

## JUSTICE SCALIA, STANDING, AND PUBLIC LAW LITIGATION

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### INTRODUCTION

United States Supreme Court Justice Antonin Scalia has become an important figure in American constitutional law. Over the past five years, he has worked significant changes in our legal landscape. He has argued—with a good deal of success—for a markedly different view of the Supreme Court's power to assure "substantive due process."<sup>1</sup> He has convinced his colleagues to dramatically curb the reach of the Free Exercise Clause.<sup>2</sup> He has pushed for a major alteration in the Court's Commerce Clause analysis<sup>3</sup> and reined in aspects of the commercial speech doctrine.<sup>4</sup> Last Term, in the hate speech case from Minnesota, he introduced what may prove to be a significantly altered approach to free speech jurisprudence.<sup>5</sup> His powerful minority opinions in

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1. *Michael H. v. Gerald D.*, 491 U.S. 110, 121-32 (1989); see also *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (Scalia, J., concurring).

2. *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990).

3. See *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part); see also Richard B. Collins, *Justice Scalia and the Elusive Idea of Discrimination Against Interstate Commerce*, 20 N.M. L. REV. 555 (1990).

4. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989).

5. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

abortion,<sup>6</sup> desegregation,<sup>7</sup> and separation of powers<sup>8</sup> cases may achieve broader influence in time.

Not surprisingly, Justice Scalia's federal courts opinions have received less attention, but here, too, his efforts have been substantial. He has altered the breadth of federal common law,<sup>9</sup> rejected the Court's broad implied cause of action doctrine,<sup>10</sup> developed a narrowed view of pendent jurisdiction,<sup>11</sup> advocated further restrictions on habeas corpus,<sup>12</sup> and won over several colleagues to his vision of the Eleventh Amendment.<sup>13</sup>

Yet, Justice Scalia's most important opinion in federal courts law is his most recent one—last summer's decision in *Lujan v. Defenders of Wildlife*.<sup>14</sup> This ruling, in my view, will mark a transformation in the law of standing—the law of “judicial control of public officers.”<sup>15</sup> Building upon his prior academic writings<sup>16</sup> and opinions as both a Justice<sup>17</sup> and a federal appellate court judge,<sup>18</sup> Scalia concluded for the *Defenders* majority—without apparent embarrassment—that “legislatively pronounced” “public rights” cannot provide the basis for standing in the federal courts unless they coincide with the Justices' views of discrete, concrete, and tangible injury.<sup>19</sup> The decision is difficult to square with the language and history of Article III, with the injury requirement

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6. See *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2873 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

7. See *United States v. Fordice*, 112 S. Ct. 2727, 2746 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

8. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

9. See *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

10. See *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring in the judgment).

11. See *Finley v. United States*, 490 U.S. 545 (1989); see also *Wendy C. Perdue*, *Finley v. United States: Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539, 572 (1990).

12. See *Penry v. Lynaugh*, 492 U.S. 302, 350 (1989) (Scalia, J., concurring in part and dissenting in part).

13. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justices O'Connor and Kennedy joined Scalia's opinion in *Union Gas Co.*

14. 112 S. Ct. 2130 (1992).

15. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 459 (1965).

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

17. See, e.g., *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).

18. See, e.g., *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1341-45 (D.C. Cir. 1986) (Scalia, J., dissenting).

19. *Defenders*, 112 S. Ct. at 2142-46.

itself, with more modest visions of judicial power, and with time-honored notions of public law litigation. It is, therefore, worthy of some exploration and even some criticism. In this brief Article, I will attempt to provide a measure of each.

### I. *LUJAN V. DEFENDERS OF WILDLIFE*

The Endangered Species Act (the Act) requires the Secretary of the Interior to initiate consultation processes when federally funded projects or agency actions threaten the continued existence of any endangered plant or animal species.<sup>20</sup> In 1986, the Department of the Interior revised its regulations, reinterpreting the statute to require consultation only for actions taken in the United States or on the high seas.<sup>21</sup> *Defenders* involved a challenge to this more geographically restricted rule.

The plaintiff, an environmental group, sought standing pursuant to several theories. At least two group members identified federally funded foreign projects that threatened endangered species of particular interest to them. One alleged that she had travelled to Sri Lanka and “‘observed th[e] habitat’ of . . . ‘the Asian elephant and the leopard,’”<sup>22</sup> which was jeopardized by the Mahaweli Project funded by the Agency for International Development. The other, who allegedly had “‘observed the traditional habitat of the . . . Nile crocodile . . . and intend[s] to do so again,’”<sup>23</sup> complained of American funding and overseeing of the reconstruction of the Aswan Dam in Egypt.

Justice Scalia, writing for the Court, easily concluded that these allegations fell short of the “imminent injury” required for standing.<sup>24</sup> The affiants’ profession of an intent to return to the places they had visited before, without “concrete plans” or “any specification,” was—jurisdictionally speaking—“simply not enough.”<sup>25</sup> “[S]ome day” intentions,” Scalia wrote, “do not support a finding of . . . ‘actual or imminent’ injury that our cases require.”<sup>26</sup>

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20. 16 U.S.C. § 1536(a)(2) (1988).

21. *Defenders*, 112 S. Ct. at 2135.

22. *Id.* at 2138 (citing Affidavit of Amy Skilbred).

23. *Id.* (citing Affidavit of Joyce Kelly).

24. *See* *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

25. *Defenders*, 112 S. Ct. at 2138.

26. *Id.* (quoting *Whitmore*, 495 U.S. at 155). The plaintiffs also sought to demonstrate

Unwilling to stop there, Justice Scalia also determined that the plaintiff failed to meet the redressability standard. Its shortcomings were twofold. First, the plaintiff had sued the Secretary of the Interior, not the agencies providing funding for the contested projects. If the Secretary were ordered to revise the disputed regulation to require consultation, it was "very much an open question" whether other agencies would be "bound" to comply.<sup>27</sup> Second, the Court indicated that federal agencies typically supplied only a "fraction" of the funding for foreign projects—ten percent in the case of the Mahaweli Project.<sup>28</sup> Accordingly, the plaintiff had produced nothing "to indicate that the projects . . . named will either be suspended, or do less harm . . . if that fraction is eliminated."<sup>29</sup>

These harsh sorts of injury and redressability<sup>30</sup> determinations, as I will discuss below, are debilitating to much public law litigation which is, by nature, predictive, probabilistic, and policy-based. They also appear to begrudge the policies of the Act. Whatever else may be said of the Court's standing determination in *Defenders*, however, it was not surprising. In the past fifteen years, the Court repeatedly has applied the injury, causation, and

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injury as users of a "contiguous ecosystem." *Id.* at 2139. The Court found that this argument was inconsistent with *National Wildlife's* requirement that environmental plaintiffs "must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." *Id.* (quoting *National Wildlife*, 497 U.S. at 887-89). Plaintiffs also claimed standing under an "animal nexus" theory, arguing that anyone who has an interest in studying or seeing endangered animals "anywhere on the globe" has standing. *Id.* Justice Scalia dismissed this claim as "beyond all reason." *Id.*

27. *Id.* at 2140.

28. *Id.* at 2142.

29. *Id.* The Court concluded that since funding is frequently only partial, the loss of any funding is not a large enough incentive to guarantee that agencies would make changes to protect species. Justice Scalia may be skeptical about the relationship between funding and behavior, but the Endangered Species Act does not seem to be. *See* 16 U.S.C. § 1535(d) (1988).

