THE FATAL FLAW OF STANDING: A PROPOSAL FOR AN ARTICLE I TRIBUNAL FOR ENVIRONMENTAL CLAIMS

I. INTRODUCTION

Emphasis on environmental protection has exploded in the past forty years. However, federal court doctrines have failed to evolve with the changing landscape of environmental law. Article III limits federal court judicial power to "cases and controversies."[1] From this requirement, the Supreme Court developed prerequisites that a plaintiff must meet to bring suit. One such requirement is the standing doctrine.[2] Standing's purpose is "to ensure . . . that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake."[3] Commentators frequently criticize the theoretical holes in the Court's current articulation of the standing doctrine, finding that it "produce[s] confusion, intellectual dishonesty, and chaos."[4] Moreover, it is often difficult for environmental plaintiffs to prove standing's three constitutional requirements of injury, causation, and redressability.[5] By establishing an Article I tribunal for environmental claims, plaintiffs would escape the intellectually suspect limitations created by the Court's standing doctrine.

This Note is divided into eight sections. After the introduction in Part I, Part II traces the history of federal environmental legislation. Parts III and IV present an abbreviated history of standing and environmental standing cases. Part V traces the development of Article I tribunals and the public rights doctrine. Next, Part VI analyzes the Court's application of its

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1. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 225 (2003) (internal quotations omitted); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–62 (1992) (contrasting judicial cases *and* controversies with executive inquiries, which bear the name "case," and legislative disputes, which bear the name "controversies").

2. *McConnell*, 540 U.S. at 225.

3. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191 (2000).

4. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 290 (1988).

5. *Defenders of Wildlife*, 504 U.S. at 560–62. For an interesting discussion of how the current standing doctrine is too restrictive and how other countries' expansive view of standing is preferable, see Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*, 7 ENVTL. LAW 321 (2001) (Australia, Britain, Canada, India, Italy, Netherlands, Greece, Philippines, South Africa, Brazil, and Pakistan); Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27, 50–52 (2003) (Philippines, Pakistan, and Bangladesh); Matt Handley, Comment, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue*, 21 REV. LITIG. 97, 116–33 (2002) (Britain, Italy, Germany, and Brazil).

current standing doctrine to environmental claims and concludes that the application leads to inadequate environmental outcomes. Finally, Part VII proposes using an Article I tribunal to decide environmental claims, and Part VIII briefly summarizes the argument.

II. ENVIRONMENTAL LEGISLATION

A survey of recent environmental legislation illustrates an increased focus on environmental protection.[6] The purpose of modern environmental law is "to correct market failures and to ensure that an adequate supply of public goods, such as clean air and water, is available to the public."[7] Modern environmental law originated in the 1960s.[8] Congress passed legislation to prevent pollution and protect habitats, including the Clean Air Act,[9] the Water Quality Act,[10] and the Endangered Species Preservation Act.[11] A renewed focus on environmental law occurred during the 1970s; Congress passed over twenty pieces of new legislation in that decade.[12] This included the creation of the Environmental Protection Agency (EPA),[13] and the introduction of the National Environmental Policy Act (NEPA),[14] which serves as the foundation for modern environmental policy.[15] While an overall decrease in federal

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6. JACQUELINE VAUGHN SWITZER, ENVIRONMENTAL POLITICS: DOMESTIC AND GLOBAL DIMENSIONS 17–32 (Thomson Wadworth 4th ed., 2004) (highlighting important environmental legislation, following the development of important environmental groups, and tracking public opinion about environmental politics).

7. Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 908 (2006).

8. SWITZER, *supra* note 6, at 18.

9. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963). The Clean Air Act of 1963 "expanded research and technical assistance programs, gave the federal government investigative and abatement authority, and encouraged the automobile and petroleum industries to develop exhaust control devices." SWITZER, *supra* note 6, at 232.

10. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965). "In 1965, the Water Quality Act established a water quality standard for interstate waters to be met by June 1967 and streamlined federal enforcement efforts." SWITZER, *supra* note 6, at 213.

11. Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966). "[T]he Endangered Species Preservation Act of 1966, mandated the secretary of the interior to develop a program to conserve, protect, restore, and propagate selected species of native fish and wildlife." SWITZER, *supra* note 6, at 257.

12. *See* SWITZER, *supra* note 6, at 19–21.

13. For an argument that the EPA is an ineffective way to effectuate environmental policy, see DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE (2005).

14. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

15. SWITZER, *supra* note 6, at 20. NEPA "require[ed] extensive analysis of the environmental impact of proposed projects and the development of ways to minimize negative impacts." *Id*.

regulation occurred in the 1980s,[16] the 1990s saw heightened congressional activity,[17] as evidenced by the passage of the Clean Air Act Amendments[18] and the Energy Policy Act.[19] A Republican-controlled Congress and Democratic executive created gridlock and eventually stalled these new legislative efforts.[20] Since 2001, a shift occurred that created a renewed interest in deregulation.[21] Several initiatives instituted in the early 1990s have been repealed by the George W. Bush administration.[22]

Despite increasing legislative protection, the Court has limited the effectiveness of congressional environmental policy by preventing enforcement of these laws in federal court.[23] For example, the Court has used standing to bar suits and limit plaintiffs under citizen-suit provisions.[24] In *Lujan v. Defenders of Wildlife*, the Court utilized the standing doctrine to limit citizen suits by requiring a demonstration of independent injury.[25] The *Defenders of Wildlife* Court reversed the

16. SWITZER, *supra* note 6, at 22.

17. For a comprehensive treatment of environmental politics in the 1990s, see NORMAN J. VIG & MICHAEL E. KRAFT, ENVIRONMENTAL POLICY IN THE 1990S (3d ed. 1997).

18. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990). The Clean Air Act Amendments of 1990 "established five categories of nonattainment areas . . . and set new deadlines by which areas must meet federal ozone standards." SWITZER, *supra* note 6, at 235.

19. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992). The Energy Policy Act of 1992 attempted to decrease U.S. oil dependence and increase use of alternative fuels. SWITZER, *supra* note 6, at 175, 177.

20. SWITZER, *supra* note 6, at 23–28.

21. *Id*. at 28–32.

22. Richard J. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 87 MINN. L. REV. 999, 1006–09 (2003) (characterizing current environmental law as an outgrowth of Republican control of the government).

23. In a survey of three decades of Supreme Court opinions, Professor Lazarus concluded that the Court's failure to recognize environmental law as a distinct area typifies "the Supreme Court's apparent apathy or even antipathy towards environmental law." Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 737 (2000). *See also* Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 ECOLOGY L.Q. 363, 365 (2006) (concluding "that the Court's interpretations [of environmental law] have worked both to sanction environmentalism and to contain or even marginalize it"). For a survey of the Court's environmental decisions, see GLEN SUSSMAN, BYRON W. DAYNES & JONATHAN P. WEST, AMERICAN POLITICS AND THE ENVIRONMENT 236–76 (2002). *See also* Jack Van Doren, *Environmental Law and the Regulatory State: Postmodernism Rears Its "Ugly" Head?*, 13 N.Y.U. ENVTL. L.J. 441 (2005) (describing the Court's treatment of environmental law as a postmodern movement that resists definition); Kristen M. Shults, Comment, Friends of the Earth v. Laidlaw Environmental Service*: A Resounding Victory for Environmentalists, Its Implications on Future Justiciability Decisions, and Resolution of Issues on Remand*, 89 GEO. L.J. 1001, 1021–25 (2001) (summarizing the voting trends of Justices in environmental standing decisions).

24. Robert J. June, Note, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 762 (1994).

25. Lujan v. Defenders of Wildlife, 504 U.S. 555, 567 (1992). The citizen-suit provision at issue provided that "any person may commence a civil action on his own behalf against any person" who is

appellate court's decision that the provision conferred the right to sue on any individual.[26] As a result, frequently no one is capable of satisfying standing requirements and environmental plaintiffs are thrown out of court.

III. A BRIEF HISTORY OF STANDING

A brief survey of the history of standing is necessary to understand the context in which environmental standing problems arise. The standing doctrine has been broken down into "five different eras."[27]

The first period ranges from the American Revolution until approximately 1920.[28] Commentators debate whether this period provides any support for the current standing doctrine.[29] The majority find that no separate standing doctrine existed at all.[30] However, a recent minority argues that current standing doctrine "reflects not only the Framers' likely concept of . . . what courts did, but also their view of the judicial role in maintaining the separation of power."[31] Regardless of its origins, the Court did not articulate standing requirements until 1920.

The New Deal encompasses the second period.[32] Justices Louis Brandeis and Felix Frankfurter created "what we now consider standing limits" to insulate New Deal legislation from judicial attack.[33] The Court held that to establish standing, a plaintiff must have a "legal right—one of

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alleged to be in violation of provisions of the Clean Air Act. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 304, 84 Stat. 1676 (1970) (codified as amended in scattered sections of 42 U.S.C.). Since the passage of the Clean Air Act Amendments, Congress has included citizen-suit provisions in environmental statutes. Mark Seidenfeld & Janna Satz Nugent, *"The Friendship of the People": Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 269, 283–84 (2005).

26. *Defenders of Wildlife*, 504 U.S. at 571–73.

27. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizens Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168 (1992). *See also* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.1 (3d ed. 1998) (tracing standing's history from 1920).

28. Sunstein, *supra* note 27, at 170.

29. It has been found that "the Framers . . . had little to say specifically about Article III's 'case and controversy' requirement." James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 34 (2001).

30. *See* Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1274–82 (1961); Sunstein, *supra* note 27, at 168–79; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394–1410 (1988).

