹⁰⁰ others have been reluctant to subscribe to such a theory.¹⁰¹ Ultimately, the district court judge in *American Electric Power* dismissed the plaintiffs' case because the theory of injury rested on a political question¹⁰² that required an "initial policy determination" which was properly the province of state and national legislative bodies.¹⁰³

The holding in *American Electric Power* demonstrates the principal problem with litigation of global environmental harm: the uncertainty surrounding the science behind the problem, together with the lack of clear government policy or legislation, serves to undermine any party's standing to claim injury and seek redress. In

99. The plaintiffs named the American Electric Power Company, Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corporation as defendants, claiming that they were the "five largest emitters of carbon dioxide in the United States," and that their emissions "constitute[d] approximately one quarter of the U.S. electric power sector's carbon dioxide emissions." *Connecticut v. Am. Elec. Power*, 406 F. Supp. 2d 265, 267–68 (S.D.N.Y. 2005).

100. See David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003). Grossman argues that such causes of action might be "legally viable," *id.* at 3, and that because of a "widely perceived lack of meaningful political action" in the area of global warming, litigation may be the "best tool for addressing climate change . . ." *Id.* at 6; see also Eduardo M. Peñalver, *Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change*, 38 NAT. RESOURCES J. 563 (1998).

101. See Elizabeth E. Hancock, Note, *Red Dawn, Blue Thunder, Purple Rain: Corporate Risk of Liability for Global Climate Change and the SEC Disclosure Dilemma*, 17 GEO. INT'L ENVTL. L. REV. 233, 244 (2005) (arguing that the tort framework is unworkable in the global warming context, because "while the global warming impact mechanism is arguably certain, an individual greenhouse gas-producer's liability for global climate change is generally non-quantifiable and may be largely dependent on external factors outside the producer's control").

102. Rather than decide the case on standing grounds, the district court judge dismissed the action solely through appeal to the political question doctrine, noting that a court must decide "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Am. Elec. Power*, 406 F. Supp. 2d at 271 (quoting *Baker v. Carr*, 369 U.S. 186, 198 (1962)).

103. *Id.* at 274. Specifically, the court sided with the defendants' arguments that certain initial policy determinations were necessary, such as a decision whether "the societal costs of reducing [greenhouse gas] emissions [should] be borne by just a segment of the electricity-generating industry . . ." *Id.* at 273.

theory, if the science behind global warming was more complete,¹⁰⁴ litigation might be more viable. In the context of global ozone depletion, the case of *Covington v. Jefferson County*¹⁰⁵ serves to illustrate this point.

In *Covington*, the Ninth Circuit found that plaintiffs had adequately demonstrated standing to sue defendants who had unlawfully maintained a landfill across the street from the plaintiffs' home.¹⁰⁶ Though the majority of the court resolved the standing issue on traditional grounds,¹⁰⁷ Judge Gould, writing a concurring opinion, endorsed a theory of standing based solely on the global harm of ozone depletion, caused by the emission of chlorofluorocarbons at the landfill.¹⁰⁸ Citing a number of Supreme Court cases, Judge Gould wrote that the specific and *particularized* injury of ozone depletion could serve to satisfy the injury in fact requirement, even though the injury is "general" in the sense that ozone depletion is a global problem affecting everyone.¹⁰⁹

Though the concurrence in *Covington* is significant in that it lays at least some foundation for standing to litigate global issues, environmentalists are still faced with the problem of litigating a very uncertain body of law in the context of a very rigid and narrowly construed standing doctrine. Consequently, courts have found it

104. Considerable debate exists as to the completeness and reliability of global climate change claims. For a comprehensive overview of the current state of global climate change science, see INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: WORKING GROUP II: IMPACTS, ADAPTATION AND VULNERABILITY (James McCarthy et al. eds., 2001). For a critical account of current global climate change science, see ROBERT C. BALLING, JR., THE HEATED DEBATE: GREENHOUSE PREDICTIONS VS. CLIMATE REALITY (1992).

105. 358 F.3d 626 (9th Cir. 2004).

106. *Id.* at 638.

107. *Id.* The court found that the Covingtons alleged adequate injury by claiming that the hazardous landfill created a risk of fires, explosions, scavengers, and groundwater contamination, thereby threatening the Covingtons' enjoyment of life and security of home. *Id.*

108. *Id.* at 649–55 (Gould, J., concurring).