30. The *Defenders* opinion employs unreasonably demanding redressability standards. It is possible, of course, that other government agencies would not consider themselves "bound" by a regulation that demanded consultation, but surely consultation would be highly likely if such a change in regulations occurred. This demand for certainty about the success of remedies is inconsistent with the Supreme Court's decision to hear other cases. For example, in *United States v. Nixon*, 418 U.S. 683 (1974), the Court could not have been any more certain that President Nixon would have complied with an order to release the White House tapes than the *Defenders* Court was certain that other agencies would comply with a directive of the Secretary of the Interior. Despite this uncertainty, the Court heard *Nixon*.

redressability standards with skepticism and even recalcitrance. The Court has tightly cabined injury,<sup>31</sup> employed causation to reject apparent congressional policies,<sup>32</sup> and interpreted redressability to demand near certainty in remedial success.<sup>33</sup>

Justice Scalia's next step in *Defenders*, however, was new. Despite the "thin" nature of the plaintiff's traditional injury claims in *Defenders*, the U.S. Court of Appeals for the Eighth Circuit granted standing based upon the provisions of the Endangered Species Act.<sup>34</sup> The statute, after all, makes clear that "any person may commence a civil suit on his own behalf . . . to enjoin . . . [the] violation of any . . . provision of [the Act]."<sup>35</sup> The district courts also are empowered to "enforce any provision" or "order the Secretary to perform [any] duty" prescribed by the statute.<sup>36</sup> The lower court characterized interagency consultation, which is required by section 7, as a legally cognizable "procedural right."<sup>37</sup> Since Congress can clearly create new legal interests, the violation of which constitutes injury in fact, the court of appeals inferred that standing was appropriate.

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31. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975) (rejecting exclusionary zoning challenge for lack of standing). In *Warth*, the Court narrowly characterized the plaintiff's injury claim as actually obtaining housing, rather than as a broader interest being given the opportunity to obtain housing (which would have been redressable). *Id.* at 502-08. The Court also refused to consider the plaintiff's alleged "interests in interracial association" as capable of sustaining "injury in fact." *Id.* at 512-14.

32. See, e.g., *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (finding insufficient link between congressional policy of allowing tax deductions for charitable hospitals and indigent plaintiff's desire for free emergency medical care). The *Simon* Court assumed, in effect, that tax deductions are unlikely to affect private behavior. *Id.* at 42-44. Congress seems to assume the opposite. See *McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972); see also Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185, 203-04 (1980-1981).

33. See *Allen v. Wright*, 468 U.S. 737, 757-59 (1984) (finding that requiring the IRS to lift tax-exempt status from racially discriminatory private schools may not achieve desired goal of public school desegregation); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 656-57 (1985).

34. *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 121-22 (8th Cir. 1990), *rev'd*, 112 S. Ct. 2130 (1992).

35. 16 U.S.C. § 1540(g) (1988).

36. *Id.*

37. *Id.*; see *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2142 (1992); 16 U.S.C. § 1536(a)(2) (1988).

Justice Scalia characterized the Eighth Circuit's holding as "remarkable."<sup>38</sup> The court based standing upon the mere congressional conferral upon "all persons of an abstract, self-contained, non-instrumental 'right.'"<sup>39</sup> As in the Court's generalized grievance cases, the interests asserted were "plainly undifferentiated and common to all members of the public."<sup>40</sup> Those cases, of course, involved violations of procedures set forth in the Constitution. There is, however, Scalia suggested, "absolutely no basis for making the Article III inquiry turn on the source of the asserted right."<sup>41</sup> If the courts were to "ignor[e]," at the "invitation of Congress," the "concrete injury requirement," they would violate the case or controversy requirement just as surely as if they had granted standing without a constitutional, common law, or statutory basis.<sup>42</sup> Although Congress may broaden the categories of "de facto injuries"<sup>43</sup> that are judicially cognizable, it may not completely abandon the injury requirement. Accordingly, the plaintiff's challenge was dismissed.

*Defenders*, therefore, took what to many will seem a surprising turn. The U.S. Supreme Court, for the first time in modern Article III analysis,<sup>44</sup> concluded that even though a federal stat-

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38. *Defenders*, 112 S. Ct. at 2142.

39. *Id.* at 2143. It is worthy of comment that in *Defenders*, Justice Scalia once again speaks in highly derogatory terms both of the plaintiff's claims and of his dissenting colleagues. See Collins, *supra* note 3, at 555 & n.2 (cataloging colorful Scalia rebuttals). In *Defenders*, Justice Scalia characterized the plaintiff's arguments as "inelegantly styled," "fantasy," "remarkable," and the results of a "Linnaean leap." 112 S. Ct. at 2139, 2140, 2142, 2140. His opponents on the Court, on the other hand, "continue to miss the point" with "facially impracticable suggestion[s]." *Id.* at 2141 n.4, 2142; see also *Lee v. Weisman*, 112 S. Ct. 2649, 2681, 2682 (1992) (Scalia, J., dissenting) (describing majority's claims as "nothing short of ludicrous" and "beyond the absurd"); *American Nat'l Red Cross v. S.G. & A.E.*, 112 S. Ct. 2465, 2476 (1992) (Scalia, J., dissenting) (calling Justice Souter's opinion for the majority "a wonderland of linguistic confusion"); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532, 537 (1989) (Scalia, J., concurring) (stating that Justice O'Connor's opinion "cannot be taken seriously" and is "irrational"). One wonders what Justice Scalia's reaction would have been if the plaintiff in *Defenders* had suggested, as he did, the recognition of, "alas," an "abstract, self-contained, non-instrumental right." *Defenders*, 112 S. Ct. at 2139, 2143.

40. *Defenders*, 112 S. Ct. at 2144 (quoting *United States v. Richardson*, 418 U.S. 166, 177 (1974)).

41. *Id.* at 2144.

42. *Id.*

43. *Id.* at 2145.

44. *But see Muskrat v. United States*, 219 U.S. 346 (1911) (dismissing case involving statute in which Congress gave certain persons the capacity to sue the United States).

ute sought to bestow standing upon a potential plaintiff, such a grant of jurisdiction violated the strictures of the case or controversy requirement. A clear statutory expression of authority—to “any person”—fell before the notoriously amorphous demand for a constitutional “case.” To be sure, the Court has long held that the congressional power to create standing was, at least in theory, subject to the limitations of Article III.<sup>45</sup> Paradoxically, however, the Court had consistently accepted intangible and widely shared statutory injuries as the basis for jurisdiction<sup>46</sup> and has asserted that the “injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.”<sup>47</sup> Justice Scalia ruled, however, that the Act’s broad-based standing scheme relied on injuries that simply do not pass constitutional muster.

If the *Defenders* holding is new to Article III jurisprudence, it is certainly not new to Justice Scalia. In a much noted 1983 lecture published in the *Suffolk University Law Review*, then-judge Scalia argued that liberalized modern standing law had resulted in the “overjudicialization of the processes of [American] governance.”<sup>48</sup> Accordingly, he urged, the distinct and palpable injury standard should be used not only to limit the justiciability of generalized constitutional claims, but also to curb the power of Congress to grant standing. The law of standing, Scalia wrote, should be employed to “restrict[] courts to their traditional undemocratic role of protecting . . . minorities against impositions of the majority, and [to] exclude[] them 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.”<sup>49</sup> Even the creation of “concrete” statutory rights, therefore, might not “suffice to mark out a subgroup of the body politic requiring judicial protection.”<sup>50</sup> Citing an administrative law decision from 1944<sup>51</sup> that

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45. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

46. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (recognizing standing under the 1968 Civil Rights Act for injury to plaintiffs’ interest in interracial association). *But cf. Warth*, 422 U.S. at 500–10 (refusing to recognize interests in interracial association as the basis for standing in a non-statutory case).