31. Leonard & Brant, *supra* note 29, at 6. *See also* Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997); Ann Woolhandler and Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

32. Sunstein, *supra* note 27, at 179.

33. *Id.*

property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[34]

The third period began with the passage of the Administrative Procedure Act (APA) in 1946.[35] The APA "was an effort to codify the developing body of judge-made standing law."[36] It established three categories of individuals who could bring suit: people "suffer[ing] a 'legal wrong'" based in the common law, people whose statutorily created interests are violated, and people expressly authorized to bring suit under statutes other than the APA.[37]

The years from the early 1960s until about 1975 constitute the fourth period.[38] During this period, the Court moved from the legal interest test to an "injury-in-fact test."[39] In *Association of Data Processing Service Organizations v. Camp*, the Court adopted a two-part inquiry requiring "injury in fact, economic or otherwise"[40] and injury "arguably within the zone of interests" of the regulatory statute.[41] Commentators have argued 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."[42]

Finally, the fifth period is the contemporary formulation of standing.[43] The Court currently recognizes two strands: "prudential standing" and "Article III standing."[44] Prudential standing consists of waivable "judicially self-imposed limits on the exercise of federal jurisdiction."[45] Article III standing requirements are mandatory[46] and consist of three elements: injury, causation, and redressability.[47] First, the plaintiff must demonstrate a "concrete,"[48] "distinct and palpable,"[49] and "real or immediate"[50] injury.[51] Second, causation requires the injury be "fairly

34. Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 137–38 (1939).
35. Sunstein, *supra* note 27, at 181.
36. *Id*.
37. *Id*. at 181–82.
38. *Id*. at 183. For a summary of standing law during this period, see Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).
39. Leonard & Brant, *supra* note 29, at 19.
40. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970).
41. *Id*. at 153.
42. Fletcher, *supra* note 4, at 229.
43. Sunstein, *supra* note 27, at 193.
44. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004).
45. Allen v. Wright, 468 U.S. 737, 751 (1984).
46. Warth v. Seldin, 422 U.S. 490, 500 (1975).
47. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).
48. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) ("That injury [in fact], we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense.").
49. *Warth*, 422 U.S. at 501.
50. Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983).

traceable to the challenged action of the defendant."[52] Third, the plaintiff must demonstrate that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[53]

IV. STANDING IN ENVIRONENTAL LAWSUITS

The Supreme Court's environmental standing jurisprudence can be broken down into three periods: the early decisions, the strict application of standing requirements, and the countermovement away from that strict application.

A. The Early Decisions

1. Sierra Club v. Morton

In *Sierra Club v. Morton*, the Court denied standing when the Sierra Club failed to allege that its members were individually injured by the destruction of a portion of Sequoia National Park.[54] The Sierra Club

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51. The Court sometimes refers to this as the "injury in fact requirement." *Defenders of Wildlife*, 504 U.S. at 560. *See* Lin, *supra* note 7, at 915–21 (tracing the development of environmental harm as a requirement for standing). For an argument that the Court has failed to use the injury requirement to sharpen litigation, demonstrating that it is not an Article III requirement, see David M. Driesen, *Standing for Nothing: the Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004).

52. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000). The Court has rarely focused much attention on the causation requirement in environmental suits. *Allen v. Wright*, 468 U.S. 737 (1984), provides an illustration of how the Court applies the causation requirement. Parents of black children attending public schools brought a class action against the IRS alleging that it had failed to deny tax-exempt status to discriminatory private schools. *Allen*, 468 U.S. at 743–44. The Court found that "[t]he line of causation between that conduct and desegregation of respondents' schools is attenuated at best." *Id.* at 757. The plaintiffs failed to demonstrate that forcing the IRS to withdraw the exemptions would make an appreciable difference in integration. *Id*. at 758. *Compare* Flast v. Cohen, 392 U.S. 83, 105–06 (1968) (upholding a taxpayer's standing to challenge federal subsidies to parochial schools as violating the First Amendment's prohibition against government establishment of religion), *and* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (denying standing based on causation and redressability to plaintiffs who challenged an IRS ruling that limited the amount of free medical care that charitable hospitals could provide), *with* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 470–71 (1982) (denying standing to a taxpayer challenging a federal government grant of surplus property as violating the Establishment Clause).

Although the Court has not frequently addressed causation in environmental suits, the issue has surfaced in the courts of appeals. *See, e.g.*, Animal Legal Def. Fund v. Glickman, 154 F.3d 426, 438–43 (D.C. Cir. 1998); Friends of the Earth, Inc. v. Crown Cent. Petrol. Corp., 95 F.3d 358, 361 (5th Cir. 1996); Natural Res. Def. Counsel v. Texaco Ref. & Mktg., Inc., 2 F.3d 493, 504–05 (3d Cir. 1993); Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 71–73 (3d Cir. 1990).

53. *Laidlaw*, 528 U.S. at 182.

54. Sierra Club v. Morton, 405 U.S. 727, 741, 734–35 (1972). Sierra Club brought suit on behalf

argued for standing under the APA[55] "as a membership corporation with 'a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country.'"[56] The Court noted that societal environmental interests deserve judicial protection, but it refused to grant standing unless the "party seeking review be himself among the injured."[57] The Court repudiated the practice of requiring only an "organizational interest in the problem."[58] Finally, the Court reiterated its expansive definition of injury, which included "'aesthetic, conservational, and recreational' as well as economic values."[59]

In dissent, Justice Douglas proposed allowing people with an "intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled" to bring suit.[60] Additionally, he found that

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of its members to prevent the destruction of a portion of Sequoia National Park by the construction of a highway and ski resort. *Id.* at 728–29. *See also* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977) ("An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members in the lawsuit.").

55. Administrative Procedure Act, Pub. L. No. 109-80, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). Originally the Court limited standing to cases where the plaintiff could allege a violation of a legal interest or legal wrong. *Sierra Club*, 405 U.S. at 733. Under the APA, the Court expanded standing by allowing individuals to bring suit if they could demonstrate that an "injury in fact" occurred and that the alleged injury occurred in the "zone of interests" of the violated statute. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

The Court has expanded its view of injury in fact. The Court used to focus on economic harm caused by agency action. *See, e.g.*, Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942) (finding that the economic harm caused to the plaintiff radio station by increasing the frequency and range of a competitor satisfied the injury requirement). In *Sierra Club* the Court recognized a

> trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action . . . toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and toward discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review.

Sierra Club, 405 U.S. at 738. The Court reaffirmed the necessity of the injury requirement despite broadening the categories of injury. *Id.*

56. *Sierra Club*, 405 U.S. at 730.

57. *Id.* at 734–35. Justice Stevens reaffirmed this position in his concurring opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Stevens, J., concurring). He found that the Court had often held that injuries to "the interest that particular individuals may have in observing any species or its habitat [are sufficient for standing,] whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species." *Id*. at 582.

58. *Sierra Club*, 405 U.S. at 739 (internal citations and quotations omitted). The Court argued that if it allowed any special interest organization to bring suit, then nothing would prevent any citizen from also bringing suit. *Id*. at 739–40. *See also* Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir. 1970) (subscribing to a public interest view in environmental suits).

59. *Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 154 (internal citations omitted).

60. *Sierra Club*, 405 U.S. at 745 (Douglas, J., dissenting). Justice Douglas supported his proposition by pointing to other inanimate objects, such as ships and corporations, that have been parties to litigation. *Id*. at 742. Additionally, Justice Douglas offered examples of a river plaintiff and

"[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects."[61]

2. United States v. Students Challenging Regulatory Agency Procedures (SCRAP)

The Court applied the principles of *Sierra Club v. Morton* in *SCRAP* and granted standing.[62] SCRAP members[63] alleged that increased railroad shipping rates would raise recycling costs, thus discouraging the use of recycled materials.[64] Reducing the use of recycled materials would arguably result in the destruction of "natural resources surrounding the Washington Metropolitan area"[65] which SCRAP members used for "recreational (and) aesthetic purposes."[66] The Court admitted this was an "attenuated line of causation"[67] but found sufficient injury for standing purposes.[68] The Court rejected the government's proposed heightened

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of "[t]hose people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger." *Id*. at 743.

61. *Id*. at 741–42. Furthermore, allowing an inanimate object to represent itself would insure the protection of all the life contained in the object. *Id*. at 743.

62. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 683–90 (1973). The Court granted standing to an environmental organization that sought to have the Interstate Commerce Commission file an environmental impact statement required by NEPA. *Id*. at 679, 685.

63. Five law students formed SCRAP for the primary purpose of enhancing the quality of the environment for its members and all citizens. *Id*. at 678.

64. *Id*. at 675–76. More specifically, SCRAP "claimed that the rate structure would discourage the use of 'recyclable' materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering, and other extractive activities [sic]." *Id*. at 676.

65. *Id*. at 678. SCRAP members claimed that they suffered economic harm from increased prices for finished products, environmental harm from the destruction of recreational areas, bodily harm from increased levels of pollution, and further economic harm from increased taxes paid to dispose of otherwise recyclable materials. *Id*.

66. *Id*. at 678. The Interstate Commerce Commission instituted an investigation of the proposed rate increase's probable environmental impact and found that the increase would have little effect on the environment. *Id*. at 676–77. Despite this investigation, the Commission "declined to include a formal environmental impact statement because it concluded that its actions will neither actually nor potentially significantly affect the quality of the human environment." *Id*. at 683 n.11.

67. *Id*. at 688.

68. *Id*. at 689–90. SCRAP claimed "that each of its members 'suffered economic, recreational and aesthetic harm' directly as a result of the adverse environmental impact of the railroad freight structure." *Id*. at 678.

