
ENVIRONMENTAL STANDING: WHO DETERMINES THE VALUE OF OTHER LIFE?

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I. STANDING AND VALUE

The constitutional requirements for standing articulated by the Supreme Court impose a fiercely contested theory of value on the democratic polity. These requirements (of injury-in-fact, causation, and redressability) are threshold requirements that must be met by the human plaintiff in order for a federal court to hear the case. Because they are constitutional in nature, these requirements trump any statutory grant of standing to citizens to stand in for ecosystems or other life that is injured by activities that are statutorily prohibited. For instance, a statute (such as the Endangered Species Act) may grant protection to a given species and grant citizens' standing to sue to enforce these protections. Nevertheless, the courts cannot hear a case brought by a citizen in which such a species is injured by activities alleged to be prohibited *unless* the *human* plaintiff can show that he or she was *also* injured by those activities. Further, the injury must be shown to be *caused by* the activity in question and the plaintiff must show that the injury would be likely to be *redressed* if the activity was stopped.¹

Such requirements, at least in those cases where the agency with enforcement power fails to act, effectively remove other life or ecosystems from any direct claim to justice in our legal system. A claim to justice is premised at least in part on the value of the parties. Therefore, the constitutional standing doctrine amounts to a judicial

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1. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (holding that when “a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of *someone else* . . . it becomes the burden of the plaintiff to adduce facts showing that [the] choices [of that third party] have been or will be made in such manner as to produce causation and permit redressability of injury”).

imposition of a theory of value in which human beings are the source and center of value.²

The scope of citizens' suit provisions in environmental regulations have been significantly curtailed by the standing doctrine, with its constitutional requirements that the plaintiff show injury-in-fact, causation, and redressability.³ Ironically, the most basic rationale for the standing doctrine is the separation of powers between the branches of the federal government.⁴ The Supreme Court explained that standing "is founded in concern about the

2. This judicial imposition of a human-centered value system is well-illustrated in an en banc case from the D.C. Circuit, *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (1998). In that case, Marc Jurnove, an individual who was trained in the care of animals and highly concerned about their welfare, contended that a number of animals at the Long Island Game Farm Park and Zoo were being treated unlawfully under the Animal Welfare Act (AWA). *Id.* at 428. (Note that the Animal Welfare Act does not have a citizens' suit provision, so this suit was brought under the Administrative Procedures Act (APA). But the constitutional standing analysis, our concern here, is identical either way.) Jurnove specifically challenged then-current USDA regulations that allegedly permitted the conditions of which he complained. *Id.* at 430. But, in order to have standing to bring suit, Jurnove could not argue on the basis of the injurious treatment to the animals – the object of his concern – even though that treatment was allegedly illegal under the AWA. Neither could he argue that he suffered a moral or ethical injury by the treatment, since the courts have not recognized such an injury (and it would probably come too close to "ideological injury" for the courts). Therefore, Jurnove had to establish that he suffered "aesthetic injury" by the mistreatment of these animals. *Id.* at 428-29, 434. The majority of the court found that injury-in-fact was established by Jurnove's aesthetic injury. *Id.* at 429. But there is something troubling, even offensive, about this finding. It diverts attention from Jurnove's concern, from the concern about the well-being of other life, to Jurnove's well-being. And the court orders a remedy, not to heal the injury to the animals, but in order that Jurnove's aesthetic tastes will no longer receive offense by the way these animals are treated. Like the citizens' suit provisions of environmental statutes, the court's inquiry should focus on whether the APA, together with the relevant agency action, give Jurnove a cause of action. The court's focus on injury-in-fact is muddled, inconsistent, and offensive to those who do not adhere to the implied theory of value.

3. *See, e.g., Lujan*, 504 U.S. at 560.

4. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498 (1975); *see also Allen v. Wright*, 468 U.S. 737, 752 (1984); *Lujan*, 504 U.S. at 560-61; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). The Supreme Court has also justified standing requirements on several additional bases. Standing serves judicial efficiency since it holds back the floodgates against those who have only an ideological, rather than a personal, particularized, stake in the outcome of the suit. *See, e.g., United States v. Richardson*, 418 U.S. 166, 192 (Powell, J., concurring). Further, standing is purported to ensure that individuals raise only their own rights and do not intermeddle with the rights of others – seeking to protect what the other does not want protected. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976). Finally, the standing requirement is purported to sharpen and focus judicial decision-making. As the Court put it in *Baker v. Carr*, standing requires a plaintiff to allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." 369 U.S. 186, 204 (1962) (cited in *Massachusetts v. Env'tl. Prot. Agency*, 127 S.Ct. 1438, 1453 (2007)).

proper – and properly limited – role of the courts in a democratic society.”⁵ By requiring that plaintiffs meet the requirements of standing, the Court arguably confines its own activity to justiciable cases and controversies and so keeps the Court out of the policy-making arena properly conferred on the elected branches of government. These requirements are also purported to prevent the other branches from infringing on each others’ constitutionally delegated powers; in particular, they prevent Congress from delegating to the courts the executive task of carrying out legislative mandates or enforcing the law.⁶

In the context of environmental regulations (such as the Endangered Species Act, the Clean Air Act, and the Clean Water Act) that protect, at least in part, ecosystems and other life, citizens’ suit provisions allow for individuals to meet statutory standing requirements by suing on account of *injury to* ecosystems or other life. The Court, however, has explicitly rejected this construal as failing to meet the constitutional requirements for Article III standing. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,⁷ the Court explained, “[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.”⁸ Even if the relevant statute prohibits activity that results in injury to a river, a species, or an ecosystem, the courts will only hear the case if the *human* plaintiff can demonstrate that *she* has suffered a particularized, concrete injury (or injury-in-fact) as a result of (i.e. causation) the prohibited activity. Further, it is the injury to the *human* plaintiff that must be likely to be redressed by a favorable ruling.