47. *Warth*, 422 U.S. at 500 (quoting *Linda R.S.*, 410 U.S. at 617 n.3), cited in *Defenders*, 112 S. Ct. at 2145.

48. Scalia, *supra* note 16, at 881.

49. *Id.* at 894 (emphasis omitted).

50. *Id.* at 895–96.

would later appear as authority in the *Defenders* opinion,<sup>52</sup> Scalia concluded that the "core" requirement of particularized harm should provide a consistent limitation "upon the congressional power to confer standing."<sup>53</sup>

While he remained a member of the U.S. Court of Appeals for the District of Columbia Circuit, Scalia could set forth his theory only in dissent;<sup>54</sup> in *Defenders*, he carried the day in our highest tribunal. As I will argue below, he may have significantly, and without justification, altered the law of standing in the process.

## II. STATUTORY STANDING AND THE CASE OR CONTROVERSY REQUIREMENT

The Endangered Species Act sets up a scheme of interagency consultation designed to "provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved . . . ."<sup>55</sup> The Act overtly fosters a "policy of Congress that all Federal departments and agencies shall seek to conserve endangered species . . . ."<sup>56</sup> To guarantee compliance, the statute indicates that "any person may commence a civil suit on his own behalf," to "enforce any . . . provision . . . or to order the Secretary to perform [a] duty" set forth in the Act.<sup>57</sup>

According to the Court in *Defenders*, there were at least two problems with the plaintiff's attempts to secure statutory standing. First, the asserted denial of "consultation" was not a "concrete" injury. It was, rather, a "procedural" interest which Justice Scalia characterized as "abstract, self-contained, [and] non-instrumen-

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51. *Id.* at 883-84 (citing *Stark v. Wickard*, 321 U.S. 288 (1944)).

52. *Defenders*, 112 S. Ct. 2130, 2145 (1992).

53. Scalia, *supra* note 16, at 886.

54. For example, in *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322 (D.C. Cir. 1986), then-Judge Scalia dissented from a ruling granting standing for consumer organizations to challenge fuel economy standards. Judge Harry Edwards, writing for the majority, stated that "[t]he question of how many suffer from an injury is logically unrelated to the question of whether there is an injury." *Id.* at 1334 (emphasis omitted). Judge Scalia disagreed, arguing that "the question whether there is adequate reason for late issuance of light-truck fuel economy standards is of interest only to the society at large, and should be resolved through the political mechanisms by which . . . society acts." *Id.* at 1345 (Scalia, J., dissenting).

55. 16 U.S.C. § 1531(a) (1988).

56. *Id.*

57. *Id.* § 1540(g).



tal.”<sup>58</sup> The *Defenders* majority clearly concluded that the plaintiff’s asserted statutory interests did not constitute a basis for real, solid, concrete harms.

The second deficiency announced was that the plaintiff’s injuries were not “distinct.” As in the constitutional generalized grievance cases,<sup>59</sup> the plaintiff sought relief that “no more directly and tangibly benefits [it] than it does the public at large.”<sup>60</sup> Because, quoting *Marbury*, “[t]he province of the court is, solely, to decide on the rights of individuals,”<sup>61</sup> entertaining the plaintiff’s claims would be “discarding a principle fundamental to the separate and distinct constitutional role” of the courts.<sup>62</sup>

Additionally, Justice Scalia distinguished the repeated statements in Article III cases that “the injury required . . . may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’”<sup>63</sup> Statutory standing cases like *Trafficante v. Metropolitan Life Insurance Co.*<sup>64</sup> and *Havens Realty Corp. v. Coleman*<sup>65</sup> entailed the recognition of *de facto* injuries “that were previously inadequate in law.”<sup>66</sup> This acceptance, in Justice Scalia’s view, represents the mere “broadening [of] the categories of injury that may be alleged in support of standing,” not the elimination of the requirement of injury altogether.<sup>67</sup>

The Article III framework which the Court relied on in *Defenders* to limit the reach of statutory standing carries a number of both explicit and implicit assumptions. The first, drawing heavily upon a private rights litigation model, is the belief that individual injury is the “core” element, or “irreducible minimum”<sup>68</sup> of a

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58. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2143 (1992). At the very least, the “non-instrumental” part of the Court’s description is perplexing. It is not easy to conclude that Act’s consultation procedures are not meant to accomplish something.

59. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982); *Ex parte Lévit*, 302 U.S. 633 (1937).

60. *Defenders*, 112 S. Ct. at 2143.

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

62. *Defenders*, 112 S. Ct. at 2144–45.

63. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

64. 409 U.S. 205 (1972) (recognizing standing under the 1968 Civil Rights Act for injury to interest in interracial association).

65. 455 U.S. 363, 373–75 (1982) (recognizing standing of person trying to test the 1968 Civil Rights Act).

66. *Defenders*, 112 S. Ct. at 2145.

67. *Id.* at 2145–46 (alteration in original) (citations omitted).

68. *Valley Forge Christian College v. Americans United for Separation of Church &*

constitutional case. Second, building upon that notion, Justice Scalia assumes that there exists an identifiable class of *de facto* injuries which constitute the appropriate outer limit of judicial cognizance. Third, the *Defenders* opinion concludes that the judiciary should play no role in the protection of shared or majority "rights" or "policies." Enforcement of the "public interest" is the job of the executive branch; allowing private citizens to pursue such "public rights" threatens our "common understandings" of judicial power.

### III. INJURY AND ARTICLE III

The constitutional barrier to standing relied on in *Defenders* is Article III's "case or controversy" requirement. As has been much noted, the Framers gave almost no indication of what the phrase meant. Probably assuming some sort of general understanding of the power of the federal courts, James Madison referred only to the limitation that tribunals deal with matters of "a Judiciary nature."<sup>69</sup> Beyond this obviously circular assertion, the debates of the Constitutional Congress reveal little to assist modern constitutional interpretation.<sup>70</sup>

John Jay, the first Chief Justice of the U.S. Supreme Court, refused to answer questions presented by Secretary of State Thomas Jefferson concerning the legality of treaties, because the questions were submitted "extrajudicially."<sup>71</sup> In addition, in 1792, the Supreme Court refused to play an administrative role in veterans' disability determinations which were "not judicial, nor directed to be performed judicially."<sup>72</sup> These limited examples serve to bolster only the general (and again somewhat circular) claim, trace-

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State, 454 U.S. 464, 472 (1982).

69. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911).

70. In *The Federalist*, Madison explicitly recognized the difficulty of differentiating between the branches, noting that "no skill in the science of government has yet been able to discriminate and define . . . its three great provinces—the legislative, executive, or judiciary . . ." Instead, "obscurity . . . reigns . . . which puzzle[s] the greatest adepts in political science." THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961).

71. Letter from John Jay to George Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488-89 (Henry P. Johnston ed., 1891).