Justice Douglas reaffirmed his *Sierra Club v. Morton* position, arguing that plaintiffs should not have to prove injury in fact. *Id*. at 703 (Douglas, J., dissenting). To grant standing, Justice Douglas would require a representative of environmental interests to show injury to the environment. *Id*. He argued that "[r]ates fixed so as to encourage vast shipments of litter are, therefore, perhaps the most immediate and dramatic illustration of a policy which will encourage protection of the environment

injury requirement[69] and maintained the minimal requirement of some injury.[70] Despite the widespread environmental impact, the Court distinguished *Sierra Club v. Morton* based on the plaintiff's alleged direct harm[71] and on the breadth of the potential damage.[72]

In contrast, Justice White's dissent argued that SCRAP failed to meet standing requirements.[73] Specifically, he found that "[t]he allegations here do not satisfy the threshold requirement of injury in fact"[74] because "the alleged injuries are so remote, speculative, and insubstantial in fact that they fail to confer standing."[75] Justice White further argued against standing by analogizing the SCRAP suit to taxpayer and moral suits which are frequently dismissed as generalized grievances.[76]

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against several erosive conditions." *Id*. at 700–01. Additionally, Justice Douglas presented an illustration of the importance of, and procedure for, environmental impact statements as provided in NEPA. *Id*. at 703–22.

Justice Blackmun's concurrence adopted a position similar to Justice Douglas's. *Id*. at 699 (Blackmun, J., concurring). He "would require only that appellees, as responsible and sincere representatives of environmental interests, show that the environment would be injured in fact and that such injury would be irreparable and substantial." *Id*.

69. The government argued for the Court "to limit standing to those who have been 'significantly' affected by agency action." *Id*. at 689 n.14 (majority opinion).

70. *Id*. The Court noted that in *Baker v. Carr*, 369 U.S. 186 (1962), it "allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote." *SCRAP*, 412 U.S. at 689 n.14.

Lower courts have found that plaintiffs who have merely an "intellectual curiosity about the outcome" alone may not meet standing requirements. *See* Montgomery Envtl. Coal. v. Costle, 646 F.2d 568, 576 (D.C. Cir. 1980). Although, if plaintiffs smell, watch, or listen to the potentially affected area, they meet the injury requirement. *Id*. at 578. *See also* Comm. for Auto Responsibility (C.A.R.) v. Solomon, 603 F.2d 992, 998–99 (D.C. Cir. 1979) (finding that "[h]arm to health and conservational interests of parties seeking judicial review is enough to meet the injury-in-fact test for standing" when an organization challenged the failure of the government to file an environmental impact statement when leasing a parking area).

71. *SCRAP*, 412 U.S. at 687–88. The Court reiterated its expansion of the injury requirement beyond economic harm and found that SCRAP members met the broader requirement of harm to "[a]esthetic and environmental well-being." *Id.* at 686–87.

72. *Id*. at 687–88. The Court focused on the vast potential impact, and it did not expound on its reasons for differentiating between the national impact in *SCRAP* and the localized interests in *Sierra Club*. *Id*. at 687–88.

73. *Id*. at 721 (White, J., dissenting).

74. *Id*. at 722.

75. *Id*. at 723.

76. *Id*. In both *Sierra Club* and *SCRAP*, the Court distinguished environmental claims from generalized grievances. In both cases the Court made clear that "standing is not to be denied simply because many people suffer the same injury." *Id*. at 687 (majority opinion). The Court found that the potential impact of finding a generalized grievance would "deny standing to persons who are in fact injured simply because many others are also injured." *Id.* at 688. The Court concluded that this "would mean that the most injurious and widespread Government actions could be questioned by nobody." *Id.*

Defendants still often make generalized grievance claims when arguing for dismissal. *See, e.g.*, Cantrell v. Long Beach, 241 F.3d 674, 679–82 (9th Cir. 2001) (finding that plaintiffs asserted a sufficient injury, and not a mere public interest, when they challenged the adequacy of an

Sierra Club v. Morton held that injury exists if environmental organizations can show direct harm to members.[77] The Court's application of this doctrine in *SCRAP* presented the outer limits of the Court's environmental standing jurisprudence.[78] Despite this expansion, Justice Douglas's proposal in *Sierra Club v. Morton* for environmental object suits,[79] and Justice White's skepticism in *SCRAP*,[80] foreshadowed the Court's subsequent divergent views of standing.

B. Strict Application

Justice Scalia adopted Justice White's restrictive view of environmental standing, and there is a correlation between his addition to the Court and the movement toward strictly applying standing requirements. After joining the Court, Justice Scalia authored most of the environmental standing opinions.[81] Before this, however, he outlined his ideas on standing in a 1983 law review article[82] and implemented those views in *Lujan v. Defenders of Wildlife*.[83]

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environmental impact statement for a redevelopment project).

77. Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972).

78. Whitmore v. Arkansas, 495 U.S. 149, 159 (1990).

79. *Sierra Club*, 405 U.S. at 741 (Douglas, J., dissenting).

80. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 722–24 (1973) (White, J., dissenting).

81. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

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

83. Commentators have defended and attacked Justice Scalia's standing views. *See, e.g.*, Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142–43 (1993) (repudiating Justice Scalia's view of standing as conflicting with "the language and history of Article III, with the injury requirement itself, with more modest visions of judicial power, and with time-honored notions of public law litigation"); Michael J. Wray, *Still Standing? Citizen Suits, Justice Scalia's New Theory of Standing and the Decision in* Steel Company v. Citizens for a Better Environment, 8 S.C. ENVTL. L.J. 207, 244 (2000) (finding that Justice Scalia's view "will reduce the number of citizen suits prosecuted and will diminish the citizen plaintiff's effectiveness in compelling compliance with federal environmental law"); Kimberly M. Large, Comment, *The Mischaracterization of Justice Scalia as Environmental Foe: What Harm to Standing Following the Court's Stance in* Laidlaw Environmental v. Friends of the Earth*?*, 10 WIDENER L. REV. 561, 575–83 (2004) (arguing that Justice Scalia's view protects the environment by freeing resources for environmental protection instead of litigation).

Similarly, Chief Justice Roberts's article defending Justice Scalia's view has already created scholarly debate. *See* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993); *see also* Paul Alexander Fortenberry and Daniel Canton Beck, *Chief Justice Roberts—Constitutional Interpretations of Article III and the Commerce Clause: Will the "Hapless Toad" and "John Q. Public" Have Any Protection in the Roberts Court?*, 13 U. BALT. J. ENVTL. L. 55 (2005).

1. Justice Scalia's Law Review Article

Justice Scalia outlined his strict standing framework in a 1983 *Suffolk University Law Review* article.[84] He emphasized a more stringent injury requirement and stressed the role of separation of powers in the standing doctrine. First, Justice Scalia argued "that courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large."[85] Second, he argued that a relaxed view of injury had created "an overjudicialization of the processes of self-governance."[86] The Court should use standing to effectuate separation of powers and to prevent this overjudicialization.[87] According to Scalia, "the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority."[88] Additionally, Justice Scalia found that standing "excludes [courts] from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*."[89] Therefore, the legislature cannot create a "concrete injury so widely shared . . . to mark out a subgroup of the body politic requiring judicial protection."[90] Justice Scalia implemented these ideas in *Defenders of Wildlife*.

2. Lujan v. Defenders of Wildlife

In *Defenders of Wildlife* the Court held that the Defenders of Wildlife ("Defenders") lacked standing to challenge regulations promulgated under

84. Scalia, *supra* note 82, at 881.

85. *Id.* at 881–82. Professor Ann Carlson argued that a stricter injury in fact requirement benefits environmental litigants because it focuses on human impact as opposed to environmental harm. Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 955–63 (1998).

86. Scalia, *supra* note 82, at 881.

87. *Cf.* Leonard & Brant, *supra* note 29, at 39. In addition to cases of a judicial nature, the Framers believed there were further limits on the types of cases that federal courts could hear. *Id.* Despite the Framers articulating a need to confine federal court jurisdiction to cases of a judicial nature, "the Constitution's structure tolerates a significant level of interaction among the branches and does not confine each branch to a strict category of permitted functions." *Id.* at 49.

88. Scalia, *supra* note 82, at 894. Professor John Echeverria argued that focusing on "minority" interests in environmental suits expands the power of big businesses and cripples environmental advocates. John D. Echeverria, *Critiquing* Laidlaw*: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties*, 11 Duke ENVTL. L. & POL'Y F. 287, 290–91 (2001).

89. Scalia, *supra* note 82, at 894.

90. *Id.* at 895–96.

the Endangered Species Act (ESA).[91] Defenders claimed that a federal regulation exempting foreign projects from consultation with the Secretary of the Interior violated the ESA.[92] Defenders members traveled to view the Nile crocodile in Egypt and the Asian elephant and Asian leopard in Sri Lanka.[93] Although the members did not observe the endangered species, they claimed a desire to return and potentially see the animals at a later date.[94] Defenders alleged that U.S. support of development projects in these nations would endanger the animals' habitats, shorten the future of these species, and prevent Defenders members from viewing the animals.[95]

In his majority opinion, Justice Scalia articulated a three-part constitutional standing test that reflected ideas from his law review article. First, "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[96] Furthermore, a particularized injury is an injury that "affect[s] the plaintiff in a personal and individual way."[97] Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be

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91. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992). *Defenders of Wildlife* renewed the debate about environmental standing. *See* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993) (arguing that the Constitution gives Congress greater power to grant standing than the restricted approach of *Defenders of Wildlife*, that the reasoning in *Defenders of Wildlife* is not applicable as a broad standing rule, and that the opinions in *Defenders of Wildlife* are amorphous).