The standing doctrine, then, has the odd effect of placing the human plaintiff before the court, with the injury to the ecosystem or other life *that is prohibited by the relevant statute* as relevant only to the extent this environmental injury also injures the human plaintiff and to the extent that healing this environmental injury redresses the injury to human plaintiff. The ecosystem and other life, in other words, become a backdrop for the human drama of injury and healing. To be sure, many interpretations of the constitutional provisions involve value judgments. However, by separating human

5. *Warth*, 422 U.S. at 498.

6. *Lujan*, 504 U.S. at 577.

7. 528 U.S. 167 (2000).

8. *Id.* at 181.

beings from the rest of nature, the current standing doctrine stands out for its wholesale imposition of a thoroughgoing and powerfully contested theory of value. And since it is on such values that a democratic polity adopts policies for how we structure our lives together, the assumption of any such value theory is best left to the elected branches of government.

This standing doctrine has deep ethical significance. It is usually considered a matter of *justice* that those injured by legally cognizable wrongs have recourse to the courts to be made whole. The Court's use of the standing doctrine effectively removes ecosystems and other life from any direct claim to justice.⁹ This amounts to the judicial institutionalization of a theory of value in which human beings are the source and center of value. The problem is not so much whether such a value theory is tenable. Rather, the problem is that by imposing a particular theory of value on a democratic polity, the Supreme Court (on almost any account of the Courts' role) has transgressed its proper boundaries and usurped a legislative, and properly democratic, function. It is part of the function of the legislature, in free and open debate, to determine the principles of justice, and the theory (or theories) of value, that order our lives together.

The effects of the Court's position are not simply theoretical. On the contrary, if courts hold that there is no injury in the destruction of other life or of an ecosystem, absent direct injury to human beings, it is difficult to muster the resources and commitments necessary to actively protect against such "environmental" injury. The current standing doctrine also forces environmentalists to couch their claims in terms of human self-interest. More than thirty years ago, Laurence Tribe pointed out the danger of this approach: "What the environmentalist may not perceive is that, by couching his claim in terms of human self-interest – by articulating environmental goals wholly in terms of human needs and preferences – he may be helping to legitimate a system of discourse which so structures human thought and feeling as to erode, over the long run, the very sense of obligation which provided the impetus for his own protective efforts."¹⁰ This yields what Tribe calls a "metamorphosis of obligation into self-interest and personal preference."¹¹ Tribe's point, in part, is that the way we speak influences the way we think. Couching arguments in

9. As noted, this is at least true where the relevant agency fails to act.

10. Laurence Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1330-31 (1974).

11. *Id.* at 1331.

terms of human preferences, as the standing doctrine forces us to do, can erode the very values that bring us to feel an obligation to ecosystems and other life. Even when one's concern with injury to other life is ethical, to be legally cognizable it must be put in terms of human injury, such as a recreational injury or an aesthetic injury, which fundamentally distorts the ethical dimension of the experienced reality.

In this paper, I begin with an articulation of the development of the current standing doctrine. I then argue that this doctrine is logically untenable, constitutionally unsupported, and undermined by our legal history.

II. DEVELOPMENT OF THE CURRENT STANDING DOCTRINE

Historically, the right to bring suit had been closely tied to recognized common-law injuries arising from contract disputes, property disputes, or tort. The early, embryonic form of standing as a distinct doctrine occurred during the 1920s and 1930s, against the background of a heated debate about the constitutionality of the administrative state, with its myriad regulations.¹² Justices Brandeis and Frankfurter, with their overlapping tenures, led the Court in the development of this doctrine. Their goal was to limit an aggressive judicial attack on progressive and New Deal legislation by erecting procedural barriers to such attacks.¹³

The Supreme Court first articulated the bar to citizen and taxpayer standing during these years. For instance, in 1923, in *Frothingham v. Mellon*, the plaintiff sued, as a taxpayer, to restrain federal expenditures under the Maternity Act of 1921, an Act intended to reduce infant and maternal mortality.¹⁴ The plaintiff claimed that the Act violated the Tenth Amendment. The Court denied standing, holding that the plaintiff alleged no injury to a legal right beyond suffering in an indefinite way in common with people generally. The Court held,

12. Perhaps ironically, the Justices who now seek to rein in citizens' suits that challenge agency actions are viewed by many as *too friendly to industry*. But they find themselves, to some degree, in alignment with earlier Justices who developed the standing doctrine to protect agency decisions from *attack or interference by industry*.

13. See, e.g., Robert Pushaw, Jr. *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 396 (1996) (arguing that Justice Frankfurter played a central role in designing the standing doctrine).

14. 262 U.S. 447, 479 (1923).

We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.¹⁵

If someone (1) has a legal right, (2) is in danger of sustaining, or has sustained, an injury to that right by the enforcement of a statute, and (3) the individual alleges that the statute is invalid, then (4) that individual has standing to sue.¹⁶ The Court in this case did not link these requirements to Article III; rather, they followed the line from common law demanding a cause of action or a legal right that has been or will be violated, with the additional concern of “generalized grievances,” that accompanied the rise of the administrative state. The plaintiff needs to show an injury beyond the claim of some indefinite suffering shared by all the population.¹⁷ Taxpayers, in general, do not have standing to sue to challenge federal expenditures because their interests are comparatively minute and their purported injury is shared by the general population.¹⁸ Similarly, in 1937, the Court ruled that a plaintiff could not gain standing merely from the claim that he had a right to have the government follow the laws.¹⁹ “[I]t is not sufficient [for standing],” the Court held, “that he has

15. *Id.* at 488. In a companion case disposed at the same time the Court denied the State of Massachusetts standing to challenge the same Act. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (holding that the plaintiff “must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of [the] enforcement [of the challenged statute], and not merely that he suffers in some indefinite way in common with people generally”).

16. *Id.*

17. *Id.* at 487-88.

18. *Id.* at 487.

19. *Ex Parte Levitt*, 302 U.S. 633 (1937). The early standing guidelines hewed roughly to preexisting law. For instance, in *Tenn Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939), the Court held that unless a plaintiff had “a legal right, —one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege,” there was no cause of action. (quoted by Laveta Casdorff, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY’S L. J. 471, 488 (1998)).

merely a general interest common to all members of the public.”²⁰ *Frothingham* and *Leavitt* establish the bar to taxpayer and citizen standing. But they do not hold that these are Article III requirements and they do not address the situation where there is a statutory grant of standing, leaving open the possibility that Congress could override these decisions for particular purposes in a given statute.