72. Hayburn's Case, 2 U.S. (2 Dall.) 408, 410 n.2 (1792).

able to *Osborn v. Bank of United States*,<sup>73</sup> that legal actions must “assume such a form that the judicial power is capable of acting on [them].”<sup>74</sup> “Cases,” then, must be reduced to concrete factual applications and not subject to direct supervision or revision by the political branches. They must employ existing legal mechanisms as well, although, since *Osborn* itself changed the “legal forms” of its day by permitting expanded injunctive relief against state officers charged with violating the U.S. Constitution, this limitation may mean less than it suggests.<sup>75</sup>

It is not surprising that, as good originalists, we have turned, with Justice Frankfurter, to “the business of the Colonial courts and the courts of Westminster when the Constitution was framed.”<sup>76</sup> Here, a great deal of work on the relevance of individual injury has been done—although, at least by immediate instrumentalist standards, it would have to be judged as some of the most ineffective work in academic history. In separate, major, and compelling efforts, Louis Jaffe in 1965,<sup>77</sup> Raoul Berger in 1969,<sup>78</sup> and Steven Winter in 1988<sup>79</sup> have demonstrated that injury was not a requisite for judicial authority in either the colonial, framing, or early constitutional periods. The Judiciary Act of 1789, like several contemporaneous state statutes, allowed “inform-er” actions.<sup>80</sup> English practice included prerogative writs, mandamus, *certiorari*, and prohibition, all designed to “restrain unlawful or abusive action by lower courts or public agencies,” and requiring only “neglect of justice,” not individual injury.<sup>81</sup> Stranger

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73. 22 U.S. (9 Wheat.) 738 (1824).

74. *Id.* at 819.

75. See Gene R. Nichol, Jr., *Moot Cases, Chief Justice Rehnquist and the Supreme Court*, 22 CONN. L. REV. 703, 715–17 (1990).

76. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

77. JAFFE, *supra* note 15, at 462–67.

78. Raoul Berger, *Standing to Sue in Public Actions: Is It A Constitutional Requirement?*, 78 YALE L.J. 816, 837–40 (1969).

79. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988). “The public rights model coexisted comfortably with the conceptual system of 19th century legal thought.” *Id.* at 1409.

80. *Id.* at 1406–07.

81. *Id.* at 1397. See generally *Union Pac. R.R. v. Hall*, 91 U.S. 343, 354–55 (1875) (“There is . . . a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty” with “no interest other than such as belonged to others . . .”).

suits and relator practice countenanced the assertion of judicial power without the existence of a direct personal stake in the controversy.<sup>82</sup>

More recently, Professor Caminker has explored the history of the related *qui tam* action in which a plaintiff is allowed to bring suit on behalf of the government with no interest in the controversy other than the "bounty" created by statute. Caminker demonstrates that *qui tam* suits have enjoyed a long and unmolested history in the United States.<sup>83</sup> In recent months, Cass Sunstein has plowed these same furrows extensively, even if not very originally, to conclude that "early English and American practices give no support to the view" that Article III demands injury.<sup>84</sup> Surely, the answer to Raoul Berger's historically based, titular question—"Is [Injury] a Constitutional Requirement?"—remains an emphatic "no."<sup>85</sup> It is not surprising, then, that in 1968, one of the most respected jurists of the post-World War II era, John Marshall Harlan, would write that it is "clear that non-Hohfeldian plaintiffs as such are not *constitutionally* excluded from the federal courts."<sup>86</sup>

Justice Scalia, perhaps surprisingly (but then perhaps not), ignored the scholarship of the history of Article III. Instead, he cavalierly stated that the injury requirement is an "irreducible constitutional minimum,"<sup>87</sup> a "principle fundamental,"<sup>88</sup> and a

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82. JAFFE, *supra* note 15, at 466-67; see BERGER, *supra* note 78, at 826-27; WINTER, *supra* note 79, at 1398-99.

83. Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 345 (1989); see *Martin v. Trout*, 199 U.S. 212, 225 (1905) (noting that actions in which the plaintiffs have "no interest whatever in the controversy other than that given by the statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government" and the right to recover is given to the "first common informer who brings the action, although he has no interest in the matter whatever except as such informer").

84. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 177 (1992).

85. See BERGER, *supra* note 78; see also Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1433 (1988) ("[T]here is in fact no basis in [Article III] or in any other provision of the Constitution for the view that the private law model is constitutional in status.").

86. *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) (noting, particularly, *qui tam* actions such as *Trout*, 199 U.S. at 225).

87. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

88. *Id.* at 2145.

“common understanding”<sup>89</sup> undergirding the exercise of judicial power. In the substantive constitutional law context, Justice Scalia has explained that traditions limiting the authority of the democratic branches of government may be discovered only by exploring “the most specific level at which [the] relevant tradition . . . can be identified.”<sup>90</sup> The reason for this closely cabined methodology is “to prevent generations from lightly casting aside important traditional values—not to enable [the] Court to invent new ones.”<sup>91</sup> Apparently, it takes far less to justify limiting the power of Congress to control the jurisdiction of the federal courts than to justify casting aside cherished values. On occasion, “new” traditions find a ready judicial home.

In his widely noted essay on interpretation, *The Rule of Law as a Law of Rules*,<sup>92</sup> Justice Scalia advocated the framing of general rules designed to bind both government actors and the courts. There are necessary limits to this process, however, since

“the difficulty of framing general rules” arises not merely from the inherent nature of the subject at issue, but from the imperfect scope of the materials that judges are permitted to consult. Even where a particular area is quite susceptible of clear and definite rules, we judges cannot create them out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided.<sup>93</sup>

The *Defenders* opinion may not have been created from whole cloth, but the source of its fabric is at least mysterious. As Justice Scalia has said himself, “When one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation.”<sup>94</sup>

89. *Id.* at 2136.

90. *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989) (justifying the historical approach to determining the rights of natural fathers); see also *Lee v. Weisman*, 112 S. Ct. 2649, 2679 (1992) (Scalia, J., dissenting) (“The line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.”) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294 (1963)).

91. *Michael H.*, 491 U.S. at 123 n.2.

92. 56 U. CHI. L. REV. 1175 (1989).

93. *Id.* at 1182–83 (quoting Aristotle, *The Politics* bk. III, ch. 11, in *THE BASIC WORKS OF ARISTOTLE* 1192 (Richard McKeon ed. & Benjamin Jowett trans., 1941)).

94. *Id.* at 1185. In order to avoid legislating “in the constitutional field,” Justice

## IV. DEFINING INJURY

Whether right or wrong, the Supreme Court has rooted its Article III jurisprudence firmly in the soil—or perhaps the shifting sands—of the particularized injury standard.<sup>95</sup> Just as the opinion in *Defenders* emphasized the injury in fact requirement's status as the "core component"<sup>96</sup> and "essential"<sup>97</sup> aspect of the case or controversy standard, other recent decisions have characterized injury as the "bedrock" principle of modern standing law.<sup>98</sup> There can be little doubt, therefore, as to the course the Court has chosen. As the Court should have recognized in *Defenders*, however, the injury standard is particularly ill-suited to provide a comprehensible barrier against the expansive use of statutory standing.

The reasons for the standard's weakness as a cabining tool lie in the nature of the injury determination itself. The injury in fact test was designed to simplify and liberalize the standing inquiry.<sup>99</sup> Layman's injury—harm "in fact"—rather than legal or "lawyer's" injury, is the linchpin. This supposedly fact-based determination is meant to be made separately from the claim on the merits. As Justice Douglas recognized in *Data Processing*, "The 'legal interest' test goes to the merits. The question of standing is different."<sup>100</sup>

These twin goals of liberalization and objectivization, however, are too weighty a burden for the injury standard to carry. Analyzing injury is, quite literally, a problem of philosophical dimension. To illustrate, compare the harms associated with the Hindu doctrine of ahimsa<sup>101</sup> and Nietzsche's claim that anything one

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Scalia claims to adhere "to a more or less originalist theory of construction." *Id.* at 1184. The *Defenders* opinion, however, makes no bow toward originalism. See generally Gene R. Nichol, Jr., *Bork's Dilemma*, 76 VA. L. REV. 337 (1990) (arguing that one of the main problems with originalist constitutional theory is that its proponents relentlessly refuse to apply it in a consistent fashion).