109. *Id.* at 651. Gould chose to reserve judgment on this issue and present his reasoning in a concurrence simply because the issue of ozone depletion was not one that the parties had briefed and was not essential to deciding the case. *Id.* at 649 n.1. Gould's theory for standing placed heavy emphasis on the clarity and conclusive nature of the scientific evidence in support of ozone depletion. *Id.* at 649–50. Additionally, Gould paid special attention to the *particularized* harm of ozone depletion, and argued that the "concrete actual injury, even though shared by others generally is sufficient to provide injury in fact." *Id.* at 651 (citing *FEC v. Akins*, 524 U.S. 11, 24 (1998)); see also *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973).

easiest, where possible, to resolve standing issues by avoiding the global inquiry entirely.¹¹⁰

While the Supreme Court has not addressed the issue of environmental suit standing since *Laidlaw*, that decision was at least an indication that the Court is willing to recognize environmental injury as having many forms.¹¹¹ In trying to apply *Laidlaw* reasoning, the circuit courts—such as the D.C. Circuit in *Massachusetts*,¹¹² and the Ninth Circuit in *Ecological Rights Foundation v. Pacific Lumber Co.*¹¹³—have discovered that some overlap between merits and standing issues is inevitable, and this is a problem the current standing doctrine is simply not capable of addressing. Thus, commentators have called for a different standing doctrine when litigating such global harms as global climate change.¹¹⁴ The extent to which such proposals will be successful remains to be seen.

110. See *Ctr. for Biological Diversity v. Abraham*, 218 F. Supp. 2d 1143, 1155 (N.D. Cal. 2002). The court found that the plaintiffs adequately established injury through their concerns regarding adverse health affects of smog and air pollution, however their concerns regarding global warming were “too general, too unsubstantiated, too unlikely to be caused by defendants’ conduct, and/or too unlikely to be redressed by the relief sought to confer standing.” *Id.*

111. See *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs.*, 528 U.S. 167 (2000); *supra* notes 77–87 and accompanying text.

112. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005); see *supra* notes 1–5, 7–9 and accompanying text.

113. 230 F.3d 1141 (9th Cir. 2000). The court in *Pacific Lumber* noted that, under *Laidlaw*, “an individual can establish ‘injury in fact’ by showing a connection to the area of concern sufficient to make credible the contention that the person’s future life will be less enjoyable” *Id.* at 1149. The Ninth Circuit held that “requiring a plaintiff to demonstrate actual environmental harm in order to obtain standing would . . . compel the plaintiff to prove more to show standing than she would have to prove to succeed on the merits.” *Id.* at 1151. Moreover, the court said a “flexible approach” is the only approach that is consistent with recognition of aesthetic and recreational injury. *Id.* at 1150.

114. See Margaret B. Hinman & Alexandra Haas, *The Constitutional Doctrine of Standing, as Applied to Citizens Seeking to Right ‘Global’ Wrongs*, *ADVOCATE*, Aug. 2004, at 11 (discussing, in the context of the *Covington* case, an analysis of injury in fact through qualitative as opposed to quantitative means); Daniel A. Farber, *Uncertainty as a Basis for Standing*, 33 *HOFSTRA L. REV.* 1123, 1124 (2005) (noting the possibility that, rather than establish standing on the basis of possible future harm, litigants could argue standing based on immediate environmental injury).

III. ANALYSIS

That the standing doctrine is a constitutionally required mandate of sound jurisprudence cannot be disputed. Article III expressly limits judicial review to “cases and controversies,”¹¹⁵ and if this phrase is to mean anything, it must mean that a plaintiff or petitioner must meet minimum requirements in order to be properly before the court.¹¹⁶ However, the *content* of those minimum requirements seems by no means explicitly clear from the text of Article III. As a result, courts have struggled to define what is meant by the idea of standing; first with the elusive requirement of a “defined legal interest,”¹¹⁷ and later with the “injury in fact” test,¹¹⁸ together with additional requirements of causation and redressability. Unfortunately, as the doctrine of injury in fact standing has grown, becoming more elaborate and more specific, it has become difficult to say where the constitutional mandate ends, and where mere judicial policy begins.