It was not until 1944 in *Stark v. Wickard* that the Court made its first reference to standing as an Article III limitation.²¹ The next case that made a similar reference did not come until 1952 in *Adler V. Board of Education*.²² In that case, an employee of the New York City Board of Education brought a suit seeking a determination that a New York law was unconstitutional, and seeking to enjoin the Board of Education from implementing it. The majority found no constitutional infirmity in the statute.²³ Justice Frankfurter, in his dissenting opinion, argued that “we should adhere to the teaching of this Court’s history to avoid constitutional adjudications on merely abstract or speculative issues and to base them on the concreteness afforded by an actual, present, defined controversy, appropriate for judicial judgment, between adversaries immediately affected by it.”²⁴ He argued that the jurisdiction of the Court was limited “by the settled construction of Article III of the Constitution. We cannot entertain, as we again recognize this very day, a constitutional claim at the instance [sic] of one whose interest has *no material significance* and is *undifferentiated from the mass of his fellow citizens*.”²⁵ Apparently, by that date, at least in the mind of Justice Frankfurter, the plaintiff’s interest must be *materially significant* and *differentiated from a generalized grievance* to meet the **constitutional** requirements for standing.²⁶ Though now elevated to constitutional requirements, this position is consistent with the claim that standing is conferred so

20. 302 U.S. at 634.

21. 321 U.S. 288, 310-11 (1944) (“[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights . . . We merely determine the petitioners have shown a right to a judicial examination of their complaint.”) (cited by Cass R. Sunstein, *What’s Standing after Lujan? of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 169 (1992)).

22. 342 U.S. 485, 501 (1952) (Frankfurter, J., dissenting).

23. *Id.* at 496.

24. *Id.* at 497-498.

25. *Id.* at 501 (emphases added).

26. Note that, in *Adler v. Board of Education*, as in *Stark v. Wickard*, the claims concerning the lack of material interest or significance largely overlapped with the lack of differentiation from the larger public or the generalized nature of the claim.

long as the law – either common law or statute – has conferred upon the plaintiff a cause of action, giving her the required interest.

By the mid-1950s, the focus of the Court had “shifted from regulatory to civil rights issues.”²⁷ As the Warren Court expanded individual rights and sought a constitutional grounding for them, the Court liberally interpreted statutes to expand the doctrine of standing.²⁸ In 1968, the Court dramatically broadened access to the courts to challenge government action. In *Flast v. Cohen*,²⁹ the Court upheld taxpayer standing to challenge federal expenditures that went to parochial schools as violating the Establishment Clause. Both the majority and the dissent agreed that the rule preventing the Court from hearing generalized grievances was prudential rather than constitutional.³⁰ The majority distinguished *Frothingham* by arguing that the First Amendment, but not the Tenth Amendment (which was at issue in *Frothingham*), was a limit on the taxing and spending authority of Congress.³¹ The Court held that “in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”³² The Court’s emphasis in this standing decision was on “adverseness” rather than “separation of powers.” However, the standard articulated such a high level of generality that probably most disputes could be described as “adverse” and whether the form was one “historically capable of judicial resolution” provided little guidance. The Burger Court subsequently moved essentially to limit *Flast* to the facts of the case rather than allowing broad-based taxpayer standing.³³

The insistence that Article III requires injury-in-fact, causation, and redressability was not a part of the judicial landscape until the

27. Casdorff, *supra* note 19, at 489.

28. *Id.* at 489-91.

29. 392 U.S. 83 (1968).

30. *Id.* at 101, 119-20 (Harlan, J., dissenting).

31. *Id.* at 105.

32. *Id.* at 101.

33. *See, e.g.*, *United States v. Richardson*, 418 U.S. 166, 175 (1974) (holding that the plaintiff lacked standing to challenge statutes providing secrecy for the CIA’s budget as violating the Constitution’s requirement of regular accounting for all expenditures because he was not suing on the basis of a personal right, but only as a citizen and taxpayer with a generalized grievance). The Court deemed it irrelevant that the plaintiff claimed that if he could not sue, no one could. *Id.* at 179.

1970s.³⁴ In 1970, two events took place that, at the time, seemed to have little to do with each other: (1) the Clean Air Act amendments introduced citizen enforcement suits into environmental statutory law,³⁵ and (2) the Supreme Court, in two opinions by Justice Douglas handed down on the same day, introduced “injury-in-fact” into standing jurisprudence.³⁶ Virtually every piece of environmental legislation that followed the Clean Air Act, including the Endangered Species Act of 1973, included a citizens’ suit provision to compel agency action to comply with the law and to allow citizens’ enforcement actions against private individuals.³⁷ Through the 1970s, the standing doctrine grew alongside the citizens’ suit provision.

Originally intended to continue the process of broadening plaintiffs’ access to the courts, the Supreme Court’s 1970 decision in *Association of Data Processing Service Organizations, Inc. v. Camp*³⁸ ironically provided the framework for the most restrictive requirements in the (comparatively brief) history of the doctrine.³⁹ The petitioners in *Data Processing*, who sold computer services to businesses, challenged a ruling of the Comptroller of Currency that allowed banks to make available data processing services to customers and other banks.⁴⁰ The lower court had dismissed the case, holding that the plaintiff lacked standing.⁴¹ In reversing the lower court, the Supreme Court argued, “[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved ‘persons’ is symptomatic of that trend.”⁴²

34. Sunstein, *supra* note 21, at 168.

35. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1706 (1970).

36. *Barlow v. Collins*, 397 U.S. 159 (1970); *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

37. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(1)(a) (2002); Toxic Substances Control Act, 15 U.S.C. § 2619(a)(1) (2006); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(a)(1) (2006); Clean Water Act of 1976, 33 U.S.C. § 1365 (2006); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(1) (2006); Safe Drinking Water Act, 42 U.S.C. 300j-8 (2006); Solid Waste Disposal Act, 42 U.S.C. § 6972 (2006); Clean Air Act, 42 U.S.C. § 7604 (2006 and Supp. 1990); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9659 (2006); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (2006); Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 60121 (2006); and others.