95. See generally Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986) (outlining generally the Supreme Court's commitment to the injury requirement as the core Article III inquiry).

96. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

97. *Id.* at 2145.

98. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982).

99. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152-53 (1970); see also Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 156-60 (1987).

100. *Data Processing*, 397 U.S. at 153.

101. Ahimsa is a minority Hindu doctrine requiring that one refrain from harming any

survives makes one stronger. This may sound extreme, obtuse, or beside the point, but it is not. It is not helpful to speak merely of concrete, direct, imminent, or actual harm. The injury determination necessarily encompasses a further question: "Injury to what?"

William Fletcher has demonstrated the question-begging nature of the injury calculus quite effectively with what he calls a "homely" example:

Imagine two siblings who compare, as children will, the treatment they receive from their parents. If one child receives a new bicycle, the other may complain if he does not also receive a new bicycle or some equivalent. A parent who has just bought a bicycle for one child is likely to say . . . to the complaining child, "It doesn't hurt you that I got a bicycle for your sister." Of course [that is] wrong . . . . The child is feeling hurt. What [we] really mean or should mean . . . is that the child should not feel hurt; or that . . . [we] do not wish to recognize the feeling as a hurt . . . .<sup>102</sup>

Why is it that economic and aesthetic injuries are legally cognizable, whereas harms to a potential plaintiff's interest in, for example, racial segregation or in remaining in the country undetected as an illegal alien are not? The reason, of course, is that the injury determination necessarily entails an exploration of what we wish to recognize as harm. From its earliest applications of the legal interest test, the Court has given hints that it understood the complexity of its venture, concluding in *Sierra Club v. Morton*<sup>103</sup> that the standard "requires . . . injury to a cognizable interest."<sup>104</sup> "Cognizable," in this sense, is an obviously loaded term. As Joseph Vining has written, "in the very recognition of a 'person' who is 'harmed' courts . . . cap the formulation of a value . . . , confirm it in our language and our thought, and permit a . . . search for its realization to begin."<sup>105</sup>

Examples of courts' reliance on their values in determining whether a party has standing appear regularly. One group of plain-

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living entity.

102. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231-32 (1988).

103. 405 U.S. 727 (1972).

104. *Id.* at 734-35.

105. JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 171 (1978).

tiffs in *Warth v. Seldin*<sup>106</sup> complained that the allegedly exclusionary zoning ordinances challenged prevented them, as residents of a particular community, from enjoying "the benefits of living in a racially and ethnically integrated community."<sup>107</sup> The Court concluded that, even if true, this lost interest did not constitute injury.<sup>108</sup> Similarly, in *Roe v. Wade*,<sup>109</sup> the Court denied standing to challenge Texas's restrictive abortion statute to a married couple who had been warned by physicians against both childbirth and the use of certain contraceptives.<sup>110</sup> Assuming that the couple's asserted deprivation of "marital happiness" was a euphemism for loss of sexual freedom and intimacy, the Court concluded that such a loss did not constitute Article III injury.<sup>111</sup>

Somehow, the Court deems these sorts of interests too ethereal or utopian (or whatever) to sustain judicial power. Occasionally, however, the Court has rejected a proffered interest more overtly. In cases like *O'Shea v. Littleton*,<sup>112</sup> *Rizzo v. Goode*,<sup>113</sup> and *City of Los Angeles v. Lyons*,<sup>114</sup> the Court denied judicial intervention, at least in part, because it reasoned that the plaintiffs would be harmed by their respective defendants only if the plaintiffs violated the law and again came into contact with police officials.<sup>115</sup> That likelihood was not one the Court was anxious to embrace. More pointedly, in *Burrafato v. United States Department of State*,<sup>116</sup> the Second Circuit denied standing to challenge State Department regulations concerning the allocation of permanent immigrant visas to an alien who had entered the country illegal-

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106. 422 U.S. 490 (1975).

107. *Id.* at 512; see Nichol, *supra* note 95, at 1930.

108. *Warth*, 422 U.S. at 513-14.

109. 410 U.S. 113 (1973).

110. *Id.* at 128.

111. *Id.*

112. 414 U.S. 488 (1974).

113. 423 U.S. 362 (1976).

114. 461 U.S. 95 (1983).

115. *Lyons*, 461 U.S. at 105-06 ("Lyons would have . . . to allege that he would have another encounter with the police."); *Rizzo*, 423 U.S. at 370-73 (viewing the risk of injury to plaintiffs from inadequate police procedures as too conjectural); *O'Shea*, 414 U.S. at 496 ("[H]ere the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law . . .").

116. 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976).



ly.<sup>117</sup> Although the plaintiff had a clear stake in the controversy, the Second Circuit thought, correctly, that giving credence to his claim would encourage illegal entry.<sup>118</sup> Determining whether a plaintiff has suffered injury in fact is not, curiously, a straight-forward factual inquiry. It is, rather, “based on [a] normative judgment about what ought to constitute a judicially cognizable injury in the particular context.”<sup>119</sup>

This “methodology” poses two difficulties for the analysis of statutory standing. First, as the Court itself has long recognized,<sup>120</sup> Congress creates legal interests—it does so every day, in myriad ways, for a huge variety of reasons and to benefit a wide array of persons. Creating legal interests, in fact, is what Congress does for a living. When those interests, having been brought into existence, are threatened or transgressed, the conclusion that the interest-holder has been injured is unavoidable. As an initial matter, therefore, it is very hard to see how a statutory grant of standing can be obliterated through the use of an injury calculus, and it is difficult to perceive a justifiable constitutional limitation on the sorts of interests Congress might create. That is why, until *Defenders*, if a plaintiff came within the terms of a statutory grant of standing, the injury in fact test was deemed to have been satisfied.

Second, the determination of injury, as I and others have suggested,<sup>121</sup> is amorphous, complex, and value-laden. If Congress chooses to create a legally cognizable interest, the Court would seem to have little basis, and even less authority, to disregard that legislative choice. In my view, this is what Justice Stevens had in mind in *Defenders* when he argued that the majority opinion served to “demean”<sup>122</sup> the interests Congress had tried to protect in the Endangered Species Act. By imposing a judicially created injury standard upon the authority of Congress to grant jurisdiction—a standard which, on its own, can have no ascertainable

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117. *Id.* at 555.

118. *Id.* at 557.

119. Fletcher, *supra* note 102, at 232.

120. See Warth v. Seldin, 422 U.S. 490, 500–01, 509–10 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

121. VINING, *supra* note 105; Fletcher, *supra* note 102, at 221; Nichol, *supra* note 95, at 1915.

122. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2148 (1992) (Stevens, J., concurring).

meaning—the power of the Court is significantly enhanced, not diminished.<sup>123</sup>

The difficulties presented by using injury to limit statutory standing are reflected in Justice Scalia's explanation of the deficiencies in the *Defenders* plaintiff's jurisdictional claims. Prior expansive statutory standing cases like *Trafficante*<sup>124</sup> and *Havens Realty*<sup>125</sup> had recognized *de facto* injuries that Scalia claimed were "inadequate in law" until rendered judicially cognizable through statutory enactment.<sup>126</sup> The assumption is, therefore, that there exists a universe of *de facto* injuries that makes up the outer boundaries of potential federal jurisdiction. If Congress chooses to recognize these sorts of interests as bases for standing, Article III is not compromised. If, however, Congress attempts—as it seemingly did through the Endangered Species Act—to reach beyond this pool, the case or controversy requirement poses an insurmountable barrier.