92. *Defenders of Wildlife*, 504 U.S. at 558–59. The specific provision of the ESA reads:

> 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, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

16 U.S.C. § 1536(a)(2) (2006). The original regulation extended the actions required by § 1536(a)(2) to foreign nations. 50 C.F.R. § 402.01 (1979). The proposed changes eliminated the consultation requirement for foreign nations and only required consultation for actions taken in the United States or on the high seas. 50 C.F.R. § 402.01 (1991).

93. *Defenders of Wildlife*, 504 U.S. at 563.

94. *Id*.

95. *Id.* at 563–64. Defenders pointed to the United States' oversight of the Aswan High Dam rehabilitation in Egypt and to the Agency for International Development's funding of the Mahaweli project in Sri Lanka. *Id.*

96. *Id.* at 560 (internal quotations omitted). Justice Scalia cites numerous cases that highlight the evolution of the injury requirement. *Id*. *See* Allen v. Wright, 468 U.S. 737, 756 (1984); Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740–41 n.16 (1972).

97. *Defenders of Wildlife*, 504 U.S. at 560 n.1. To be affected in a personal way, the organization must show direct effects on its members and more than an "injury to a cognizable interest." *Id.* at 563.

'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'"[98] Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[99]

Applying this test, Justice Scalia found that Defenders failed to establish an imminent injury because its members lacked a return plan.[100] Justice Scalia also rejected Defenders' argument that the ESA's citizen-suit provision waived the specific injury requirement.[101] Finally, Justice Scalia, writing for the Court, rejected Defenders' ecosystem nexus, animal nexus, and vocational nexus theories.[102]

Justice Scalia only gained a plurality of the Court for his conclusion that Defenders failed to meet the redressability requirement.[103] For standing to exist, Justice Scalia required that a favorable decision likely

98. *Id.* at 560 (citations omitted).

99. *Id.* at 561 (citations omitted).

100. *Id*. at 564. Justice Kennedy's concurrence found that it was not unreasonable to require return airline tickets to demonstrate an imminent injury. *Id*. at 579 (Kennedy, J., concurring). Justice Scalia goes on to explain that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes." *Id.* at 565 n.2 (majority opinion). Justice Blackmun's dissent argued that the requirement of concrete return visit plans is a mere formality. *Id*. at 593 (Blackmun, J., dissenting). Justice Blackmun found that "the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not." *Id*.

101. *Id*. at 571–78 (majority opinion). The Court's logic is difficult to follow, but it seems to hinge upon a generalized grievance argument. The plaintiff alleged that it suffered a procedural injury by the Secretary's failure to follow consultation procedures. *Id*. at 572. Justice Scalia found this argument unique because there was no underlying concrete interest that the failure to follow the procedure would violate. *Id*. at 572–73. If the Court allowed all citizens to bring suit to compel the executive to enforce the law, plaintiffs could circumvent the case or controversy requirement. *Id*. at 573–74. Justice Scalia supported this proposition by referencing the Court's limitations on taxpayer suits. *Id.* at 574–76.

In contrast, Justice Kennedy's concurrence suggested that Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id*. at 580 (Kennedy, J., concurring). Congress's power to grant standing is limited by its ability to "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Id*. If Congress uses "citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws," it oversteps the outer limit of its ability to confer Article III standing. *Id*. at 580–81.

102. *Id.* at 565–68 (majority opinion). The "ecosystem nexus" theory proposed granting standing to "any person who uses *any part* of a 'contiguous ecosystem' adversely affected by a funded activity . . . even if the activity is located a great distance away." *Id*. at 565. The "animal nexus" theory sought to grant standing to "anyone who has an interest in studying or seeing the endangered animals anywhere on the globe." *Id*. at 566; *cf.* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986) (noting that a person who worked with or observed a particular species could allege sufficient facts to satisfy the injury requirement). Finally, the "vocational nexus" theory sought to grant standing to "anyone with a professional interest in such animals." *Defenders of Wildlife*, 504 U.S. at 566.

103. *Defenders of Wildlife*, 504 U.S. at 568–72.

redress the alleged harm.[104] He found it "entirely conjectural" that requiring the Secretary to change a regulation would affect the species at the specific projects Defenders members visited.[105] Additionally, Justice Scalia stated that Defenders failed to demonstrate that withdrawing agency funding would affect the specific projects because the agency only provided a fraction of the funds.[106]

C. The Countermovement Away From Strict Application

The Court moved away from a strict application of Article III standing requirements in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*.[107]

In *Laidlaw*, the Court found that Friends of the Earth satisfied standing requirements.[108] Laidlaw had violated the limits of a treated-water-discharge permit and polluted the North Tyger River.[109] Friends of the Earth members alleged that they stopped using the river for recreational purposes because it smelled and looked polluted.[110] Friends of the Earth brought suit under the Clean Water Act's (CWA's) citizen-suit provision.[111]

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104. *Id*. at 561.

105. *Id*. at 571. The Court would require plaintiffs to name the agencies funding the projects as defendants; therefore, a favorable decision would stop funding for the specific projects mentioned. *Id*. at 568. *See also* Glover River Org. v. U.S. Dep't of Interior, 675 F.2d 251 (10th Cir. 1982) (finding that the plaintiff lacked standing to challenge the listing of the leopard darter as an endangered species when the plaintiff's requested relief was the preparation of an environmental impact statement and when the plaintiff failed to list the specific projects that threatened the leopard darter).

106. *Defenders of Wildlife*, 504 U.S. at 571.

107. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000). Like *Defenders of Wildlife*, *Laidlaw* also sparked an academic debate. *See, e.g.*, Echeverria, *supra* note 88 (exploring whether Article III limits federal court cases to the enforcement of federal rights and arguing that a case is not moot when a defendant complies with the law after the suit commences); Shults, *supra* note 23 (tracing the evolution of the Court's standing doctrine, contrasting the views presented in *Laidlaw* and *Defenders of Wildlife*, and summarizing the positions taken by the justices in environmental cases).

108. *Laidlaw*, 528 U.S. at 184, 186.

109. *Id*. at 176. The permit limited the discharge of pollutants, regulated effluent from the facility, and imposed reporting obligations. *Id*. Laidlaw repeatedly discharged mercury into the North Tyger River in excess of the allowable daily average. *Id*.

110. *Id*. at 181–83. Friends of the Earth members stopped fishing, camping, swimming, picnicking, walking, bird-watching, wading, hiking, boating, driving, and canoeing in or around the river because of concern about discharged pollutants. *Id*.

111. *Id*. at 176. The CWA requires that a citizen-suit plaintiff provide notice to the EPA, the state in which the alleged violation occurred, and the alleged violator sixty days before initiating suit. 33 U.S.C. § 1365(a), (b) (2006). The CWA prevents the citizen suit from continuing if the EPA or the state where the alleged violation occurred commences suit. 33 U.S.C. § 1365(b)(1)(B) (2006). Friends of the Earth notified Laidlaw of its intent to file suit; Laidlaw then requested that the South Carolina Department of Health and Environmental Control (DHEC) file suit. *Laidlaw*, 528 U.S. at 176–77.

First, the Court found a sufficient injury.[112] The Court emphasized that "the relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."[113] The Court also concluded that Friends of the Earth alleged specific[114] and definite harm to future river use.[115] Finally, the Court found that Friends of the Earth's argument comported with its holding in *Los Angeles v. Lyons* that a plaintiff seeking injunctive relief must show a "real or immediate threat that the plaintiff will be wronged again."[116] In *Laidlaw*, the Court found "nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of the waterway and would subject them to other economic and aesthetic harms."[117]

Second, the Court found that the deterrent effect of civil penalties satisfied the redressability requirement.[118] The Court held that "[t]o the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress

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DHEC and Laidlaw reached a settlement and Friends of the Earth subsequently filed. *Id*. at 177.

112. *Laidlaw*, 528 U.S. at 176–77.

113. *Id*. at 181. The Court found that requiring the plaintiff to demonstrate injury to the environment would "raise the standing hurdle higher than the necessary showing for success on the merits." *Id*. By requiring a demonstration of harm to the plaintiff, the Court limited the standing inquiry. Under the dissent's view, a plaintiff would have to demonstrate both personal injury and environmental injury. *Id*. at 199 (Scalia, J., dissenting). In contrast, Justice Douglas's proposal for environmental object suits would only require a demonstration of injury to the environment, as plaintiff, and not injury to an individual. Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

114. *Laidlaw*, 528 U.S. at 169 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990)). The Court distinguished *National Wildlife Federation* because Laidlaw's actions "directly affected those affiants' recreational, aesthetic, and economic interests." *Id*. at 184. In *National Wildlife Federation*, an environmental organization challenged the Bureau of Land Management's land withdrawal review program, alleging "that the reclassification of some withdrawn lands and the return of others to the public domain would open the lands up to mining activities, thereby destroying their natural beauty." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 879 (1990).

115. *Laidlaw*, 528 U.S. at 184. The Court found that Friends of the Earth's affidavits, which stated that members stopped using the affected waterway for fear of pollution, alleged a sufficient injury. *Id*. at 181–82. The Court reasoned that Friends of the Earth members "adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183. The Court contrasted the plaintiff members' desire to use the river to Defenders members' speculative plans to return to Egypt and Sri Lanka. *Id*.

116. Los Angeles v. Lyons, 461 U.S. 95, 111 (1983). Subsequently, "the Supreme Court has reaffirmed that a plaintiff seeking injunctive relief must show a likelihood of future injury." ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3 (4th ed. 2003). In *Lyons*, a victim of the Los Angeles Police Department's chokehold policy attempted to enjoin the procedure. The Court held that the victim failed to meet the injury requirement. *Id.*

117. *Laidlaw*, 528 U.S. at 184.