38. 397 U.S. 150 (1970).

39. Casdorff, *supra* note 19, at 492-93.

40. 397 U.S. at 151.

41. *Id.*

42. *Id.* at 154.

To facilitate this trend, the Court separated the issue of standing from the “legal interest” test which, it held, went to the merits.⁴³ For the issue of standing, the Court held, “[t]he first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”⁴⁴ Instead of examining the governing law to see if Congress had created a legal interest, the Court would perform an independent standing inquiry that would turn on the facts rather than the law. Since *Data Processing*, injury-in-fact has been taken as one of the three constitutional requirements for meeting the Article III standard for cases or controversies. The question of whether the plaintiff has suffered an injury-in-fact was separated from the merits of the case and determined before the court got to the merits. It is a threshold matter that the courts must resolve to hear the case.

The next major development in the standing doctrine came in 1975. In *Warth v. Seldin*,⁴⁵ four classes of plaintiffs challenged the zoning ordinances of Penfield, New York, that they claimed excluded low- and moderate-income housing. The Court denied standing to all four classes because, the Court held, they were unable to establish a nexus between the ordinance and their claimed injury; that is, the plaintiffs failed to show that, absent the ordinances, they would have been able to afford housing in Penfield. The Court never reached the merits of the case because the majority held that the plaintiffs had failed to demonstrate a causal connection between the ordinance and the claimed injury. The Court stated, “The Art. III judicial power exists only to *redress* [redressability] or otherwise to protect against injury to the complaining party, even though the court’s judgment may benefit others collaterally. A federal court’s jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury *resulting from* [causation] the putatively illegal action.”⁴⁶ Since then, the three

43. *Id.* at 153.

44. *Id.* at 152. This case also first articulated the “zone of interest” test as a prudential standing requirement for cases brought under the Administrative Procedures Act (APA). See Casdorff, *supra* note 19, at 493-94. Since this paper’s focus is on (1) citizens’ suits (which make the Administrative Procedures Act unnecessary for bringing a suit) and (2) the constitutional requirements for standing, we will not explore this aspect of the case.

45. 422 U.S. 490 (1975).

46. *Id.* at 499 (emphases added) (citations and quotations omitted). See also *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41-42 (1976) (holding that, as a constitutional matter, the claimed injury must be one that “fairly can be traced” to the defendant’s actions and that the injury is likely to be “redressed by a favorable decision”).

constitutional requirements to meet Article III standing have been injury-in-fact, causation, and redressability.⁴⁷

In 1992, the citizens' suit provisions of environmental statutes and the (now) constitutional requirements of standing clashed dramatically in *Lujan v. Defenders of Wildlife*.⁴⁸ Nine years earlier, in 1983, then-Judge Antonin Scalia of the U.S. Court of Appeals of the District of Columbia, published an article, "The Doctrine of Standing as an Essential Element of the Separation of Powers,"⁴⁹ whose reasoning would become that of the Supreme Court in *Lujan*. Judge Scalia stated that his "thesis is that the judicial doctrine of standing is a crucial and inseparable element of . . . [the] principle [of separation of powers], whose disregard will inevitably produce – as it has during the past few decades – an overjudicialization of the processes of self-governance. More specifically, I suggest 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."⁵⁰ In *Lujan*, Justice Scalia, writing for the Supreme Court, echoed this reasoning. The Interior Department had promulgated a regulation that required consultation only for actions taken in the United States or on the high seas, exempting from the Endangered Species Act actions by U.S. government taken overseas. The plaintiffs in *Lujan* claimed that the U.S. government funded activities abroad which would increase the rate of extinction of threatened or endangered species, so that the regulation at issue was against the provisions of the Endangered Species Act. Justice Scalia, in his majority opinion, noted that the first constitutional requirement of standing is that "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."⁵¹ He added in a footnote that the injury, to be particularized, "must affect the plaintiff in a personal and individual way."⁵²

When the plaintiff is herself the object of an action, this will generally not be a hurdle. But when "a plaintiff's asserted injury

47. *Warth*, 422 U.S. at 498-99.

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

49. Scalia, *supra* note 4.

50. *Id.* at 881-82.

51. *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (internal quotations omitted).

52. *Id.* at 560, n.1.

arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."⁵³ In *Lujan*, the plaintiffs' claim to injury was that two of the plaintiffs had traveled to foreign countries and observed endangered animals in their native habitat, and these animals were now threatened with extinction by the action of the U.S. government.⁵⁴ Both plaintiffs claimed that they intended to go back and would be harmed if the animals were to become extinct. The Court ruled that the plaintiffs had not shown how damage to the animals would produce any *imminent* injury to the plaintiffs since they did not have any *definite, concrete* plans to return.⁵⁵ The Court held that the injury-in-fact requirement of Article III standing invalidated the explicit congressional grant of standing to citizens in the Endangered Species Act (and presumably in other environmental statutes). Congress can create statutory standing only if there is also injury-in-fact. The Court noted that it does not make any difference that the Endangered Species Act was intended, in part, to provide a means by which to preserve ecosystems on which endangered or threatened species depend.⁵⁶ "To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question."⁵⁷

The Court explicitly rejected citizens' suit provisions, common to environmental statutes, as a means of gaining standing:

Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch . . . 'The province of the court,' as Chief Justice Marshall said in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 170, 2 L. Ed. 60

53. *Id.* at 562. As Judge Scalia had put it nine years earlier, "when an individual who is the *very object* of a law's requirement or prohibition seeks to challenge it, he always has standing. . . . Contrast that classic form of court challenge with the increasingly frequent administrative law cases in which the plaintiff is complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*." Scalia, *supra* note 4, at 894.

54. 504 U.S. at 562-64.

55. *Id.* at 564. As the dissent points out, this requirement is likely an "empty formality" since it could be satisfied by the simple expedient of purchasing plane tickets to the designated locations. *Id.* at 592 (Blackmun, J., dissenting).