In any event, it is clear that the modern approach to standing was not designed with an eye toward facilitating (and clarifying the outer bounds of) environmental litigation. The result has been a mixed, inconsistent, and confusing body of law, which offers little guidance from one case to the next as to how standing issues ought to best be resolved.

Given the confusion and uncertainty surrounding the injury-in-fact test, it was perhaps not surprising that the circuit courts resorted to “hypothetical jurisdiction” to resolve easy cases which posed difficult standing problems.¹¹⁹ Judicial economy would seem to dictate that,

115. See U.S. CONST. art. III, § 2.

116. See *Ex parte* McCordle, 74 U.S. 506, 514 (1868) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”). Justice Scalia in *Steel Co.* noted that the Supreme Court’s “insistence that proper jurisdiction appear begins at least as early as 1804.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 95 (1998) (citing *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804)).

117. See *supra* note 16 and accompanying text.

118. See *supra* notes 18–23 and accompanying text.

119. See *supra* notes 58–59 and accompanying text. The rationale for use of hypothetical jurisdiction was two-fold. First, courts often justified hypothetical jurisdiction by claiming judicial economy considerations. Second, (and commentators have noted ironically) hypothetical jurisdiction was seen as fostering judicial restraint. See Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 247 (1999)

where a case could quickly be disposed of on the merits, the jurisdictional “bramble bush” created by the standing issue should best be avoided.¹²⁰ But, as the holding in *Steel Co.* made clear, hypothetical jurisdiction, while convenient, did not solve the standing problem. Rather, it merely side-stepped the problem, leading to hypothetical judgments of highly questionable precedential value.¹²¹ In light of this fact, the Supreme Court was right to expressly condemn the practice.

Unfortunately, in the wake of *Steel Co.*, a new problem in the field of environmental suits has surfaced: the frequent merger of standing issues with the merits of plaintiffs’ environmental claims has left courts ill-equipped to resolve the problems of a plaintiff’s standing in a consistent and reliable manner. When the bar for standing is set too high, the line between the three-part injury, causation, and redress analysis and the merits of a plaintiff’s case becomes indistinguishable. Plaintiffs are left in the unfortunate position of having to prove that they will win on the merits of their case just to show that they have standing to litigate their claim in the first place.

The *Massachusetts* case provides a clear example of this very problem. Petitioners sought to compel the EPA to regulate carbon dioxide under the Clean Air Act after the Agency had already refused to do so.¹²² The petitioners’ case in chief rested on the theory that the failure to regulate carbon dioxide contributed to global warming, thereby causing the particularized harm of rising sea levels and increased flooding.¹²³ According to the petitioners, forcing the

(explaining both rationales).

120. See *United States v. Parcel of Land*, 928 F.2d 1, 4 (1st Cir. 1991).

121. *Steel Co.*, 523 U.S. at 101; see also Idleman, *supra* note 119, at 259 (noting that hypothetical jurisdiction doctrine was fraught with difficulties, including unjustified over-use and inconsistent application).

122. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005); see also *supra* notes 2–3 and accompanying text.

123. *Massachusetts*, 415 F.3d at 53. According to the court:

[P]etitioners filed two volumes of declarations with the court, some containing lengthy exhibits. The declarations, from scientists, engineers, state officials, homeowners, users of the nation’s recreational resources, and other individuals, predict catastrophic consequences from global warming caused by greenhouse gases, including loss of or damage to state and private property, frequent intense storm surge floods, and increased health care costs.

Agency to regulate carbon dioxide would reduce global warming and its harmful effects.¹²⁴ But it was these very claims that the Agency attacked in contesting the petitioners' standing. The injury-in-fact claim, along with causation and redressability, required proof of the very same issues. If the petitioners could not show at the outset that they would win on the merits, then they were precluded from meeting their burden to show standing.

If the current standing doctrine poses a catch-22 for environmental plaintiffs, it poses an identical problem for judges who hear such cases. Judges cannot be expected to review the exact same set of facts and arguments, used twice to advocate for two different results at two stages in the litigation process. While the proof required at the trial itself is ultimately judged by a clear "preponderance of the evidence" standard, it is not at all clear what standard applies to proof of standing, particularly when the evidentiary burden may shift depending on when the opposing party chooses to contest that standing.¹²⁵ With respect to the *Massachusetts* case, one commentator noted that the D.C. Circuit Court was completely handicapped by the standing doctrine from the very outset: The court could not pronounce that the petitioners had standing without effectively overruling the EPA's administrative ruling, and yet could not review that administrative ruling without first finding that the petitioners had standing.¹²⁶

Ultimately, the majority in *Massachusetts* was left with two options: deny standing outright and refuse to consider the matter further, or assume *arguendo* that the petitioners had standing and proceed to the merits. The majority chose the latter, and in so doing, expressly violated the procedural mandate set forth in *Steel Co.*¹²⁷ Regardless of whether such an approach led ultimately to an invalid

Id. at 54 (citation omitted).