118. *Id*. at 185.

to citizen plaintiffs who are injured or threatened with injury."[119] In this case, civil penalties likely would redress Friends of the Earth members' injuries and alter Laidlaw's behavior.[120] Finally, the Court found inapplicable *Steel Company v. Citizens for a Better Environment*'s holding that suing "to assess penalties for wholly past violations" does not provide redress.[121]

Justice Scalia's dissent argued that Friends of the Earth failed to meet the injury and redressability requirements.[122] Justice Scalia argued that Friends of the Earth failed to demonstrate a concrete and particularized injury.[123] He pointed to affidavits which express "concern" about pollution and "belief" of excess mercury levels, as opposed to actual facts related to environmental degradation.[124] He reiterated *Defenders of Wildlife*'s focus on injury to the plaintiff, but he argued that it is nearly impossible to demonstrate a personalized injury without first establishing an environmental injury.[125] Justice Scalia concluded that the majority "makes the injury-in-fact requirement a sham" by granting standing based on beliefs and concerns.[126]

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119. *Id*. at 186. The Court noted that the purpose of civil penalties is to promote immediate compliance and deter future violations. *Id.* at 185. Furthermore, the Court reasoned that the availability, as opposed to the imposition, of civil penalties is sufficient. *Id*. at 186. The Court also explained that the availability of civil penalties only had value if they could be carried out and that civil penalties typically bring about deterrence. *Id*. The Court admitted that sometimes civil penalties may be so insubstantial and remote that they do not have a deterrent effect. *Id*. at 187.

120. *Id.*

121. *Id.* at 187–88. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the Court held that Citizens for a Better Environment failed to meet the redressability requirement because none of the plaintiff members' request for relief would "serve to reimburse respondent for losses caused by the late reporting." *Id*. at 105–06. The plaintiff filed suit to obtain information about the storage and release of toxic chemicals. *Id*. at 104. In a variety of other contexts, the Court has granted standing when the plaintiff can show an injury from being deprived information that is promised by federal statute. *Compare* FEC v. Akins, 524 U.S. 11, 19 (1998) (finding that a violation of a federal statute that created a right to information was sufficient to establish injury in fact), *with* United States v. Richardson, 418 U.S. 166, 179–80 (1974) (holding that the plaintiff was not entitled to information about the CIA's budget because his case presented a generalized grievance, despite the Constitution providing for a regular statement and accounting). The Court in *Steel Co.* found "[n]othing supports the requested injunctive relief except respondent's generalized interest in deterrence, which is insufficient for purposes of Article III." *Steel Co.*, 523 U.S. at 108–09.

122. *Laidlaw*, 528 U.S. at 198–99, 202 (Scalia, J., dissenting).

123. *Id*. at 198.

124. *Id*.

125. *Id*. Justice Scalia noted that environmental plaintiffs under the CWA typically first demonstrate harm to the environment, and then plaintiffs show that the harm to the environment impacts them. *Id*. at 199.

126. *Id*. at 201. Justice Scalia would require "evidence supporting the affidavits' bald assertions regarding decreasing recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw's violations, even though harmless to the environment, are somehow responsible for these effects." *Id*. at 200.

In addition, Justice Scalia found that the majority's interpretation of redressability "has grave implications for democratic governance."[127] He found that the analysis failed to provide "relief specifically tailored to the plaintiff's injury."[128] Specifically, Friends of the Earth's "remedy is a statutorily specified 'penalty' for past violations, payable entirely to the United States Treasury."[129] Justice Scalia's argument focused on three main points.[130] First, he found Friends of the Earth presented a generalized grievance which "convert[ed] an 'undifferentiated public interest' into an 'individual right' vindicable in the courts."[131] As evidence, Justice Scalia cited *Linda R.S. v. Richard D.*,[132] where the Court required a direct relationship "between the alleged injury and the claim sought to be adjudicated."[133] Second, he found potential civil penalties too speculative.[134] The possible imposition of a civil penalty created "*fear* of a penalty for *future* pollution," but did not guarantee behavior change.[135] Third, Justice Scalia found that the CWA's citizen-suit provision violated separation of powers.[136] Congress had usurped the executive's enforcement power by allowing private citizens to bring suit for CWA violations.[137]

V. HISTORY OF ARTICLE I TRIBUNALS AND PUBLIC RIGHTS

Like the Court's standing jurisprudence, the Court's treatment of Article I tribunals has fluctuated over time. Congress has created a variety of Article I tribunals. For example, Congress has established territorial

127. *Id*. at 202.

128. *Id*. at 204. *But cf.* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 264–65 (1991) (finding that a change in airport standards was a personal injury fairly traceable to a congressional board).

129. *Laidlaw*, 528 U.S. at 202 (Scalia, J., dissenting).

130. *Id*.

131. *Id.* at 205.

132. Linda R.S. v. Richard D., 410 U.S. 614 (1973).

133. *Id*. at 618. The mother of an illegitimate child sought to require the state to enforce a child support statute against her child's father, which the state only enforced for legitimate children. *Id*. The Court held that potential future child support payments failed to establish redressability because it was speculative whether the father would pay. *Id.*

134. *Laidlaw*, 528 U.S. at 205–09.

135. *Id*. at 208.

136. *Id*. at 209–10.

137. *Id*. The citizen-suit provision allowed plaintiffs to set the enforcement agenda by acting "as a self-appointed mini-EPA." *Id.* at 209. Justice Scalia rejected the argument that permitting the EPA or comparable state agencies to intervene allowed the executive to set the enforcement agenda. *Id*. at 210. He noted that even though the executive is allowed to intervene, the private citizen still chooses the target. *Id*. at 209–10.

courts, consular courts, courts in unincorporated districts outside the United States, military courts, private land claims courts, Indian citizenship courts, the District of Columbia courts, the Tax Court, and the Court of Claims.[138] The Court's jurisprudence on Article I tribunals and public rights, however, has vacillated significantly. Decisions from three distinct time periods highlight these differences.[139] First, in *Murray's Lessee v. Hoboken Land & Improvement Co.*, the Court began delimiting the role of Article I tribunals for public rights cases.[140] Second, *Crowell v. Benson* expanded the notion of public rights to aide the creation of the administrative state.[141] Third, the Court's modern interpretation of Article I tribunals and public rights evolved in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[142] *Thomas v. Union Carbide Agricultural Products Co.*,[143] and *Commodity Futures Trading Commission v. Schor*.[144]

A. The Foundations of Using Article I Tribunals for Public Rights Disputes

In *Murray's Lessee v. Hoboken Land & Improvement Co.*, the Court suggested that Congress can choose to assign public rights cases to the judiciary or non–Article III tribunals.[145] In this case, treasury officials audited and issued a distress warrant against a collector whose accounts were in arrears.[146] The collector challenged the officials' actions as a violation of Article III; he alleged that the treasury officials were exercising judicial power.[147] The Court concluded that the treasury

138. Maryellen Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOK. L. REV. 207, 215 n.44 (1983). For a summary of the history of each of these tribunals see David A. Case, *Article I Courts, Substantive Rights, and Remedies for Government Misconduct*, 26 N. ILL. U. L. REV. 101, 145–85 (2005).

139. Numerous commentators have advocated for a shift in the theoretical framework of legislative courts. *See* Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 226–28 (1983) (arguing for a return to a more textual reading of Article III); Craig A. Stern, *What's a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043 (abandoning the balancing test and looking to the Constitution for support of the public rights exception).

140. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).

141. Crowell v. Benson, 285 U.S. 22, 51 (1932). For a summary of early cases discussing Article I tribunals, see Wilber Griffith Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930).

142. N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

143. Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985).

144. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

145. *Murray's Lessee*, 59 U.S. at 284.

146. *Id.* at 275.

147. *Id.*

officials did not exercise judicial power, and therefore their actions were constitutional.[148]

First, according to the Court, enumerated legislative powers include the collection of state funds.[149] The Court listed legislative powers as "the powers 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and welfare of the United States, to raise and support armies; to provide and maintain a navy.'"[150] Additionally, Congress's power "includes all known and appropriate means" of effectuating the enumerated legislative purposes.[151]

Second, the Court found that although Congress can assign tasks to the judiciary, this assignment alone fails to create a judicial controversy.[152] In attempting to differentiate a judicial controversy from a congressionally assigned task, the Court explained that:

> there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[153]

Therefore, Congress has the discretion to assign certain public rights controversies to Article III courts or Article I tribunals.

B. The Court Affirms the Use of Article I Tribunals for Public Rights Disputes

In *Crowell v. Benson*, the Court reaffirmed the public/private distinction in *Murray's Lessee* and allowed initial determinations in administrative agencies for private law matters.[154] The case arose when J. B. Knudsen suffered injuries while working on a barge owned by his employer, Charles Benson.[155] Knudsen brought suit against Benson under the Longshoremen's and Harbor Workers' Compensation Act ("Longshoremen's Act").[156] The Longshoremen's Act provided for initial

148. *Id.* at 281.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 284.
154. Crowell v. Benson, 285 U.S. 22, 51 (1932).
155. Crowell v. Benson, 45 F.2d 66, 66 (5th Cir. 1930), *aff'd*, 285 U.S. 22 (1932).
156. *Crowell*, 285 U.S. at 36.

determination of claims by the United States Employees' Compensation Commission and for review of those decisions by injunction in federal district courts.[157] Letus Crowell, a Deputy Commissioner of the United States Employees' Compensation Commission, found in favor of Knudsen, and Benson brought suit in federal district court to enjoin the award.[158] The Supreme Court held that the Longshoremen's Act's procedure did not violate due process because federal courts could suspend or set aside the Commission's order.[159]

In concluding that Knudsen and Benson's controversy dealt with private rights, the Court reiterated the public and private rights distinction in *Murray's Lessee*.[160] The Court found this distinction "at once apparent."[161] In exercising its powers, Congress can create Article I tribunals to determine matters between the government and private individuals, or it may delegate that power to executive officers or the judiciary.[162] Additionally, for disputes involving private rights, the Court refused to create a requirement that "all determinations of fact in constitutional courts shall be made by judges."[163]

C. An Oscillating Theoretical Framework for Article I Tribunals

1. Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, a plurality of the Court prohibited expansive use of Article I tribunals.[164] The Bankruptcy Act of 1978 ("Bankruptcy Act") created bankruptcy courts that served as adjuncts to federal district courts and that had expansive jurisdiction over all civil proceedings arising under or related to bankruptcy proceedings.[165] After concluding that bankruptcy judges are not Article III judges,[166] the plurality found that Article I tribunals are limited to three historical exceptions: territorial courts, military tribunals, and public rights cases.[167] In its discussion of public rights cases, the

157. *Id.* at 43–44.
158. *Id.* at 37.
159. *Id.* at 45.
160. *Id.* at 50–51.
161. *Id.* at 50.
162. *Id.*
163. *Id.* at 51.
164. N. Pipeline Coast. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83–84 (1982).
165. *Id.* at 53.
166. *Id.* at 60.
167. *Id.* at 63–70.