56. Through its standing jurisprudence, then, the Court has effectively imposed an anthropocentric value theory through its doctrine of standing. Persons, not ecosystems, must be injured in order to have standing to sue on behalf of ecosystems *whose health the relevant law is intended to protect*.

57. *Lujan*, 504 U.S. at 565.

(1803), 'is, solely, to decide the rights of individuals.' Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3.⁵⁸

Congress, the Court held, cannot convert the public interest in the proper administration of laws into an individual right that permits all individuals to sue. Article III standing requirements, and especially the requirement of "injury-in-fact," prohibit this conversion because it would violate the separation of powers and make the courts "monitors of the wisdom and soundness of Executive action."⁵⁹

Though the Court in subsequent decisions has backpedaled from the stringent application of the "concrete injury" requirement for standing, in what one commentator has called a move from "injury-in-fact" to "injury-in-fiction,"⁶⁰ it remains confined to the boundaries it set for itself in the three constitutional requirements for standing – injury-in-fact, causation, and redressability. This confinement is reflected in recent decision, *Massachusetts v. EPA*, where both the majority and the dissent argue *within* these boundaries. The disagreement among the Justices stems from their differing interpretation of how stringently to apply these terms. The Court uses its test for standing to determine the constitutionality of the

58. *Id.* at 576-77. Steven L. Winter has aptly called this Scalia's "imperial vision of the law" in which the citizens and ostensible rulers are left as passive and alienated subjects, with the imperial executive having not just the power to enforce the law, but the *exclusive* power for such enforcement. Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?* 12 DUKE ENVTL. L. & POL'Y F. 155, 163 (1993). Winter points out several other problems with Scalia's argument, such as its tension with the very notion of "rule of law." *Id.* at 166.

59. 504 U.S. at 577 (quoting *Allen v. Wright*, 468 U.S. 737, 760 (1984)).

60. Jonathan H. Adler, *Stand or Deliver: Citizens Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 55 (2001).

congressional grant of standing. Prior to *Lujan*, where it could be discerned, the Court had deferred to congressional intent with regard to the grant of standing.⁶¹ *Lujan*, then, seemingly casts the Court's prior reasoning into doubt.

III. STANDING AS A NORMATIVE INQUIRY

These holdings set the stage for the Court's decision in *Lujan*, with its stringent articulation of the injury-in-fact test, examined above. The Court in *Lujan*, recall, held that the injury-in-fact requirement demanded a showing that the injury affected the plaintiff in a "personal and individual way,"⁶² was "concrete and particularized," "actual or imminent," "not conjectural or hypothetical."⁶³ This stringent test made a finding of "as applied" unconstitutionally of citizens' suit in environmental statutes practically a foregone conclusion – as Justice Scalia intended. Such suits could be successful only if the plaintiff could also meet these stringent Article III requirements.⁶⁴

Because standing is a threshold question,⁶⁵ the courts must make the determination concerning these three requirements independently of the governing law and before turning to the merits of the case. If the Article III standing requirements were determined on the basis of the governing law, then the court would simply ask if

61. See, e.g., Richard J. Pierce, *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1179 (1992). For further support of this thesis, see also *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345-48, 352-53 (1984); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72-81 (1978); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210-12 (1972); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 155-56 (1970); *Fed. Comm'ns Comm'n v. Sanders Bros. Radio Station*, 309 U.S. 470, 473-76 (1940).

62. 504 U.S. at 560 n.1.

63. 504 U.S. at 560.

64. But what is the source of these requirements, and, in particular, of the injury-in-fact requirement? The short answer is that the Court invented them. But they may have been led down that path by a mistaken interpretation of the Administrative Procedures Act (APA) by *Kenneth Culp Davis*. 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.02, at 211-13 (1958). See Sunstein, *supra* note 21, at 186.

Note that the Court in *Data Processing* was interpreting the APA. But interestingly, the opinion is actually unclear on whether the injury-in-fact test was meant to apply to the Court's interpretation of the APA or to Article III standing. Subsequent decisions, of course, have interpreted it as an Article III requirement. In 1958, *Davis* misread the words "adversely affected or aggrieved" (and so having standing to challenge an agency decision) in the APA to mean injury "in fact." But the words are not freestanding; they are followed by "within the meaning of a relevant statute." See APA, § 1.C.

65. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

the plaintiff had a cause of action grounded in a legal source, either common law or statutory law. If there was such a cause of action, the “case” or “controversy” requirement of Article III would be met. Where such a cause of action was missing, the case would be dismissed for lack of standing.

But the Supreme Court has set Article III standing requirements as a threshold question, and divorced the inquiry into injury-in-fact (as well as causation and redressability) from legal interest.⁶⁶ The Court in *Data Processing* sought to move from a complex legal inquiry to a purely fact-based inquiry of whether there was a factual harm.⁶⁷ But this separation is untenable. It is inevitable, indeed logically necessary, that we rely on some standard to distinguish between what counts as an injury and what does not. This is a value-laden, normative inquiry. To be sure, this notion is partially obscured by the fact that in many cases there are fairly well-established conventions on what counts as an injury. In enacting statutes, legislatures often make value determinations or normative decisions about what *ought* to count as an injury, what sorts of harms *ought* to be redressable in the courts. Likewise, with the common law, judges make these determinations, often appealing to such norms as equity or justice.