First, and curiously, the Scalia framework concedes that the dichotomy between *de facto* and "legally cognizable" injuries poses great difficulty for existing standing law. If there are *de facto* injuries which are not legally cognizable, why is that so? I would assume that by definition, the harms asserted do not fail the injury in fact test. It also cannot be because the injuries are "indirect" or "intangibile," though these are the sorts of labels the Court usually employs. Rather, it is because, at least when standing is not based on a statutory or constitutional interest, the determination of injury is a normative enterprise.

Second, and perhaps more fundamentally, Justice Scalia's category of *de facto* injuries lacks characteristics that distinguish such injuries from harms that are not *de facto* injuries. The public

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123. See Fletcher, *supra* note 102, at 233 (stating that the Court's insistence on an injury in fact requirement springs from the Court's desire to avoid overjudicialization of the legislative process).

124. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

125. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court recognized statutory standing on the basis of the Civil Rights Act of 1968. One of the "testers" who was granted standing conceded that he had no interest in actually obtaining housing in the Richmond area in question. Rather, he was helping to construct a case of racial steering. Nonetheless, the Supreme Court ruled that the tester's statutorily created right to truthful information about housing availability had been transgressed—thus creating injury. *Id.* at 373-74. Under the *Defenders* methodology, however, the tester actually would have nothing at stake.

126. *Defenders*, 112 S. Ct. 2130, 2145 (1992).

law of the United States has changed dramatically in the last four decades. *Marbury v. Madison*<sup>127</sup> may indeed have reflected a belief that “[t]he province of the court is, solely, to decide on the rights of individuals,”<sup>128</sup> but today, the federal courts regularly entertain lawsuits based upon “intangible” and “generalized” claims such as concern for the snail-darter,<sup>129</sup> or saving the whale;<sup>130</sup> or the mathematical “dilution”—based on population,<sup>131</sup> race,<sup>132</sup> or politics<sup>133</sup>—of the power of the vote; or the “separationist” anxieties created by the federal government contributing to the salaries of Catholic school teachers;<sup>134</sup> or a plaintiff’s representational interest in pursuing a claim for members of a class.<sup>135</sup> Almost contemporaneous with the *Defenders* decision, the Supreme Court concluded that the mere “perception” of unfairness in the criminal system<sup>136</sup> and the unthreatened specter of reduction in property value<sup>137</sup> constitute injury in fact. The list of “non-individualized, non-concrete actions” (if such things exist outside the Article III context) is a long one.<sup>138</sup> As Professor Monaghan has recognized, “many rights may be held in common as well as in gross.”<sup>139</sup> Many of the modern federalism and sep-

127. 5 U.S. (1 Cranch) 137 (1803).

128. *Id.* at 170.

129. *TVA v. Hill*, 437 U.S. 153 (1978).

130. *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221 (1986).

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

132. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

133. *Davis v. Bandemer*, 478 U.S. 109 (1986).

134. *Aguilar v. Felton*, 473 U.S. 402 (1985).

135. *United States Parole Comm’n v. Geraghty*, 445 U.S. 388 (1980).

136. *Powers v. Ohio*, 111 S. Ct. 1364, 1371 (1991). Justice Scalia, it should be noted, dissented in *Powers*.

137. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899–902 (1992).

138. Consider also: *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388 (1987) and *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322 (D.C. Cir. 1986); cases claiming non-statutory environmental injury such as *Duke Power Co. v. Carolina Env’tl. Study Group*, 438 U.S. 59 (1978) and *Sierra Club v. Morton*, 405 U.S. 727 (1972); and Voting Rights Act cases such as *Thornburg v. Gingles*, 478 U.S. 30 (1986).

139. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 *YALE L.J.* 1363, 1370 (1973). See generally Susan Bandes, *The Idea of a Case*, 42 *STAN. L. REV.* 227 (1990) (“[U]ninstated acceptance of private rights model leads to a refusal to recognize . . . collective rights and collective harms.”); Martin H. Redish, *The Passive Virtues, The Counter-Majoritarian Principle, and the Judicial-Political Model of Constitutional Adjudication*, 22 *CONN. L. REV.* 647 (1990) (arguing that the particularized injury standard is an inappropriate limitation on the power of judicial review).

aration of powers cases are not disputes over individual rights in *Marbury's* sense.<sup>140</sup> More importantly, if all of these cases represent *de facto* injuries, as Justice Scalia uses the term, then surely the concept does not mean very much; perhaps, it does not mean anything at all. More likely, the statement that a plaintiff is injured is a normative one based on factors extraneous to the measurement of harm.<sup>141</sup> Put that way, a court is on quite shaky ground when it disagrees with a congressional assertion of standing.

## V. LIMITING CONGRESS THROUGH THE INJURY REQUIREMENT

I have argued above that the injury in fact standard is incapable of providing a comprehensible and ingenuous limitation on the power of Congress to grant standing. The injury determination is, necessarily, value-laden—drawing upon both legal norms and social acceptance of the sorts of claims asserted. Yet, the uncontested power of Congress to create legal interests capable of incursion, and the legislative branch's constitutional authority to regulate the jurisdiction of the federal courts, create an insurmountable set of barriers to the use of this malleable injury standard to cabin Congress. In my view, therefore, Justice Scalia and his colleagues inappropriately limited statutory standing in *Defenders*.

This claim, it should be said, is more limited than that made by Professor Cass Sunstein in response to *Defenders*.<sup>142</sup> Sunstein argues that the injury in fact standard inappropriately "defines modern public law by reference to common law principles."<sup>143</sup> Accordingly, Sunstein advocates scrapping the standard that has served as our jurisdictional cornerstone for over two decades:

Whether an injury is cognizable . . . should not depend on its familiarity or its common law pedigree; this approach [represents] a conspicuous reintroduction of *Lochner*-era notions of substan-

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140. See, e.g., *Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992); *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Cases like *Bowsher v. Synar*, 478 U.S. 714 (1986), and *INS v. Chadha*, 462 U.S. 919 (1983), begin as individual rights cases, but on the merits they measure the interests of one institution against the another. In a true private rights model, these cases would be dismissed under the third-party standing rule.

141. Fletcher, *supra* note 102, at 231-32.

142. Sunstein, *supra* note 84.

143. *Id.* at 187.

tive due process. Whether an injury is cognizable should depend on what the legislature has said . . . or on the definitions of injury provided in the various relevant sources of positive law. The Court should abandon the metaphysics of injury in fact. It should return to the question whether a cause of action has been conferred on the plaintiff.<sup>144</sup>

There is much truth in Sunstein's claim. When used to thwart expressed congressional will, the injury test's dangers are real. In my view, however, these dangers should not deny injury in fact's "metaphysics" a place in the law of federal courts.

It is no doubt attractive to return the standing inquiry "to the question whether a cause of action has been conferred on the plaintiff."<sup>145</sup> Much standing law is no less circular than it was in the days of the much-chastised legal interest test,<sup>146</sup> and the injury in fact standard often masks what is a complex and clearly normative undertaking. It is also true that focusing on cause of action analysis frequently does not resolve the difficult questions of standing law; it merely postpones them. Administrative Procedure Act cases like *Data Processing* can be most successfully handled by interpreting the "adversely affected" language of the statute and, of course, the legal norms on which the plaintiff relies.<sup>147</sup>

If we move beyond the confines of the Administrative Procedure Act to, for example, section 1983 cases, familiar problems reappear. In *Linda R.S. v. Richard D.*<sup>148</sup> and *Warth v. Seldin*,<sup>149</sup> for example, plaintiffs lodged equality challenges against state and local government practices. The contested governmental practices, however, primarily regulated the activities of third parties rather than the plaintiffs. Does the Equal Protection Clause create a legal claim in such instances? What of challenges to essentially non-regulatory government behavior? Think, for example, of the fol-

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144. *Id.* at 191.