Justices found that "[t]he distinction between public rights and private rights has not been definitively explained in our precedents."[168] Additionally, the Justices recognized that the public rights exception is based on separation of powers principles and sovereign immunity.[169] The plurality concluded that "[p]rivate-rights disputes . . . lie at the core of the historically recognized judicial power" and that public rights cases must involve a dispute between private individuals and the government.[170] The Justices distinguished the federal bankruptcy power, which could be a public right, from state-created private rights.[171]

Additionally, the plurality articulated limits on Congress's ability to create adjunct Article I tribunals.[172] When Congress creates substantive rights, "it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges."[173] However, Congress must limit an Article I tribunal's functions to ensure that the essential attributes of judicial power are retained in Article III courts.[174] In its final analysis, the plurality concluded that Article III prevented Congress from giving Article I tribunals complete power over "all matters related to those arising under the bankruptcy laws."[175]

In dissent, Justice White rejected the plurality's oversimplification of the history of Article I tribunals and advocated for a balancing test.[176] Justice White traced the "complicated and contradictory" history of Article I tribunals and concluded that the Court has not articulated a workable standard to evaluate the constitutionality of these tribunals.[177] He proposed that Article III values should be "balanced against competing constitutional values and legislative responsibilities."[178] Two factors weigh in favor of the constitutionality of Article I tribunals: review of the tribunal's decisions by Article III courts and congressional delegation of issues that are of little interest to the political branches.[179]

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168. *Id*. at 69.
169. *Id.* at 67.
170. *Id*. at 70.
171. *Id.* at 71.
172. *Id*. at 80–81.
173. *Id.* at 80.
174. *Id.* at 81.
175. *Id*. at 76.
176. *Id*. at 103–16 (White, J., dissenting).
177. *Id*. at 113.
178. *Id.*
179. *Id.* at 115.

2. Thomas v. Union Carbide Agricultural Products Co.

Three years later, in *Thomas v. Union Carbide Agricultural Products Co.*, the Court limited the *Northern Pipeline* plurality's strict reading and advocated for a more functional approach to evaluating the constitutionality of Article I tribunals.[180] The Court held that Article III allows Congress to require binding arbitration for disputes under the Federal Insecticide, Fungicide, and Rodenticide Act.[181] The Court reasoned that it "has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts."[182] Furthermore, the Court narrowly construed *Northern Pipeline*'s plurality opinion[183] and found permissible the use of Article I tribunals for private rights disputes closely related to governmental regulatory activities.[184] The Court no longer required the federal government to be a litigant and rejected strict adherence to the formal historical categories used in *Northern Pipeline*.[185]

3. Commodity Futures Trading Commission v. Schor

Finally, in *Commodity Futures Trading Commission v. Schor* the Court adopted a multi-factor balancing test to analyze the constitutionality of Article I tribunals.[186] William Schor brought a claim for reparations in the Commodity Futures Trading Commission (CFTC).[187] The CFTC's jurisdiction permitted it to hear state law counterclaims arising out of the transaction that precipitated the reparations claim.[188] In upholding the CFTC's ability to hear counterclaims, the Court concluded that the CFTC's jurisdiction did not violate Article III.[189]

Adopting the framework from Justice White's dissent in *Northern Pipeline*, the Court found that "the constitutionality of a given congressional delegation of adjudicative functions to a non–Article III body must be assessed by reference to the purposes underlying the

180. Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 584–85 (1985).
181. *Id.* at 571.
182. *Id.* at 583.
183. *Id.* at 584.
184. *Id.* at 594.
185. *Id.* at 586–87.
186. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).
187. *Id.* at 837.
188. *Id.*
189. *Id.* at 857.

requirements of Article III."[190] The Court confessed that its precedents "do not admit easy synthesis," but stated that conclusory references to Article III are not enough.[191] The Court focused on the importance of separation of powers and enumerated a number of factors to consider when analyzing non–Article III bodies.[192] These factors include:

> the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[193]

The Court found that the distinction between public and private rights is a consideration, but it should not be given "talismanic power."[194] The Court concluded that "due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III."[195]

VI. ANALYSIS

A. The Court's Current Standing Test Compromises Environmental Protection

The Court's amorphous application of Article III standing compromises environmental protection. Although the Court has settled on the requirements, its refusal to adequately define injury, causation, and redressability empowers federal courts to inconsistently apply the standing doctrine. Additionally, the Court's standing decisions typically turn on case specific facts, thus creating sporadic environmental decisions.

1. The Injury Requirement Lacks a Coherent Formulation and Foundation

The Court applies the injury requirement inconsistently, finding some harm concrete, distinct, palpable, actual, or imminent, while finding other

190. *Id.* at 847.
191. *Id.*
192. *Id.* at 850–51.
193. *Id.* at 851.
194. *Id.* at 853–54.
195. *Id.* at 857.

harm merely speculative.[196] *SCRAP*, *Defenders of Wildlife*, and *Laidlaw* demonstrate the Court's inconsistency when applying the injury requirement to environmental cases. The effect of increased railroad rates on SCRAP members' recreational uses of the natural environment was a sufficient injury,[197] but Defenders members' plans to return to study endangered species was deemed speculative.[198] Additionally, proximity to harm, regardless of the plaintiff's actual use of the affected area, seems to guarantee a concrete injury.[199] The Court's attempts to define the injury requirement are "as if the Justices were trying to get their arms around the mist."[200]

Second, the injury in fact requirement lacks a constitutional basis and allows judges to bar court access based on their own ideologies. Injury in fact "first arose in a 1958 treatise by Kenneth Culp Davis, purporting to interpret the Administrative Procedure Act['s] . . . 'adversely affected or aggrieved' language."[201] Professor Davis's creation of the injury in fact requirement prevents anchoring injury analysis in precedent. It has aided inconsistent application. Additionally, the injury in fact requirement allows judges to use a "standard that is normatively laden and independent of facts."[202] Professor William Fletcher argues "that anyone who claims to be injured is, in fact, injured if she can prove the allegations of her complaint."[203] He provides the example of a parent buying a bicycle for one child but not the other.[204] The bicycle-less child feels hurt regardless

196. *See* Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 308 (2002) (finding that "[s]eemingly obvious injuries have been rejected as abstract or idiosyncratic"); *cf.* Roberts, *supra* note 83, at 1223 (arguing that the Court's current standing requirements are of "the sort common to the lawyer's craft").

197. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 678 (1973).

198. Lujan v. Defenders of Wildlife, 504 U.S. 555, 567 (1992).

199. *SCRAP*, 412 U.S. at 685. In *Laidlaw*, the Court found a sufficient injury despite several members of Friends of the Earth not using the river since childhood. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 198 (2000) (Scalia, J., dissenting).

200. Nichol, *supra* note 196, at 320. Additionally, the Court's formulation of the injury requirement makes it difficult to address concerns like global warming. *See* Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1 (2005); Blake R. Bertagna, Comment, *"Standing" Up for the Environment: The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming*, 2006 BYU L. REV. 415 (2006); Brian Mayer, Note, *Climate Change, Insurance, NEPA, and Article III: Does a Policy Holder Have Standing to Sue a Federal Agency for Failure to Address Climate Change Under NEPA?*, 74 UMKC L. REV. 435, 447–53 (2005).

201. Sunstein, *supra* note 27, at 185.

202. *Id*. at 188–89.

203. Fletcher, *supra* note 4, at 232.

204. *Id*.

of if the parent thinks that the feeling is justified.[205] Similarly, plaintiffs are injured if they can demonstrate the facts that led to them feeling hurt. When judges decide whether the feelings are justified, their normative decision defines the injury. The correlation between a judge's political party and the likelihood of granting standing evinces this normative judgment.[206] The judge's choice between the labels "actual and imminent" or "speculative and abstract" is inherently value-laden.

2. Causation and Redressability are Easily Manipulable

Like the injury requirement, causation and redressability are "[e]xtremely fuzzy and highly manipulable."[207] The cases dealing with causation and redressability "are usually so dependent on their particular facts that they provide little general guidance."[208] It is difficult to see why stopping a rate increase established a causation chain and adequately redressed SCRAP members' recreational injuries, [209] but pulling funding for a project failed to redress Defenders members' concerns over environmental destruction.[210] Additionally, whether a court finds causation and redressability can turn on how broadly the injury is characterized.[211] For example, if the injury is characterized as a loss of opportunity instead of a specific action, the harm will not be speculative and will be redressable.[212]

Although familiar in the law, causation analysis "is subject to uncertainty and manipulation."[213] This uncertainty "may be misused as an excuse to avoid decision or confused with other more plausible reasons to

205. *Id*.