The question of what *is* an injury is a normative inquiry because it depends upon an individual’s understanding of the way something *ought to be and ought to function* (how, say, a human body ought to exist and function, or the way tree or ecosystem ought to exist and function, etc.). Such an understanding depends deeply on what we believe the purpose of such entities are (e.g., does an ecosystem exist, finally, for the human good? Or does it have a broader purpose or purposes, quite independent of the human good?). An injury to an entity, then, is a deviation, or a pathology, from the way that entity ought to exist or function (i.e., a deviation from our normative vision). This is essentially a metaphysical inquiry, and far from being value-free, it implicates the deepest of our values. Even if we restrict ourselves to human beings, what is an injury is far from clear. Does someone who fears that the river is polluted in the absence of any scientific evidence suffer a concrete, factual injury? Does someone

66. See, e.g., *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

67. *Id.* See also, Sunstein, *supra* note 21, at 188 (arguing that “[t]he *Data Processing* Court appears to have thought that it was greatly simplifying matters by shifting from a complex inquiry of law (is there a legal injury?) to an exceedingly simple, law-free inquiry into fact (is there a factual harm?)”).

who finds deeply offensive, and so offers a legal challenge to, the grant of tax deductions to racially segregated schools suffer a concrete, factual injury? Does an individual who feels deep sorrow over the threatened loss of a species suffer a concrete, factual injury? Does someone who cares deeply about animals, upon seeing them treated cruelly, suffer a concrete, factual injury? The Supreme Court has answered these questions in various ways because the injury-in-fact standard cannot not actually provide guidance as between people with differing normative worldviews. By stripping “injury” from its legal grounding, the Supreme Court has unmoored the term from any common reference point. That is, how individuals answer the question “what is an injury in fact?” implicates their normative vision of reality; the term “injury” becomes highly mutable because it is a depository that refracts these differing worldviews.

To be sure, the underlying logic of *Lujan*, with its three constitutional requirements for Article III standing, remains the law of the land. And these requirements were reinforced by several cases that came after *Lujan*.⁶⁸ However, the Court has not consistently followed the stringent version of the injury-in-fact/causation/redressability test set out in *Lujan*. In 2000, the Supreme Court held that the citizens’ suit plaintiffs in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*⁶⁹ did have Article III standing. The lower court had found “repeatedly,

68. See, e.g., *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102-04 (1998). In this case, the Court emphasized,

[T]he irreducible constitutional minimum of standing contains three requirements. . . . First and foremost, there must be alleged (and ultimately proven) an ‘injury in fact’ – a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. . . . Second, there must be causation – a fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury. This triad of injury in fact, causation, and redressability constitutes the core of Article III’s case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.”

Id. (internal citations and quotations omitted.)

The Court held that the plaintiff company could not meet the stringent redressability requirement on its request for information about toxic releases under a right-to-know statute because none of the relief requested “would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent.” *Id.* at 105-06 (internal citations and quotations omitted). Therefore, the plaintiff had no Article III standing, despite the presence of a citizens’ suit provision in the governing law. See generally *Bennett v. Spear*, 520 U.S. 154 (1997). The *New York Times* has noted that the Supreme Court’s trend of tightening standing requirements was one of the “most profound setbacks for the environmental movement in decades.” William Glaberson, *Novel Antipollution Tool Is Being Upset by Court*, NY TIMES, June 5, 1999, at A1, cited in Adler, *supra* note 60, at 39.

69. 528 U.S. 167 (2000).

Laidlaw's discharges exceeded the limits set by the permit. In particular, despite experimenting with several technological fixes, Laidlaw consistently failed to meet the permit's stringent 1.3 ppb (parts per billion) daily average limit on mercury discharges. The District Court later found that Laidlaw had violated the mercury limits on 489 occasions between 1987 and 1995.⁷⁰ The district court had found that Friends of the Earth (FOE) had standing, and though it denied injunctive and declaratory relief, it did issue a civil penalty against Laidlaw.

However, the district court also explicitly found, despite the violations, "There has been no demonstrated proof of harm to the environment."⁷¹ Additionally, the district court found, "[T]he overall quality of the river exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water. The fish tissue studies . . . showed levels of mercury in the sampled fish well below the Food and Drug Administration (FDA) action level . . ."⁷² The Court of Appeals for the Fourth Circuit, after assuming without deciding the issue of standing, ordered the case dismissed for mootness, noting Laidlaw's subsequent compliance with the permits.⁷³ The Supreme Court reversed the Court of Appeals finding of mootness because "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case."⁷⁴

Laidlaw contended that FOE lacked standing because there was no injury-in-fact. To support their standing claim, the plaintiffs offered affidavits from local residents. For instance, one residence claimed that, as a boy, he camped and fished near the river three to fifteen miles south of Laidlaw's plant. However, he wouldn't do that anymore because "he was *concerned* that the water was polluted by Laidlaw's discharges."⁷⁵ He also stated that the river looked and smelled polluted. Other residents gave similar statements. For example, another resident maintained that before Laidlaw came, she used to walk near the river, wade in, picnic, and bird watch. But "she

70. *Id.* at 176 (citing the lower court's decision, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 956 F.Supp. 588, 613-21 (D.S.C. 1997)).

71. *Friends of the Earth*, 956 F.Supp. at 602.

72. *Id.* at 600.

73. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 149 F.3d 303, 306 n.4 (4th Cir. 1998).

74. *Friends of the Earth*, 528 U.S. at 174.

75. *Id.* at 182 (emphasis added).

no longer engaged in these activities in or near the river because she was *concerned* about harmful effects from discharged pollutants.”⁷⁶ The thrust of the injury claimed in these affidavits are the individuals’ subjective apprehensions and fears that Laidlaw’s discharges *may* be affecting water quality, despite the lack of scientific support for these fears.

In spite of this subjective basis for the claim of injury, the majority, by a 7-2 vote, found that FOE had standing to sue. The majority held, “The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff.”⁷⁷ The Court explicitly held, then, that there need be no injury to the environment to support citizen-suit standing. The plaintiff’s mere knowledge that a permit was violated, which in turn resulted in fear and that subjective fear lessened the “aesthetic and recreational values of the area” for the plaintiff, was enough to grant standing.⁷⁸ There was no scientifically supported deterioration in water quality and no increased risk of ingestion of chemicals; there was nothing but the plaintiffs’ subjective fears based on technical permit violations. These subjective fears, where they impact plaintiffs activities and enjoyment, are apparently enough to support a finding of injury-in-fact. As one commentator points out, this is a long way from the concrete, particularized injury required in *Defenders*: “‘Injury-in-fact’ became injury in fiction.”⁷⁹

Typically, as Scalia points out in the dissent, the environmental plaintiff claims that the harm to the environment harmed the plaintiff. Scalia notes,

... harm to the environment is not *enough* to satisfy the injury-in-fact requirement unless the plaintiff can demonstrate how he personally was harmed. In the normal course, however, a lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs. While it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of that injury. Ongoing ‘concerns’ about the environment are not enough, for it is

76. *Id.* (emphasis added).