145. This argument is made powerfully in Fletcher, *supra* note 102, at 228-39.

146. See generally VINING, *supra* note 105, at 39-45 (applauding the demise of the legal interest standard).

147. 5 U.S.C. § 702 (1988) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.")

148. 410 U.S. 614 (1973) (challenging allegedly discriminatory application of state child support provision).

149. 422 U.S. 490 (1975) (challenging allegedly exclusionary local zoning ordinances).

lowing claims: That Justice Black had been appointed to the Supreme Court in violation of the Emoluments Clause;<sup>150</sup> that a municipality's Christmas creche is prohibited by the First Amendment;<sup>151</sup> that a public subsidy for private segregated schools is a deprivation of equal protection;<sup>152</sup> that the CIA must publish its budget;<sup>153</sup> that congressmen can't serve in the executive branch;<sup>154</sup> or that congressional pay raises must be accomplished through explicit legislation.<sup>155</sup>

Faced with these sorts of jurisdictional claims, it is perhaps not surprising that the Court would turn to an overarching concept—a rule that would attempt to define the breadth of the cognizable causes of action for more than one constitutional provision at a time. It might even be that if Professor Sunstein were himself to cast a reasonable approach to such an array of lawsuits, under the rubric of the examination of available causes of action, he would look to what the plaintiff has at stake beyond the bare asserted constitutional violation and to whether each member of the populace, or only some specially affected subset, can stand as plaintiff. Fundamentally, of course, these are the focal points of the injury in fact test. And they are hardly illegitimate inquiries for a court attempting to measure judicial authority. The problem, rather, is that the Constitution is, and probably should remain, silent on such issues.<sup>156</sup> So the Supreme Court, despite Justice Scalia's efforts, is in no position to impose its vision of permissible public law litigation upon Congress.

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150. *Ex parte Lévit*, 302 U.S. 633 (1937) (arguing that the appointment violated U.S. CONST. art. I, § 6, cl. 2, which provides that no senator or representative shall be appointed to a civil office which was either created or the emoluments of which were increased during the senator's or representative's period in office).

151. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *see also* *Mueller v. Allen*, 463 U.S. 388 (1983) (challenging to state tax deduction for "tuition, textbooks, and transportation" expenses for education of children in sectarian primary and secondary schools).

152. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984); *Norwood v. Harrison*, 413 U.S. 455 (1973).

153. *United States v. Richardson*, 418 U.S. 166 (1974).

154. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

155. *Richardson v. Kennedy*, 313 F. Supp. 1282 (W.D. Pa. 1970), *aff'd*, 401 U.S. 901 (1971).

156. This means, of course, that the injury test should not be seen as a constitutional mandate. *See generally* Evan T. Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605 (1992); Nichol, *supra* note 99.

## VI. THE UNHELPFUL TURN TO ARTICLE II

In denying plaintiffs standing under Article III, the *Defenders* opinion also placed extraordinary reliance on the demands of Article II. While casting aside the statutory standing claim, Justice Scalia indicated that Congress had no power to turn the “undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts.”<sup>157</sup> To allow Congress to wield such power would “transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’”<sup>158</sup> Although the Court in *Defenders* held that the use of the provisions of the Act to provide standing violated Article III as applied, it thought that the “take Care” clause added significant further justification to the result.<sup>159</sup>

The Court’s turn to Article II analysis is perplexing. On the one hand, it does seem broadly consistent with Justice Scalia’s general vision of executive authority. As he wrote in dissent in *Morrison v. Olson*,<sup>160</sup> the “inexorable command of Article II is clear” that “the executive power must be vested in the President of the United States.”<sup>161</sup> Accordingly, the mixture of citizen and judicial enforcement set forth in the Endangered Species Act—to demand consultation at the request of “any person”—impermissibly intrudes upon executive prerogative.

On the other hand, Scalia’s position in *Morrison* was uttered in dissent, and a lonely one at that.<sup>162</sup> Moreover, separation of powers analysis focuses on one branch of government’s degree of intrusion on the constitutional authority of another, or on the extent to which the challenged actions consolidate powers that should properly be shared.<sup>163</sup> Without being boneheaded about it, under this inquiry a challenged legislative or judicial action either unconstitutionally abrogates executive power or it does not.

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157. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2145 (1992).

158. *Id.* (quoting U.S. CONST. art. II, § 3).

159. See *The Supreme Court—1991 Term*, 106 HARV. L. REV. 163, 308–18 (1992).

160. *Morrison v. Olson*, 487 U.S. 654 (1988).

161. *Id.* at 697, 710 (Scalia, J., dissenting).

162. Justice Scalia was the sole dissenter in *Morrison*.

163. See *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison*, 487 U.S. at 694–96.

It should make little difference what sort of plaintiff seeks to trigger the incursion.

The Endangered Species Act requires interagency consultation when government acts threaten certain species. If the agency fails to follow this procedure, "any person" can seek judicial intervention to force consultation. Does this scheme, when initiated by an "undifferentiated" member of the public, usurp executive authority? Consider three examples where the Court's standing criteria would be met.

First, imagine a plaintiff who clearly does have standing—for example, an American professor of zoology presently attempting to study the Nile crocodile in Egypt—who challenges the governmental actions involved in *Defenders*. If a court were to order consultation in a suit brought by the zoologist, would the intrusion on executive authority be any less than that contemplated by the *Defenders* plaintiffs?

Second, imagine that the Act were amended to include the following provision:

The interagency consultation process described herein is designed to reduce the threatened harm to endangered species in the United States and around the world. All persons have a legally cognizable interest in reducing potential threats to the survival of endangered species. The consultation requirement is explicitly applicable to U.S. government-funded projects developed in foreign countries. Any person, whether or not otherwise harmed by the challenged government action, may enforce the consultation procedures required by the Act in federal court.

At least two members of the *Defenders* majority, Justices Kennedy and Souter, suggest that standing would be acceptable under such a statute.<sup>164</sup> In his concurrence, Justice Kennedy opined 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 . . . ."<sup>165</sup> If a plaintiff were to file an action similar to *Defenders* on the strength of such a statutory amendment, standing would apparently exist, but would the threat to the

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164. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2146-47 (1992) (Kennedy and Souter, JJ., concurring in part and concurring in the judgment). When added to the Stevens, Blackmun, and O'Connor positions in *Defenders*, this would seem to constitute a majority.

165. *Id.*



executive's Article II powers be any greater or any less than that rejected in *Defenders*?<sup>166</sup>

Finally, what if the Act were amended to allow a \$50 "bounty" for any plaintiff who is successful in enforcing the consultation requirement?<sup>167</sup> Money is the "personal stake" that we understand best in the United States. This easy (and cheap) move would bring the suit clearly within the *qui tam* tradition and, one assumes, safely under the umbrella of the case or controversy requirement.<sup>168</sup> The federal courts, therefore, would entertain the action brought in *Defenders* if a bounty were attached to the claim; is the incursion upon executive authority somehow diminished?