206. *See* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758–63 (1999) (finding that Republican judges are four times more likely to vote to deny standing in environmental cases than Democratic judges); *cf.* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 617 (2004) (concluding that if clear precedent and effective judicial oversight exist, judges render predictable decisions but if either variable is absent, "federal judges are more likely to decide standing issues based on their own ideological preferences").

207. Sunstein, *supra* note 27, at 228 (redressability). *See also* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1463 (1988) (causation).

208. Roger Beers, *Standing and Rights of Action in Environmental Litigation*, *in* ALI-ABA CLE COURSE OF STUDY—ENVIRONMENTAL LITIGATION (June 22–25, 2005).

209. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 675–76, 678 (1973). Specifically, the recreational interests included camping, hiking, fishing, and sightseeing. *Id.* at 678.

210. *Id*. at 678.

211. Sunstein, *supra* note 207, at 1465.

212. *Id.*

213. WRIGHT, MILLER & COOPER, *supra* note 27, § 3531.5.

avoid decision."[214] Causation analysis also often requires "considerable discovery, factfinding, and, worst of all, judicial speculation on the precise effects of regulatory initiatives."[215] Environmental plaintiffs must invest significant resources to gather evidence linking the government's inaction with their environmental harm, but this process does not guarantee them a day in court. After collecting evidence, an environmental plaintiff's fate turns on whether the judge finds that Congress intended the regulation to alleviate their harm. The causation inquiry is inefficient and wastes resources on a jurisdictional question.[216]

Like the injury requirement, redressability often turns on a judge's normative beliefs. The Court characterizes redressability as either "likely" or "speculative." There is no clear way to measure whether government action will affect a third party.[217] Since it is impossible to predict the effect of government action, it is left to the judge to choose the label for the proposed remedy. These "predictions of remedial benefit may be skewed so as to recognize, deny, or simply confuse standing."[218]

3. The Current Standing Doctrine Usurps Legislative Power

Standing gives the judiciary power to circumvent legislative policy decisions. This malleability of the injury, causation, and redressability requirements increases judicial power by allowing judges to "decide which cases are to be heard on the basis of a bolstered 'intuition' rather than obedience to principle."[219] Standing takes control from the legislature and "disaggregates the citizenry; it is a judicial version of divide and conquer."[220]

Professor Richard Pierce argues that current standing doctrine eviscerates "the principle of legislative supremacy" for three reasons.[221] First, courts can dictate "which congressional policy decisions bind agencies."[222] Second, this decision "confers on agencies discretion to

214. *Id.*
215. Sunstein, *supra* note 207, at 1464.
216. *Id*.
217. *Id*.
218. WRIGHT, MILLER & COOPER, *supra* note 27, § 3531.6.
219. Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1941 (1986).
220. Winter, *supra* note 30, at 1313–14.
221. Richard J. Pierce, Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1200–01 (1993).
222. *Id.* at 1200

ignore many congressional policy decisions."[223] Third, denying standing prevents Congress from making "many judicially enforceable policy decisions"[224] and disregards "the reality of these many layers of politically accountable judgments that originate in legislative choices."[225] Examining the ESA highlights Professor Pierce's concerns. Two purposes of the ESA are to preserve endangered species and to protect their ecosystems.[226] *Defenders of Wildlife* upheld the Department of Interior's finding that these policy decisions do not apply to international projects.[227] Although Congress is not completely powerless because it could pass corrective legislation, the Court's denial of standing still potentially prevents enforcement of congressional policy. *Defenders of Wildlife*'s denial of standing usurped Congress's decision to protect endangered species.

B. Other Proposed Solutions Will Not Adequately Correct the Problem

1. Eliminating or Redefining Existing Standing Requirements

Voluminous arguments have been made to eliminate or redefine existing standing requirements.[228] These arguments ignore the stranglehold that the Court has placed on Congress's ability to create enforceable rights and fail to address the standing doctrine's historic theoretical flaws. According to Chief Justice Roberts, "[i]f Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional."[229] Although Chief Justice Roberts's general proposition is true, it assumes that the current standing jurisprudence is founded in Article III. The Court has constantly contradicted itself and failed to consistently define

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223. *Id.*

224. *Id.*

225. William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 277 (2001). *Cf.* Harold J. Krent, Laidlaw*: Redressing the Law of Redressability*, 12 DUKE ENVTL. L. & POL'Y F. 85, 109–17 (2001) (arguing that judicial review insures the proper application of the redressability requirement by Congress).

226. 16 U.S.C. § 1531(b) (2006).

227. Lujan v. Defenders of Wildlife, 504 U.S. 555, 558–59 (1992).

228. *See, e.g.*, David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79, 127–28 (2004) ("[C]ourts should consider whether the injury complained of is of the type the statute seeks to prevent and whether it threatens the health and longevity of the social system."); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68 (1984) (advocating for a more rudimentary injury inquiry); Pierce, *supra* note 206, at 1776 (arguing for a "broad, permissive, and probabilistic approach to injury and causation").

229. Roberts, *supra* note 83, at 1226.

standing.[230] The only way to escape this morass, at least for environmental disputes, is to start over with congressionally defined rights in an Article I tribunal.

2. Granting Environmental Objects the Right to Sue

Several commentators advocate for granting environmental objects standing to adequately protect environmental interests.[231] Dissenting in *Sierra Club v. Morton*, Justice Douglas provided support for animal actions by arguing for a federal rule that "allow[s] environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage."[232] The debate has surfaced in several lower federal courts.[233] This argument, however, ignores the common law's

230. Richard J. Pierce, Jr., *Issues Raised by* Friends of the Earth v. Laidlaw Environmental Services*: Access to the Courts for Environmental Plaintiffs*, 11 DUKE ENVTL. L. & POL'Y F. 207, 243 (2001).

231. *See, e.g.*, Katherine A. Burke, *Can We Stand for It? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633 (2004) (proposing amendments to the Federal Rules of Civil Procedure and the ESA to allow animals to bring their own suits); Elizabeth L. DeCoux, *In the Valley of Dry Bones: Reuniting the Word "Standing" with Its Meaning in Animal Cases*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 681 (2005) (arguing that a guardian should be capable of establishing standing to protect the interests of animals); James Dumont, *Beyond Standing: Proposals for Congressional Response to Supreme Court "Standing" Decisions*, 13 VT. L. REV. 675 (1989) (arguing that the Thirteenth, Fourteenth, and Fifteenth Amendments give Congress vast power to grant standing to plaintiffs currently denied standing); Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795 (1997) (proposing to effectively implement the Animal Welfare Act third parties should be able to bring claims on behalf of animals); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972) (presenting a philosophical and legal analysis for the creation of legal rights for natural objects by tracing the development of rights for other groups); Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000) (arguing that animals should have standing to protect their own legal interests); Lauren Magnotti, Note, *Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing*, 80 ST. JOHN'S L. REV. 455 (2006).

232. Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

233. The Ninth Circuit has argued that the Constitution does not limit Congress's power to grant standing to animals. Cetacean Cmty. v. Bush, 386 F.3d 1169, 1175–76 (9th Cir. 2004) (denying standing to a group of whales, porpoises, and dolphins but finding that "nothing in the text of Article III explicitly limits the ability to bring a claim in federal court to humans"). Environmental groups often list nonhumans as plaintiffs, but the groups also list organizations to ensure that they meet standing requirements. *See, e.g.*, Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency, 126 F.3d 461, 466 n.2 (3d Cir. 1997); Mount Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1447 n.13 (9th Cir. 1992); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982); Salmon v. Pac. Lumber Co., 30 F. Supp. 2d (N.D. Cal. 1998); Marbled Murrelet (Brachyramphus Marmoratus) v. Pac. Lumber Co., 880 F. Supp. 1343 (N.D. Cal. 1995); Hawaiian Crow ('Alala) v. Lujan, 906 F. Supp. 549 (D. Haw. 1991); N. Spotted Owl v. Lujan, 758 F. Supp. 621 (W.D. Wash. 1991); N. Spotted Owl (Strix Occidentalis Caurina) v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988). Two courts of appeals appear to have used the animal's perspective when addressing standing requirements. *See, e.g.*,

focus on injury to the person. Therefore, creating rights in environmental objects would significantly depart from our legal foundations.[234] Furthermore, despite potentially relaxing the injury requirement, environmental objects would still face causation and redressability problems.

The problems that arise from the Court's inconsistent application of Article III standing will be transposed into a new context. First, the purpose of allowing environmental object plaintiffs is to satisfy the injury requirement. Animals facing habitat destruction or pollution are directly harmed, satisfying the injury prong.[235] Although the injury requirement seems straightforward, an injured environmental object still must demonstrate future harm.[236] The demonstration of future harm could lead to anomalous results like in *Lyons*.[237] Second, multiple factors affect tiny ecosystems. Pinpointing the cause of injuries suffered by individual plaintiffs would be fairly difficult.[238] Third, a favorable court decision must redress a plaintiff's injury.[239] Courts typically order compensation for injured plaintiffs, but compensation likely would be useless to redress direct environmental harm. Injunctions present a viable alternative but are still potentially problematic because they do not guarantee a tangible benefit to environmental objects.[240] Although granting organisms standing might remedy some environmental harm, the Court's inconsistent application of Article III standing requirements would still create gaps in the enforcement of environmental legislation.

Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231 (11th Cir. 1998) (analyzing the causation and traceability requirements from the Loggerhead Turtle's perspective); Palila v. Haw. Dep't of Land and Natural Res., 852 F.2d 1106 (9th Cir. 1988) (analyzing the injury requirement from the Palila's perspective).