77. *Id.* at 181.

78. *Id.* at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

79. Adler, *supra* note 60, at 56.

the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions.⁸⁰

The majority, in a sense, turned on its head the typical use of the claim that it is harm to the plaintiff, and not the environment, that is relevant to standing. Usually, this means that the harm to the environment must be severe enough to also have harmed the plaintiff. But the majority in *Laidlaw* empties the claim of meaning by holding that there need be no harm to the environment or threat human health for the plaintiff to have suffered injury-in-fact due to technical violation of discharge permits. Subjective fear is enough.

Even though *Laidlaw*, in one sense, represents a victory for environmentalists insofar as standing requirements seem to have been relaxed. Yet it is troubling that the standing doctrine made the well-being of the river, in significant measure, irrelevant. It was human subjective fears about pollution to the river, unmoored from actual harm to the river or the environment that allowed the court to hear the case. Insofar as it focuses such exclusive attention on these fears as its basis for the finding of injury-in-fact, this case illustrates what is wrong with the standing doctrine *from the perspective of the environmentalist*. The environment has been so instrumentalized by the standing doctrine that harm to the environment can actually be left entirely out of the picture by the court deciding whether an environmental plaintiff has standing to sue, ostensibly to engage as "private attorneys general" to protect the environment. In the Court portrayal of this case, it is difficult to avoid the conclusion that what is being redressed in this case is not harm to the environment but harm to the plaintiffs' psyches caused by their beliefs about the environment. The environment is merely a stage, a background, on which the ethically salient, and exclusively human, activity takes place.

This is not to impugn the integrity of the plaintiffs in this case. It is to impugn a judicial system that forces plaintiffs to argue in terms of harm to themselves, when their primary motivation may well be ethical concern for the well-being of a river, an ecosystem, or other life. In *Laidlaw*, plaintiffs should have been free to sue for *Laidlaw's* failure to meet the permit requirements. But such standing should be understood as the result of a congressional grant of standing, of a statutory cause of action. The plaintiffs were given a cause of action

80. *Friends of the Earth*, 528 U.S. at 199 (Scalia, J., dissenting) (citations and quotations omitted).

by the Clean Water Act's citizens' suit provision when Laidlaw repeatedly failed to meet the requirements of the permit that they were issued.

Another post-*Lujan* case that displays the split in the Court, and the malleability of the standing requirements, is *Massachusetts v. EPA*.⁸¹ In this case, the Court held that Massachusetts had standing to sue the EPA for failing to offer a statutorily authorized rationale for its refusal to regulate carbon dioxide emissions from new vehicles. The state's claimed injury was the loss of its shoreline, purportedly due to the rising sea level caused by global warming. But there was conflicting testimony in the record on whether subsidence was at least a partial cause of the shoreline loss. Further, tailpipe emissions of carbon dioxide in the United States account for only six percent of the worldwide emissions and new regulations would, realistically, only marginally impact this small percentage. To claim that the loss of shoreline is an injury-in-fact caused by the EPA's failure to regulate new vehicles' carbon dioxide emissions seems a bit of a stretch of these concepts of injury-in-fact and causation. (The majority basically reasoned that every little bit counts, and big problems have to be tackled one step at a time.) Chief Justice Roberts claimed in his dissent, with some justification, that the Court's decision "recalls the previous high-water mark of diluted standing requirements."⁸² He points out the speculative nature of the injury as the injury caused by the failure of the EPA to regulate new vehicle emissions.⁸³

But the primary problem is the Court's doctrine of standing itself. The divorce of the Article III, and especially the injury-in-fact requirement, from any statutory cause of action – that is, making standing an independent threshold question – not only untethers standing from its historical and constitutional bounds and imposes a value theory that is highly contested, it is also conceptually untenable (and results in the "looseness" and "manipulability" that the Chief Justice refers to). To determine what counts as an injury requires a

81. 127 S. Ct. 1438 (2007).

82. *Id.* at 1470-71. Chief Justice Roberts was referring to the Court's decision in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). The Chief Justice continues, "Over time, *SCRAP* became emblematic not of the looseness of Article III standing requirements, but of how utterly manipulable they are if not taken seriously as a matter of judicial self-restraint." *Id.* He is entirely right on the manipulability of the requirements. But what he means by "judicial self-restraint" is less clear. Perhaps he means continued use of the requirements to advance the conservative justices anti-environmental agenda.

83. *Massachusetts v. EPA*, 127 S. Ct. at 1470.

normative framework for determining how something ought to be or ought to function. In short, what counts as an injury depends on one's worldview. It's a small wonder that standing has become the locus of powerful ideological differences. What counts as an injury to a conservative may differ markedly from what counts as an injury to a liberal precisely because their worldviews, their views of the way the world ought to be, differ markedly.

In addition to its logical problems, the current standing doctrine finds little support in either the Constitution or history.

IV. STANDING IN THE CONSTITUTION AND EARLY HISTORY OF THE REPUBLIC

Article III of the Constitution limits federal court jurisdiction to "Cases" and "Controversies."⁸⁴ The text of the Constitution provides little guidance on how these terms are to be interpreted. Article III does not refer to standing or injury-in-fact. Article III requires a case or controversy, which likely requires some law (either common law or statute) to provide a cause of action, but any further requirements do not come from the text of the Constitution.

And history belies the claim that these requirements are deep-seated in American jurisprudence. Vindication of the rule of law, the undifferentiated public interest in the faithful execution of the law, have long been viewed as the proper province of the citizen plaintiff – contrary to modern standing law.⁸⁵ As Louis Jaffe summarized his historical survey in 1961, "the public action – an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations – has long been a feature of our English and American law."⁸⁶ In 1875, for instance, the Supreme Court was presented with a petition for a writ of mandamus (or a court command) by private citizens to compel a federally chartered railroad to build a railroad line.⁸⁷ The Court allowed the action to go forward even though the Court maintained that the petitioners were

84. U.S. CONST., art. III, § 2.

85. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

86. Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961).