124. *Id.* at 54–55.

125. See *supra* notes 31–37 and accompanying text.

126. Farber, *supra* note 114, at 1128.

127. *Massachusetts*, 415 F.3d at 55–56. Judge Randolph, writing for the majority, noted that *Steel Co.* actually allows for the course of action chosen by the court when dealing with questions of statutory standing. *Id.* at 56. Judge Randolph offered little in the way of justification as to why the approach was permissible in addressing issues of constitutional standing. *Id.*

and unworkable hypothetical judgment, the merger of merits and standing left the court with no other reasonable choice.

The *Massachusetts* case thus clearly demonstrates that a new approach to standing is needed for litigation involving global environmental issues. Litigants who have tried to squeeze the square peg of global climate change injury through the round hole of current standing doctrine have met with mixed results, and those taking novel approaches such as mass tort, nuisance claims, and class action suits have thus far fared no better.¹²⁸

The federal courts have not seen the last of cases alleging injury based on global climate change. In practical terms, however, concrete and uncontested injury will rarely if ever be provable in such cases. Though the Supreme Court recognized as much in *Laidlaw*, that case has not been interpreted by the circuit courts with any definite consistency,¹²⁹ and the future of global environmental issue standing is anything but certain.

IV. PROPOSAL

Though a judicial solution to the problem of standing in global environmental issue suits may be elusive, certain practical resolutions to the problem can be articulated. The mere evolution of the science behind global climate change may offer a solution to the standing problem. If, in the future, environmental science is more able to accurately predict climate change and its effects—and to link climate change with carbon dioxide production—injury will consequently be easier to establish.¹³⁰ Such a change in the science would more closely align the campaign against global warming more with that

128. See, e.g., *Connecticut v. Am. Elec. Power*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (discussed *supra* notes 96–103 and accompanying text).

129. See Melanie A. Anbarci, *The Laidlaw Decision: Shield or Sword?*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 143, 150–53 (2001) (discussing possible implications of *Laidlaw*); Hans Hull, *Fourth Circuit Court of Appeals Grants Standing to Citizen Group*, 28 ECOLOGY L.Q. 555 (2001) (discussing the inconsistent application of *Laidlaw* by the circuit courts).

130. While scientific knowledge of the global warming phenomenon is continually increasing, recent studies have proposed novel theories as to the precise link between carbon dioxide, global warming, and global environmental harm. See Julian A. Dowdeswell, *The Greenland Ice Sheet and Global Sea-Level Rise*, 311 SCIENCE 963 (2006); Damon Matthews, *Global Change: The Water Cycle Freshens Up*, 439 NATURE 793 (2006).

against ozone depletion—a phenomenon that has a much more established scientific record, and a cause to which courts have generally been much more amenable.

Additionally, the problem of global climate change standing could be avoided entirely if global warming were addressed through legislative (as opposed to adjudicative) measures. Court opinions dismissing actions based on global climate change have said as much,¹³¹ however, in the current political climate, indications that such legislation might materialize (let alone succeed) are slight.

Thus, there is still a clear need for a *judicial* solution to the problem presented by global environmental issue litigation generally, and climate change litigation in particular. One such solution was, ironically enough, presented and then rejected by the court in the *Massachusetts* case. The plurality opinion indicated the possibility of referring the matter of the petitioners' standing to a special master for review.¹³² Though the court ultimately concluded that such a move would be "folly,"¹³³ it would arguably be no less so than proceeding on the merits without first resolving the standing problem.

Use of a special master would avoid the problem of the same court reviewing the same evidence for two different purposes. It would establish a clear, independent assessment of petitioners' standing, and could conceivably have the effect of clarifying just what is required for a party to establish standing. In short, use of a special master would take the normative distinction between standing and merits and transform it into a *procedural* mandate, rather than leaving it an abstract, theoretical exercise.