234. Stone, *supra* note 231, at 459–64.

235. Burke, *supra* note 231, at 651.

236. In *City of Los Angeles v. Lyons*, 461 U.S. 45 (1983), the Court required a demonstration of future harm, despite previous injury, to challenge a police department's chokehold policy. *Id.* at 111. The Court further found that "a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional." *Id*. *But see* Loggerhead Turtle v. County Council, 148 F.3d 1231, 1247–56 (11th Cir. 1998) (finding that loggerhead turtles met the causation and redressability requirements despite defendant's argument that multiple sources affected loggerhead turtles' nesting habits).

237. *Lyons*, 46 U.S. at 111.

238. *See* Salmon v. Pac. Lumber Co, 30 F. Supp. 2d 1231, 1234–35 (N.D. Cal. 1998) ("The dramatic reduction in the . . . salmon population has been due to many natural and man-made conditions, including long-term trends in atmospheric conditions, . . . the predation of . . . salmon by California Sea Lions and Pacific Harbor Seals, and commercial timber harvesting.").

239. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 182 (2000).

240. *See* Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973); *supra* note 133.

3. Establishing Property Rights in Environmental Resources

Creating property rights in environmental resources ignores a fundamental purpose of environmental law—to correct market failures. It has been argued that "the establishment of property rights in environmental resources would both encourage greater resource stewardship *and* resolve the standing muddle created by inconsistent court opinions."[241] The creation of property rights is intended to promote conservation in the private sector.[242] This proposal assumes that owners will be interested in the long term sustainability of their resources. Environmental law was created to correct for market failures where people did not adequately protect the environment.[243] Although in some instances creating a property interest may lead to greater environmental protection,[244] relying on market forces could also facilitate abandoning environmental protection to promote short term wealth maximization.[245]

VII. PROPOSAL

By creating an Article I environmental tribunal, Congress could avoid the amorphous application of Article III standing. The judiciary's sole purpose is to "decide on the rights of individuals."[246] In contrast, "vindicating the *public* interest . . . is the function of Congress and the Chief Executive."[247] Therefore, the proper forum to enforce the public's interest in the environment is an Article I tribunal for environmental claims ("Proposed Tribunal").[248]

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241. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 70 (2001). *See also* Sunstein, *supra* note 27, at 234–35.

242. Adler, *supra* note 241, at 71.

243. *See* Lin, *supra* note 7.

244. Adler, *supra* note 241, at 71–73 (listing examples from Zimbabwe, New Zealand, and Iceland where creating property interests has led to greater environmental protection).

245. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

246. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

247. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992). For an argument that Article II precludes Congress from delegating the power to protect the interests of the public as a whole, see Harold J. Kent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993).

248. Article III courts consist of life-tenured judges with protected salaries and were created to decide Article III cases and controversies. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 4.1 (4th ed. 2003). In contrast, judges in Article I tribunals sit for fixed terms and only address specific subjects. *Id*. *See generally* Judith Resknik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581 (1985).

A. Supreme Court Precedent

The Proposed Tribunal meets the Court's standards for Article I tribunals. The Proposed Tribunal could be limited to the enforcement of statutory rights created by specific environmental legislation. This would ensure that it is adjudicating cases about pure public rights. Pure public rights "originate in a statute enacted by Congress . . . and the government is always a party, seeking to protect the public health, safety, or welfare by enforcing or defending such laws."[249] Relying on substantive rights created in environmental legislation avoids the Court's concerns in *Northern Pipeline*[250] by limiting the jurisdiction to inherently public matters. Additionally, the Proposed Tribunal would be within *Thomas*'s limits[251] since it would be enforcing a governmental regulatory scheme. Finally, the factors from *Schor*[252] heavily favor the constitutionality of the Proposed Tribunal. The historical analysis reveals that public rights disputes have frequently been removed from the confines of Article III courts.[253] Additionally, the rights to be enforced are not constitutional rights but are congressional creations.[254] Finally, the congressional purposes of protecting public health and the environment provide strong reasons for creating the Proposed Tribunal.

B. Separation of Powers

Justice Scalia's separation of powers analysis in environmental standing decisions supports establishing the Proposed Tribunal. Justice Scalia has repeatedly emphasized his reluctance to grant standing in environmental cases because of the potential usurpation of executive power.[255] He has reasoned that allowing an individual to assert a

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249. Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1073–74 (1999); *cf.* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004) (attempting to narrow the scope of the public rights exception and focusing on the framer's use of the word "tribunal" in Article I).

250. N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 78 (1982).

251. Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 594 (1985).

252. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

253. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 Howard) 272 (1856).

254. *See supra* Part III.

255. In *Defenders of Wildlife*, Scalia argued that

> [t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (citations omitted).

generalized claim would allow the courts "to assume a position of authority over the governmental acts of another and co-equal department."[256] Furthermore, Justice Scalia finds some concrete injuries too general to support a congressional conferral of standing.[257] Justice Scalia's separation of powers argument leaves no options within Article III courts to assert general environmental claims. Therefore, the only place to assert such claims is within the legislative or executive branches.

Article I supports the formation of the Proposed Tribunal. The Proposed Tribunal conforms to the Court's separation of powers analysis. The enumerated legislative powers include the ability to provide for the "welfare of the United States."[258] Environmental legislation serves the purpose of correcting "market failures" and "ensuring that an adequate supply of public goods, such as clean air and water, is available to the public."[259] This is within the ambit of legislative power. Additionally, Congress has the ability to effectuate its purpose of ensuring effective environmental legislation through the Necessary and Proper Clause.[260] Further, allowing the President to appoint the tribunal's members subject to congressional approval likely will avoid a potential Article II challenge.[261]

C. The EPA

The EPA would be an inadequate forum for addressing environmental disputes.[262] Although it seems appropriate to give the EPA greater adjudicatory power, the Court's treatment of administrative agencies makes the EPA an ineffective forum. The Court often limits the enforcement power of administrative agencies and classifies them as

256. Mass. v. Mellon, 262 U.S. 447, 489 (1993). Justice Scalia found that "the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the more undemocratic role of prescribing how the other two branches should function to serve the interest *of the majority itself*." Scalia, *supra* note 82, at 894.

257. Scalia, *supra* note 82, at 895–96 (using the example of a governmental action which affects "all who breathe" and believing that this injury could be resolved by the normal political process).

258. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 Howard) 272, 281 (1855).

259. Lin, *supra* note 7.

260. *Murray's Lessee*, 59 U.S. (18 Howard) at 281.

261. *See* Springer v. Gov't of Philippine Islands, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement."); *see also* Buckley v. Valeo, 424 U.S. 1, 138–41 (1976) (finding that vindication of public rights must be conducted by officers appointed by the executive).

262. *See supra* note 13.

adjuncts of Article III courts.[263] In this role, the EPA would require a federal district court to implement any decision.[264] EPA adjudication still subjects environmental disputes to Article III standing when the litigant seeks enforcement. Additionally, agencies like the EPA have been subject to agency "capture" by political pressure from the regulated industry.[265] The power of well-organized private interest groups has prevented the implementation of statutory enactments that harm regulated industries.[266] Increased EPA adjudicatory authority likewise would be subject to industry pressure. This would prevent the enforcement of environmental policy. The Proposed Tribunal could escape similar political pressure by providing its members lengthy tenures and prohibiting their removal except for good cause.

D. Due Process Standards

Appellate review is not required for all Article I tribunals, but the courts of appeals and Supreme Court could provide limited review of the Proposed Tribunal's decisions.[267] The Court "possesses no jurisdiction over some cases initially tried before military tribunals," and Article III appellate review "is never available as of right."[268] Therefore, federal court review is not required for Article I tribunals to meet due process requirements. However, Congress usually provides for the oversight of inferior tribunals by the federal judiciary.[269] The courts of appeals could exercise limited review of the Proposed Tribunal's decisions through writs of mandamus.[270] This allows federal court review without subjecting plaintiffs to a standing inquiry. Finally, decisions of the Proposed Tribunal could create a constitutionally recognized injury that would allow

263. Crowell v. Benson, 285 U.S. 22, 51–65 (1932)
264. N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 78 (1982).
265. Sunstein, *supra* note 27, at 168.
266. *Id*.
267. Several commentators have argued that some form of Article III court review is necessary for Article I tribunals to pass constitutional muster. *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233 (1990); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); Richard B. Saphire and Michael E. Solimine, *Shoring up Article III: Legislative Court Doctrine in the Post* CFTC v. Schor *Era*, 68 B.U. L. REV. 85, 87–88 (1988) (advocating for meaningful Article III court review).
268. Fallon, *supra* note 267, at 973.
269. Pfander, *supra* note 249, at 721.
270. *Id.* at 724–25.

appellate court review.[271] This would move the Court's focus beyond standing and to the merits of the plaintiff's claim.

E. The Seventh Amendment

The Seventh Amendment does not prevent the formation of the Proposed Tribunal. Court precedent "has said that the Article III and Seventh Amendment analyses are the same, so that if the public rights doctrine or the balancing test allows Congress to assign a matter to a non-Article III court, it can do so without providing a jury."[272] Therefore, the Seventh Amendment analysis is coextensive with the public rights analysis. Since it should be found that the Proposed Tribunal is adjudicating pure public rights, no Seventh Amendment concerns should arise.

VIII. CONCLUSION

The Court's amorphous application of Article III standing requirements has allowed environmental harm to go uncorrected. Even drastic doctrinal reform would still subject the environment to the Court's ubiquitous Article III standing requirements. Therefore, to provide adequate protection for the environment, an Article I tribunal should be created.

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271. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617–18 (1989) (granting certiorari in a case that originally would not meet federal standing requirements when the state court judgment caused direct, specific, and concrete injury).

272. Sward, *supra* note 249, at 1098. *See also* Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407 (1995).

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