87. *Union Pacific Railroad v. Hall*, 91 U.S. 343 (1875). For more detailed analysis, see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1404-05 (1987).

seeking to enforce “a duty to the public generally” and had “no interest other than what belonged to others.”⁸⁸

Congress’ creation of the *qui tam* action and informers’ action also undercut the view that Article III bars congressionally authorized citizen actions.⁸⁹ Early Congress created numerous *qui tam* statutes, with the purpose of giving citizens the right to bring civil suits to help enforce criminal law. Under the *qui tam* action, a citizen could bring suit against those who violated the law. Many statutes in the first decade of the nation’s existence allowed for *qui tam* actions; these included statutes criminalizing the slave trade with other nations⁹⁰ and criminalizing liquor importation without the payment of duties.⁹¹ As the Supreme Court explained in 1905, “[s]tatutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government.”⁹² Similarly, early Congress created informers’ action, through which private citizens could bring suit to enforce public duties and keep a share of the resulting fine or damages. The informers’ action could be applied both against private individuals and public officers.⁹³ There is no evidence in the historical record that anyone harbored any doubts about the constitutionality of what were in essence citizens’ suits.⁹⁴

Of course, both the *qui tam* action and the informers’ action generally allowed the plaintiff a monetary award, and in that sense, differ from modern citizens’ suits. The award of a bounty did not create an injury where none existed before, but rather served as an incentive to carry out desired action.⁹⁵ Further, mandamus suits were allowed, but did not involve the exchange of money. And the very

88. *Union Pacific Railroad*, 91 U.S. at 354.

89. See, e.g., Winter, *supra* note 87, at 1391; Sunstein, *supra* note 21, 174-76; Winter, *supra* note 58, at 156-60. These articles provide further analysis of these actions.

90. Act of Mar. 22, 1794, ch. 11, § 2, 1 Stat. 347, 349.

91. Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209. See Sunstein, *supra* note 21, at 175, for further examples.

92. *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

93. See Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45.

94. Sunstein, *supra* note 21, at 175-76.

95. *Id.* at 176. Of course, Congress could create a bounty, say, of a dollar, for citizen enforcement of environmental regulations to make the current citizens’ suit equivalent to *qui tam* and informers’ action. But such an action would merely show the emptiness, indeed silliness, of the attempt to maintain a meaningful difference between these early actions and the modern citizens’ suit provisions.

fact that no constitutional concerns were voiced about these stranger suits makes it unlikely that they, as such, were thought to be constitutionally problematic. Early American law and judicial practices do not support the claim that there are constitutional limits on Congress' authority to establish standing. There is no hint of an Article III requirement of injury-in-fact in the text or in the historical record. The Article III requirement of a case or controversy, read in light of the text of the Constitution as well as constitutional history, means nothing more than that some source of law must have conferred a cause of action for a given plaintiff to have standing.

V. CONCLUSION

The Supreme Court's modern interpretation of its role, and the place of the doctrine of standing in maintaining that role, cannot withstand scrutiny. It is not supported by the text of the Constitution, history, or logic. Further, it is a usurpation of legislative prerogative and a violation of the separation of powers, rather than a bulwark against such violation. Perhaps because of the Court's anxiety to avoid having to rule on the category of cases represented in *Lujan* – those that are brought by plaintiffs who seek to force government agencies to obey the law – the Court crossed the boundary that separates the branches of government and made a vastly important public policy choice. Specifically, the Court imposed a theory of value on the democratic polity in which human beings are the source and center of value. At least in those cases where an agency fails to act, an individual is no longer allowed (1) to step forward and sue on behalf of an ecosystem or species that is injured (2) by activity that is prohibited by statute (3) even when that statute also grants citizen standing, (4) unless that individual can demonstrate that she herself is injured by the activity. And it is this injury to the human individual that is judicially cognizable, and would likely be redressed by a favorable ruling. The natural environment and other life become a mere backdrop for playing out of the human drama.

The Supreme Court's development of the injury-in-fact requirement for standing highlights this aspect of the value theory espoused by the Court: the Court endorses an anthropocentric value theory insofar as it is only injuries to human beings that "count."

This may be a viable value theory. This may be the value theory that we, the people, would choose. But it is not a value theory that is mandated by the U.S. Constitution and it is not within the purview of the courts in a democratic polity, by any reasonable view of the role

of the courts, to force on the nation. Far from being a bulwark to protect the separation of powers, the Supreme Court has employed the doctrine of standing to break down that separation and usurp the prerogatives of the legislative branch.

The severing of injury-in-fact from legal injury transformed the court's legal inquiry not into simple factual inquiry but rather into an extraordinarily complex metaphysical inquiry – an inquiry into the ultimate and more general nature of entities. If we consider the notion of legal interest, then what counts as a legal interest and a legal injury can be clarified. If the U.S. government drains the wetlands on federal lands, an individual does not, by that action alone, have a legal interest; consequently, that individual has no standing and there is no Article III case or controversy. If, however, Congress passes a statute granting citizens standing to sue their government in order to protect wetlands, then Congress has granted a cause of action – a beneficial interest in wetlands and the legal right to sue for their protection.

Congress, by creating a cause of action to complain against environmental destruction or racial discrimination, is granting individuals a legal interest in a certain state of affairs (say, clean air, or thriving species, or racial equality). It is this legal interest by which courts judge if there is a cause of action, and so standing and an Article III “case” or “controversy.” Severing the standing inquiry from the inquiry into whether there is legal interest was the primary wrong turn that has allowed the Supreme Court to use the standing doctrine for ideological purposes – both conservative (staunch, strict inquiry into injury-in-fact) and liberal (loose, diluted inquiry into injury-in-fact).

To move the Court out of the policy-making arena, the current doctrine of standing should be jettisoned for a more structured, predictable, and less ideologically driven inquiry into whether the plaintiff presents a cause of action. Such a development would take the courts out of the business of imposing a contested value theory on the democratic polity and restore the proper balance between the branches of government.