An important consideration to keep in mind, however, is that such a procedure would only be appropriate in those rare cases in which Article III standing and merits have merged. This is entirely distinct from the earlier hypothetical jurisdiction practice, which was applied by federal courts merely on the basis that the standing issue presented was "difficult" for the judiciary.¹³⁴

131. See *Am. Elec. Power*, 406 F. Supp. 2d at 272–73 (discussed *supra* notes 96–103 and accompanying text).

132. *Massachusetts v. EPA*, 415 F.3d 50, 55 (D.C. Cir. 2005).

133. *Id.* (quoting *WRIGHT ET AL.*, *supra* note 28, § 3531.15).

134. See *Smith v. Avino*, 91 F.3d 105, 108 (11th Cir. 1996).

The second solution, which could potentially provide the clearest resolution and have the greatest impact, would be for the Supreme Court to address the standing issue in depth when it issues an opinion in the *Massachusetts* case. The Court's holding in *Steel Co.* did not adequately resolve the problem of what to do when merits and Article III standing issues merged. Justice Scalia noted that the overlap between merits and Article III standing would only happen with regard to "entirely frivolous" claims.¹³⁵ However, as the *Massachusetts* case has now clearly demonstrated, such is not the case. Merits and standing can and, in fact, do overlap in cases like *Massachusetts*, which involve a globalized harm that is both concrete and particularized.

The Court has, for some time now, recognized that a cause of action based on injury suffered by the public at large is not *per se* barred by the standing doctrine, so long as that injury is itself sufficiently definite. This recognition repudiates the long-held maxim that "injury to all is injury to no one."¹³⁶ This fact, along with *Laidlaw's* expanded conception of what may constitute environmental injury, would seem to indicate that global environmental harm litigation may be viable.

But the current standing doctrine does not allow for such wrongs to be litigated in a way that ensures any consistency or predictability. The fusion of standing and merits in such cases presents litigants with an impossible hurdle at the very outset: the contest over whether the complaining party has standing masks the primary issue to be litigated and leaves courts in a jurisdictional quagmire—courts are forced to judge a party's standing with a rigid three-part injury in fact doctrine that is ill-equipped to handle the task.

A separate and distinct rubric by which to judge a party's standing in merger cases would solve this problem. The Court could pronounce either a unique judicial standard which might take into account the merger issue or a separate procedural rule which could accommodate the overlap of standing and merits. Perhaps the easiest

135. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998).

136. See *FEC v. Akins*, 524 U.S. 11, 23 (1998) (holding that, in order to bar standing for a "generalized grievance," the harm must not only be widely shared, but must also be of "an abstract and indefinite nature").

solution would be to treat such cases exactly as they come—resolving *both* standing and merits simultaneously, such that a party's ability to establish standing would necessarily imply victory on the merits, and vice versa. Ultimately, it is a problem to which the Supreme Court itself must speak. In this particular area of law, the circuit courts can only apply past precedent, which is ill-fitted to the problem at hand, and can only result in judgments which are highly questionable.

V. CONCLUSION

Global climate change is undeniably a problem. Though the outer boundaries of our scientific understanding of the problem are uncertain, what *is* certain is the legal injury that global climate change has the potential to inflict. That being the case, litigation that centers around this controversy is not likely to abate. Legislative attempts to address the issue have stalled and do not appear to offer any real indication that the controversy will be resolved through the political process. Hence, litigation is becoming an evermore attractive option to environmentalists concerned about global climate change.

The standing doctrine is an important tool which assures that parties are properly before a given court and are litigating a controversy that is both real and justiciable. Recent Supreme Court precedent has hinted that the injury of global warming (and legitimate concerns *about* global warming) may in fact be sufficiently concrete and particularized in order to establish standing for such cases. However, the nature of the injury is such that the standing issue becomes indistinguishable from the merits of the case. The current standing doctrine is not equipped to handle such an overlap, and the result has been a confusing and inconsistent line of global warming cases. The *Massachusetts* case in particular demonstrates the need for clear guidance on how to resolve cases of overlap between merits and Article III standing. By granting certiorari in the *Massachusetts* case, the Supreme Court is now the legal body best situated to provide such guidance, and it is imperative that it do so, lest the injury surrounding the threat of global warming be ignored.