My point, now perhaps beleaguered, is that the "personal stake" a plaintiff brings to a suit challenging executive action is a question quite analytically distinct from the separation of powers determination. The nature and extent of the plaintiff's injury tells us very little about the scope of presidential power. A plaintiff with a demonstrably concrete and personalized injury may seek relief which intrudes fundamentally upon the executive domain.<sup>169</sup> A plaintiff with only a "citizen's interest" in executive compliance, on the other hand, may pose no meaningful threat to executive authority. It can hardly be the case that the same exercise of judicial power which violates executive authority if requested in a statutory citizen suit is constitutionally permissible if a bounty or imminent zoological interest provides the basis for jurisdiction. Justice Scalia's apparent effort to conflate the two inquiries serves neither Article II nor Article III admirably.

## VII. STANDING AND PUBLIC LAW LITIGATION

It is not likely that Justice Scalia raised the barriers of the case or controversy requirement merely to limit the geographical

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166. Of course, the inconsistency illustrated by this example is with the *Defenders* majority's position. Justice Scalia, who did not join Justice Kennedy's concurrence, might well regard the statute in this example as a violation of Article III.

167. Professor Sunstein has suggested this alternative as a congressional response to *Defenders*. Sunstein, *supra* note 84, at 223-24.

168. See generally Cainker, *supra* note 83 (discussing the constitutionality of *qui tam* actions).

169. See *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967) (challenge to Vietnam War).

confines of the Endangered Species Act. After all, the Court could have accomplished that task by reaching the merits and deciding against the plaintiffs. It seems more plausible that the *Defenders* decision, along with Justice Scalia's 1990 opinion in *Lujan v. National Wildlife Federation*,<sup>170</sup> is part of a broader agenda.

In 1976, Professor Abraham Chayes wrote a now-classic article entitled *The Role of the Judge in Public Law Litigation*.<sup>171</sup> Drawing upon the characteristics of then newly recognized "public" actions—cases desegregating schools, supervising the operation of prisons, challenging environmental degradation, attacking regulatory programs, and the like—Chayes contrasted the traditional "private rights" model of adjudication with what he called public law litigation. Traditionally, lawsuits arose from disputes between private parties about private rights. These actions were bipolar, retrospective, party-controlled, and self-contained.<sup>172</sup> The judge played the role of a neutral umpire. The goal was compensation for past harm. The standing question "could hardly arise" under this essentially common law model, since the plaintiff's authority to sue was merged with the validity of the merits of the claim.<sup>173</sup>

The "new" public law litigation did not look or act this way. Most frequently, these lawsuits sought the vindication of constitutional or statutory interests, not a private, common law right. The relief sought might affect many people and diverse concerns. "The argument [was] about whether or how a government policy or program shall be carried out."<sup>174</sup> Therefore, the liability determination and the relief imposed were, to some extent, predictions of what was likely to occur in the future. The decree was designed to alter future behavior, not to pay for prior wrongs. This new model, as Professor Chayes described it, "reflects and relates to a regulatory system where . . . arrangements are the product of positive enactment. In such a system, enforcement . . . is necessarily implementation of regulatory policy."<sup>175</sup>

At the same time that Chayes published his essay, the Supreme Court was beginning to construct the injury, causation, and

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170. 497 U.S. 871 (1990).

171. 89 HARV. L. REV. 1281 (1976).

172. *Id.* at 1282-85.

173. *Id.* at 1290.

174. *Id.* at 1295.

175. *Id.* at 1304.

redressability trilogy that now constitutes the foundation of modern standing law.<sup>176</sup> Not only did the Court require injury “in fact,” it also demanded that the harm be “distinct” and “tangible.” It made causation, an obvious corollary of the injury standard, a more rigorous hurdle—seemingly reversing normal pleading presumptions and measuring causal links with skepticism.<sup>177</sup> The redressability standard also took a shot in the arm. The Court made it more difficult for beneficiaries of government regulation to pursue lawsuits, because the benefits of affirmative relief were often indirect or contingent. Then, in the early 1980s, Justice Scalia began his personal crusade to markedly strengthen standing’s curb on an “overjudicialized” government.

The tensions between the public litigation model and the bolstered standing requirements of the last two decades are clear and direct. Disputes about public policies frequently implicate new sorts of citizen interests—interests for which there are no clear counterparts at common law. These diverse concerns can be characterized as intangible, abstract non-injuries. Because public actions often seek systemic rather than localized changes, the interests asserted also can be described as general and non-distinct. The causation and redressability standards hit directly at the predictive and probabilistic nature of the public action. If a suit is designed to alter future government behavior, the effects of the desired changes may well be speculative and uncertain.

Now, the Court has directed the apparent juggernaut of the particularized injury standard toward the power of Congress as well. Justice Scalia’s assault on broad-based statutory standing claims may not end with the Endangered Species Act. In his *Suffolk University Law Review* essay, he argued that even “concrete” statutorily created interests might not “suffice to mark out a subgroup of the body politic requiring judicial protection.”<sup>178</sup> As an appellate judge, he wrote that widely shared statutory claims are “of interest only to the society at large, and should be resolved through the political mechanisms by which . . . society acts.”<sup>179</sup>

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176. See, e.g., *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975).

177. See *Nichol*, *supra* note 32.

178. Scalia, *supra* note 16, at 881.

179. *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1345 (D.C. Cir. 1986) (Scalia, J., dissenting).

This cabining theory may reach well beyond the admittedly tempting "any person" language of the Act. It is not difficult to construct a significant list of modern standing decisions which could fall if generalized actions are ruled beyond the federal judicial power.<sup>180</sup>

It is also ironic that these moves may be accomplished under an umbrella of judicial restraint and concern for the appropriate separation of powers. The *Defenders* opinion speaks so frequently and so eloquently of the need to avoid judicial enforcement of the "public interest" that the reader is tempted to forget that it is an aspect of a statute passed by the U.S. Congress—designed to foster the express policy of species conservation—that the Court effectively has declared unconstitutional. The statute apparently ran afoul of the "common understandings" that Justice Scalia senses about judicial power. The notion that the Justices' view of the appropriate, traditional role of a branch of government might limit federal congressional authority is not new to constitutional jurisprudence, but it has had a troubled history.<sup>181</sup> Justice Scalia's view of separation of powers threatens to constitutionalize an unbalanced scheme of regulatory review. As courts whittle away the public litigation model, regulatory incentives become skewed.<sup>182</sup> The courts can protect the interests of regulated entities, but the interests of "regulatory beneficiaries"<sup>183</sup> are left to the political process. If the workings of American government are indeed "overjudicialized," it would seem more sensible, and more direct, to craft increasingly deferential standards of review on the merits rather than to completely bar Congress from recognizing certain interests.

In fairness, it is true that public law litigation has been, fundamentally, the child of the courts. The judiciary itself initiated the

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180. *E.g.*, *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (discussed *supra* note 125); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Gladstone, Realtors v. Bellwood*, 441 U.S. 91 (1979); *United States v. SCRAP*, 412 U.S. 669 (1973); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Flast v. Cohen*, 392 U.S. 83 (1968); *Baker v. Carr*, 369 U.S. 186 (1962); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322 (D.C. Cir. 1986); *Scenic Hudson v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

181. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

182. *See* Sunstein, *supra* note 85, at 1433-38.

183. *Id.* at 1433.

major changes highlighted by Professor Chayes over fifteen years ago. What the Court gives, it can, in almost every sense, take away. Yet nothing in the Constitution demands a private rights model of adjudication—not its language, not its history, not its structure, and not the standards fashioned to measure access. The U.S. Supreme Court should not pretend otherwise, even to repudiate its past.